



**MALTA**

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

**Case No. 645/23**

**The Police  
(Inspector Zachary Zammit)**

**Vs**

**Mursal Aden Diriye**

**Today, 7<sup>th</sup> November 2023**

**The Court,**

Considered the charges brought against **Mursal Aden Diriye**, son of Aden Diriye Shire and Basra neè Abokor, holder of Residence Permit Number 111567A, born in Somalia on the 5<sup>th</sup> October 1994, of having on the 19<sup>th</sup> August 2023, at around 11:00hrs in Triq San Gorg, St. Julian's, Malta:

1. Been an accomplice in a theft aggravated by amount which does not exceed two thousand three hundred and twenty nine Euro and thirty seven cents (€2,329.37), and by violence, this having occurred to the detriment of Sandip Bin;
2. Having knowingly received or purchased any property which has been stolen, misapplied or obtained by means of any offence, or taken part, in any manner whatsoever, in the sale or disposal of the same property, which property has a value that exceeds two hundred and thirty two Euro and ninety four cents (€232.94), however does not exceed two thousand three hundred and twenty nine Euro and thirty seven cents (€2,329.37);
3. Having without intent to kill or to put the life of Sandip Bin in manifest jeopardy, caused harm to his body or health, which injuries are of a slight nature;
4. Having lead an idle and vagrant life;
5. Having rendered himself a recidivist, through judgement from the Court of Magistrates which judgements are definitive and cannot be changed;

And further that on the same date at around 11:40hrs, inside St. Julian's Police Station, Triq San Gorg, St. Julian's, Malta:

6. Wilfully committed any spoil, damage or injury to or upon any movable or immovable property to the detriment of the Malta Police Force and/or the Government of Malta and/or any other entities, which damage does not exceed two thousand five hundred Euro (€2,500), however exceeds two hundred and fifty Euro (€250);
7. Having wilfully disturbed the public peace and order;

Considered the requests by the Prosecution for the Court: (i) to order the accused to make restitution to the injured party of any loss or damages or other injury or harm suffered through the offence; (ii) to order the accused to pay for any Court Experts, in terms of Section 533(1) of Chapter 9 of the Laws of Malta;

Considered the documents submitted by the Prosecution marked Doc. “ZZ1” to Doc. “ZZ7” at folio 13 to 25 of the records of the proceedings, amongst which the Consent granted by the Attorney General in terms of Section 370(4) of Chapter 9 of the Laws of Malta;

Considered that the accused, whilst declaring that he has no objection to his case being dealt with summarily, replied that he is not guilty of the charges brought against him<sup>1</sup>;

Considered testimony given by Sandip Bin during the sitting held on the 31<sup>st</sup> August 2023<sup>2</sup> and the testimony given by Inspector Zachary Zammit during the sittings held on the 31<sup>st</sup> August 2023<sup>3</sup> and on the 12<sup>th</sup> October 2023<sup>4</sup> and considered the documents submitted by him marked as Doc. “ZZX” at folio 37 of the records of the proceedings, Doc. “ZZT1” to Doc. “ZZT3” at folio 58 to 60 of the records of the proceedings, considered the testimony given by Bickey Katwal<sup>5</sup> and PS1161 Aldo Zammit<sup>6</sup> during the sitting held on the 13<sup>th</sup> September 2023 and the testimony given by Anam Gurung<sup>7</sup>, PC445 Kurt Bonello<sup>8</sup> and PC274 Roderick Caruana<sup>9</sup> during the sitting held on the 26<sup>th</sup> September 2023, considered the testimony given by Inspector Chantelle Vella Casha<sup>10</sup>, Stephania Calafato Testa, Assistant Registrar in the Criminal Courts and Tribunals, and Dr. Stephanie Palmier<sup>11</sup> given during the 12<sup>th</sup> October 2023, and considered the documents submitted by Inspector Vella Casha marked Doc. “CV” a folio 61 and 62 of the records of the proceedings and the documents submitted by Stephania Calafato Testa marked Doc. “SCT1” to Doc. “SCT5” at folio 63 to 71 of the records of the proceedings, considered the testimony given by the accused during the sitting held on the 24<sup>th</sup> October 2023<sup>12</sup>;

Heard submissions by the Prosecution and Defence Counsel;

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<sup>1</sup> Folio 12 of the records of the proceedings.

<sup>2</sup> Folio 29 to 33 of the records of the proceedings.

<sup>3</sup> Folio 34 to 36 of the records of the proceedings.

<sup>4</sup> Folio 57A of the records of the proceedings.

<sup>5</sup> Folio 39 to 42 of the records of the proceedings.

<sup>6</sup> Folio 43 to 45 of the records of the proceedings.

<sup>7</sup> Folio 47 to 50 of the records of the proceedings.

<sup>8</sup> Folio 52 to 54 of the records of the proceedings.

<sup>9</sup> Folio 55 to 56 of the records of the proceedings.

<sup>10</sup> Folio 60A and 60B of the records of the proceedings.

<sup>11</sup> Folio 72 and 73 of the records of the proceedings.

<sup>12</sup> Folio 75 to 79 of the records of the proceedings.

Considered all the records of the proceedings;

### **Considered:**

The accused is being charged of having on the 19<sup>th</sup> August 2023, at around 11:00hrs in Triq San Gorg, St. Julian's, Malta: (1) Been an accomplice in a theft aggravated by amount which does not exceed €2,329.37, and by violence, this having occurred to the detriment of Sandip Bin; (2) Having knowingly received or purchased any property which has been stolen, misapplied or obtained by means of any offence, or taken part, in any manner whatsoever, in the sale or disposal of the same property, which property has a value that exceeds €232.94, however does not exceed €2,329.37; (3) Having without intent to kill or to put the life of Sandip Bin in manifest jeopardy, caused harm to his body or health, which injuries are of a slight nature; (4) Having lead an idle and vagrant life; (5) Having rendered himself a recidivist, through judgement from the Court of Magistrates which judgements are definitive and cannot be changed; And further that on the same date at around 11:40hrs, inside St. Julian's Police Station, Triq San Gorg, St. Julian's, Malta: (6) Wilfully committed any spoil, damage or injury to or upon any movable or immovable property to the detriment of the Malta Police Force and/or the Government of Malta and/or any other entities, which damage does not exceed €2,500, however exceeds €250; (7) Having wilfully disturbed the public peace and order.

The accused replied that he is not guilty of the charges brought against him.

### **Evidence:**

**Sandip Bin**<sup>13</sup>, the alleged victim, testified that, he works at Spar Supermarket in St. Julian's, and after his shift on the day of the incident forming the merits of these proceedings, he went with some friends at the park (this transpired to be the garden in Triq San Gorg, St. Julian's) to drink beer and wine. When they were on their way out from this park, someone came up to him and took his mobile phone from his back pocket. When he asked this person to return his mobile phone, this person threw it to another person. When Sandip Bin went up to this second person to get his mobile phone back, this person punched him and he then fell to the ground. He stated further that the first person ran away from the park but the second person, whom he recognised as being the accused, was kept on site. Sandip Bin stated that the accused punched him on his left cheek and below the left shoulder. He stated that he went to the medical centre the following Tuesday, where he was given a medical certificate. Sandip Bin claimed further that even though there were about another five or six persons at the park, it was the accused and the other person, who ran away from the site, who stole his mobile phone. He also stated that the stolen mobile phone was a Redmi 9A and even though it was given to him by a colleague as a gift, this colleague told him that it costs around €200/€300.

**Bickey Katwal**<sup>14</sup>, one of the friends of Sandip Bin who was present on the day of the incident, testified that following the end of their night shift a Spar Supermarket, he

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<sup>13</sup> Testimony given during the sitting held on the 31<sup>st</sup> August 2023, folio 29 to 33 of the records of the proceedings.

<sup>14</sup> Testimony given during the sitting held on the 13<sup>th</sup> September 2023, folio 39 to 42 of the records of the proceedings.

and his friends, including Sandip Bin, went to the St. Julian's garden, to have some drinks. He too stated that at one point someone came up to Sandip Bin and took his mobile phone from his back pocket and when Sandip Bin tried taking his mobile phone back, this person threw it to another person, whom Bickey Katwal recognised as being the accused, and when Sandip Bin then went to the accused to get his mobile phone back, the accused punched him in the face. At that point Sandip Bin fell to the ground but he then got up and went after the persons who took his mobile phone and managed to catch up to the accused and kept him there until the Police arrived on site. At that point the mobile phone was not in the possession of the accused.

**Anam Gurung**<sup>15</sup>, who was also present on the day of the incident, confirmed that he and his friends, amongst whom Sandip Bin, were in the park having a drink and when they got up to leave, someone took Bin's mobile phone from his pocket and when he, that is Sandip Bin, tried to get his mobile phone back this person threw the phone to another person. He said that in this incident Sandip Bin was also hit and he fell to the floor, however he was not in a position to say who had hit Bin.

**Dr. Stephanie Palmier**<sup>16</sup> testified that on the 22<sup>nd</sup> August 2023, at around 10:18a.m., she had examined a certain Sandip Bin, holder of Identity Card Number 382556A, and on examination *he was found to have superficial abrasions over the dorsum of the right hand which is the back of the hand, a 3 cm bruise over the left clavicle area which is around the shoulder and pain over the left under arm area, and the certificate I issued on the day was certified as slight safe complications.* She confirmed that Doc. "ZZX" a folio 37 of the records of the proceedings is the certificate issued by her on the 22<sup>nd</sup> August 2023.

**Inspector Zachary Zammit**<sup>17</sup> testified that *on the 19<sup>th</sup> August, I was duty Inspector at St. Julian's and when I was at the police station I was informed that the police just apprehended 2 individuals regarding theft that had occurred in the previous time. I was informed that around, I believe it was around 11, around 11, 11:30, I was informed that the incident had happened beforehand. And when I went downstairs, the duty sergeant, it was PS1161, that regarding what had happened, he explained that the accused, which I am recognising in the Hall, and some other people were involved in a theft, as indicated in the PFR, Mr. Sandip Bin. ... the district police had been called on the scene regarding an argument between a group of people. It was explained by Sandip Bin and his accompanying friends what had happened and they indicated the accused as one of his other friends. This one of the other friends was arrested as well however at the police station I managed to clarify that this person, this unrelated party who was a friend of the accused, and was on the scene as well, he was not a part of the theft. He was simply walking with the accused and his other friends and so he was subsequently released. The victim explained exactly what had happened regarding the accused, how he had received the phone, not taking the phone but received and also been a part of the disappearance of the phone because upon his arrest, the phone was not found on the accused. He also explained that he had been injured by the accused during the whole incident. ... While at the police station, upon completing the report by the PFR,*

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<sup>15</sup> Testimony given during the sitting held on the 26<sup>th</sup> September 2023, folio 47 to 51 of the records of the proceedings.

<sup>16</sup> Testimony given during the sitting held on the 12<sup>th</sup> October 2023, folio 72 and 73 of the records of the proceedings.

<sup>17</sup> Testimony given during the sitting held on the 31<sup>st</sup> August 2023, folio 34 to 36 of the records of the proceedings.

*the accused saw the victim and his friends while they were, I am not sure if they were leaving the police station or they were upon completing their report. However, upon seeing them at the police station, the accused became very aggressive because he felt that he had been wrongly accused by them. He was handcuffed to the chairs that we have attached at the police station, we have a set of 3 chairs. It was at that moment that he rose from the chairs, carrying the chairs with him. The chairs have a metal bar on each end and the metal bar is freely swinging on each end. The accused therefore presented a danger both to himself and to the police officers present due to these chairs that were being swung around at that moment and the police had to restrain him. However, the accused aggressively resisted the restraining so much so that around 4 to 5 police officers at the same time had to restrain him with the chairs themselves. During this, damage was done both to the chairs and to the parquet flooring of the police station. ... upon a lot of attempts the accused was then successfully restrained after the damage had been done. ... I also confirmed with the Quarter Master, Department of Police Stations, regarding the estimate of damages which are currently standing at 824 euro, however there are still more estimations that need to be done regarding the parquet flooring. Inspector Zammit also submitted the medical certificate pertinent to Sandip Bin, dated 22<sup>nd</sup> August 2023<sup>18</sup>, and which was presented to him by the said Sandip Bin after the accused was arraigned in Court under arrest.*

Inspector Zammit submitted three photographs showing the damage caused to the chairs and the parquet at the St. Julian's Police Station. These are marked as Doc. "ZZT1" to Doc. "ZZT3" and are exhibited at folio 58 to 60 of the records of the proceedings.

The testimony by Inspector Zammit regarding the incident which occurred at the St. Julian's Police concerning the accused was confirmed by **PS1161 Aldo Zammit**, who testified during the sitting held on the 13<sup>th</sup> September 2023<sup>19</sup>. PS1161 Aldo Zammit further stated that *there were a group of male, sort of individuals that let's say reside, literally reside at Spinola Gardens and we've been having so much reports about theft, drug trafficking etc. We know these guys, we know them by name or by anything, we just literally know them, and as soon as these guys reported at the Police Station and one of my officers told me what was going on, I told him that we might know these guys, they would go armed or whatsoever, because we don't know what they are gonna do to us. We knew the other guy also, we know this male individual who is detained, he has been to the Police Station before several times.*

**PC 445 Kurt Bonello**<sup>20</sup> testified that *on the 19<sup>th</sup> August at around 11:10, we received a phone call at the police station that there was an argument in Triq San Gorg, in the garden, and me and PC274 we went up there and we entered the garden. A taxi driver told us that there was a big argument between a lot of people and they told us that they went in Triq il-Knisja further down. Me and PC274 we went there, we saw a group of people fighting, we saw Mursal, whom he recognised as the accused, and another group of people arguing between each other. After, we*

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<sup>18</sup> Doc. "ZZX" at folio 37 of the records of the proceedings.

<sup>19</sup> Folio 43 to 45 of the records of the proceedings.

<sup>20</sup> Testimony given during the sitting held on the 26<sup>th</sup> September 2023, folio 52 to 54 of the records of the proceedings.

*spoke with the victims and they told us that they had a fight because they stole their phone. Me and PC 274 arrested Mursal and his friend and we gave him his rights and we took them to the police station. When we were at the police station, Mursal became a bit aggressive. He even broke the chairs of the police station and we had to restrain him. ... He stood up with the chairs, he was turning with the chairs he was trying to break them. After that we try to calm him down and he didn't stop. And we had to restrain him and the chairs were broken as well.* The version of events as stated by PC445 Kurt Bonello was confirmed by his colleague **PC 274 Roderick Caruana** during the testimony given during the sitting held on the 26<sup>th</sup> September 2023.

**Inspector Chantelle Vella Casha**<sup>21</sup> testified and submitted documents relating to the cost of the damages caused to the chairs at the St. Julian's Police Station. From her testimony and the documents submitted, marked as Doc. "CV" a folio 61 and 62 of the records of the proceedings, it transpires that the cost of the damages to the chairs amounts to €824.47.

**Stephania Calafato Testa**<sup>22</sup>, Assistant Registrar in the Criminal Courts and Tribunals, submitted a judgement in the name "The Police v. Mursal Aden Diriye" delivered by the Court of Magistrates (Gozo) as a Court of Criminal Judicature on the 11<sup>th</sup> July 2019<sup>23</sup> and she declared that no appeal was lodged from that judgement and that the fine imposed on the accused in those proceedings, is still pending<sup>24</sup>.

The **accused**<sup>25</sup> confirmed the statement he gave to the Police and reiterated that he did not steal Standip Bin's mobile phone. Under cross examination he declared that the mobile phone he had in his possession on the day of the incident belonged to his friend Aden (or Adil as indicated in the accused's statement<sup>26</sup>) and he was simply using it. He claimed that during the incident he had returned the phone to his friend. He also claimed that when he arrived at the place of the incident he saw a group of people fighting and he recognised an Eritrean national, whose name however he doesn't know. The accused declared that Sandip Bin went up to him telling him that his mobile phone was stolen and he (that is the accused) told him to file a report with the Police. He claimed that he tried to stop the fight between these persons and in the midst of it he got hit several times. When he managed to separate them, the Eritrean left the scene whilst the other persons, the Nepali nationals, started accusing him that he had stolen the phone. He also claimed that when he asked the Nepali national if the mobile phone he had in his possession at the time, that is the one which according to him belonged to his friend, belonged to him, this Nepali national told him no, and at this point they attacked him.

With regard to the incident at the St. Julian's Police Station, the accused declared that *I was drunk and also I saw the other people were not cuffed and they arrested me, that's why I was aggressive.*

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<sup>21</sup> Testimony given during the sitting held on the 12<sup>th</sup> October 2023, folio 60A and 60B of the records of the proceedings.

<sup>22</sup> Testimony given during the sitting held on the 12<sup>th</sup> October 2023, folio 62A and 62B of the records of the proceedings.

<sup>23</sup> Doc. SCT4 at folio 66 to 69 of the records of the proceedings.

<sup>24</sup> Doc. SCT5 at folio 70 of the records of the proceedings.

<sup>25</sup> Testimony given during the sitting held on the 24<sup>th</sup> October 2023, folio 75 to 79 of the records of the proceedings.

<sup>26</sup> Doc. "ZZ5" at folio 21 to 23 of the records of the proceedings.

## **Charges:**

**The first charge brought against the accused** - the accused is being charged with having on the 19<sup>th</sup> August 2023, at around 11:00hrs in Triq San Gorg, St. Julian's, Malta: Been an accomplice in a theft aggravated by amount which does not exceed €2,329.37, and by violence, this having occurred to the detriment of Sandip Bin.

The Court observes that the Maltese Criminal Code does not define the crime of theft however, the elements that make up this crime have long been established by local jurisprudence based on the teachings of the jurist Carrara, who defines the crime of theft as *la contrettazione dolosa della cosa altrui fatta invito domino con animo di farne lucro*.

Reference is made to the judgement in the names **Il-Pulizija v. Adrian Valletta**, delivered by the Court of Criminal Appeal on the 12<sup>th</sup> March 2019, wherein the Court observed that: *il-Qorti għalhekk thoss li f'dan l-istadju għandha tagħmel apprezzament ta' dritt u cioè tagħti tifsira tal-kunċett ta' serq, u cioè tar-reat kontra l-proprietà ta' terzi per eċċellenza jew aħjar kif jgħid il-Manzini - 'l'oggetto generico della tutela penale (b'referenza għal dan ir-reat) è l'interesse pubblico riguardante l'inviolabilità del patrimonio'. Jekk wieħed janalizza l-Kodiċi Penali tagħna, ma jsibx definizzjoni tal-kunċett ta' serq, għalhekk in-nozzjoni ta' serq tista' prima facie tidher faċli u ta' intelligenza volgari, madanakollu r-reat ta' serq dejjem ta lok għal kwistjonijiet frekwenti u vivament dibattuti fid-dritt kriminali. Hija l-prattika kostanti tal-Qrati tagħna li jadoperaw id-definizzjoni mogħtija minn Carrara fil-Programma Speciale Vol. IV para 2017 - vide fl-ismijiet Il-Pulizija v. Tanti. Il-Carrara jgħid: "il furto è la contraccettazione dolosa della cosa altrui invito domino con animo di farne lucro". Għalhekk jirriżulta minnufih li sabiex jissussisti serq irid jkollna l-elementi kostitwiti kollha ta' dan l-istess reat u cioè: 1. il-contractatio tal-ħaġa, 2. li tappartjeni lil terzi, 3. magħmula b'mod fraudolenti, 4. mingħajr l-kunsens tas-sid, u 5. animo lucrandi. Għalhekk meta ngħidu li sabiex jissussisti s-serq il-contractatio tar-res aliena irid isir b'mod fraudolenti rridu infissru li t-teħid ta' l-oġġett irid isir bl-intenzjoni li dan qed jittieħed mingħand terzi, jiġifieri li t-teħid qed isir għad-dannu ta' terzi. Huwa importanti sine qua non biex jiġi pruvat is-serq li hemm l-intenzjoni tal-mens rea mhux biss it-teħid tar-res aliena iżda l-intenzjoni li ser isir akkwist - animo di farne lucro. Il-kontraccettazzjoni ma hiex biżżejjed imma hemm bżonn li tkun saret invito domino u luci faciendi għajta. In fatti r-rekwizit speċjali għas-serq huwa li wieħed qed jipprokura, sodisfazzjon, vantaġġ jew benefiċċju minn ħaġa li tappartjeni lil terzi. Fis-serq l-interess li jrid jiġi pruvat huwa l-pussess ta' l-oġġett li jrid jiġi prodott minn kull teħid illeġittimu kommess mediante sottrazione senza violenza personale, kif jgħid Manzini presupposto essenziale del furto è la mancanza del possesso del agente. Meta fil-fatt sid ta' res aliena m'għandux interess fl-oġġett jew aħjar abbanduna l-istess oġġett, minn jieħu dan l-oġġett ma jistgħax jinsab ħati ta' serq, se mai ta' misapproprjazzjoni. Fil-fatt, kif ġie spjegat fil-kawza "Il-Pulizija v. S. Pisani", il-Qorti qalet li sabiex jeżisti l-vjolazzjoni ta' serq, mhux biss l-oġġett irid jiġi meħud, iżda li t-terz jiġi spussessat mill-oġġett. Kwantu għar-rekwizit ta' invito domino huwa intwittiv li l-kunsens tas-sid jidderimi r-reat ta' serq. Dan il-kunsens jista' jkun tant espress kemm taċitu. F'ċirkostanzi eċċezzjonali jista' jkun preżunt, u allura l-buona fede ta' l-awtur tal-contractatio teskludi r-reat. Bil-kelma lucro wieħed*

*m'għandux jifhem biss lokupletazzjoni venali jew borswali imma kwalunkwe vantaġġ, sodisfazzjoni, utili, pjaċir, benefiċċju jew komodu li l-ħati jkollu fi ħsiebu li jipprokura. Carrara jgħid: “avvengache per lucro qui non s'intende una effettiva locupletazione, ma qualsiasi vantaggio o sodisfazione procurata a sè stesso”.*

The Court firmly believes Sandip Bin when he claims that whilst he was at the St. Julian's garden in Triq San Gorg, someone stole his mobile phone from his back pocket. Apart from the fact that the Court considers him to be a credible witness, also because he was consistent in his version of events from the very beginning of the case, that is both at investigation stage<sup>27</sup> and eventually also during these proceedings<sup>28</sup>, his claim has been duly corroborated by the testimony of Bickey Kawtal<sup>29</sup> and Anam Gurun<sup>30</sup>. The accused himself does not deny that Sandip Bin's mobile phone was stolen but he claims that it wasn't him who stole the mobile phone.

As a matter of fact, it clearly transpires that Sandip Bin's mobile phone was not actually stolen by the accused, that is he was not the person who physically took the mobile phone from Bin's back pocket, but the Court is of the opinion that the accused did indeed help the author of this crime in the execution of the same.

As already stated above, Sandip Bin's version of events is very credible and it has been duly corroborated by other evidence submitted by the Prosecution. Furthermore, Bin himself stated that the accused did not take the mobile phone from his back pocket but when he turned to the person who took his phone for him to return it to him, this person threw the mobile phone to the accused who caught it and when Sandip Bin turned towards him to get his phone, he did not return it but instead he punched Bin and in this manner allowed the other person to escape from the scene and for the mobile phone not to be found and returned to its owner.

Even though the accused denies any involvement in this crime and claims that the mobile phone he had in his possession on the day of the incident belonged to his friend Aden (or Adil as indicated in the accused's statement<sup>31</sup>), to whom he eventually returned the phone during the commotion with the Sandip Bin and his friends, contrary to Sandip Bin, the said accused is not at all credible and convincing.

Even though the logical thing to do was to summon his friend as a witness in order to corroborate his version of events, the accused did not do so and simply limited himself to confirming his statement given to the Police<sup>32</sup>. It is this very statement which casts doubt on the credibility of the accused since from the same it results that this Aden/Adil, the presumed owner of the mobile phone he had in his possession on the day of the incident, did not remain on site after the accused gave him the mobile phone and when the Police arrived he was not there, so much so that in his statement the accused told the Police *I can help you find Adil*. Any person who is not involved in any crime and who legitimately owns a mobile phone, would have stayed on site to

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<sup>27</sup> Vide the Police Report filed by Sandip Bin on the 19<sup>th</sup> August 2023, Doc. “ZZ2” at folio 14 to 17 of the records of the proceedings.

<sup>28</sup> Testimony given during the sitting held on the 31<sup>st</sup> August 2023, folio 29 to 33 of the records of the proceedings.

<sup>29</sup> Testimony given during the sitting held on the 13<sup>th</sup> September 2023, folio 39 to 42 of the records of the proceedings.

<sup>30</sup> Testimony given during the sitting held on the 26<sup>th</sup> September 2023, folio 47 to 51 of the records of the proceedings.

<sup>31</sup> Doc. “ZZ5” at folio 21 to 23 of the records of the proceedings.

<sup>32</sup> *Ibid.*



give his version of events to the Police, particularly if his friend is being unjustly accused of a theft. This did not happen and Aden/Adil simply vanished from the site with the mobile phone in his possession.

From all the evidence submitted it clearly results that the accused did indeed help the person who stole the mobile phone from Sandip Bin, help which in terms of Section 42(d) of Chapter 9 of the Laws of Malta and local jurisprudence makes the accused an accomplice to the crime of theft of the said mobile phone.

Section 42(d) of Chapter 9 of the Laws of Malta provides that: *A person shall be deemed to be an accomplice in a crime if he - ... (d) not being one of the persons mentioned in paragraphs (a), (b) and (c), in any way whatsoever knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed.* Reference is also made to the judgement in the names **Il-Pulizija v. Omissis, Jason Galea**, delivered by the Court of Criminal Appeal on the 31<sup>st</sup> May 2017, wherein that Court stated: *il-figura tal-komplici hija ta' 'dak li għalkemm ma jipparteċipax materjalment fis-serqa ... jagħmel xi ħaġa, bi ftehim magħhom, jiġifieri jkun hemm il-ftehim minn qabel magħhom, biex jgħinhom jew fil-preparazzjoni tas-serqa, jew fit-twettiq tas-serqa, anke min ikun qiegħed jgħinhom fit-twettiq tas-serqa per eżempju billi joqgħod għassa barra. ... jew inkella, dejjem bi ftehim magħhom, jew fil-preparazzjoni jew fit-twettiq tas-serqa, jew jgħinhom, però dejjem bi ftehim minn qabel magħhom, biex wara s-serqa jaħarbu, jew biex ma jinqabdux jew biex jiddisponu mir-refurtiva. L-importanti huwa li jkun hemm il-ftehim minn qabel' ... Ma hux neċessarju illi l-komplici jkun preżenti fuq ix-xena tad-delitt basta li jkun offra dik l-għajjnuna bi ftehim minn qabel.*

As stated above, in this case it clearly results that the accused, by receiving the mobile phone from the person who physically stole it from Sandip Bin and by punching Bin to allow that other person to leave the site with the phone, is an accomplice in this crime. The Prosecution therefore duly proved beyond reasonable doubt that the accused is indeed guilty of being an accomplice in the commission of the theft of the mobile phone belonging to Sandip Bin.

The Prosecution is charging the accused of being an accomplice in the commission of the theft of the said mobile phone, aggravated by violence and by amount.

Section 262(1)(a) of Chapter 9 of the Laws of Malta provides that: *A theft is aggravated by "violence" - here it is accompanied with homicide, bodily harm, or confinement of the person, or with a written or verbal threat to kill, or to inflict a bodily harm, or to cause damage to property.* Section 262(2) of Chapter 9 of the Criminal Code provides that: *in order that an act of violence may be deemed to aggravate the theft, it shall be sufficient that such act be committed previously to, at the time of, or immediately after the crime, with the object of facilitating the completion thereof, or of screening the offender from punishment or from arrest or from the hue and cry raised by the injured party or by others, or of preventing the recovery of the stolen property or by way of revenge because of impediment placed or attempted to be placed in the way of the theft, or because of the recovery of the stolen property or of the discovery of the thief.*

The Prosecution is clearly founding the charge of theft aggravated by violence on the medical certificate issued by Dr. Stephanie Palmier, Doc. “ZZX” at folio 37 of the records of the proceedings, and the testimony by the said Dr. Palmier during the sitting held on 12<sup>th</sup> October 2023<sup>33</sup>. Whilst the Court does not doubt that when Sandip Bin went to the accused to get his mobile phone back, the accused punched him, it is finding it very hard to correlate the injuries indicated in the medical certificate issued by Dr. Stephanie Palmier, classified by her as slight injuries, with this particular incident, and this for the very simple reason that Sandip Bin went to Floriana Health Centre and was examined by Dr. Palmier a full three days after the incident forming the merits of these proceedings.

In fact the incident in question happened on the 19<sup>th</sup> August 2023 at around 11:00hrs, whilst he was examined by Dr. Palmier on the 22<sup>nd</sup> August 2023 at 13:04hrs. From the medical certificate and from the testimony by Dr. Stephanie Palmier it does not transpire whether the injuries found on Sandip Bin were fresh or else whether they had been inflicted days before. This fact leads the Court to the conclusion that the Prosecution did not prove beyond reasonable doubt that the theft in question was aggravated by violence.

The Prosecution is also charging the accused with the crime of theft aggravated by value. Section 267 of Chapter 9 of the Laws of Malta provides that: *theft is aggravated by "amount", when the value of the thing stolen exceeds two hundred and thirty-two euro and ninety-four cents (€232.94).*

Sandip Bin claimed that the stolen mobile phone, a Redmi 9A, was given to him as a gift by a colleague and that this colleague, who was never summoned to testify in these proceedings, told him that it cost between €200 and €300. The Court cannot accept this statement by Bin as a proof beyond reasonable doubt of the value of the stolen mobile phone, since it is merely hearsay evidence.

Sections 598 and 599 of Chapter 12 of the Laws of Malta, made applicable to criminal proceedings by Section 645 of Chapter 9 of the Laws of Malta, provide that: *as a rule, the court shall not consider any testimony respecting facts the knowledge of which the witness states to have obtained from the relation or information of third persons who can be produced to give evidence of such facts. (2) The court may, either ex officio or upon the objection of any party, rule out or disallow any question tending to elicit any such testimony. (3) Nevertheless the court may require the witness to mention the person from whom he obtained knowledge of the facts to which any such question refers (Section 598). The court may, according to circumstances, allow and take into consideration any testimony on the relation of third persons, where such relation has of itself a material bearing on the subject-matter in issue or forms part thereof; or where such third persons cannot be produced to give evidence and the facts are such as cannot otherwise be fully proved, especially in cases relating to births, marriages, deaths, absence, easements, boundaries, possession, usage, public historical facts, reputation or character, words or deeds of persons*

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<sup>33</sup> Folio 72 and 73 of the records of the proceedings.

*who are dead or absent and who had no interest to say or write a falsehood, and to other facts of general or public interest or of public notoriety (Section 599).*

The Court also makes reference to the judgement in the names **Subramaniam v. Public Prosecutor**<sup>34</sup>, wherein that Court stated that: *evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.*

In this case the testimony given by Sandip Bin might be considered as proof of what his colleague told him but it does not constitute proof of the value of the stolen mobile phone. Therefore the Prosecution did not prove beyond reasonable doubt that the theft of the mobile phone was aggravated by amount.

In the light of all the above, the Court is of the opinion that the Prosecution managed to prove beyond reasonable doubt that the accused is guilty of being an accomplice in the crime of simple theft.

**The second charge brought against the accused** - The accused is also being charged of having on the 19<sup>th</sup> August 2023, at around 11:00hrs in Triq San Gorg, St. Julian's, Malta, knowingly received or purchased any property which has been stolen, misapplied or obtained by means of any offence, or taken part, in any manner whatsoever, in the sale or disposal of the same property, which property has a value that exceeds €232.94, however does not exceed €2,329.37.

This charge is clearly alternative to the first charge brought against the accused and once he is being found guilty of being an accomplice in the crime of simple theft, the Court is not going to consider this particular charge and therefore abstains from considering it further.

**The third charge brought against the accused** - By virtue of the third charge being brought against him, the accused is being charged of having on the 19<sup>th</sup> August 2023, at around 11:00hrs in Triq San Gorg, St. Julian's, Malta, without intent to kill or to put the life of Sandip Bin in manifest jeopardy, caused harm to his body or health, which injuries are of a slight nature.

As already observed further above, even though the Court does not doubt that the accused punched Sandip Bin in the face, since it is finding it very hard to correlate the injuries indicated in the medical certificate issued by Dr. Stephanie Palmier, classified by her as slight injuries, with this particular incident, in view of the fact that Bin went to Floriana Health Centre and was examined by Dr. Palmier a full three days after the incident forming the merits of these proceedings, it deems that the

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<sup>34</sup> Judicial Committee of the Privy Council, 1 W.L.R. 965 (1956).

Prosecution did not prove beyond reasonable doubt that the accused caused Sandip Bin slight injuries and therefore it cannot find him guilty of the third charge brought against him.

**The fourth charge brought against the accused** - The accused is also being charge of having led an idle and vagrant life.

In his statement to the Police<sup>35</sup>, the accused stated that he does not have a home and that he lives around in St. Julian's. He also confirmed that he does not work and that he eats from the Church. The accused therefore himself admits that he led an idle and vagrant life and the Court must therefore find him guilty of the fourth charge brought against him.

**The fifth charge brought against the accused** - By virtue of the fifth charge brought against him, the accused is being charged of having rendered himself a recidivist, through judgement from the Court of Magistrates which judgements are definitive and cannot be changed.

In support of this charge the Prosecution summoned the Assistant Registrar of the Criminal Courts and Tribunals who submitted a judgement in the names **The Police v. Mursal Aden Diriye** delivered by the Court of Magistrates (Gozo) As a Court of Criminal Judicature on the 11<sup>th</sup> July 2019<sup>36</sup>. From the identification number quoted in the said judgement, it clearly results that the same was delivered against the accused in these proceedings.

By virtue of the above-mentioned judgement, the accused was found guilty of the charges brought against him in those proceedings and he was condemned to eight months imprisonment and to a fine (*multa*) of €200. From testimony given by Stephania Calafato Testa<sup>37</sup>, Assistant Registrar in the Criminal Courts and Tribunals, and documentation submitted by her<sup>38</sup>, it transpires that the above-mentioned judgement has not been appealed and that the accused has not yet paid the fine (*multa*) of €200.

In terms of Section 49 of Chapter 9 of the Laws of Malta, *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*. Once the judgement delivered on the 11<sup>th</sup> July 2019 has become *res judicata*, since no appeal has been lodged from it, and the accused is being found guilty of having committed another offence after the said judgement has so become *res judicata*, then it clearly results that he is to be found guilty of being a recidivist in terms of Section 49 of Chapter 9 of the Laws of Malta.

Section 50 of Chapter 9 of the Laws of Malta provides that: *Where a person sentenced for a crime shall, within ten years from the date of the expiration or*

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<sup>35</sup> Doc. "ZZ5" at folio 21 to 23 of the records of the proceedings.

<sup>36</sup> Doc. "STC4" at folio 66 to 69 of the records of the proceedings.

<sup>37</sup> Testimony given during the sitting held on the 12<sup>th</sup> October 2023, folio 62A and 62B of Chapter 9 of the Laws of Malta.

<sup>38</sup> Doc. "STC1" at folio 63 of the records of the proceedings, Doc. "STC2" at folio 64 of the records of the proceedings and Doc. "STC3" and Doc. "STC5" at folio 65 and 70 of the records of the proceedings.

*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 may be sentenced to a punishment higher by one degree than the punishment established for such other crime.*

In view of the fact that to date, and therefore also at the date of the commission of the crime of which the accused is being found guilty in these proceedings, the the fine (*multa*) of €200 imposed on the accused by the judgement delivered by the Court of Magistrates (Gozo) As a Court of Criminal Judicature on the 11<sup>th</sup> July 2019, is still pending, it cannot be considered that there has been the expiration of the punishment in terms of Section 50 of Chapter 9 of the Laws of Malta.

This observation of the Court is supported by that observed by the Court of Criminal Appeal in the judgement in the names **Il-Pulizija v. Anthony Said**, delivered on the 10<sup>th</sup> July 2015: *Il-Qorti ħasbet fit-tul dwar is-sottomissjoni li l-perjodi speċifikati fl-artikolu 50 f'kull każ ma jiskattawx jekk il-persuna konċernata ma tkunx skontat il-piena għaliex dan ikun ifisser li sabiex persuna tevadi l-awment fil-piena konsegwenza ta' reċidività kull ma għandha tagħmel hu li ma tħallasx il-multa imposta jew tevadi l-inkarċerazzjoni. B'hekk jinħoloq incientiv lill-ikkundannat sabiex jagħmel minn kollox biex jevadi s-sanzjoni tal-Qorti u b'hekk jevadi l-awment fil-piena f'każ ta' reċidiva. Dan ma jidhirx li jiffavorixxi politika penali sana. B'danakollu, id-diċitura tal-artikolu 50 ma jidhirx li jhalli alternattiva lill-Qorti ħlief li tagħti lill-kliem tal-istess artikolu t-tifsira naturali tiegħu u cioè li t-termini preskritti fl-artikolu 50 għall-finijiet tal-awment tal-piena jiskattaw meta l-ewwel sentenza tkun giet skontata. Peress li s-sentenza ma tistax titqies skontata jekk il-multa ma tkunx giet mħallsa, jew konvertita fi priġunerija li tiġi skontata, allura fil-każ li ma jirriżultax li l-piena tal-multa tkun giet imħallsa l-awment fil-piena minħabba rreċidiva ma japplikax ....*

In view of the above, the accused cannot be deemed to be a recidivist in terms of Section 50 of Chapter 9 of the Laws of Malta.

**The sixth charge brought against the accused** - The accused is also being charged of having on the same date at around 11:40hrs, inside St. Julian's Police Station, Triq San Gorg, St. Julian's, Malta: wilfully committed any spoil, damage or injury to or upon any movable or immovable property to the detriment of the Malta Police Force and/or the Government of Malta and/or any other entities, which damage does not exceed €2,500, however exceeds €250.

In his statement to the Police<sup>39</sup> and under cross-examination during these proceedings<sup>40</sup>, the accused admitted that on the 19<sup>th</sup> August 2023 whilst under arrest at the St. Julian's Police Station he became aggressive and he caused damages at the said Police Station. Even though he tried to justify his actions by claiming to have been drunk and angry at the fact that Sandip Bin and his friends weren't arrested too, the Court deems that in the circumstances of this case these excuses do not exonerate the accused from criminal responsibility or diminish his criminal responsibility.

<sup>39</sup> Doc. "ZZ5" at folio 21 to 23 of the records of the proceedings.

<sup>40</sup> Testimony given during the sitting held on the 24<sup>th</sup> October 2023, folio 75 to 79 of the records of the proceedings.

In support of this particular charge against the accused, the Prosecution, via testimony given by Inspector Zachary Zammit<sup>41</sup>, submitted a number of photographs - Doc. “ZZT1” to Doc. “ZZT3” a folio 58 to 60 of the records of the proceedings - which show the damage caused by the accused and via testimony given by Inspector Chantelle Vella Casha<sup>42</sup>, who submitted Doc. “CV” at folio 61 and 62 of the records of the proceedings, established that the damage caused by the accused amounts to €824.47.

In view of the above, the Court deems that the Prosecution proved beyond reasonable doubt that the accused is guilty of the sixth charge brought against him.

**The seventh charge brought against the accused** - The accused is also being charged of having on the same date at around 11:40hrs, inside St. Julian’s Police Station, Triq San Gorg, St. Julian’s, Malta, wilfully disturbed the public peace and order.

The Court makes reference to the judgement in the names **The Police v. Nicholas Obaseki**, delivered by the Court of Magistrates (Malta) As a Court of Criminal Judicature on the 15<sup>th</sup> June 2020, wherein further reference was made to the following judgements: *Il-Pulizija versus Maria Concetta Green*<sup>43</sup> wherein the Court held: *L-artikolu 338(dd) tal-Kodiċi Kriminali jikkontempla r-reat komunement imsejjaħ ‘breach of the peace’. L-elementi ta’ dan ir-reat ġew eżaminati funditus fdiversi sentenzi u ġie ritenut li, bħala regola, ikun hemm din il-kontravvenzjoni meta jkun hemm għemil volontarju li minnu nnifsu jew minħabba ċ-ċirkostanzi li fihom dak l-għemil iseħħ inissel imqar minimu ta’ nkwieta jew tħassib fmoħħ persuna (li ma tkunx l-akkuzat jew l-imputat) dwar l-inkolumità ta’ persuna jew dwar l-inkolumità ta’ proprjetà, kemm b’riżultat dirett ta’ dak l-għemil jew minħabba l-possibilità ta’ reazzjoni għal dak l-għemil. L-iskambju ta’ kliem, anke jekk inġurjuż jew minaċċjuż fih innifsu u mingħajr ma jkun hemm xejn aktar x’jindika li dak l-argument jista’ jiżviluppa fih, jew iwassal għal, xi haġa oħra u aktar serja (bħal ġlied bl-idejn jew ħsara fil-proprjetà) ma jammontax għall-breach of the peace fis-sens tal-artikolu 338(dd) tal-Kodiċi Kriminali. In the judgement by the said Court differently presided, *Il-Pulizija vs. Noel Tanti*<sup>44</sup> it was held: ... *Fl-Appell Kriminali “Il-Pulizija vs. Paul Busuttil” [23.6.1994] imbagħad ġie ritenut li din l-ekwiparazzjoni ta’ dan ir-reat mal-kunċett Ingliz ta’ “breach of the peace” tirrisali għal żmien Sir Adriano Dingli li proprju f’ kawża deċiża minnu fl-10 ta’ Gunju, 1890 , fl-ismijiet: “Ispettore Raffaele Calleja v. Paolo Bugeja et.” kien qal hekk :- “Che il buon ordine e la tranquillità pubblica sta nella sicurezza, o nella opinione ferma della sicurezza sociale , -- nel rispetto dei diritti e dei doveri sia degli individui in faccia all’ autorità pubblica, sia degli individui stessi fra loro, e ogni atto che toglie o diminuisce la opinione della sicurezza pubblica, o della sicurezza individuale, è violazione dell’ ordine pubblico, indipendentemente dalla perpetrato di altro reato.” (Kollez. Vol. XVII, p.47, 475). Fl-istess sentenza ta’**

<sup>41</sup> Testimony given during the sitting held on the 12<sup>th</sup> October 2023, folio 57A of the records of the proceedings.

<sup>42</sup> Testimony given during the sitting held on the 12<sup>th</sup> October 2023, folio 60A and 60B of the records of the proceedings.

<sup>43</sup> Decided by the Court of Criminal Appeal on the 19<sup>th</sup> November 1999, Deciżjonijiet tal-Qrati Superjuri, Vol. LXXXIII.iv.441.

<sup>44</sup> Decided by the Court of Criminal Appeal on the 5<sup>th</sup> May 2005.

*Paul Busuttil ġew citati b'approvazzjoni McCall Smith u Sheldon li, fil-ktieb tagħhom "Scots Criminal Law" (Edin. Butterworths, 1992), jgħidu:- "The essence of the offence is the causing of alarm in the minds of the lieges. This alarm has been variously defined by the Courts. In Ferguson v. Carnochan (1889) it was said not necessarily to be "alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking of the social peace". Alarm may now be too strong a term: in Macmillan v. Normand (1989) the offence was committed when abusive language caused "concern" on the part of policemen at whom it was directed." (p.192) u dik il-Qorti żiedet tgħid li:- "Naturalment huwa kwazi impossibbli li wieħed jiddeciedi aprioristikament x' jammonta jew x' ma jammontax f' kull każ għar-reat ta' ksur volontarju tal-buon ordni u l-kwiet tal-pubbliku. Kif jgħid awtur ieħor Skoċċiż, Gerald H. Gordon, fit-test awtorevoli tiegħu "The Criminal Law of Scotland" (Edinburgh, 1978): "Whether or not any particular acts amount to such a disturbance is a question of fact depending on the circumstances of each case, and strictly speaking probably no case on breach of the peace can be regarded as an authority of general application." (p.985, para.41- 01). U aktar 'l quddiem l-istess awtur jgħid :- "...although it has been held not to be a breach of the peace merely to annoy someone such annoyance could amount to a criminal breach of the peace if the circumstances were such that it was calculated to lead actual disturbance." (p.986, para. 41-04).*

When the circumstances of the incident that occurred at the St. Julian's Police Station, as recounted by various Police Officers in their testimony during the course of these proceedings, are considered in the light of the above quoted judicial principles, it clearly results that the accused is to be found guilty of the seventh charge brought against him too.

### **Punishment:**

For the purposes of punishment the Court took into account the nature and seriousness of the offences of which the accused is being found guilty. It also took into account that the second charge brought against the accused is alternative to the first charge brought against him and that the damage caused by the accused at the St. Julian's Police Station is damage to public property.

### **Decide:**

For the above-mentioned reasons that Court, whilst abstaining from considering the second charge brought against the accused and whilst finding the accused not guilty of the third charge brought against him and therefore discharges him from the same, after considering Sections 17(b)(d), 31, 42(d), 43, 49, 284, 285, 325(1)(b), the third proviso to Section 325(1), 338(w) and 338(dd) of Chapter 9 of the Laws of Malta, it is finding the accused guilty of being an accomplice in the crime of simple theft to the detriment of Sandip Bin and it is also finding him guilty of the fourth, fifth, sixth and seventh charges brought against him and condemns him to thirteen (13) months imprisonment and to a fine (*multa*) of €824.47.

Since the value of the mobile phone stolen from Sandip Bin has not been satisfactorily established, the Court is abstaining from considering the request by the Prosecution to order the accused to pay damages to Sandip Bin.

Since no Experts have been appointed in these proceedings, the Court is also abstaining from considering the request put forth by the Prosecution in terms of Section 533 of Chapter 9 of the Laws of Malta.

In terms of Section 534AD of Chapter 9 of the Laws of Malta, the Court asked the accused whether he wants a copy of the judgement translated in a language that he understands but he declares that he does not need a translation of the judgement since he can understand judgement.

**MAGISTRATE**

**DEPUTY REGISTRAR**