



**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE
MAGISTRATE
DR. GABRIELLA VELLA B.A., LL.D.**

Case No. 59/2020

**Police
(Inspector Leeroy Balzan Engerer)**

Vs

**Abdiwali Ahmed Ali
Abdi Ahmed Ibrahim**

Today, 12th July 2021

The Court,

After having considered the charges brought against **Abdiwali Ahmed Ali**, son of Ahmed Ali and Aneb neè Said, born in Somalia on the 1st January 1996, holder of Police Number 13U 083 and against **Abdi Ahmed Ibrahim**, son of Ahmed and Sado neè Ismail, born in Somalia on the 17th May 1992, holder of Ref. Com. 25979/19, of having on the 8th February 2020, between five (5:00hrs) and six (6:00hrs) in the morning in the Maltese Islands:

1. Committed theft of a mobile phone, a watch and money worth more than three thousand Euros (€3,000) to the detriment of Ozgur Siar Oskaya, which theft is aggravated by amount and time;
2. Without the intent to kill or to put the life of Ozgur Siar Oskaya in manifest jeopardy, caused harm to the body or health of Ozgur Siar Oskaya, which harm is of slight nature;
3. Lead an idle and vagrant life;

After having considered the charges brought against **Abdiwali Ahmed Ali** only, that on the 8th February 2020 in the Maltese Islands:

4. Became a recidivist by a number of judgements of the Court of Magistrates, which judgements have become *res judicata*;

5. Committed a crime of voluntary nature during an operative period of suspended sentence given by Magistrate Dr. Yana Micallef Stafrace LL.D., on the thirty first (31st) of May 2019;

After having considered the request by the Prosecution for the Court to condemn the accused, if found guilty of the charges brought against them, to pay the expenses incurred in the appointment of Experts, in terms of Section 533 of Chapter 9 of the Laws of Malta;

After having considered the request by the Prosecution for the Court to issue a Protection Order against both the accused in order to provide for the security of Ozgur Siar Oskaya or for keeping public peace or for protecting the injured party or other individuals from harassment or other conduct which will cause fear of violence in accordance with Section 412C of Chapter 9 of the Laws of Malta;

After having heard both the accused reply that they are not guilty of the charges brought against them¹;

After having heard testimony by Ozgur Siar Oskaya given during the sitting held on the 27th February 2020² and after having considered the documents submitted by him marked Doc. “OS1” and Doc. “OS2” at folios 35 to 40 of the records of the proceedings, after having heard testimony by Inspector Leeroy Balzan Engerer given during the sittings held on the 27th February 2020³, 18th August 2020⁴, 19th April 2021⁵, 24th May 2021⁶, 2nd June 2021⁷ and on the 21st June 2021⁸ and after having considered the documents submitted by him marked Docs. “LBX1” and “LBX2” at folios 65 and 66 of the records of the proceedings, documents further submitted by him at folios 117 to 120 of the records of the proceedings and documents marked Doc. “LBX1” to Doc. “LBX7” at folios 132 to 145 of the records of the proceedings, after having heard testimony by Inspector Joseph Xerri given during the sittings held on the 3rd July 2020⁹ and 17th February 2021¹⁰ and after having considered the documents submitted by him marked Doc. “JS1” and Doc. “JS2” at folios 98 to 102 of the records of the proceedings, after having heard testimony by PS249 Michael Vella¹¹ and PS850 Stephen Micallef¹² given during the sitting held on the 13th August 2020 and testimony by John Louis Sammut, in representation of the Agency for Asylum Seekers (AWAS), given during the sitting held on the 26th November 2020¹³, after having heard testimony by Abdi Ali Juma given during the sitting held on the 17th February 2021¹⁴, by Maria Dolores Fenech, Assistant Registrar of the Criminal Courts

¹ Folios 26 and 27 of the records of the proceedings.

² Folios 29 to 34 of the records of the proceedings.

³ Folios 41 and 42 of the records of the proceedings.

⁴ Folios 63 and 64 of the records of the proceedings.

⁵ Folios 115 and 116 of the records of the proceedings.

⁶ Folio 125 and 126 of the records of the proceedings.

⁷ Folios 130 and 131 of the records of the proceedings.

⁸ Folios 147 and 148 of the records of the proceedings.

⁹ Folios 50 and 51 of the records of the proceedings.

¹⁰ Folios 96 and 97 of the records of the proceedings.

¹¹ Folios 56 and 57 of the records of the proceedings.

¹² Folios 58 and 59 of the records of the proceedings.

¹³ Folios 84 to 87 of the records of the proceedings.

¹⁴ Folios 103 to 105 of the records of the proceedings.

and Tribunals, given on the 1st March 2021¹⁵ and by Dr. Sarah Ezabe, in representation of the International Protection Agency Refugee Commission, given during the sitting held on the 19th April 2021¹⁶, after having heard testimony by the accused Abdiwali Ahmed Ali¹⁷ and by the accused Abdi Ahmed Ibrahim¹⁸ given during the sitting held on the 21st June 2021;

After having considered the Note by the Attorney General dated 20th May 2021¹⁹ by virtue of which he sent the accused to be tried by this Court, subject to no objection being made by them in terms of Section 370(3) of the Criminal Code, Chapter 9 of the Laws of Malta, for an offence or offences under the provisions of:

Against both the accused Abdiwali Ahmed Ali and Abdi Ahmed Ibrahim:

- Articles 261(a)(c)(f), 262(1)(a)(2), 267, 270, 274(c), 277(a), 279(b) and 280(1)(2) of the Criminal Code, Chapter 9 of the Laws of Malta;
- Articles 214, 215 and 221(1) of the Criminal Code, Chapter 9 of the Laws of Malta;
- Article 338(w) of the Criminal Code, Chapter 9 of the Laws of Malta;
- Articles 382A, 383, 384, 385, 386 and 412C and 412D of the Criminal Code, Chapter 9 of the Laws of Malta; and
- Articles 17, 31, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;

Against the accused Abidwali Ahmed Ali alone:

- Articles 49, 50 and 289 of the Criminal Code, Chapter 9 of the Laws of Malta;
- Articles 28A, 28B and 28C of the Criminal Code, Chapter 9 of the Laws of Malta;

After having heard oral submissions by the Prosecution and Defence Counsels;

After having considered all the records of the proceedings;

Considers:

The accused Abdiwali Ahmed Ali and Abdi Ahmed Ibrahim together are being accused of having on the 8th February 2020, between 5:00a.m. and 6:00a.m. in the Maltese Islands: (1) committed theft of a mobile phone, a watch and money worth more than three thousand Euros (€3,000) to the detriment of Ozgur Siar Oskaya, which theft is aggravated by amount and time; (2) without the intent to kill or to put the life of Ozgur Siar Oskaya in manifest jeopardy, caused harm to the body or health of Ozgur Siar Oskaya, which harm is of slight nature; and (3) lead an idle and vagrant life. The accused Abdiwali Ahmed Ali alone is being accused of having on the 8th February 2020 in the Maltese Islands: (4) became a recidivist by a number of judgements of the Court of Magistrates, which judgements have become *res judicata*; (5) committed a crime of voluntary nature during an operative period of suspended

¹⁵ Folios 107 and 108 of the records of the proceedings.

¹⁶ Folios 113 and 114 of the records of the proceedings.

¹⁷ Folios 149 to 151 of the records of the proceedings.

¹⁸ Folios 152 to 154 of the records of the proceedings.

¹⁹ Folio 122 of the records of the proceedings.

sentence given by Magistrate Dr. Yana Micallef Stafrace LL.D., on the thirty first (31st) of May 2019.

Both the accused replied that they are not guilty of the charges brought against them.

By a Note dated 20th May 2021²⁰, the Attorney General sent the accused to be tried by this Court, subject to no objection being made by them in terms of Section 370(3) of the Criminal Code, Chapter 9 of the Laws of Malta, for an offence or offences under the provisions of:

Against both the accused **Abdiwali Ahmed Ali and Abdi Ahmed Ibrahim**:

- Articles 261(a)(c)(f), 262(1)(a)(2), 267, 270, 274(c), 277(a), 279(b) and 280(1)(2) of the Criminal Code, Chapter 9 of the Laws of Malta;
- Articles 214, 215 and 221(1) of the Criminal Code, Chapter 9 of the Laws of Malta;
- Article 338(w) of the Criminal Code, Chapter 9 of the Laws of Malta;
- Articles 382A, 383, 384, 385, 386 and 412C and 412D of the Criminal Code, Chapter 9 of the Laws of Malta; and
- Articles 17, 31, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta.

Against the accused **Abidwali Ahmed Ali alone**:

- Articles 49, 50 and 289 of the Criminal Code, Chapter 9 of the Laws of Malta;
- Articles 28A, 28B and 28C of the Criminal Code, Chapter 9 of the Laws of Malta.

The alleged victim in the proceedings, that is **Ozgur Siar Oskaya**, testified before the Court on the 27th February 2020²¹ and in his testimony he declared that on the 8th February 2020, at around 5:00a.m., whilst on his way home from Paceville, he met three persons who asked him something. Since he couldn't understand them, since he does not speak English, he tried translating what they said on Google Translate on his mobile phone. One of these persons took his phone from his hands and then the three of them started discussing something until all of a sudden he could not see his phone anymore. When he asked the person who took his phone, where his phone was, he replied "your phone is not with me". These three individuals further told him that if he wanted his phone back he had to follow them, and so they started walking together. They told him that if he wanted his phone back he had to go into a garden with them but he refused. Ozgur Siar Oskaya explained that opposite this garden there is a Pizza Hut and there is also a coffee shop. He further explained that although when he was stopped by these three persons it was still 5:00a.m., the place was not so dark because it was lit since there is a bank and a coffee shop close by, however the garden where they wanted him to go was dark. Eventually they all entered the garden and there he was told that if he wanted his phone back he had to give them five Euros. Ozgur Siar Oskaya explained that *they were just using body language and couldn't speak properly*. At a certain point these persons started strangling him and he ended up lying down on the floor, at which point they also took

²⁰ Folio 122 of the records of the proceedings.

²¹ Folios 29 to 34 of the records of the proceedings.

his watch and his wallet with the money in it. Once they took these items from him, these three persons started running towards the bus station and then they separated: two of them went towards the bank, whilst the other one went to the right.

Asked what kind of phone and watch he had, Ozgur Siar Oskaya replied that his mobile phone was an iPhone X, costing around two thousand Euros, and that the watch was a Graham Brand, costing around four thousand Euros. He further declared that in his wallet he had about one hundred and eighty-five Euros. In the course of his testimony, Ozgur Siar Oskaya recognised the accused Abdiwali Ahmed Ali as one of the persons who stole his possessions, namely as the person who stole his watch. In so far as concerns the accused Abdi Ahmed Ibrahim and his involvement in the incident, Ozgur Siar Oskaya was somewhat confused in the sense that at first he did not recognise him as one of the persons involved in this case, then prodded by the Prosecution he stated that he was the one who took his phone but upon being admonished by the Court that he had to be sure and not simply assume the involvement of the accused in the incident, he stated that Abdi Ahmed Ibrahim was the person who hit him. On being asked by the Court whether he actually recognised him or he thinks he recognised him, Ozgur Siar Oskaya replied *I am sure*. He stated that even though there were three persons at the time of the incident, one of them, whom he didn't recognise, did not do anything to him but was just searching around.

Ozgur Siar Oskaya submitted a set of documents, marked Doc. "OS1" and Doc. "OS2" at folios 35 to 40 of the records of the proceedings, pertinent to the watch which was stolen from him, from which documents it transpires that as at 15th January 2020 the watch was valued at four thousand Euros.

Inspector Leeroy Balzan Engerer²² testified that: *on the 8th February 2020 around five in the afternoon Ozgur Siar Oskaya called at the St. Julians Police Station to report that between two or three dark skinned persons had taken his mobile phone and also his watch and didn't give them back. The watch and the phone costed around six thousand Euros. He advised us that it happened around five thirty in the morning near Triq Ross bus stop which is situated next to Spinola Gardens next to Hilton Hotel and we also advised him that if he sees them again, he will advise the Police so that will ask them regarding the incident which happened. On the 9th February 2020 the complainant came together with a translator and advised us that he saw three persons which were in the incident. Basically the persons were Ahmed Abdiwali Ali which I recognise over here on the left hand side of the Court, Abdi Ahmed Ibrahim who is on the right hand side of the Court and Ali Jama. They were all arrested and the Magistrate on turn was advised regarding the exceeding six hours of arrest and Mr Oskaya was brought back to the station to re-confirm the involvement of the persons involved in the incident and confirmed that Mr Abdiwali was the one who took the watch from him and the other who helped him. Mr Ali Jama was confirmed that he didn't have nothing to do in the incident so he was released from investigations. Then, on the 10th February 2020, I presented Mr Ahmed Abdiwali Ali and Mr Abdi Ahmed Ibrahim and charged them of theft of mobile which exceeds two thousand and three hundred Euros (€2,300) and apart from the fact, I forgot to say, the complainant also had some certificates*

²² Testimony given during the sitting held on the 27th February 2020, folios 41 and 42 of the records of the proceedings.

regarding the incident as when he was stopped by these persons, he suffered slight injuries as well and I also accused them regards to the slight bodily harm to Mr Ozgur Siar Oskaya. In reply to the question by the Court: in so far as concerns the persons involved, when he recognised Mr Abdiwali Ahmed Ali, he told you that he was the person who took his watch, what did he tell you about his phone and his wallet with the money? Did he tell you that it was him who took everything or he just took the watch?, Inspector Leeroy Balzan Engerer declared that: to tell you the truth, the accused over here pointed out that there was another Somali person who might have been involved in the incident. As a matter of fact, I have the passport held at the Police Station regarding some more investigation of this person, whom they accused and I reconfirmed if is the person who recognised in the yard of St.Julians Police station or the person on the passport. He reconfirmed that the person in the yard was the one who took everything, the wallet, the mobile phone and also the watch. To the Court's further question: and this is Mr Abdiwali Ahmed Ali?, Inspector Balzan Engerer replied: exactly. The accused are stating and I have the passport that Mr Moktar who is a renowned person in the area of St. Julians. I reconfirmed with the victim if it is the person on the passport or if it is the person who is standing there in the yard. Together there was the translator from the Consulate of Turkey so that we could eliminate the language barrier and he reconfirmed three times in regards to Mr Ahmed Ali Abdiwali.

During the sitting held on the 18th September 2020²³, Inspector Leeroy Balzan Engerer submitted two documents pertaining to the details of the accused Abdi Ahmed Ibrahim and the accused Abdiwali Ahmed Ali, marked as Doc. "LBX1" and Dok. "LBX2" at folios 65 and 66 of the proceedings. In so far as concerns a medical certificate pertinent to the slight injuries allegedly sustained by Ozkur Sair Oskaya during the incident forming the merits of these proceedings, Inspector Balzan Engerer declared that: *In regards to any medical certificate Ozkur Siar Oskaya presented, I do not have any certificates at this stage and as you can see from the charge, the charges of slight nature of very minimal injuries which is 221(3). I applied those charges because he said that they held him but basically there were some abrasions on the neck when they were holding him. So, I do not have any certificates. The victim did not want to present any certificates. With regards to the recidivism and a true copy of the judgment regarding Abdi Ahmed Ali, they will be presented in the next sitting.* In so far as concerns the charge brought against both the accused that they lead an idle and vagrant life, Inspector Balzan Engerer declared that: *regarding the third charge against both the accused, I can say that when we usually patrol the areas of St. Julians as in regards to an idle and vagrant life, next to the Spinola St. Julians Gardens you can see them always there so that's the charge of leading an idle and vagrant life. Whenever asked, it's not the first time that they are summoned to the Police Station, in regards to petty crime. Their answer to their residence is basically wherever they find so they do not have a fix address and basically you'll find them drinking in the Spinola Gardens, that's a proof of leading an idle and vagrant life.*

During the sitting held on the 2nd June 2021, Inspector Leeroy Balzan Engerer submitted a number of documents namely: (a) the Declaration of Refusal of Legal

²³ Folios 63 and 64 of the records of the proceedings.

Assistance by the accused Abdi Ahmed Ibrahim, marked as Doc. “LBX1” at folio 132 of the records of the proceedings; (b) the statement given by the accused Abdi Ahmed Ibrahim, marked as Doc. “LBX2” at folios 133 and 134 of the records of the proceedings; (c) the Declaration of Refusal of Legal Assistance by the accused Abdiwali Ahmed Ali, marked Doc. “LBX3” at folio 135 of the records of the proceedings; (d) the statement given by the accused Abdiwali Ahmed Ali, marked as Doc. “LBX4” at folios 136 and 137 of the records of the proceedings; (e) the Conviction Sheet of the accused Abdi Ahmed Ibrahim, marked as Doc. “LBX5” at folio 138 of the records of the proceedings; (d) the Conviction Sheet of the accused Abdiwali Ahmed Ali, marked as Doc. “LBX6” at folios 139 to 142 of the records of the proceedings; and (e) a Police Incident Report dated 8th February 2020, marked as Doc. “LBX7” at folios 143 to 145 of the records of the proceedings.

Under cross-examination by Defence Counsel for the accused Abidwali Ahmed Ali, Inspector Leeroy Balzan Engerer²⁴, in reply to the question whether on the day when the accused were apprehended any identification parade was held, declared that: *the case was investigated by Inspector Joseph Xerri who was my colleague at the St. Julian’s police station. From my regards, I only presented them under arrest on the 10th of February. Basically, investigations regarding whom they were, what I can recall is that the accused here were pointed out by the victim himself. ... From my records no, I don’t remember that there was any identification parade.* In reply to the questions: *Inspector, Inspector Xerri would have told you if he had done it yes? There would have been something in the files?* Inspector Balzan Engerer replied: *obviously, yes* and to the question: *the fact that there isn’t anything, means that it wasn’t done?* he replied: *most probably it hadn’t been done but obviously Inspector Xerri can confirm this because as I know Inspector Xerri and we used to work together, but that’s my opinion, we usually do not pinpoint them, we do some kind of identification parade with pictures of various Somali nationals.* Asked once again: *but since there is nothing in the file, no identification parade was done?* Inspector Balzan Engerer replied: *I cannot confirm that. ... From my end I cannot confirm that* and asked: *if there was an identification parade, something would have been inserted in the file, am I correct or not?* he replied: *not by force because regarding some police investigations, some may be written down on the PIRS but some may be confidential information between the police themselves.*

Inspector Joseph Xerri²⁵ testified that: *On 8th February 2020, PS 249 Michael Vella, had received a report of an alleged mugging in St. Julian’s and the report was made by a Turkish national Ozgur Siar Oskaya (holder of passport number U22801390) and this Mr. Oskaya had said that he had been attacked by 5 persons of dark skin. That same evening, at night, Mr. Oskaya had approached PS 850 Steve Micallef while he was at Paceville and he had indicated that he had identified 3 of those persons who attacked him earlier that evening. So PS 850 went on site together with other police officers and Mr. Oskaya and had proceeded to the arrest of 3 nationals who did not have any identification with them but one of them was identified as Abdi Ali Jama – holder of Maltese ID card number 102614(M). On the 9th of February 2020, I had summoned all the suspects to my office as I was the duty*

²⁴ Testimony under cross-examination given during the sitting held on the 21st June 2021.

²⁵ Testimony given during the sitting held on the 3rd July 2020, folios 50 and 51 of the records of the proceedings.

officer on that day. I first spoke with Abdiwali Ahmed Ali who was identified as the holder of passport number 13U083 and upon being given his rights, he requested to be assisted by a legal professional and hence he was conveyed to the GHQ lockup so that he could consult with a lawyer in the morning because I was speaking to them after 21:00pm. The second suspect I spoke to was Abdi Ahmed Ibrahim who is also a Somali national born on the 17th May 1992, he stated that he did not have a fixed address and could not provide any documentation. Mr. Ibrahim also requested legal assistance and he was also conveyed to the lockup pending consultation in the morning and hence I had spoken to Mr. Abdi Ali Jama who had renounced his legal rights and raised a written statement in which he had stated that he had been homeless for the past year and a half, confirmed that the previous evening he was in Paceville but denied any involvement in this case. From there on, since I was duty on night watch, I had given handover to Inspector Leeroy Balzan Engerer who took over the further investigations and had then arraigned the 2 persons accused today whom I identify in court as the persons I had spoken to.

During the sitting held on the 17th February 2021²⁶, Inspector Xerri further testified that: *I am presenting a batch of documents consisting of 4 documents which refer to the 31st May 2019 on the day which I had arraigned under arrest Mr. Abdiwali Ahmed Ali whom I recognise in court wearing the grey suit, charged on theft. On the day he had admitted to the charges and was sentenced by the duty magistrate, Dr. Yana Micallef Stafrace, for 18 months imprisonment suspended for 4 years. I am presenting a copy of the charges in Maltese, a true copy of the charges in English and the court minutes of the sitting. ... I am also presenting an e-mail which I had sent to the refugee commission querying regarding any details with regards to the same, Mr. Ahmed Abdiwali Ali and I was informed that he had an application for international protection which was lodged but this continued as implicitly withdrawn on the 8th of February 2014 and then a subsequent application on the 12th June 2017 was rejected on the 26th July 2017. I am presenting the e-mail correspondence with the refugee commission. The documents in question are exhibited as Doc. "JS1" and Doc. "JS2" at folios 98 to 102 of the records of the proceedings.*

Maria Dolores Fenech²⁷, Assistant Registrar of the Criminal Courts and Tribunals, confirmed that no appeal was lodged by Abdiwali Ahmed Ali from the judgement delivered on the 31st May 2019 by Magistrate Dr. Yana Micallef Stafrace.

PS 249 Michael Vella²⁸ testified that: *On the 8th February of this year at around 05:20 in the afternoon, I was duly stationed at St. Julians Police Station where a certain Ozgur Siar Oskaya, of a Turkish nationality, came to report that earlier on that day he was stolen by three dark skinned male persons while he was at Ross bus stop which is situated in St. Georges Road, St. Julians. He explained that while he was passing from there, these three persons approached him and asked him for a cigarette but he didn't understand and he took out his mobile in order to translate so that they could understand him. At first they asked him for five Euro in order to help him to find the mobile which they took. Later on they escaped and took as well*

²⁶ Folios 96 and 97 of the proceedings.

²⁷ Testimony given during the sitting held on the 1st March 2021, folios 107 to 108 of the records of the proceedings.

²⁸ Testimony given during the sitting held on the 13th August 2020, folios 56 and 57 of the records of the proceedings.

his mobile, his wallet, his money and his watch. Later on we went round the area, the Ross bus stop, in order to identify these people together with the victim but he failed to identify them. So, I suggested that he reported during the night watch to try and identify these three persons. Nothing further to add. ... I gave handover to Sergeant 850 Stephen Micallef explaining what has happened in order to take the victim to the place where the incident occurred in order to try and identify these culprits. **PS850 Stephen Micallef**²⁹ testified that: *On the 8th February 2020 I was stationed in Paceville, I was night watch duty and I was approached by a Turkish person who was identified as a certain Ozgur Siar Oskaia who claimed that he made a report at St. Julians Police Station regarding a mugging. Obviously I checked with St. Julians Police Station and confirmed the report and he also stated that he recognised around three persons involved in the mugging. I advised him that I could not help him other than walking behind him and him identifying the persons. We walked in St. Georges Street, which is in the vicinities of Paceville and he identified three people, two of whom are sitting here. All of the persons that were arrested had no identification except for one who was identified as a certain Abdi Ali Jama, his ID is 102614A. PS 850 Stephen Micallef confirmed that his involvement in the case was limited to the arrest of the persons indicated to him by the accused and during his testimony he recognised both accused as two of the three persons arrested by him.*

John Louis Sammut³⁰, **in representation of the Agency for Asylum Seekers (AWAS)**, testified that both the accused are no longer residents at Hal Far Open Centre. The accused Abdiwali Ahmed Ali entered the Centre on the 18th November 2019 on a contract for a year, however on the 17th January 2020 he left on a voluntary basis and eventually got out of the system on the 17th February 2020. The accused Abdi Ahmed Ibrahim entered the Centre on the 5th June 2019 and left after three weeks, that is on the 28th June 2019, and on the 16th July 2019 he got out of the system. John Louis Sammut further stated that for someone to be re-admitted to the Open Centre, *if they come back before the 15 days have expired, they can come back but if the 15 days have expired, they need to go for intake to AWAS and the management decides on case by case basis who to let in again or not.* He however confirmed that neither one of the accused ever returned to the Hal Far Open Centre after they left. He further stated that: *if they come to the centre they won't be let in and they will be directed to AWAS head office to go there and ask for any re-accommodation. ... If a person residing in Hal Far tent village comes to the centre, he can go in and go out whenever he wants. Obviously, we take record of all the people coming in so that we would have a record of who is getting in and going out. Obviously, if a person is not coming in the centre for 15 days, automatically he is taken out from the accommodation. ... a fall-in we don't have because obviously since it is an open centre, we don't force people to go in but at the centre there is a registration system where people come and sign Monday, Wednesday and Friday so that they can keep their bed and get their per diem.*

Dr. Sarah Ezabe³¹, **in representation of the International Protection Agency Refugee Commission**, testified that the accused Ahmed Ali Abdiwali, having Ref. Com. No. 16419, is a Somali national and he applied with the Refugee

²⁹ Testimony given during the sitting held on the 13th August 2020, folios 58 and 59 of the records of the proceedings.

³⁰ Testimony given during the sitting held on the 26th November 2020, folios 84 to 87 of the proceedings.

³¹ Testimony given during the sitting held on the 19th April 2021, folios 113 and 114 of the records of the proceedings.

Commission on the 12th September 2013. His application was rejected on the 27th July 2017, on the grounds that there were no reasons at law which could justify his request. The accused Ibrahim Ahmed Abdi, having Ref. Com. No. 25979, is also a Somali national who applied with the Refugee Commission on the 28th May 2019. His application was deemed inadmissible since he had another application pending in another Member State.

Abdi Ali Jama³², who was the third person initially suspected of and arrested for the incident forming the merits of these proceedings but subsequently released since it transpired that he was not involved, stated that on the 8th February 2020 he was in the garden at St. Julian's but that he did not see anything happening since he was drunk. He stated that he was with another group of Somalis and also recognised the accused as two of the Somalis who used to hang around in this same garden with him.

The accused **Abdiwali Ahmed Ali**³³ declared that: *I will explain for you only one thing. In 2019 I was in hospital and I take injection there and they help me for medicine and the doctor, Anthony Zahra he sent me to Hal Far to stay there and they start for me some money every month €130 so I can eat there and I can sleep there. In January 2020, every month I take one cheque of Hal Far of €130 and February I take the money, I buy clothes and that one night, I think on the 9th or 8th I think it was in February, I used to go in Marsa or somewhere, after I drink and I go to St. Julian's. But that they did tell me after, I meet there, I come back and the case happened on that night and I wasn't there I swear, I was in Hal Far and I always was there I take my medicine because at 9 o'clock I have to be there in office and I take my medicine and when I take the medicine, you can check my paper, with this medicine you cannot walk and you cannot go out when you take this medicine, you have to sleep. I take Olanzapine, I take Novatrim, I take Valium and I take atarax for injection so I cannot walk when I take this medicine and I have to sleep. After the case has happened, I went to St. Julian's and the police they arrest me and they tell me that I am under arrest and when I went to the police station they told me "You are here and you steal" and I told them sir, yes, before, long time, I come three times in prison and my case is ... years and that's why you recognize my face and you have filed a report for me in police station in St. Julian's but now I changed my life, I take medicine and I always take care of myself in Hal Far and I always live there. I never tried to steal because I'm not hungry, I have where I can eat and I have where I can sleep. So please, you don't have witnesses and you don't have the cameras and everywhere in St. Julian's there are the cameras and no one saw me and this guy now you tell me I was in St. Julian's but I never saw him in my life. Inspector then told me "No, you are arrested and we go to the court and after court we will see what happens".* Abdiwali Ahmed Ali reiterated that on the date of the incident he was not in St. Julians but he was at Hal Far.

Under cross-examination the accused Abdiwali Ahmed Ali declared that he arrived in Malta in 2013 and that during the years 2013, 2014, 2015 and 2016 he never had a report with the St. Julian's Police Station. He further declared that: *I never was there. I was in Marsa and I always live in Hal Far and I work with rubbish car in*

³² Testimony given during the sitting held on the 17th February 2021, folios 103 to 105 of the records of the proceedings.

³³ Testimony given during the sitting held on the 21st June 2021, folios 149 to 151 of the records of the proceedings.

Birzebbuga. So for 4 years I didn't go in St. Julian's. In 2017, I go with my friend in St. Julian's and I drink there when I stopped work because I had problems with documents, almost 9 years I didn't get documents and I didn't get any money and they came to take me out from Hal Far and I slept in Hamrun or Marsa street and sometimes I didn't eat. So I stay good so when I go to St. Julian's to eat there or stay there. OK it's true I come to prison 2 or 3 times. ... 2 times before for stealing mobile and that's why you recognized my face but I swear on the Koran, I didn't steal in this case and I don't know how it happened and I don't recognize this guy also. You are right, you are inspector and you can bring me to court and you can put me in prison but everything is proof, you have to make me proof, you have to bring me some camera or witness.

The accused **Abdi Ahmed Ibrahim**³⁴ declared that: *when I caught for the police that time I was staying in St. Julian's, I was drinking with some friends and then, another day, that day, I was asked from the inspector about the story of the mobile but even I didn't stay, even I didn't have information about that one because that night I stayed in St. Julian's but I stayed on the beach drinking with my friend and then around 2 o'clock at night we were going to go in Marsa and then I went in Birzebbuga, I was living there and before I was living in Hal Far and then we changed. ... I drink with the limits but that time I swear to God I didn't stay.* Under cross-examination he declared that up until December 2019 he worked, claiming that he worked on the beach taking care of the umbrellas and sun-beds and subsequently he worked as a dishwasher. He declared that he worked for 8 hours a day and the pay was of €40.

Note by the Attorney General dated 20th May 2021:

Upon consideration of the Note by the Attorney General dated 20th May 2021³⁵, it transpires that after the compilation of evidence the Attorney General sent the accused to be tried together by this Court for, amongst others, offences under: Sections 261(a)(c)(f), 262(1)(a)(2), 267, 270, 274(c), 277(a), 279(b) and 280(1)(2) of Chapter 9 of the records of the proceedings. Thus, after the compilation of evidence the Attorney General sent the accused to be tried together for the offence of theft aggravated by violence, by amount exceeding €2,329.37 and by time. However, the compilation of evidence referred to the offence of theft aggravated by amount exceeding €2,329.37 and by time only and did not include the aggravation of violence.

The offence of theft aggravated by violence, by amount exceeding €2,329.37 and by time, as indicated by the Attorney General in his Note of the 20th May 2021, carries a punishment of **18 months to 8 years** in terms of Sections 31, 274(c), 277(a), 279(b) and 280(2) of Chapter 9 of the Laws of Malta. The offence of theft aggravated by amount exceeding €2,329.37 and by time forming the subject-matter of the compilation of evidence against the accused, carries a punishment of **13 months to 7 years**, which shall not be awarded in its minimum, in terms of Sections 279(b) and 280(1) of Chapter 9 of the Laws of Malta. This therefore means that by his Note of the 20th May 2021, the Attorney General effectively sent the accused to be tried for a

³⁴ Testimony given during the sitting held on the 21st June 2021, folios 152 to 154 of the records of the proceedings.

³⁵ Folios 122 and 123 of the records of the proceedings.

graver offence than that with which they were originally charged and which graver offence was not dealt with during the compilation of evidence, something which cannot be done.

In this regard the Court refers to the judgement in the names **Il-Pulizija v. Michael Carter, Appell Nru. 82/01**, delivered by the Court of Criminal Appeal on the 7th December 2001, wherein the said Court observed that: *meta ... ir-rinviju għall-ġudizzju jsir skond is-subartikolu (3) ta' l-Artikolu 370 (u allura wieħed qed jitkellem fuq għall-anqas reat wieħed fost dawk imputati, li huwa ta' kompetenza tal-Qorti Kriminali) in-nota ta' rinviju għall-ġudizzju tassumi rwol simili għal dak ta' l-att ta' akkuża quddiem il-Qorti Kriminali. Fin-nota ta' rinviju għall-ġudizzju skond l-Artikolu 370(3) ma jistgħux jiżdiedu reati li dwarhom ma tkunx saret il-kumpilazzjoni. L-Avukat Ġenerali, naturalment, jista' jnaqqas reat jew reati u anke jżid skużanti. Bħal fil-każ ta' l-att ta' akkuża, jekk fin-nota ta' rinviju għall-ġudizzju taħt l-imsemmi Artikolu 370(3) l-Avukat Ġenerali jakkuża lil xi ħadd bħala awtur ta' reat, il-Qorti tal-Maġistrati, wara li tkun akkwistat il-kompetenza bil-kunsens ta' l-akkużat (Art. 370(3)(ċ)), tista' issibu ħati ta' tentattiv ta' dak ir-reat, jew ta' reat ieħor anqas gravi iżda kompriż u involut f'dak ir-reat, jew bħala komplici f'dak ir-reat. In fatti din it-tielet ipoteżi kien il-punt prinċipali fis-sentenza ta' Seisun et (cioè li l-Qorti tal-Maġistrati, wara rinviju għall-ġudizzju skond l-Artikolu 370(3), tista' ssib lill-akkużat ħati bħala kopmlici flok bħala l-eżekutur materjal) għandu jingħad ukoll, però, li f'din is-sentenza din il-Qorti, diversament presjeduta, ma jidhirx li apprezzat id-differenza bejn rinviju skond l-Art. 370(3) u rinviju skond l-Art. 433(5).*

In view of the above the Court can only consider whether it can find the accused guilty of the offence of theft aggravated by amount exceeding €2,329.37 and by time - this is indeed the first charge brought against the accused.

Theft aggravated by amount exceeding €2,329.37 and by time:

From the evidence submitted by the Prosecution, the Court is of the opinion that the Prosecution has proven beyond reasonable doubt that the accused Abdiwali Ahmed Ali is indeed guilty of the offence of theft aggravated by amount exceeding €2,329.37 and by time. This same level of proof however was not reached by the Prosecution with regard to the accused Abdi Ahmed Ibrahim.

When Ozgur Sair Oskaya testified before this Court he recognised, with certainty, the accused Abdiwali Ahmed Ali as one of the persons involved in the theft of his watch, mobile phone and money which took place on the 8th February 2020 in St. Julian's at around 5:00a.m. and of which he was the victim, and in particular he recognised him as the person who took his watch. This certainty by the victim, that is that the accused Abdiwali Ahmed Ali was one of the persons involved in the theft, was also expressed by him before the Executive Police when he was asked whether he identified any one of his aggressors from three persons who had been arrested by the Police. In fact, Inspector Leeroy Balzan Engerer testified that after the persons suspected of having committed the theft were arrested, that is the accused Abdiwali Ahmed Ali, the accused Abdi Ahmed Ibrahim and a certain Ali Jama, Ozgur Sair Oskaya *was brought back to the station to re-confirm the involvement of the persons involved in*

the incident and confirmed that Mr. Abdiwali was the one who took the watch from him and the other who helped him. Mr. Ali Jama was confirmed that he didn't have anything to do in the incident so he was released from investigations. ... to tell you the truth the accused over here pointed out that there was another Somali person who might have been involved in the incident. As a matter of fact, I have the passport held at the Police Station regarding some more investigation of this person whom they accused and I reconfirmed if it is the person who recognised in the yard of the St. Julian's Police Station or the person on the passport. He (that is Ozgur Sair Oskaya) reconfirmed that the person in the yard was the one who took everything, the wallet, the mobile phone and also the watch. ... The accused are stating and I have the passport that Mr Moktar who is a renowned person in the area of St. Julians. I reconfirmed with the victim if it is the person on the passport or if it is the person who is standing there in the yard. Together there was the translator from the Consulate of Turkey so that we could eliminate the language barrier and he reconfirmed three times in regards to Mr Ahmed Ali Abdiwali³⁶.

Whilst Ozgur Sair Oskaya was certain that the accused Abdiwali Ahmed Ali was one of the persons involved in the theft of his watch, mobile phone and money, he did not express the same level of certainty with regard to the accused Abdi Ahmed Ibrahim. When it came to the identification of the mentioned accused, Ozgur Sair Oskaya was very confused in his testimony. At first he did not recognise him, then he said that whilst the accused Abdiwali Ahmed Ali took his watch, the accused Abdi Ahmed Ibrahim took his phone but then he changed his mind again and said that Abdi Ahmed Ibrahim was the person who hit him during the incident. Ozgur Sair Oskaya was so evidently confused in his identification of the accused Abdi Ahmed Ibrahim that the Court remarked that he could not assume that the said Abdi Ahmed Ibrahim was involved in the theft simply because he was sitting next to the accused Abdiwali Ahmed Ali but he had to be sure of his involvement. Even though Ozgur Sair Oskaya said that he was sure of his identification of Abdi Ahmed Ibrahim, the Court does not deem his testimony with regard to the mentioned accused as being sufficient to prove beyond reasonable doubt the involvement of said Abdi Ahmed Ibrahim in the incident in question.

Defence Counsel for the accused Abdiwali Ahmed Ali placed particular emphasis as to whether any identification parade was held in so far as concerns the identification of the persons allegedly involved in the theft of which Ozgur Sair Oskaya was a victim. Quite evidently, Defence Counsel is trying to weaken the implications of the recognition by Ozgur Sair Oskaya of the mentioned accused as one of the persons involved in the theft. In this regard however the Court makes reference to the judgement in the names **Il-Pulizija v. Massimo Caruso**, delivered by the Court of Criminal Appeal on the 17th March 2008, wherein that Court observed that: *dwar il-proċess ta' identifikazzjoni, il-Qorti ta' l-Appell Kriminali (Sede Inferjuri) fil-kawża Il-Pulizija v. Stephen Zammit, deċiża fil-15 ta' Lulju 1998 (Vol. LXXXII.iv.235) qalet li: "Il-liġi tagħna hi partikolarment skarsa dwar regoli li għandhom x'jaqsmu ma' l-identifikazzjoni ta' imputat jew akkużat. Infatti, l-unika disposizzjoni tal-Liġi in materja - l-Artikolu 648 tal-Kodiċi Kriminali - hi redatta fin-negattiv, fis-sens li tgħid x'mhux meħtieġ u mhux x'inhu meħtieġ". Dik id-disposizzjoni tipprovdi*

³⁶ Testimony given during the sitting held on the 27th February 2020, folios 41 and 42 of the records of the proceedings.

testwalment hekk: “Biex issir il-prova ta’ l-identità ta’ persuna li għandha tigi magħrufa jew ta’ oġġett li għandu jinġieb bħala prova, mhux meħtieġ, bħala regola, li x-xhud jagħraf dik il-persuna minn fost persuni oħra, jew dak l-oġġett minn qalb oħrjan bħalu, ħlief meta l-Qorti, f’xi każ partikolari, ikun jidhrilha xieraq taġġmel dan għall-finijiet tal-gustizzja”.

Dik l-istess Qorti ezaminat fid-dettal din il-kwistjoni, u billi huwa rilevanti għall-każ odjern se jiġi kkwotat in extenso. Hija fil-fatt qalet: “Minn din id-disposizzjoni jidher ċar li l-legislatur ma riedx jxekkel lill-partijiet fil-kawża b’revoli riġidi ta’ kif għandha ssir l-identifikazzjoni ta’ persuna jew oġġett, iżda ħalla fil-ġudizzju prudenti tal-Qorti li tirregola ruħha skond il-każ. Din id-disposizzjoni, naturalment, tapplika għal identifikazzjoni f’Qorti; meta si tratta ta’ identifikazzjoni li tkun saret barra mill-Qorti, bħal, per eżempju, fl-Għassa tal-Pulizija, u li għalhekk tkun ippreċediet l-identifikazzjoni fil-Qorti, il-liġi taġġna ma tgħid xejn. Dan ma jfissirx li ma hemmx regoli ta’ prudenza dettati mill-bwon sens li għandhom jiġu osservati, speċjalment f’dawk li jissejġu identification parades; dawn ir-regoli huma intiżi fl-interess kemm tal-Prosekuzzjoni kif ukoll tad-difiża bl-iskop li l-identifikazzjoni ta’ persuna bħala l-awtur ta’ reat jew bħala l-persuna altrimenti involuta fih tkun attendibbli b’mod li l-Ġudikant tal-fatt ikun jista’ jserraħ moħħu li ma hemmx żball f’dik l-identifikazzjoni. Fl-Ingilterra ħafna minn dawn ir-regoli huma llum inklużi fil-Code of Practice D taħt il-Police and Criminal Evidence Act, 1984. S’intendi dawn ir-regoli mhumieq applikabbli għal Malta, iżda xi wħud minnhom huma utili ħafna għax iġġinu biex jiżguraw dak li ngħad aktar ‘il fuq, u cioè l-attendibilità ta’ l-identifikazzjoni. Hekk, per eżempju, waħda minn dawn ir-regoli hi li meta ikun hemm aktar minn xhud wieħed u dawna jkunu ser jintwerew xi ritratti, ‘only one witness shall be shown photographs at any one time’ (para.2, Annex D) u dan bl-iskop ovvjju li xhud ma jkunx jista’ jinfluwenza lix-xhud l-ieħor. Ix-xhud għandu jiġi muri numru sostanzjali ta’ ritratti, mhux sempliċement wieħed jew tnejn, u ‘he shall not be prompted or guided in any way but shall be left to make any selection without help’ (para. 4). Ir-ritratti hekk użati, u speċjalment dak li talvolta x-xhud ikun indika bħala li jirrappreżenta lill-persuna li qed jidentifika, għandhom jiġu ppreservati biex jekk ikun il-każ, jiġu esebiti fil-Qorti. Kwantu għal identification parades dawn ir-regoli jipprovdu, fost ħwejjeg oħra li: ‘The parade shall consist of at least eight persons (in addition to the suspect) who so far as possible resemble the suspect in age, height, general appearance and position in life ...’.

Jerga jiġi ribadit li n-non-osservanza ta’ dawn ir-regoli ma jwassalx għall-inammissibilità tal-prova ta’ l-identifikazzjoni; ikun ifisser biss li, skond iċ-ċirkostanzi partikolari tal-każ, dik l-identifikazzjoni tista’ ma tkunx attendibbli biżżejjed. Lanqas ma għandu dan kollu jfisser jew jiġi interpretat bħala li hemm xi regola ġenerali li xhieda okulari (eye-witness testimony) hija minnha nnifisha inattendibbli jew li fiha xi perikoli. Kif fisser Chief Justice Miles fis-Supreme Court of the Australian Capital Territory fil-kawża Sharrett v. Gill (1993) 65 A Crim R.: ‘... I am unaware of any authority in this country or elsewhere ... that lays down a general principle that all eye-witness testimony is subject to weaknesses and dangers. It would be surprising if there were such a principle. Of course, everybody knows that everybody else has human failings with regard to such matters as observation, interpretation, recollection and articulateness and such failings are

assumed to be taken into account in most cases by the tribunal of fact unless there is some particular need for the fact-finder to refer to or to be referred to some aspect of the case where such failings are relevant. The highest judicial authorities emphasise that, in jury trials, cases of disputed identification require express and precise reference to these human failings ... and this principle has been extended to trials without a jury. However, it is hard to imagine life where people are not able to act safely and sensibly upon their observations of what they see and hear, and even upon their identification of fellow human beings by such observations. The ability to distinguish one human being from another and to recognise a person as one previously encountered are surely basic skills indispensable to social existence, and skills well-acquired at an early age. What the lawyers call identification is essentially no different from what is generally known as recognition’.

Fi kliem ieħor huwa biss f’certu kazijiet li tista’ verament tqum il-kwistjoni ta’ l-attendibilità ta’ identification evidence. Il-każ klassiku fl-Ingilterra huwa dak ta’ Turnbull (1977) QB 224, fejn il-Qorti esprimiet ruħha hekk: ‘First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided that this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused’s case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger’ (ara Blackstone’s Criminal Practice, 1991, pagna 1991; Archbold, 1997, pagni 1255-1256)”.

Kif osservat ukoll din il-Qorti fis-sentenza tagħha fl-ismijiet “Ir-Repubblika ta’ Malta v. Giuseppe sive Joseph Cassar” mogħtija fit-22 ta’ Marzu 1988 (Vol. LXXII.v.868), “skond il-liġi tagħna għall-identifikazzjoni ta’ l-akkuża mhux neċessarja identification parade”. Hija qalet: “Dan il-punt gie trattat mill-Qorti ta’ l-Appell Kriminali (Sede Inferjuri) per W. Harding fil-kawża “Il-Pulizija v. Leading Steward Victor Dalmas” deċiża fit-13 ta’ Mejju 1961 (Vol. XLV.iv.963), fejn waqt li gie ribadit dak li għadu kif ingħad fuq dan l-artikolu dik il-Qorti qalet ukoll: “Hu

ċertament desiderabbli li l-identifikazzjoni ssir bla ma dak li jkun imsejjaħ biex jidentifika jigi b'xi mod, anki involontarjament, sugġestjonat, u hi nota l-prattika irrakkomandata f'ċerti kazijiet, fis-sens li f'identifikazzjoni simili, meta jkun jeħtieg, jingabru xi persuni, più o meno ta' l-istess età u klassi soċjali tad-detenu, li jkun jista' jieħu post fejn irid fosthom”.

From all the above therefore, it clearly results that the fact that an identification parade does not seem to have been held for the purposes of the identification by the victim Ozgur Siar Oskaya of the perpetrators of the theft of his watch, mobile phone and money, does not in itself nullify or diminish the validity of the recognition of the accused Abdiwali Ahmed Ali by the said victim both at the St. Julian's Police Station on the 9th February 2020 and during his testimony before the Court during the sitting held on 27th February 2020. As a matter of fact, in terms of Section 648 of Chapter 9 of the Laws of Malta, an identification parade is not, as a rule necessary, unless the Court, in some particular case shall deem it expedient to adopt such course for the ends of justice. In this particular case the Court does not deem that there was the need for an identification parade for purposes of the identification of the accused as one or more of the perpetrators of the theft to the detriment of Ozgur Siar Oskaya since, in its opinion and as already stated above, the level of certainty expressed by the victim as to the identification of the accused Abdiwali Ahmed Ali as one of the persons involved in the theft, leaves little, if at all any, doubt as to the trustworthiness of said identification. The fact that Ozgur Siar Oskaya is the only person who has identified the accused Abdiwali Ahmed Ali as one of the perpetrators of the theft to which he fell victim, too does not diminish the value of his testimony and identification and this as is clearly set out in Section 638 (1) and (2) of Chapter 9 of the Laws of Malta which provide that: *(1) In general, care must be taken to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness. (2) Nevertheless, in all cases, the testimony of one witness if believed by those who have to judge of the fact shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses.*

The Court therefore reiterates that the Prosecution managed to prove beyond reasonable doubt that the accused Abdiwali Ahmed Ali was indeed involved in the theft perpetrated to the detriment of Ozgur Siar Oskaya.

The said accused Abdiwali Ahmed Ali tries to create an alibi for himself for the 8th February 2020 by alleging that on the date in question and particularly at the time of the theft he was not in St. Julian's but at the Hal Far Open Centre. During his testimony given during the sitting held on the 21st June 2021³⁷, the accused Abdiwali Ahmed Ali claimed that following an admission to hospital he was prescribed certain medication which used to be administered to him at the Hal Far Open Centre at around 9:00p.m. and after which medicine he always slept and did not go out. He further declared that upon being arrested by the Executive Police in connection with the theft, he informed them that *now I changed my life, I take medicine and I always take care of myself in Hal Far and I always live there. I never tried to steal because I'm not hungry, I have where I can eat and I have where I can sleep. So please, you*

³⁷ Folios 149 to 151 of the records of the proceedings.

don't have witnesses and you don't have the cameras and everywhere in St. Julian's there are the cameras and no one saw me and this guy now you tell me I was in St. Julian's but I never saw him in my life.

With regard to the probatory value of an alibi, the Court makes reference to that observed by the Court of Criminal Appeal in the judgement in the names **Ir-Repubblika ta' Malta v. Giuseppe sive Joseph Cassar**, delivered on the 22nd March 1988, where the said Court observed that: *dwar l-alibi jiġi osservat li qalet din il-Qorti in re R. v. Alfred Muscat deċiż fl-20 ta' Awwissu 1968 u cjoè li "biex alibi jirnexxi meta jiġi avanzat mill-akkużat m'hemmx għalfejn li jiġi ppruvat b'assolutezza matematika tal-ħin, li trid toqgħod tqis bil-kronometru f'idejha, imma biżżejjed illi mill-kumpless taċ-ċirkostanzi jkun jidher verosimili, probabbli, li l-akkużat ma kienx preżenti meta suppost li l-fatt ġara. M'hemmx bżonn ... ikun ippruvat mid-difiża "water tight" għal kollox imma biżżejjed li jkun hemm kompleks taċ-ċirkostanzi li minnhom jiddebolixxu t-teżi tal-prosekuzzjoni dwar l-akkuża.*

From the above therefore it results that the alibi of the accused need not be water tight but it is sufficient that, on the basis of the circumstances of the case, it is probable and likely that the accused indeed was not on the scene of the crime at the time of the commission of the crime.

When the circumstances which result from evidence brought forward in this case are considered, it clearly results that the alibi of the accused Abdiwali Ahmed Ali is not adequately supported in a way for it to be probable and likely that he was not on the scene of the theft to the detriment of Ozgur Siar Oskaya, which occurred in St. Julian's on the 8th February 2020 at around 5:00a.m.

Whilst the accused Abdiwali Ahmed Ali claims that on the 8th February 2020 he was at the Hal Far Open Centre, where according to him he was living at the time, where he was administered his medication and then went to sleep, from testimony given by John Louis Sammut³⁸ as a representative of the Agency for Asylum Seekers (AWAS), it transpires that the accused Abdiwali Ahmed Ali left the Hal Far Open Centre on the 17th January 2020 and never returned to the said Centre. The witness declared that even though persons living at the Hal Far Open Centre are free to leave whenever they want and they can also return within a maximum period of fifteen days for them to be able to retain their allocated place at the Centre, a register is kept for the monitoring of who leaves and who returns and Abdiwali Ahmed Ali never returned to the Centre after leaving voluntarily on the 17th January 2020. He further stated that once a person leaves the Centre and does not return within a maximum period of fifteen days, that person cannot just walk into the Centre and expect to be accommodated there but he must go through a process through the AWAS offices.

The discrepancy between that alleged by the accused Abdiwali Ahmed Ali and that stated by John Louis Sammut, reflects negatively on the alibi of the said accused and the Court surely cannot accept as true and founded the claim by Abdiwali Ahmed Ali that on the 8th February 2020 he was not at St. Julian's and consequently was not involved in the theft to the detriment of Ozgur Siar Oskaya because he was at the Hal

³⁸ Testimony given during the 26th November 2020, folios 84 to 86 of the records of the proceedings.

Far Open Centre taking his medication and then sleeping. There is little doubt that in view of the testimony by John Louis Sammut, the accused Abdiwali Ahmed Ali had to put forth proper and satisfactory evidence in support of his allegation and not merely take the stand himself and testify. Abdiwali Ahmed Ali opted not to do so and rested his case solely on his testimony, which testimony however is, as already observed above, countered and in truth nullified by the testimony of John Louis Sammut and therefore does not even reach the level of probability.

In view of the above, the Court reiterates that the Prosecution proved beyond reasonable doubt that the accused Abdiwali Ahmed Ali was involved in the theft to the detriment of Ozgur Siar Oskaya. The Court is also of the opinion that the Prosecution proved beyond reasonable doubt that the theft to the detriment of Ozgur Siar Oskaya perpetrated by the accused Abdiwali Ahmed Ali was aggravated by amount and by time.

For the crime of theft to be aggravated by amount and by time, the following elements must subsist: Section 267 of Chapter 9 of the Laws of Malta - *theft is aggravated by "amount", when the amount of the thing stolen exceeds two hundred and thirty-two euro and ninety-four cents (232.94)* and Section 270 of Chapter 9 of the Laws of Malta - *theft is aggravated by "time", when it is committed in the night, that is to say, between sunset and sunrise.*

Ozgur Siar Oskaya claimed that during the incident which occurred in St. Julian's on the 8th February 2020, at around 5:00a.m., his watch, his mobile phone and the money in his wallet were stolen. He further claimed that the accused Abdiwali Ahmed Ali specifically stole his watch which had a value of around four thousand Euro (€4,000). Ozgur Siar Oskaya proved the value of the watch by submitting document Doc. "OS1" - which is dated 15th January 2020 - and document Doc. "OS2" at folios 35 to 40 of the records of the proceedings. In view of this the Court deems that the Prosecution proved beyond reasonable doubt that the theft perpetrated by the accused Abdiwali Ahmed Ali to the detriment of Ozgur Siar Oskaya is aggravated by amount, which amount not only exceeds the sum of €232.94 in terms of Section 267 of Chapter 9 of the Laws of Malta but also exceeds the sum of €2,329.7 in terms of Section 277(b) of Chapter 9 of the Laws of Malta.

In so far as the aggravation of time, it transpires from testimony given by Ozgur Siar Oskaya that the theft occurred whilst he was on his way home from Paceville at around 5:00a.m., and although the area where it happened was quite well lit since there is a Bank and also a cafeteria, it was still dark. In view of this, the Court deems that the Prosecution also managed to prove beyond reasonable doubt that the theft perpetrated by the accused Abdiwali Ahmed Ali to the detriment of Ozgur Siar Oskaya is aggravated by time.

In view of all the above-mentioned considerations, the Court deems that whilst the Prosecution did not prove beyond reasonable doubt that the accused Abdi Ahmed Ibrahim is guilty of the offence of theft aggravated by amount and time and therefore he must be acquitted from the relative charge, it proved beyond reasonable doubt that the accused Abdiwali Ahmed Ali is indeed guilty of the offence of theft aggravated

by amount and time in terms of Sections 261(c)(f), 267, 270, 279(b) and 280(1) of Chapter 9 of the Laws of Malta.

Slight bodily harm:

In terms of the Note dated 20th May 2021, the Attorney General sent the accused Abdiwali Ahmed Ali and Abdi Ahmed Ibrahim together to be tried for the offences under Sections 214, 215 and 221(1) of the Criminal Code, Chapter 9 of the Laws of Malta.

The accused are therefore being charged and the Attorney General is seeking to have them found guilty of the offence of bodily harm, which is of a slight nature - this is indeed the second charge brought against the accused.

The Court without any hesitation states that the Prosecution did not prove beyond reasonable doubt that both the accused, or either one of them, is guilty of the said offence towards Ozgur Siar Oskaya. In his testimony Ozgur Siar Oskaya claimed that during the theft one of the perpetrators strangled him and that he was pushed to ground and also made to lie down but not only does not mention anything about being effectively injured but he did not even exhibit any medical certificate which shows and actually proves that he had been injured in this incident. With regard to the medical certificates, Inspector Leeroy Balzan Engerer declared that: *In regards to any medical certificate Ozgur Siar Oskaya presented, I do not have any certificates at this stage and as you can see from the charge, the charges of slight nature of very minimal injuries which is 221(3). I applied those charges because he said that they held him but basically there were some abrasions on the neck when they were holding him. So, I do not have any certificates. The victim did not want to present any certificates*³⁹.

In the absence of medical certificates attesting to any form of injury sustained by Ozgur Siar Oskaya and in the absence of any other proof showing that the said Ozgur Siar Oskaya was indeed injured during this incident, the Court reiterates that it cannot find the accused Abdiwali Ahmed Ali and Abdi Ahmed Ibrahim guilty of the charge of causing slight bodily harm to Ozgur Siar Oskaya and it must therefore acquit them from the said charge.

Leading and idle and vagrant life:

By means of the Note dated 20th May 2020, the Attorney General sent the accused Abdiwali Ahmed Ali and Abdi Ahmed Ibrahim to be tried for the offence under Section 338(w) of Chapter 9 of the Laws of Malta, which is the offence (contravention) of leading an idle and vagrant life - this is indeed the third charge brought against the accused.

Even though both the accused declared in their testimony the up until they were arrested by the Executive Police on the 9th February 2020, they both lived at the Hal Far Open Centre, from the testimony given by the John Louis Sammut, as a

³⁹ Testimony given during the sitting held on the 18th September 2020, folios 63 and 64 of the proceedings.

representative of AWAS, both the accused were not resident at the Hal Far Open Centre and this from the 17th January 2020 in so far as concerns the accused Abdiwali Ahmed Ali and from the 28th June 2019 in so far as concerns the accused Abdi Ahmed Ibrahim. The accused did not bring forth any form of evidence to disprove that claimed by John Louis Sammut, which further proof in the circumstances is indeed necessary, particularly in the light of the fact that John Louis Sammut further clarified that even though persons living at the Hal Far Open Centre are free to leave whenever they want and they can also return within a maximum period of fifteen days for them to be able to retain their allocated place at the Centre, a register is kept for the monitoring of who leaves and who returns and both the accused never returned to the Centre after they both voluntarily left on the dates mentioned above.

Although both the accused claim to have some form of income, or at least for a certain period of time they had some form of income, no definite proof has been submitted by them in this regard. On the contrary Inspector Leeroy Balzan Engerer declared that *regarding the third charge against both the accused, I can say that when we usually patrol the areas of St. Julians as in regards to an idle and vagrant life, next to the Spinola St. Julians Gardens you can see them always there so that's the charge of leading an idle of vagrant life.*

In the light of the above, the Court deems that the Prosecution proved beyond reasonable doubt that both the accused are guilty of the offence of leading an idle and vagrant life in terms of Section 338(w) of Chapter 9 of the Laws of Malta.

Abdiwali Ahmed Ali alone - recidivism and commission of an offence of a voluntary nature during the operative period of a suspended sentence:

By means of the Note dated 20th May 2021, the Attorney General sent the accused Abdiwali Ahmed Ali alone to be tried by this Court for being a recidivist in terms of Section 49, 50 and 289 of Chapter 9 of the Laws of Malta and of having committed an offence of a voluntary nature during the operative period of a suspended sentence imposed by Magistrate Dr. Yana Micallef Stafrace on the 31st May 2019, in terms of Sections 28A, 28B and 28C of Chapter 9 of the Laws of Malta - these are indeed the two charges brought against Abdiwali Ahmed Ali alone.

It is an established principle at law that for an accused to be considered a recidivist in terms of Sections 49 and 50 of Chapter 9 of the Laws of Malta and, where appropriate, in terms of Section 289 of Chapter 9 of the Laws of Malta and for an accused to be considered to have committed an offence of a voluntary nature during the operative period of a suspended sentence imposed upon him by a Court of Criminal jurisdiction, the Prosecution must first and foremost submit the judgement or judgements which show that the accused has already been charged and found guilty of another offence or other offences, and this also within the time periods set out in Section 50 and 289 of Chapter 9 of the Laws of Malta, and that he has been found guilty of another offence or other offences and been subjected to a suspended sentence, which was still during its operative period at the time of the commission of the subsequent offence⁴⁰.

⁴⁰ Il-Pulizija v. Julian Genovese, delivered by the Court of Criminal Appeal on the 9th October 2009.

In order to prove these two particular charges against the accused Abdiwali Ahmed Ali, the Prosecution, through the testimony of Inspector Joseph Xerri, submitted a charge sheet in the names “The Police v. Abdiwali Ahmed Ali” as filed before the Court of Criminal Inquiry on the 31st May 2019 and the minutes of the arraignment dated 31st May 2019, Doc. “JS1” at folios 98 to 101 of the records of the proceedings. With regard to these documents, Inspector Joseph Xerri stated that these *refer to the 31st May 2019 on the day which I had arraigned under arrest Mr. Abdiwali Ahmed Ali whom I recognise in court wearing the grey suit, charged on theft. On the day he had admitted to the charges and was sentenced by the duty magistrate, Dr. Yana Micallef Stafrace, for 18 months imprisonment suspended for 4 years.*

The Court is of the opinion that the documents submitted by the Prosecution do not satisfy the requirement at law to prove recidivism and the commission of a voluntary offence during the operative period of a suspended sentence, since these do not constitute a judgement.

With all due respect to the Prosecution, the annotation in the minutes of the arraignment (or of any sitting during the course of criminal proceedings) of any decision of that Court upon the admission of the accused to the charges brought against him, is precisely an annotation and not a judgement and can never be considered a judgement or tantamount to such. This observation is supported by that observed by the Court of Criminal Appeal in the judgement in the names **Il-Pulizija v. Albert Bezzina**, delivered on the 25th July 1994: *il-Qorti tosserva illi la l-artikolu 377(1) u lanqas l-artikolu 382 ma jirrikjedu li s-sentenza tinkiteb mill-Maġistrat; dak li trid il-liġi hu dak li jgħid il-Maġistrat meta jagħti s-sentenza jiġi reġistrat u riprodott fil-kopja tas-sentenza. Dak illi hemm fuq il-komparixxi huma l-appunti tal-Maġistrat, mhux is-sentenza. ...”. Stabbilit allura illi dak li jidher mitkub mill-Maġistrat di proprio pugno fuq il-komparixxi huma biss in-notamenti tiegħu, jifdal biex jiġi stabbilit jekk allura is-sentenza dattilografata u wkoll iffirmata mill-gudikant hijiex valida skond il-liġi billi l-motivi li wasslu lil ċQorti għad-deċiżjoni tagħha inkitbu wara li ġiet mogħtija s-sentenza.*

If the notes written by the Magistrate whilst delivering his/her decision written directly by him/her on the Writ of Summons cannot be considered as a judgement in terms of law, then likewise and surely the minutes of the sitting, including any decision given by the Magistrate, as recorded by the Deputy Registrar during the proceedings before a Court of Criminal Inquiry as converted into a Court of Criminal Judicature following the admission of the accused to the charges brought against him, cannot and must not be considered to be a judgement in terms of law.

This therefore means that the Prosecution did not prove beyond reasonable doubt and in terms of law the charge that the accused Abdiwali Ahmed Ali is a recidivist in terms of Section 49, 50 and 289 of Chapter 9 of the Law of Malta and the charge that he committed a crime of a voluntary nature during the operative period of a suspended sentence. The Court must therefore acquit the accused Abdiwali Ahmed Ali from the said two charges brought against him alone.

Decide:

For these reasons the Court whilst acquitting the accused Abdi Ahmed Ibrahim from the first and second charges brought against him and whilst acquitting the accused Abdiwali Ahmed Ali from the second charge, fourth and fifth charges brought against him and after considering:

- Sections 7(2), 12(2), 17(d), 261(c)(f), 267, 270, 279(b), 280(1) and 338(w) of Chapter 9 of the Laws of Malta finds the accused **Abdiwali Ahmed Ali** guilty of the first and third charge brought against him and condemns him to eighteen (18) months imprisonment;
- Furthermore in terms of Section 532A of Chapter 9 of the Laws of Malta and Section 24 of Chapter 446 of the Laws of Malta, the accused **Abdiwali Ahmed Ali** is being condemned to pay Ozgur Siar Oskaya the sum of four thousand Euros (€4,000) representing the value of the watch which he stole from the said Ozgur Siar Oskaya; and after considering
- Sections 7(2), 12(2) and 338(w) of Chapter 9 of the Laws of Malta, finds the accused **Abdi Ahmed Ibrahim** guilty of the third charge brought against him and condemns him to a period of one (1) month detention.

In view of all the facts which transpired during these proceedings and in the light of that observed by the Court, and also in view of the fact that no Experts have been appointed in these proceedings, the Court is abstaining from considering the requests by the Prosecution and the Attorney General and from applying the provisions set out in Sections 382A, 383, 384, 385, 386, 412C, 412D, 532B and 533 of Chapter 9 of the Laws of Malta.

MAGISTRATE

DEPUTY REGISTRAR