



Court of Magistrates (Malta)
As a Court of Criminal Judicature

Magistrate Dr Josette Demicoli LL.D

The Police
(Inspector Christabelle Chetcuti)

Vs

Arne Wolfgang Schmidt

Case No: 680/2015

Today 27th April 2022

The Court,

Having seen the charges brought against Arne Wolfgang Schmidt, 45 years, son of Wolfgang Schmidt and Edeltraut, born in Halie Wetsfalia, born on the 23rd November 1969, with no fixed address in Malta, holder of German Identity Card bearing number L7KN9CZ7M

Charged with having, on these Islands, during July 2015 and in the preceding months, in various parts of Malta, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law:

1. By means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence

of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made gain for the sum of over five thousand Euros (€5000) to the detriment of Paul Zammit;

2. Also, under the same circumstances for having misapplied, converting to his own benefit or the benefit of any other person, the sum of over five thousand Euros (€5000), which was entrusted or delivered to him under a title which implies an obligation to return such thing or to make use thereof for a specific purpose to the detriment of Paul Zammit.

Having seen the note of renvoi sent by the Attorney General dated 12th November 2020 so that the accused be tried summarily and the relevant articles of the law mentioned in same and having heard the accused declare that he has no objection that his case be tried summarily.

Having heard witnesses.

Having heard final submissions.

Having seen all the acts and documents of this case.

Considers

The accused is being charged with having in the month of July 2015 and in the preceding months committed the crimes of fraud and misappropriation to the detriment of Paul Zammit.

Inspector **Matthew Vella**¹ testified that on the 30th July 2015 he was duty officer at the then Economic Crime Unit and was informed by Paul Zammit that he had lodged a report at Birkirkara Police Station and stated that in May 2015 he met a certain Arne Wolfgang Schmidt on a flight back to Malta which was coming from Frankfurt. They exchanged contact details and they started to meet each other on several occasions. Schmidt even resided at Paul Zammit's residence for about four weeks at one point in time. Paul Zammit reported that he gave Arne Schmidt gold granules

¹ 25th August 2015

on two occasions and gold coins. Arne Schmidt gave him a receipt dated 10th June 2015 which indicated that the granules were exchanged at the Pro Aurum for the value of €25,310.09. However, no receipt was given by Arne Schmidt to Zammit with regards to the coins.

Initially Paul Zammit, at the Birkirkara Police Station, stated that he was offered by Schmidt to be a business partner in a company which Schmidt was going to have here in Malta. However, in the statement it emerged that Zammit was willing to help Arne Schmidt with his financial problems with regards to his business. They agreed that Schmidt had to give him back the money by end of year 2015.

In the second instance, Zammit stated that he needed cash liquidity so he gave another amount of gold to Schmidt so as to exchange it in Germany. This happened in front of a certain Abner Grech. Eventually Schmidt gave Zammit a receipt dated 6th July 2015 which indicated that the gold was exchanged at Pro Aurum in Germany for the value of €24,967.17.

Arne Schmidt sent an email to Paul Zammit² with an attachment and stated that he had attached an Ing Diba Bank receipt which indicated that Schmidt had transferred money from his account with the German Bank into Zammit's BOV Bank account. Zammit checked with BOV but the transfer never occurred and he was informed that it could never happen because the IBAN number of the German Bank account contained an extra digit. Zammit tried to make contact with Schmidt on several times and through emails and on one occasion Zammit managed to contact Schmidt who told him that he was on his way to South Africa and told Zammit again that he gave the order to check what happened. The last contact Zammit had with Schmidt on Skype was on the 21st July 2015 and this led Zammit to suspect that Schmidt was not going to affect the transfer. Zammit informed that Schmidt has a business office in Malta, and thus the Inspector carried out his investigations which finally led to Arne Schmidt's arrest, upon obtaining a warrant of arrest. The accused then released two statements.

Inspector Christabelle Chetcuti testified³ on the same lines as Inspector Matthew Vella.

² Dok MV1

³ 25th August 2015

Paul Zammit testified⁴ that he is a pensioner and for 18 years he had been looking after his mother until her passing away a year and a half before. He explained how he had met Arne Schmidt whilst travelling from Frankfurt to Malta in May 2015, and started talking to each other. They exchanged their cards. Paul Zammit invited Arne Schmidt over to his house. He explained to him about a company registered in Malta to do safari and golf excursions to South Africa from Europe. He stated also that for the past twenty years he had been a financial controller but stated that he was fed up with that.

Then Schmidt lived in his house for some time and was grumbling about his business partner in Africa and asked him whether he could help him to find someone to lend him money because otherwise everything would be gone. This was in June 2015. Zammit stated that the accused started gradually but on a particular night he made him very sensitive about it. Zammit told him that he did not have liquidity but he had some gold and coins, which his mother had given to him, that he could offer to Arne Schmidt. The accused accepted and told him that they would put everything in writing, but this was never done. These were in a safe place. He explained that the coins were in different numeration and he gave them to Schmidt on that same night. He also gave him the gold. They weighed the coins on the kitchen scale and were about 200 grammes. The gold was sealed in a plastic bag as well as in linen. Arne Schmidt told him that he would get about €25,000 for the gold and about €5,000 for the coins. Schmidt left for Germany to exchange the gold and infact Zammit paid for his flight. Then he came back to Malta. Then he had to depart quickly because one of his daughters was injured.

The accused did not give him a receipt of the coins, though he promised it to him. Schmidt kept complaining about his business partner. When the accused came back to Malta after departing following his daughter's injury, Zammit explained that he himself had a cash liquidity problem and he gave Schmidt the second kilo of gold to exchange in Germany. This was end of June/beginning of July. This happened in parte civile's kitchen and this second time round, Abner Grech, his personal trainer, was present. Schmidt was going to leave to Germany. Zammit gave him

⁴ 25th August 2015

the gold granules which were sealed in the plastic bag and he put them back in the cloth bag which Schmidt put the bag in his luggage.

Eventually Schmidt came back to Malta but did not give him any money for the gold and coins. Zammit kept asking him about the money but the accused told him that it takes some time. He confirmed Dok MV4 in the sense that Arne Schmidt had shown him that document. The accused kept telling him that he would send the money by transfer but the money was never received by him. Zammit confirmed the email he received with the transfer note. He explained that when he checked whether the money had actually been transferred into his bank account, it resulted in the negative. Moreover, Ing Diba Bank informed him the the IBAN number was invalid. Thus, Zammit started to contact Schmidt. When it was evident that Schmidt did not want to speak to him, Abner Grech accompanied him to the Police Station to lodge a report.

Abner Grech explained⁵ how Paul Zammit had confided in him. He confirmed he was present when Zammit gave to Schmidt the 1 kilo gold in the kitchen. He explained that Schmidt had a luggage in his hand and he put the bag of gold into his luggage. He testified that he had retrieved evidence from Zammit's PC, from the Skype logs and found Arne Schmidt's facebook. This witness said that Zammit trusted Schmidt so much that he lived at his house and trusted him with his apartment in London. He confirmed that Zammit had shown him MV3 and MV4.

From the documents presented by a BOV Bank representative **Joanna Bartolo**⁶, it results that the amount of €24,967.17 was never transferred to Zammit's accounts.

PC 569 Salvatore Sinue Salomone⁷ confirmed that the origin of the email exhibited as Dok MV2 sent on the 18th July 2015 was from an IP address registered with a service provider created in Germany.

Maria Farrugia, in representation of Central Bank of Malta⁸, exhibited Dok MF which refers to the publication by Central Bank of Malta on its website of indicative prices of gold. Then, **David Borg** from the Consul's

⁵ 28th August 2015

⁶ 8th October 2015 – Dok JB1 and JB2

⁷ 9th February 2016

⁸ 27th November 2019

Office⁹, presented Doc DB which shows the prices for gold from July 2014 till July 2015 as published in the Government Gazette every Tuesday and Friday on a weekly basis.

Arne Schmidt has released two statements¹⁰. In the first statement, he explained how he met Paul Zammit. He stated that he even lived at his house. Zammit asked him to look at his accounts and explained to him that he had an apartment in London and was having problems with it. So, they went to London to check the apartment which was in a poor condition. Zammit complained about the bills of the renovation of the apartment and asked Arne Schmidt how he could get cash for gold because he was short of money. Schmidt stated that at times he deals in gold. So, he showed Zammit how it works on the internet. He showed him a receipt about some gold transactions which he had previously done and sent him a copy to explain better how it works. He recognized the receipt he sent to Paul Zammit but he had to confirm with the original receipts. He denied having any financial problems. He affirmed that Paul Zammit did not give him any gold granules or gold coins. He never got gold from Zammit and the receipts he sent were only as an example. He confirmed he never sent any money to Zammit. He denied sending him the Ing Diba receipt dated 16th July 2015. He stated that the account number is not his and that he could not explain why and how there was his name on the receipts.

In the second statement¹¹, the accused confirmed the contents of the previous statement. He confirmed contacting Paul Zammit. With reference to the conversation dated 21st July 2015 he explained that he was referring to the issue that Zammit wanted to cancel the renting apartment contract of the London flat. He said that he did not answer the calls and messages from Paul Zammit or contacted him back because he was on holiday in South Africa. He gave his email addresses and access to the emails Paul Zammit sent him over the past few months.

From the evidence brought forward, it has been confirmed that the accused did not send any money to Paul Zammit.

⁹ 14th January 2020

¹⁰ Dok MV8 at fol 90 et seq

¹¹ Dok MV9

It also results from the acts of the case that on the 24th February 2022, Paul Zammit exhibited a note by means of which he withdrew his criminal complaint against Arne Schmidt, on the basis of which the criminal complaint, these criminal proceedings have been initiated and undertaken.

The defence exhibited Dok AA1 which is a written agreement dated 18th February 2022 by means of which Paul Zammit and Arne Schmidt reached an amicable agreement (following also the First Hall Civil Court's judgment delivered on the 10th December 2015) and whereby Arne Schmidt paid the remaining amount of €65,511.95 to Paul Zammit following a separate payment of €10,000 paid on 28th July 2021 to the said Paul Zammit.

Considers

As already stated, the accused is facing the charge of having defrauded Paul Zammit of a sum exceeding five thousand Euro.

The required elements so that this charge subsists are well-established in our jurisprudence¹²

*Fil-Liġi taġhna biex ikun hemm it-truffa jew il-frodi innominata irid ikun ġie perpetrat mill-aġent xi forma ta' ingann jew qerq, liema ingann jew qerq ikun wassal lill-vittma sabiex taġhmel jew tonqos milli taġhmel xi ħaġa li gġibilha telf patrimonjali bil-konsegwenti qligħ għall-aġent ... jekk l-ingann jew qerq ikun jikkonsisti f'raġġiri jew artifizji - dak li fid-dottrina jissejjaħ ukoll mis en scene - ikun hemm it-truffa; jekk le ikun hemm hemm ir-reat minuri ta' frodi innominata (jew lukru frawdolenti innominat)*¹³.

Illi x'jikostitwixxi r-raġġiri u l-artifizji ukoll huwa ben stabbilit fil-ġurisprudenza. Fi kliem Antolisei¹⁴

artificio e' ogni studiata trasfigurazione del vero, ogni camuffamento della realta effettuato sia simulando cio che non esiste, sia dissimulando ... cioe che esiste. Il

¹² **Il-Pulizija vs Anthony Fountain et** decided on the 15th December 2011

¹³ **Pulizija ve Carmela German** AK decided on the 30th December 2004 and the jurisprudence therein quoted

¹⁴ Manuale Di Diritto Penale (Giuffre) paġna 356

raggiro d'altra parte e un avvolgimento ingenuo di parole, destinate a convincere: piu precisamente una menzogna corredata da ragionamenti idonei a farla scambiare per verita. E certo che l'espressione del codice di per se' richiama l' idea di una certa astuzia o di un sottile accorgimento nel porre l'inganno in opera.

Antolisei jkompli jghid pero li

nell'applicazione pratica della legge questa idea e' andata sempre piu affievolendosi, fin quasi a scomparire del tutto. Per tal modo si e' finito con l'ammettere che anche la semplice menzogna puo bastare per dare vita alla truffa¹⁵.

Illi f'dan is-sens anke l-Qorti ta' l-Appell Kriminali qalet hekk dwar il-messa in xena:

Il-Ligi tagħna ma tirrikjediex li l-messa in xena, cioè daww l-artifizji jew raġġiri, ikunu xi haġa kkumplikata jew arkittetta b'haġna pjanijiet¹⁶.

Then in the judgment in the names of **Il-Pulizija vs Marjanu Zahra**¹⁷

Biex jissussti ir-reat tal-frodi jew truffa gie ritenut kostantement fil-gurisprudenza u fis-sentenzi tal-qorti tagħna illi iridu jinkonkorru diversi elementi. Ibda biex irid ikun hemm ness bejn is-sugġett attiv u is-sugġett passiv tar-reat u cioè' bejn minn qiegħed jikkometti r-reat u il-vittima. Hemm imbagħad l-element materjali ta' dana ir-reat u cioè' l-użu ta' ingann jew raġġiri li iwasslu lil vittima sabiex isofri it-telf patrimonjali. Finalment huwa necessarju li ikun hemm l-element formali tar-reat konsistenti fid-dolo jew fl-intenzjoni tat-truffatur jew frodatur li jinganna u dana sabiex jikseb profitt jew vantaġġ għalih

¹⁵ Op cit pagna 357

¹⁶ Ref Pulizija vs Emanuel Ellul deciza 20.06.1997.

¹⁷ Court of Magistrates (Malta) as a Court of Criminal Judicature decided on the 2nd March 2011

innifsu. Jekk xi wieħed jew iktar minn dawn l-elementi huma nieqsa, allura ir-reat tat-truffa ma jistax jisussisti. Illi f' sentenza mogħtija mill-Qorti tal-Appelli Kriminali (per Imhalled Carmel. A. Agius) deċiża fit-22 ta' Frar 1993, fl-ismijiet *Il-Pulizija vs Charles Zarb*, il-Qorti għamlet esposizzjoni ferm preċiża, studjata u dettaljata għar-rigward tal-elementi ta' dana ir-reat. Il-Qorti bdiet sabiex esprimiet ruħha b'dan il-mod għar-rigward ta' dana ir-reat:

“Id-delitt tat-truffa huwa l-iprem fost il-kwalitajiet ta' serq inpropriji u hu dak li fl-iskola u fil-legislazzjoni Rumana kien magħruf bħala steljolat u li jikkorrispondi eżattament għat-truffa tal-Codice Sardo, għal frodi tal-Kodiċi Toskan, għal Engano jew Estafa fil-kodiċi Spanjol, għal Bulra f'dak Portugiz, u għal Esroquerie fil-Kodiċi Franciż ... Id-disposizzjonijiet tal-Kodiċi tagħna li jikkontemplaw ir-reat ta' truffa kienu ġew meħuda minn Sir Adriano Dingli mill-paragrafu 5 tal-artikolu 430 tal-Kodiċi delle Due Sicilie li hu identiku hlief għal xi kelmiet insinjifikanti għal Kodiċi Franciż (artikolu 405) avolja dan, il-Kodiċi delle Due Sicile, it-truffa kien sejħilha Frodi”. Skond ġurisprudenza kostanti, l-ingredjenti tal-element materjali ta' dan id-delitt ta' truffa, huma dawn li ġejjin.

Fl-ewwel lok bħala sugġett attiv ta' dan id-delitt jista' jkun kulhadd.

Fit-tieni lok il-Legislatur, aktar mill-interess soċjali tal-fiduċja reċiproka fir-rapport patrimonjali individwali, hawn qed jittutela l-interess pubbliku li jimpedixxi l-użu tal-ingann u tar-raġġiri li jinduċu bniedem jiddisponi minn ġid li fil-kors normali tan-negozju ma kienx jagħmel.

Fit-tielet lok hemm l-element materjali tat-truffa u jikkometti d-delitt tat-truffa kull min:

- a. b'mezzi kontra l-liġi, jew
- b. billi jagħmel użu minn ismijiet foloz jew
- c. ta' kwalifiki foloz jew
- d. billi jinqeda b'qerq ieħor u

- e. ingann jew
- f. billi juri haġa b'ohra sabiex iġieghel titwemmen l-eżistenza ta' intrapriżi foloz,
- g. jew ta' hila
- h. setgħa fuq haddiehor jew
- i. ta' krediti immaginarji jew
- j. sabiex iqanqal tama jew biża dwar xi grajja kimerika, jagħmel qliegħ bi hsara ta' haddiehor.

.... Hu neċessarju biex ikun hemm ir-reat ta' truffa, li l-manuori jridu jkunu ta' natura li jimpressjonaw bniedem ta' prudenza u sagaċja ordinarja, li jridu jkunu frawdolenti u li hu neċessarju li jkunu impjegati biex jipperswadu bl-assistenza ta' fatti li qajmu sentimenti kif hemm indikat fil-liġi."

Dwar l-artifizji intqal mill-Qorti illi "hemm bżonn biex ikun reat taħt l-artikolu 308 illi l-kliem jkun akkumpanjat minn apparat estern li jsaħħaħ il-kelma stess fil-menti ta' l-iffrodat. Din it-teżi hija dik aċċettata fil-ġurisprudenza ta' din il-Qorti anke kolleġġjalment komposta fil-kawża "Reg vs Francesco Cachia e Charles Bech (03.01.1896 - Kollez.XV.350) li fiha intqal illi "quell' articolo non richiede solamente una asserzione mensioniera e falza, ma richiede inoltre che siano state impiegate, inganno, raggiro o simulazione, ed e' necessario quindi che la falza asseriva sia accompagnata da qualche atto diretto a darla fede."

Għar-reati ta' truffa komtemplat fl-artikolu 308 tal-Kodiċi Kriminali, il-Qorti iċċitat lill-Imħallef Ġuże Flores fejn qal illi "kif jidher mid-diċitura partikolari deskrittiva adoperata, hemm bżonn li tirriżulta materjalita' speċifika li sservi ta' supstrat għall-verosimiljanza tal-falsita prospettata bħala vera u b'hekk bħala mezz ta' qerq. Ma huwiex bizzejjed għal finijiet ta' dak l-artikolu affermazzjonijiet, luzingi, promessi, mingħajr l-użu ta' apparat estern li jirrivesti bi kredibilita' l-affermazzjonijiet menzjonjieri tal-frodatur. Il-liġi taġhti protezzjoni speċjali kontra l-ingann li jkun jirrivesti dik il-forma tipika, kważi tejjatrali, li tissupera il-kawtela ordinarja kontra s-sempliċi luzingi, u li taġhti li daww l-esterjorita ta' verita kif tirrendi l-idea l-espressjoni feliči fid-dritt Franciż mise-en-scene."

“...Kwantu jirrigwarda l-element formali, cioè' kwantu jirrigwarda d-dolo ta' dan ir-reat ta' truffa, Jinghad illi jrid jkun hemm qabel xejn l-intenzjoni tal-frodatur li jipprokura b'ingann l-konsenja tal-flus jew oġġett li jkun fi profit ingust tiegħu. L-ingustizzja tal-profitt toħroġ mill-artikolu 308 tal-Kodiċi Kriminali fejn il-kliem “bi ħsara ta' haddiehor” ma jhallux dubbju dwar dan. Jigifieri biex ikun hemm l-element intenzjonali tar-reat ta' truffa, hemm bżonn li s-sugġett attiv tar-reat fil-mument tal-konsumazzjoni tiegħu ikun konxju tal-ingustizzja tal-profitt u b'dan il-mod il-legittima produttività tal-profitt hija bizzejjed biex teskludi d-dolo.”

Illi minn dina l-esposizzjoni magħmula mill-Qorti tal-Appell li iċċittat diversi sentenzi oħra tal-qrati tagħna jidher illi l-elementi rikjesti sabiex jisussisti ir-reat tal-frodi baqgħu invarjati fiż-żmien.

Illi f'sentenza mogħtija mill-Corte di Cassazione Penale gie deciz illi element ewelieni fir-reat tal-frodi huwa “l'elemento del danno patrimoniale” Biex imbagħhad jissusti dana t-tip ta' reat huwa necessarju illi jeżistu “I tre momenti di cui si compone il reato e' cioè' la produzione dell'artificio, nella successive induzione in errore e nella consequenziale produzione dell'ingiusto profitto per l'agente.” (Cassazione penale sez.II 3 ottobre 2006 n.34179)

Illi għar-rigward ta' dana l-element soġġettiv tar-reat tat-truffa, kif gie ritenut mill-awtur Francesco Antolisei, ikkwotat f'sentenza oħra mogħtija mill-Qorti tal-Appelli Kriminali (Il-Pulizija vs Patrick Spiteri deciza 22/10/2004) : “L'agente ... deve volere non solo la sua azione, ma anche l'inganno della vittima, come conseguenza dell'azione stessa, la disposizione patrimoniale, come conseguenza dell'inganno e, infine, la realizzazione di quel profitto che costituisce l'ultima fase del processo esecutivo del delitto. Naturalmente occorre che la volonta sia accompagnata dalla consapevolezza del carattere frodatorio del mezzo usato, dell'ingiustizia del profitto avuto in mira e del danno che ne deriva all'ingannato.”

Illi l-artikolu 309 tal-Kapitolu 9, imbagħad jikkontempla ir-reat minuri tal-frodi innominat. Illi għar-rigward ta' dana ir-reat, għalkemm l-element tar-“raggiri” jew l-“artifizji”, huwa nieqes u allura anke gidba semplici hija bizzejjed għal kummissjoni ta' dana ir-reat, izda dana irid bil-fors iwassal sabiex il-vittma u cioe' is-sugġett passiv ta' dana ir-reat isofri xi telf patrimonjali. Illi kif gie deciz fis-sentenza Il-Puliizja vs Carmela German (Appelli Kriminali Inferjuri 30/12/2004): “Kwantu għal kwistjoni jekk il-gidba semplici – a differenza ta' l-artifizji u raggiri – tistax tammonta ossia twassal għar-reat ta' frodi innominata, ir-risposta hija certament fl-affermattiv, basta li tali gidba tkun effettivament tammonta għal qerq, cioe' intiza jew preordinata sabiex il-persuna l-oħra (il-vittma) tagħmel jew tonqos milli tagħmel xi haġa li ggibilha telf patrimonjali bil-konsegwenti arrikkiment għal min jgħid dik il-gidba u basta, s'intendi li tkun effettivament waslet għal dana t-telf min-naħa u arrikkiment min-naħa l-oħra.”

The accused is also charged of misappropriation. Reference is made to the judgment in the names of **Il-Pulizija vs. Enrico Petroni u Edwin Petroni**¹⁸ which details the requirements necessary for such a charge to subsist:

“Dana r-reat isehh meta wiehed (1) jircievi flus jew xi haġa oħra minghand xi hadd; (2) bl-obbligu li jrodd dawk il-flus jew dik ix-xi haġa lura jew li jagħmel użu minnhom b'mod specifiku; (3) u minflok ma jagħmel hekk idawwar dawk il-flus jew dak l-oġġett bi profitt għalih jew għal haddiehor.”

L-awtur Francesco Antolisei jikteb:

“La vera essenza del reato [di appropriazione indebita] consiste nell'abuso del possessore, il quale dispone della cosa come se ne fosse proprietario (uti dominus). Egli assume, si arroga poteri che spettano al proprietario e, esercitandoli, ne danneggia il patrimonio” (Manuale di Diritto Penale, Giuffre` (Milano), 1986, Parte Speciale, Vol. 1, p. 276)”

¹⁸ Deciza fid-9 ta' Gunju, 1998. Ara wkoll **The Police vs Keith Arthur Mayho** deciza fl-4 ta' Frar 2013

Then, in the judgment in the names of **Il-Pulizija vs. Dr. Siegfried Borg Cole**¹⁹ the Court of Criminal Appeal deemed that:

*"[...F]il-każ ta' flus li jkunu qed jinżammu minn xi ħadd biex dawn eventwalment jiġu ritornati lil sidhom, in-nonrestituzzjoni tagħhom tista' tammonta għal approprjazzjoni indebita [...]. Kif jispjega Luigi Majno: Finalmente, a costituire il delitto di appropriazione indebita e` necessario il dolo. Trattandosi di delitto contro la proprietà, a scopo d'indebito profitto per se` o per un terzo, il dolo sarà costituito dalla volontarietà della conversione con scienza della sua illegittimità, e dal fine di lucro: onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d'un il-Prsdiritto proprio da far valere, non commette reato per difetto di elemento intenzionale. Per la stessa ragione, e per difetto inoltre di elemento obiettivo, non incorrerà in reato chi nel disporre della cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo. **Il dolo speciale nel reato di appropriazione indebita e` (come nel furto e nella truffa) l'animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell'inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai deviazioni della pratica giudiziale, che diedero spesse volte l'esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale.** Rettamente pertanto fu giudicato non commettere appropriazione indebita (e neppure il delitto di ragion fattasi, per mancanza di violenza) il creditore che trattiene un oggetto di spettanza del suo debitore a garanzia del credito; l'operaio che avendo ricevuto materia prima da lavorare, si rifiuta, perché non pagato dal committente, di proseguire nel lavoro e di rendere la materia ricevuta; l'incaricato di esigere l'importo di titoli, che non avendo potuto compiere tale esazione, trattiene i titoli a garanzia del dovutogli per le pratiche inutilmente fatte allo scopo di esigere. In generale la giurisprudenza e` costante nel richiedere come elemento costitutivo imprescindibile il dolo"²⁰.*

¹⁹ 23 ta' Diċembru 2003

²⁰ The Police vs Keith Arthur Mayho deċiża fl-4 ta' Frar 2013

L-essenza vera ta' dan ir-reat huwa l-abbuż tal-fiduċja tal-persuna li tkun iddisponiet mill-ħaġa bħal li kieku kienet tagħha 'uti dominus', tarroga lilha nnifisha poteri li jappartjenu lis-sid u b'hekk jagħmel ħsara lill-proprjeta' ta' haddiehor.

L-awtur Taljan Maino fil-ktieb tieghu Commento al Codice Penale Italiano [vol IV - p.102, para 1949 u p. 105 - para 1951] jgħid is-segwenti:

"Il reato di appropriazione indebita e' perfetto colla conversione della cosa altrui inprofitto a proprio o di un terzo, indipendentemente dall'effettivo ricavo della conversione."

The defence stated that the charge of fraud should be considered as an alternative to the charge of misappropriation. The Court does not agree. This does not result from the acts of the case.

Having said this, the Court deems that the circumstances of the case and from the proof brought forward the elements required so that this charge subsists do not result. The Court deems that the parte civile's version of events is more credible than the one which the accused has given in his statements. The Court is convinced that Paul Zammit has given gold coins and two bags of gold to the accused and that the accused had to Exchange this gold for cash and that he had to give the money to said Paul Zammit. Apart from the fact that in his testimony Paul Zammit was convincing, there are also the receipts which Arne Schmidt has sent and in the second instance Abner Grech was present. No reason has been brought forward to discredit in any manner this witness.

However, there was no mise-en-scene. Paul Zammit handed over the gold granules and gold coins upon the agreement that Arne Schmidt would be exchanging them for gold. There is no doubt that Zammit trusted the accused completely. These circumstances as brought forward are more akin to misappropriation rather than fraud. It is also of interest to point out that in the written agreement entered into and exhibited as Dok AA1, the parties agreed that this was a case in terms of article 293 of the

Criminal Code, though this certainly is not a determining factor for this Court to acquit the accused from the charge of fraud.

With regards to the charge of fraud, the Court must examine whether the fact that the parte civile has withdrawn his complaint must necessarily mean that with regards to misappropriation the Court must declare that the proceedings are extinct. However, in the note of renvoi the Attorney General has mentioned article 294 of Chapter 9 of the Laws of Malta.

Apart from the fact that the defence was right when stating that from the evidence brought forward, this aggravating circumstance does not result in any manner.

However, it is to be noted that in the charges proferred against Arne Schmidt it is clear from the second charge that Arne Schmidt was only charged to be in violation of article 293 of Chapter 9 of the Laws of Malta and not with the aggravating circumstance as resulting from article 294 of Chapter 9 of the Laws of Malta.

The Court of Criminal Appeal in its judgment in the names of **Il-Pulizija vs Omissis**²¹ stated the following:

Illi qabel ma' din il-Qorti tinoltra ruhha fl-aggravozju marbut mal-apprezzament tal-provi maghmul mill-Ewwel Qorti u allura mal-mertu tal-kaz, hija tal-fehma illi ghandu jigi indirizzat dan l-aggravozju imqanqal matul il-kors tat-trattazzjoni ta' dan l-appell ta indoli legali, kif imfisser.

Issa huwa minnu illi minn qari tan-nota ta' rinviyu ghal gudizzju tal-20 ta' Mejju 2008, l-Avukat Generali, fit-termini ta'l-artikolu 370(3) tal-Kodici Kriminali, baghat l-atti lura lill-Qorti tal-Magistrati sabiex il-kaz jigi iggudikat mill-Qorti bhala dik issa ta' Gudikatura Kriminali, ghar-reati mahsuba fl-artikoli 198, 86,87,203 u 209 tal-Kodici Kriminali u dan fil-forma kontinwata tal-imsemmija reati.

Issa meta "ir-rinviju ghall-gudizzju jsir skond is-subartikolu (3) tal-Artikolu 370 (u allura wiehed qed jitkellem fuq ghall-anqas reat wiehed, fost dawk imputati, li huwa ta' kompetenza tal-Qorti Kriminali), in-nota ta' rinviyu ghall-gudizzju tassumi rwol simili ghal dak ta' l-att ta' akkuza quddiem il-Qorti Kriminali. Fin-nota ta' rinviyu ghall-gudizzju skond l-Artikolu 370(3) ma jistghux jizdiedu reati

²¹ Delivered on the 26th October 2017

li dwarhom ma tkunx saret il-kumpilazzjoni; l-Avukat Generali, naturalment, jista' jnaqqas reat jew reati u anke jzid skuzanti. ..²²

Illi bhal kif jaghmel meta jigi biex jirredigi l-att ta'l-akkuza, l-Avukat Generali wara li jifli l-atti tal-kumpilazzjoni irid jara liema huma dawk ir-reati li jistghu jigu imputati lill-persuna akkuzata fejn allura huwa jista' inaqas reat jew reati minn dawk li kienu qed jigu investigati tul l-atti kumpilatorji. Issa ghalkemm l-Avukat Generali ghar-reat mahsub fl-artikolu 198 tal-Kodici Kriminali cioe' dak ta'l-istupru, kif ukoll dak mahsub fl-artikolu 203, ma jindikax ic-cirkostanza aggravanti imsemmija għall-ewwel reat fl-artikolu 202(b) u għat-tieni reat imfisser fis-sub-inciz (1)(c) għall-istess artikolu tal-ligi u cioe' l-fatt illi r-reati gew kommessi fuq il-persuna ta' dixxendenti taht l-eta ta' tmintax-il sena, l-Ewwel Qorti għaddiet biex sabet htija għal dawn ir-reati bic-cirkostanzi aggravanti. L-appellanti jilmenta allura illi b'hekk ir-reat gie rez iktar gravi minn dak indikat fin-nota ta' rinviu għal gudizzju. Jinsisti inoltre illi din ic-cirkostanza aggravanti kellha tohrog mill-provi ikkumpilati, haga li fil-fehma tiegħu ma tirrizultax ippruvata, u gjaldarba l-Avukat Generali ma hassx il-htiega li jindika dan l-aggravju allura kellu jkun evidenti għall-Ewwel Qorti illi din il-prova ma saritx.

Illi l-artikolu 589 tal-Kodici Kriminali jitkellem dwar dak li għandu ikun fiha l-att tal-akkuza meta fis-sub-inciz (b) li jikkontempla l-parti narrattiva ta'l-att ta'l-akkuza hemm dispost illi l-Avukat Generali "għandu fisser il-fatt li jikkostitwixxi r-reat, bilpartikularitajiet li jkun jistgħu jingħataw dwar iż-żmien u l-lok li fihom ikun sar il-fatt u dwar il-persuna li kontra tagħha r-reat ikun sar, flimkien maċ-cirkostanzi kollha li, skont il-ligi u fil-fehma tal-Avukat Generali, jistgħu jkabbru jew inaqqsu l-piena."

Ikompli s-sub-iniz (c) hekk meta jitkellem fuq il-part akkuzatorja ta'l-att ta'l-akkuza meta hemm dispost illi din tikkostitwixxi:

"għabra fil-qosor li fiha l-imputat jigi akkużat tar-reat kif miġjub jew imfisser fil-ligi, u bit-talba sabiex jitmexxa kontra l-akkużat skont il-ligi, u sabiex l-istess akkużat jigi ikkundannat għall-piena stabbilita mil-ligi (hawn jingħad l-artikolu

²² II-Pulizija vs Michael Carter – 07/12/2001 App.Kri

tal-ligi li jikkontempla r-reat) jew għal kull piena oħra li skont il-ligi tista' tingħata skont kif jiġi iddikjarat ħati l-akkuzat."

Mela allura għalkemm fil-parti narrattiva ta' l-att ta' l-akkuza l-Avukat Generali għandu jindika c-cirkostanzi kollha ta' fatt li jistgħu jkabbru jew inaqqsu l-piena u allura jirrendu ir-reat iktar gravi, madanakollu imbagħad fil-parti akkuzatorja huwa bizzejjed illi jiġi indikat l-artikoli tal-ligi li jikkontempla ir-reat. Dan x'aktarx għaliex huwa rimess għal gudizzju tal-gurija popolari biex jiddeciedu jekk il-fatti esposti mill-Avukat Generali jirrizultawx ippruvati mill-evidenza li tingieb waqt il-guri, fejn imbagħad il-kwistjoni dwar il-piena li għandha tigi erogata f'kaz ta' sejbien ta' htija għal fatti kif decizi mill-gurati tigi, imhollija f'idejn l-Imhalled togat.

Ekwiperata n-nota ta' rinviu għal gudizzju ma' l-att ta' l-akkuza allura huwa bilwisq evidenti illi huwa bizzejjed illi l-Avukat Generali jindika l-artikoli tal-ligi li jikkontempla r-reat u dan kif hemm indikat b'mod specifiku fl-artikolu tal-ligi suicitat. Issa huwa minnu illi n-nota ta' rinviu għal gudizzju ma' fijiex dik il-parti narrattiva bħalma fiha l-att ta' l-akkuza, izda l-indikazzjoni tal-fatti tal-kaz johorgu mill-imputazzjonijiet kif originarjament mfassla kontra l-imputat. Illi fis-sentenza fl-ismijiet "Il-Pulizija vs Francesco sive Godwin Scerri" deciza 18 ta' April 2012 minn din il-Qorti kif diversament ippresjeduta gie deciz illi:

"Fin-nuqqas ta' indikazzjoni differenti mill-Avukat Generali, l-artikoli citati mill-Avukat Generali u l-akkuza originali jridu jigu ezaminati flimkien għal dak li jirrigwarda lfattispecji partikolari tal-kaz."

Dan għaliex, kif ingħad għalkemm in-nota ta' rinviu għal gudizzju hija imqabbla mal-att ta' l-akkuza, madanakollu fiha hija mankanti dik il-parti narrattiva bħalma hemm fl-att ta' l-akkuza li titkellem dwar il-fattispecje tal-kaz li abbazi tagħhom huma imsejjsa ir-reati li jigu hemmhekk imputati. Xejn ma kien josta lill-Ewwel Qorti allura stabbilit ir-reat, illi teroga dik il-piena li fil-fehma tagħha kienet tapplika għac-cirkostanzi partikolari tal-kaz kif imfissra fl-imputazzjonijiet. Għalhekk stabbilit illi lappellanti kien qed jiġi akkuzat bir-reati ta' l-istupru vjolenti u l-korruzzjoni talminorenni, kien jispetta lill-Ewwel Qorti sabiex misjuba l-htija għal dawn ir-reati, meta tigi tqies il-piena li għandha tigi erogata, tara jekk mill-fattispecje din kellhiex tizdied minhabba xi cirkostanza aggravanti. Għal dawn il-motivi għalhekk dan l-ewwel aggravu qed jiġi michud.

Upon reading this judgment, this Court deems that once Arne Schmidt was not originally charged in the charge sheet of the aggravating circumstance, then the Attorney General could not in his note of renvoi add this aggravating circumstance. Hence the Court must abstain from taking cognisance of this article as mentioned in the note of renvoi.

Hence, since it has been determined that Arne Schmidt is charged with violating article 293 of the Criminal Code and since the criminal complaint has been withdrawn, hence the Court will be declaring the second charge as being extinct. Reference is hereby being made to **Il-Pulizija vs Silvio (Salvatore) Aquilina**²³.

Decide

Hence for the above-mentioned reasons, the Court does not find the accused guilty of the first charge brought against him and acquits him of same, whilst declares that the procedure with regards to the second charge as being extinct. Moreover, abstains from taking cognizance of article 294 of Chapter 9 of the Laws of Malta indicated in the note of renvoi dated 12th November 2020 .

Dr Josette Demicoli

Magistrate

²³ Court of Criminal Appeal delivered on 24th September 2015