

The Court of Magistrates (Malta)
(Court of Criminal Judicature)
Magistrate Dr. Monica Vella LL.D.; M.Jur.

The Police
(Inspector Godwin Scerri)

Vs

Robert Alan Smith

Compilation No.: 2808/23

Today the 28th September 2023;

The Court,

Having seen the charges presented by the Executive Police on the 8th May 2023 against Robert Alan Smith, 33 years old, son of Paul Alan and Sharon nee' Hyde, born in the U.K. on the 2nd of June 1989, without a fixed residence and holder of British Passport number 528246525:

Accused of having on the 7th of May, 2023, at around 00:15hrs at Vitale Street, Mgarr (Malta), with the intent to commit the crime of theft from various vehicles to the detriment of various persons, manifested such intent by overt acts which followed the commencement of the execution of the crime and not completed in consequence of some accidental cause independent by the accused, in breach of Article 41(1)(a), 261, 270, 271(g) of Chapter 9 of the Laws of Malta.

And accused of having on the same date, circumstances and on previous days, in these islands led an idle and vagrant life in breach of Article 338(w) of Chapter 9 of the Laws of Malta.

And accused of having on the same date, place, time and circumstances of having committed a crime during the operational period of a suspended sentence, sentenced on the 22nd of April. 2023 by Magistrate Dr Gabriella Vella LL.D., in breach of Article 28B of Chapter 9 of the Laws of Malta.

The Court was humbly requested to consider Mr Robert Alan Smith as being a recidivist in breach of Article 49, 50 and 289 of the Laws of Malta¹.

Having noted the accused pleaded not guilty on the same day when he was charged.²

¹ Fol. 1 and 2 of the proceedings.

² Fol. 9 of the proceedings.

Having noted the conviction sheet of the accused presented by the prosecution³.

Having noted all the acts of the case.

Having heard all the witnessess in the proceedings.

Having considered all the evidence in the proceedings.

Having heard the final submissions of the parties.

Having seen that the case was adjourned for judgement for today's sitting.

Considered:

The Facts:

In summary, the case relates to attempted thefts from various vehicles at Vitale Street, Mgarr (Malta) on the night of the 7th May 2023. It seems that the accused, who it transpires from the acts of the proceedings, has no fixed address and has a drug addiction problem, entered at least one car and tried to force open various others when someone shouted at him and phoned to the police. The officers repaired

³ Fol. 8 of the proceedings.

on site and, following the description given by the person who made the report, apprehended the accused.

Apart from attempted theft, the accused is also being charged with leading an idle and vagrant life and being a recidivist.

Evidence:

PS 217 Italo Mizzi gave evidence on the 18th May 2023. He recalls that he was duty sergeant at Mosta Police Station when he received a phone call from the control room where he was told that a male person wearing a hoodie and shorts had opened or was trying to open some cars in Mgarr. He went on site at Triq Vitale, in Mgarr. He was also informed that PS 1194 from the RIU section had arrested a suspect which matched the description of the individual. The arrest was made by the RIU a few minutes away from Triq Vitale, Mgarr on foot, and a few seconds⁴ by car. He spoke to an eyewitness Alexia Sammut who stated that the accused opened or tried to open the cars. Another person Bernardette Vassallo told the officer that her car was opened. He established that some cars were not locked and the owners who were contacted did not report anything stolen. The accused was given his rights verbally. He informed the officers that his British Passport was held in Court and he was residing at Gnejna Bay. He was residing in a camp made of plastic. The officers spoke to his father at his Mgarr residence and who was present in Court. The accused cooperated during the investigation and when asked by the sergeant what had happened that night the accused replied:

⁴ Fol. 15 of the proceedings.

‘I did some cocaine with a friend of mine in Gnejna Beach and then I wanted some more and I counted my money and I did not have enough. So I walked to Imgarr to get a drink and on my way back I have noticed some cars which were unlocked. I only managed to open one. I have tried other cars to open them but they were all locked. While I was trying to open the cars from their handles, then I heard someone shouting from a balcony and then straight away I left. After a few minutes I was arrested by the police.’⁵

The officer continued that the accused begged for help since he was a drug addict. The sergeant confirmed that the description given by the control room matched the suspect.

In cross-examination the officer confirmed that no tools were found on the accused’s person. No tools were found at the tent either. The officer also confirmed that the cars which were opened were unlocked.

Alexia Sammut gave evidence on the 18th May 2023 and explained that she lives in Triq Vitale, Mgarr. Explains that she noticed a man opening a car and then move and trying to open another car. At that stage she called her husband but did not hear her since he was asleep. She told her husband to call the police. The man was wearing a shorts and a jacket with a hoody. His head was covered with a hoody. She did not see the face of the individual. The witness claims that the man was slim, not fat and tall. She gave all the information to the police.

⁵ Fol. 18 of the proceedings.

Cross-examined she confirms that the suspect did not touch her belongings. She does not recognise the accused.⁶

Ivan Sammut gave evidence on the 18th May 2023 and that he was waken up by his wife and the latter told him that there was a suspect opening cars outside. He called the police following a description given by his wife. He confirms that the police came on site and confirms that he noticed the suspect walking on the pavement.⁷ He confirms that he did not see his face.

Cross-examined he confirms that he cannot confirm if he had something in his hand. He cannot confirm if his hands were in his pockets.

Bernardette Vassallo gave evidence on the 18th May 2023 he recalls that she heard her dog barking. She noticed the police and they told he that he car was opened. The police did not knock at her door but she was alerted by her dog. She told the officers that her Renault car was closed through her remote. She went to her car, which is usually used by her husband, but nothing was missing.⁸ She confirms that the car was locked.

Cross-examined she confirms that when the lock clicks after pressing the remote she did not check physically. Nothing was noted.

⁶ Fol. 27 of the proceedings.

⁷ Fol. 29 of the proceedings.

⁸ Fol. 33 of the proceedings.

Inspector Godwin Scerri gave evidence on the 18th May 2023 and he explained his role in the investigation. He recalls that after being informed he confirmed his arrest and took a statement to the accused.⁹

The accused during the second interrogation stated the following:

Q. Where you doing drugs together at the Beach?

A. Yes cocaine and mariuana.

Q. So when the police stopped you in Mgarr you were high?

A. No.

.....
.....

Q. I have an eye witness ready to testify against you after seeing you open a number of vehicles, checking what's inside and moving to other vehicles, what do you have to say for this?

⁹ Fol. 35 of the proceedings. Inspector Scerri presented copy of bodycam footages of PS 217 Italo Mizzi on the 31st May 2023. Fol. 43 of the proceedings.

A. I did not check loads of vehicles. I did not go in the vehicles, I went in one vehicle to go to sleep and someone shouted so I left.

.....
.....

Q. Am I right in saying that you are living outside without any proper shelter, job or means to live by?

A. No I could go to my dad's. I just chose not to because he is strict.¹⁰

Stefania Calafato Testa gave evidence on the 31st May 2023 and confirmed the judgement in the names The Police vs Robert Alan Smith decided on the 24th April 2023 by Magistrate Dr. Gabriella Vella and that there was no appeal from this judgement.¹¹

On the 31st May 2023 PC 927 **Joseph Camilleri** gave evidence and confirms that on the 7th May 2023 while they were at Gnejna parking the control room notified them that someone was stealing from the cars. The control room described the person as wearing a black hoody and shorts. The accused was noticed a few minutes later and was arrested since he matched the description given by the control room. He has a small screw driver and some coins. The coins were found inside his hoody. He consented to the search on his body.

¹⁰ Fol. 39A of the proceedings.

¹¹ Fol. 42 of the proceedings.

Under-cross examination he confirms that the screw driver was given by his sergeant to the district officers.¹²

PC 2384 Christine Penza gave evidence on the 31st May 2023 and she confirms that call received and that she went on site.¹³ The officers spoke to Alexia Sammut and were told that the suspect opened a BMW LCU 452 and a Renault Megane FCD 585. Suspect moved to the direction of Gnejna. When she arrived he was already arrested.

Cross-examined she confirms that she did not verify if the cars were opened or not.

PC 927 Joseph Camilleri gave further evidence on the 14th June 2023 whereby he corrected his previous testimony and held that no screw driver was found on the accused but only some coins.¹⁴

PS 1194 Christopher Debrincat gave evidence on the 14th June 2013 and confirmed that he was with PC 927 and they arrested the accused since he matched the description given by the control room.¹⁵ He confirmed that the suspect was almost immediately handed over to the district police. They did not talk to any civilians and the cars were not noticed with broken windows or locks.

¹² Fol. 47 of the proceedings.

¹³ Fol. 48 of the proceedings.

¹⁴ Fol. 52 of the proceedings.

¹⁵ Fol. 54 of the proceedings.

Cross-examined he confirms that no tampering was noticed.

PS 217 Italo Mizzi was cross-examined on the 19th July 2023 and explains that the part of the report Dok IM2 he was explaining the information received by the control room. No scene of the crime officers were appointed. When dew is present no fingerprints can be taken.¹⁶ The officer confirms that the police found more than one car open. He confirms that 7 cars were found open but the number plates are not all registered in the report. He confirms that a couple of coins were found on him. The coins were put in a medium sized envelope. The officer confirms that he took him to be visited by a medical practitioner, Dr. Malcolm Falzon. PS Mizzi held that the suspect was begging for help in view of his addiction.

On further examination by the prosecution Mr. Mizzi confirmed that his rights were given upon his arrest and then he took his version by making some basic questions.

Considered:

This is an act of attempted theft from several vehicles on the night of the 7th May 2023 at Vitale Street Mgarr whereby the accused was stopped within a few minutes of a call that a witness did to the police control room. The accused fitted the description of the eyewitness who called immediately the police and who also immediately reported

¹⁶ Fol. 64 of the proceedings.

thereat and practically found the accused on site. There is no doubt that the accused has an acute drug that urgently needs to be addressed.

The Court rejects the defence line of argument that the answers given to PS Mizzi should be discarded since they were given under the influence of drugs. Being under the influence of substances is not a defence. When questioned by inspector Scerri although admitting to have taken drugs he stated that he was not 'high' and consequently he was aware of his rights, could well understand the questions and also the consequences of his answers.

The Police did not bring evidence that anything was stolen from the other cars or that there was anything of value within same. However, the first charge is of attempted theft. The accused was stopped from continuing with his actions when he heard someone shouting. One cannot exclude that the accused was willing to steal a car or more. although it seems that this was not the subject of the investigation.

From the evidence gathered, in the mind of this Court there is no doubt that the accused entered at least one vehicle which he was not authorised to do. This Court does not believe the accused when he states that he just went inside the car to sleep. Moreover, one witness stated that there was some small change in the car but could not quantify the amount. The accused was residing in a makeshift tent and the only purpose that this Court can see for entering the vehicle was to find money or other items to sustain his addiction. The questions however remains: was there anything of value that could be stolen? From the records of the case it seems that there was none. The police did not proof that the accused had the intention to steal the car/s. The

police also failed to exhibit the money allegedly found on the accused or to question him about the money that they state was found on his person. Moreover, it seems from what the accused told the police that he already had some money on him and thus the police should have made further enquiries. The Court also notes that although PS Mizzi holds that 7 cars were opened, the prosecution failed to make further enquiries and summon the owners of such vehicles to attest if anything was stolen from such vehicles.

In the case **Il-Pulizija vs Anthony Busuttil** decided by the Court of Appeal on the 12th March 1955 per Mr. Justice W. Harding the Court held:

‘F’ akkuza ta’ tentattiv ta’ serq il-Prosekuzzjoni ghandha id-dmir tipprova li , fejn saru l-atti pretizi kommessi ghal serq, kien hemm xi haga x’ tinseraq¹⁷. Altrimenti tonqos il-forza fizika oggettiva, ghax jonqos is-suggett passiv tal-konsumazzjoni tad-delitt, u kwindi, ghall-finijiet tat-tentattiv, jonqos l-element mehtieg tal-‘pericolo corso’ tad-dritt aggredit.’

The Court holds that for the above reasons the accused **cannot be found** of attempted theft under articles 261, 270 and 271(g) of Chapter 9 of the Laws of Malta.

Considered further:

The accused is also charged with the contravention of leading an idle and vagrant life. The Court believes from what was stated by PS Mizzi this contravention has been proved to the degree required by law. The fact that a person lives in a makeshift tent, with no work or profession is in essence a vagrant life¹⁸. The description given by the sergeant

¹⁷ Emphasis of this Court.

¹⁸ See also reply to the questioning. Trade, profession or calling: NO.

who went on site to see the tent where he lived is enough for the Court to conclude that this contravention was proven by the prosecution.

Considered further:

The accused is charged of being a recidivist under articles 49, 50 and 289 of Chapter 9 of the Laws of Malta. The prosecution besides the conviction sheet also exhibited a true copy of the judgement dated 22nd April 2023 by the Court of Magistrates presided by Magsitrate Dr. Gabriella Vella. It was also proven that this judgement is res judicata by the testimony of the registrar of the Court.

The Court is reproducing the exact text of the provisions for clarities' sake:

49.(1) A person is deemed to be a recidivist if, after being sentenced for any offence by a judgement, even when delivered by a foreign court, which has become res judicata, he commits another offence;¹⁹

50. Where a person sentenced for a crime shall, within ten years from the date of the expiration or remission of the punishment, if the term of such punishment be over five years, or within five years, in all other cases, commit another crime, he maybe sentenced to a punishment higher by one degree than the punishment established for such other crime.²⁰

¹⁹ Emphasis of this Court

²⁰ Emphasis of this Court

289 (1) In the case of a second or subsequent conviction for any offence²¹ referred to in this Sub-title, the punishment may be increased, in the case of a second conviction, by one or two degrees, and, in the case of a third or subsequent conviction, by one to three degrees.

Since the charge of which the accused is being found guilty is a contravention and since only articles 49 and 289 deal with offences (crimes and contraventions) while article 50 speaks only of a crime, therefore, in respect of the charge of recidivism the accused can only be found guilty under articles 49 and 289 (1) while he has to be acquitted under article 50.

Considered further:

The award of a punishment for a contravention is established under article 7 (2) and 7 (3) of the Criminal Code Chapter 9 of the Law of Malta.

7(2) Subject to the provisions of article 53 or of any other special law, the punishments that may be awarded for contraventions are –

(a) detention;

(b) fine (ammenda);

(c) reprimand or admonition.

²¹ Emphasis of this Court

(3) The expression "punishments restrictive of personal liberty" includes the punishments of imprisonment and detention

Then article 28B speaks that the latter can be applied if the person is found guilty of an offence, therefore including a contravention. In fact the test reads:

28B.(1) Where an offender is convicted of an offence²² punishable with imprisonment committed during the operational period of a suspended sentence and either he is so convicted by or before a court competent under article 28C to deal with him in respect of the suspended sentence or he subsequently appears or is brought before such a court, then, unless the sentence has already taken effect, that court shall order that the suspended sentence shall take effect.

In respect of this third charge, the law speaks of an offence, which would include a crime and a contravention. The charge, however, which has been brought against the accused is of “having committed a crime”

Since the accused has not been found guilty of having committed a crime, but he has been found guilty of committing a contravention, then this charge as has been worded, does not result, and thus the Court cannot find guilt in the accused in this respect.

Decides:

²² Emphasis of this Court

The Court, thus, having seen articles 28B, 41(1)(a), 49, 50, 261, 270, 271(g), 289 and 338(w) of Chapter 9 of the Laws of Malta finds the accused NOT GUILTY of attempting to commit theft under articles 261, 270, 271(g) and finds the accused NOT GUILTY of being a recidivist under article 50 of Chapter 9 of the Laws of Malta but finds the accused Robert Alan Smith GUILTY under article 338(w) and GUILTY of being a recidivist under articles 49 and 289 of Chapter 9 of the Laws of Malta and condemns him to a term of **imprisonment of four months from which term the time he has made under preventive arrest in connection with this case is to be reduced.**

The Court orders that a copy of this judgement is sent to the Commissioner of Police in his capacity as Principle Immigration Officer to seriously consider the removal of the accused from these Islands once the accused has served his time under this judgement and this since he is a threat to the public peace and good order.

Finally, the Court also solicits the Director of the Corradino Correctional Facility to assist the accused to rehabilitate himself from his problem with drug abuse.

Dr. Monica Vella LL.D.,M.Jur

Magistrate

Victor Deguara

Deputy Registrar