



**In the Court of Magistrates (Malta)**

**As a Court of Court of Criminal Judicature**

**Magistrate Dr Nadine Sant Lia**

**B.A., LL.M(Kent); LL.D., Barrister-at-Law (England & Wales)**

**Comp No: 864/2023**

**Today, the 7th August 2024**

**The Republic of Malta**

**(Inspector Elisia Scicluna)**

**vs**

**Jimale Hassan Abdullahi**

The Court after having seen the charges proffered against:

JIMALE HASSAN ABDULLAHI of Somalian nationality, of thirty five (35) years of age, son of Jimale Hassan u Satia neé Hussein, born in Mogadishu, Somalia on the first (18) of January of the year 1988, without a fixed residence, and holder of identity card number 0043988A

Having been charged in the name of the Republic of Malta with having, on the 21st of October 2023 at the establishment 'Taste of Africa', Triq Hal Qormi, Hamrun, Malta and/or in other places in the Maltese Islands:

1. With the intent to commit a crime of theft at the establishment named The Taste of Africa, to the detriment of Mohamed Mashud Yahya (K.I 0029933A), and any other person, manifested such intent by over acts and commenced the execution of the crime which was not completed in consequence of some accidental cause independent of his will, which theft if completed would have been aggravated with time and amount, which exceeds the sum of €232.94;
2. Rendered himself recidivist in terms of Articles 49, 50 and 289 of Chapter 9 of the Laws of Malta, by means of a decision given by the Court of Magistrates Malta, which was rendered res judicata and therefore cannot be altered.

The Court is requested so that in the case of guilt, in addition to any punishment which the Court deems fit to impose, orders the accused Jimale Hassan Abdullahi

to pay the expenses relating to the appointment of experts in terms of Article 533 of Chapter 9 of the Laws of Malta;

The Court also requested so that in the case of guilt, this Court applies the dispositions found within Articles 15A and 28H et seq of Chapter 9 of the Laws of Malta, wherein the guilty person would pay the damages in terms of Articles 15A and 28H et seq of Chapter 9 of the Laws of Malta;

The Court is also requested so that in the case of guilt, it is to consider Jimale Hassan Abdullahi as a recidivist, and this in terms of Articles 49, 50 u 289 of Chapter 9 of the Laws of Malta;

The Court is also requested to provide for the safety of the victim and his family or for the keeping of the public peace, in addition to, or in lieu of the punishment applicable to the offence, requires the accused to enter into his own recognisance in a sum of money fixed by the Court as per Article 383 382A, 383, 384 and 385 of Chapter 9 of the Laws of Malta.

Having seen that during the sitting of the 11th January 2024, the accused declared that he is not guilty of the charges proffered against him<sup>1</sup>.

Having seen that the Attorney General consented to these proceedings being dealt with summarily<sup>2</sup>.

Having seen that the Prosecution concluded its evidence during the sitting of the 21<sup>st</sup> May 2024<sup>3</sup>.

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<sup>1</sup> Folio 64 of the acts of the proceedings

<sup>2</sup> Fol. 19 of the acts of the proceedings

<sup>3</sup> Fol. 153 of the acts of proceedings

Having seen that the Defence declared that it will not be producing any evidence during the sitting of the 18<sup>th</sup> June 2024<sup>4</sup>.

Having heard the submissions made by the Prosecution and the Defence.

## **Having Considered**

### **Summary of facts of the case**

This case concerns an attempted aggravated theft by the accused Jimale Hassan Abdullahi from the shop Taste of Africe, Hamrun, on the 21<sup>st</sup> of October 2023.

## **Having Considered**

That reference will be made to the most salient testimonies heard and documents exhibited during these proceedings.

**Kurian Johns** testified during the sitting of the 31<sup>st</sup> October 2023<sup>5</sup> who immediately indicated the accused as the person who had tried to commit a robbery from the shop Taste of Africa, Hamrun, where he was working together with his colleague Muri Insa on the 21<sup>st</sup> October 2023 at about 07:00-08:00hrs. He explained that the accused had taken money from a box near the cash point and was going to flee but at the time there was the meat supplier in the shop who managed to close the door. The witness called for police assistance. The witness could not recount the exact amount of money which had been taken by the accused. Under cross examination the witness explained that his designation in

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<sup>4</sup> Fol. 161 of the acts of proceedings

<sup>5</sup> Fol. 29-37 acts of the proceedings

the shop is that of cashier but at the time, he was in another part of the shop, located in an adjoining building, cleaning the meat chiller. The witness confirmed that he had seen the accused holding the stolen money in his hands but then put the money on a table when his exit from the shop had been impeded.

**Inspector Elisia Scicluna**, stationed at Hamrun Police Station, testified during the same sitting<sup>6</sup>. She explained that on the 21<sup>st</sup> October 2023 at about 07:10hrs she was informed that by PS 1144 that a certain Abdullahi Jimale Hassan has been arrested in relation to a report lodged at Hamrun Police Station by Kurian Johns. Johns had reported that the assailant was being detained in the shop Taste of Africa, Qormi Road, Hamrun, after he had attempted to steal money from the shop. The accused was arrested and detained at the Police Station after having been given his rights in the Somali language. PS 1144 then spoke to the Johns, Muri Insah and a certain Yahya Muhammad Massoudi who is the actual owner of the shop. A CCTV footage was provided to police which very clearly shows the sequence of events. The witness went on to explain that on the same day, she took a statement from the accused after he was given his statutory rights and had declined to consult with a lawyer. The statement was taken in the presence of PC 110 Owen Vella and interpreter Bashir Hussein. The accused stated that he had gone to the shop to buy but realized that he had lost €5 in cash but failed to explain why he had gone near the cash register. Inspector Scicluna also testified during the sitting of the 12<sup>th</sup> March 2024<sup>7</sup> and the 21<sup>st</sup> March 2024<sup>8</sup> whereat she presented a copy of the CCTV footage and a number of stills from that footage.

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<sup>6</sup> Fol. 42-48 acts of the proceedings

<sup>7</sup> Fol. 86-88 acts of the proceedings

<sup>8</sup> Fol. 91-92 acts of the proceedings

Muri Inusah testified during the sitting of the 7<sup>th</sup> December 2023<sup>9</sup> who explained that on the 21st October 2023, he was working at Taste of Africa shop and he found someone in the cash taking money. The man was holding cash, specifically €50 notes in his hand and tried to flee. The witness managed to get hold of the assailant whilst his colleague rushed to the police station for assistance. He recognized the accused in the Court hall and stated that he had seen him previously in the shop and in Hamrun.

**Mohammed Mahsud Yahya** testified during the sitting of the 4<sup>th</sup> March 2024<sup>10</sup> who confirmed that he is the owner of the shop Taste of Africa, Hamrun but was not in the country when the incident occurred. He explained that he had been told what happened by his employee Muri Inusah and requested him to check the CCTV footages. He confirmed that the incident is in fact recorded in the CCTV footages, which he personally downloaded and passed on to the police via an email. The witness did know the exact amount of money that was going to be taken but conformed that none was in fact taken. Under cross-examination the witness explained that the CCTV camera does not capture sound and that it is an IP camera. The witness took the stand again on the 21<sup>st</sup> May 2024<sup>11</sup>. He confirmed that he had seen the CCTV footage from the shop and although he did not know the accused, he could tell that it was a person from Ethiopia or Somalia. Under cross-examination, the witness confirmed that although there are 12 cameras in the shop, the footage presented is the only one which is relevant. He further

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<sup>9</sup> Fol. 52-55 acts of the proceedings

<sup>10</sup> Fol. 66-75 acts of the proceedings

<sup>11</sup> Fol. 156-159 acts of the proceedings

explained that although he had personally sent the footage to the police by email, they found difficulty retrieving it so eventually the police called directly at the shop and downloaded the footage directly. He was not in Malta when this occurred.

**PC 397 Ramona Magro**, stationed at Hamrun Police Station testified during the same sitting<sup>12</sup>. She was present during the arrest of the accused on the 21<sup>st</sup> October 2023 together with PS 1144 and PC 734. When she entered Taste of Africa she could see a considerable amount of €50 notes on the floor and a male person by the name of Jimale Hassan Abdullahi was being detained by the shop employees. She recognized the accused as that same person and confirmed that upon arrest he had been given his rights in the Somali language. Under cross examination the witness confirmed that she had seen the accused personally being detained in the shop and that is the connection upon which she recognizes him present in the Court hall.

**PC 734 Franco Portelli**, stationed at Hamrun Police Station, testified during the same sitting<sup>13</sup>. Like the previous witness, he too confirmed that he was present for the arrest of the accused from Taste of Africa and that there was a considerable number of bank notes scattered on the floor.

**Stephania Calafato Testa**, Assistant Registrar – Criminal Courts, testified during the sitting of the 21<sup>st</sup> March 2024<sup>14</sup> whereat she presented four judgements delivered against the accused Abdullahi Jimale Hassan.

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<sup>12</sup> Fol. 76-80 acts of the proceedings

<sup>13</sup> Fol. 81-84 acts of the proceedings

<sup>14</sup> Fol. 94-96 acts of the proceedings

## **Considerations**

### **The Statement released by the Accused**

The accused had his statement<sup>15</sup> taken by the Police as part of their investigation by Inspector Elisia Scicluna on the 21st October 2023 after he was given his statutory rights and had declined to consult with a lawyer. The statement was taken in the presence of PC 110 Owen Vella and interpreter Bashir Hussein. The accused stated that he had gone to the shop to buy but realized that he had lost €5 in cash but failed to explain why he had gone near the cash register.

### **Having Considered**

#### **Submissions**

The prosecution and the defence made oral submissions before the Court during the sitting of the 27<sup>th</sup> June 2024<sup>16</sup>.

The prosecution stressed that the attempted theft is in fact aggravated by the time, which is 7am<sup>17</sup>, and also by the amount of money involved – which exceeds €292.94 but does not exceed €2329.37. Prosecution also submitted that the accused was identified beyond any doubt and also that he is clearly a recidivist, referring to the judgements attesting to previous conviction presented by the Registrar of the Criminal Courts. The defence, on the other hand, impugns the CCTV evidence in the sense that there is no certainty as to the chain of custody relative to such and also because, as it states, fails to capture the full incident. Importantly, the defence challenges (i) the aggravation based on the amount of money involved and states

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<sup>15</sup> Fol. 38-41 of the acts of the proceedings

<sup>16</sup> Fol 163-168 acts of the proceedings

<sup>17</sup> Reference was made to the judgement in the names Pulizija vs Stephen Urry (Court of Magistrates, decided on the 8<sup>th</sup> May 2023)



that the amount was not determined beyond reasonable doubt by any of the witnesses produced by the prosecution and also (ii) the aggravation by time and stresses that the time of 7am is clearly beyond sunrise. Therefore, on this basis it stresses that the punishment should not in any case exceed six months imprisonment as it is a case of a simple theft. The defence also points out that recidivism is an ad hoc offence, the identity of the agent must be proven independently from that in relation to the main charge.

### **Considerations**

The accused stands charged that on the 21<sup>st</sup> October 2023, with the intent to commit a crime of theft at the establishment named The Taste of Africa, to the detriment of Mohamed Mashud Yahya (K.I 0029933A), and any other person, manifested such intent by over acts and commenced the execution of the crime which was not completed in consequence of some accidental cause independent of his will, which theft if completed would have been aggravated with time and amount, which exceeds the sum of €232.94.

From the evidence considered by the Court, including the CCTV footage, eyewitness testimonies and also the testimony given by the Police officers that attended on scene shortly after the alleged incident, the Court considers that the accused is accurately identified as the agent of the acts alleged in his regard in the present charges.

The accused has opted not to testify or bring forward any evidence in his defence. The Court also considers that in his statement, the accused did not provide a version of events which in any way undermines the prosecution's thesis.

The Court considers that when the accused was stopped and prevented from leaving the shop in question, he had already managed to access a compartment under the check-out point of the shop and effectively taken possession of a number of bank notes which were stored there. Even if, for argument's sake, the accused never managed to leave the premises with the money in hand or on his person, he had already taken the money in an abusive and illegal manner and had, even if momentarily, dispossessed the legitimate owners of the money from same. In other words, the *contrectatio dolosa di cosa altrui* had clearly taken place and the accused was only prevented from leaving the shop with the money owing to the timely intervention of third parties - some thing with manifestly was an accidental cause independent of the will of the accused. Therefore, the offence of attempted theft results.

### **Aggravation by "Time" and "Amount"**

The prosecution has additionally attributed two aggravating circumstances by "Time" and by "Amount" to the offence of theft in this case.

Article 270 of the Criminal Code states that a theft is aggravated by "time", when it is committed in the night, that is to say, between sunset and sunrise. Therefore, for this aggravation to result, it is the prosecution's duty to prove that the crime effectively occurred between sunset and sunrise. From an assessment of the evidence produced, whilst Kurian Johns stated that the incident occurred between 07:00hrs and 08:00hrs and Inspector Elisia Scicluna confirmed that the report about the incident was

received at about 07:10hrs, no evidence whatsoever was produced as to whether it was still dark at the time in the sense that the event occurred “between sunrise and sunset”. The prosecution did not present evidence of the fact of it still being dark at the time of the alleged crime was done. Furthermore, the prosecution failed to mention the time of the alleged offence in the charge. In view of these considerations, the Court cannot declare the aggravating circumstance of “Time” applicable.

As to the other aggravating circumstance, Article 267 of the Criminal Code sets out 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) and Article 279(a) of the Criminal Code establishes that whosoever shall be guilty of theft aggravated by “amount”, if the value of the thing stolen does not exceed two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) shall be liable to imprisonment for a term from five months to three years. It is therefore also incumbent on the prosecution to prove what the amount involved actually is.

Here again, the amount involved has certainly not been proven beyond reasonable doubt as none of the prosecution’s witnesses, including the shop’s owner or the employees on duty Kurian Johns and Muri Insa clearly failed to identify the exact figure other than the fact that there was a “considerable number” of Fifty Euro notes scattered on the floor. Whilst the word “considerable” may have its functionality as a figure of speech, it clearly falls short of constituting a proof which enables this Court to find favourably for the prosecution on the aggravation by amount.

Therefore the Court considers that that prosecution has proven its case of attempted theft to a level of beyond a reasonable doubt only in terms of simple theft. The

aggravations of time and amount have not been proved to the level required by law and therefore the defendant will be acquitted of these aggravations.

Articles 284 and 285 of the Criminal Code establishes that when a theft is not accompanied by any aggravating circumstances specified in Article 261, is simple theft and prescribes a punishment of imprisonment for a term from one to six months subject to the proviso that if the value of the thing stolen does not exceed twenty-three euro and twenty-nine cents (€23.29), the offender shall, on conviction, be liable to imprisonment for a term not exceeding three months.

Now in this case, whilst the amount involved has certainly not been proven beyond reasonable doubt as none of the prosecution's witnesses, including the shop's owner or the employees on duty there could certainly identify the exact figure, all the relevant witnesses including the aforementioned employees and also the Police officers that attended on scene could clearly recall that there were a number of Fifty Euro notes scattered on the floor close to the counter. Thus, the presence of even one Fifty Euro note dispels the applicability of the proviso.

Thus, the Court believes that even though the aggravating circumstances mentioned in the charge have not been proven to the degree required at law, given its circumstances, this case nonetheless warrants a punishment that departs from the minimum.

In this case, the charge brought forward against the accused and the facts presented in evidence concern an attempt. Article 41(1)(a) of the Criminal Code states that:

*Whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by a commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction -(a) if the crime was not completed in*

*consequence of some accidental cause independent of the will of the offender, to the punishment established for the completed crime with a decrease of one or two degrees.*

In the circumstance, therefore, the Court will be decreasing the punishment applicable by one degree

## **Having Considered**

### **Recidivism**

The Court will now consider the charge of recidivism proffered against the accused.

The institute of recidivism is regulated by Article 49 and 50 of the Criminal Code which state the following:

*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 [...]*

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

Whereas Article 289 of the Criminal Code speaks specifically of recidivism concerning cases of theft:

*289.(1) In the case of a second or subsequent conviction for any offence referred to in this Subtitle, 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.*

*(2) When the increase of punishment cannot otherwise take place than by the application of solitary confinement, such punishment may be awarded to the extent of eighteen periods.*

The aforementioned article is specifically applicable in cases of recidivism concerning offences relating to theft and required that a person has been “convicted” for such an offence. Therefore, once the criteria established in Articles 49 and 50 are fulfilled, Article 289 is automatically applicable even if the punishment awarded in relation to the previous conviction is a suspended sentence.

The prosecution exhibited an appeal judgment<sup>18</sup> wherein it results that at appeal stage (11<sup>th</sup> December 2019) the defendants conviction was altered and he was condemned to a term of six (6) months imprisonment.

The prosecution exhibited a judgment<sup>19</sup> wherein in April of 2018 the defendant was condemned to an effective term of seven (7) months imprisonment.

The prosecution exhibited a judgment<sup>20</sup> wherein in July 2015 the defendant was condemned to a term of one (1) month imprisonment.

The prosecution exhibited a judgment<sup>21</sup> wherein in February 2015 the defendant was condemned to a term of three years and nine months imprisonment.

From the judgments presented there is no evidence that the defendant had previously been found guilty of theft. From an examination of the criminal record sheet there is

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<sup>18</sup> Dok SCT1, Folio 97-131 acts of proceedings

<sup>19</sup> Dok SCT2, Folio 132-135 acts of proceedings

<sup>20</sup> Dok SCT4, Folio 138 acts of proceedings

<sup>21</sup> Dok SCT5, Folio 139-142 acts of proceedings

indicated on his criminal record that he has previously been found guilty of theft.<sup>22</sup> However, as these relative judgments were not duly exhibited by the prosecution the Court is lacking in the best evidence available to substantiate the allegation.

Therefore whilst the Court considers the defendant a recidivist in terms of article 49 and 50 of the Criminal Code it will acquit him of finding him guilty in terms of article 289 of the Criminal Code and will take into account the provisions of an increase in punishment according to the same law.

So therefore, the accused will be treated as a recidivist in terms of law and thus, the decrease of one degree in punishment contemplated in view of the fact that in this case we are dealing with an attempted offence will be offset with an increase of one degree which is being imposed by this Court in view of the fact that the accused is a recidivist.

## **Consideration**

### **Punishment**

The criminal record of the accused<sup>23</sup> was exhibited in the acts of the proceedings. The Court notes that said document attests to an alarming number of convictions related to aggression, assaults on public officers, theft and voluntary damage and that despite the various opportunities given, the accused failed to reform his conduct.

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<sup>22</sup> Folio 21A and 24 of the acts of proceedings

<sup>23</sup> Fol 21-25 acts of the proceedings

## Decide

Therefore, after having seen Articles 41, 49, 50, 261(c)(f), 267, 270, 279(a), 280(1), 281(a) and 289 of Chapter 9 of the Laws of Malta, the Court hereby finds Jimale Hassan Abdullahi **guilty** of the charges proffered against him so however that he shall be considered to be guilty of a simple theft in terms of Articles 284 and 285 of Chapter 9 of the Laws of Malta and a recidivist in terms of article 49 and 50 of the Criminal Code whilst acquitting him of the aggravations of theft by time and amount in accordance to article 261(c)(f) and of article 289 of the Criminal Code and accordingly, condemns him to an effective term of **six months** imprisonment which in accordance to article 28A of the Chapter 9 of the Laws of Malta the said term is being suspended for two (2) years from today.

The court after having seen article 383 of the Criminal Code in order to provide for the safety of individuals or for the keeping of the public peace, in addition to the punishment applicable to the offence, requires the offender to enter into his own recognizance in the amount of one thousand Euros (€1,000) for a one (1) year period.

The Court abstains from taking cognisance of the requests by the prosecution in accordance to articles 15A and 28H of the Criminal Code since no amounts were indicated.

Furthermore, in view of the fact that no experts were appointed in this case, the Court abstains from making any order on the defendant in terms of Article 533 of Chapter 9 of the Laws of Malta.



The Court explained the judgment in plain and simple language to the defendant.

Delivered today the 7th August 2024 at the Courts of Justice in Valletta, Malta.

**Dr. Nadine Sant Lia**

**Magistrate**

**Oriana Deguara**

**Deputy Registrar**