COURT OF CRIMINAL APPEAL
MADAME JUSTICE NATASHA GALEA SCIBERRAS B.A., LL.D

Appeal Number: 348/2023

The Police
(Inspector Saviour Baldacchino)

vs

Jeffry VARGHESE

Today, 28th February 2025

The Court:

Having seen the following:

A. THE CHARGES

1. This is an appeal from a judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 3rd October 2023 against **Jeffry VARGHESE**, 33 years of age, son of Simon and Eliemma, born in India on 15th April 1991, holder of identity card number 215705(A), on being charged as follows:

   For having on 24th August 2021 at around 19:20hrs in St. Paul's Bay:

   1. Committed a non-consensual act of a sexual nature against Omissis in breach of Article 207 of Chapter 9 of the Laws of Malta;

   2. Without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend

offenders, arrested, detained or confined Omissis against her will as per Article 86 of Chapter 9 of the Laws of Malta;

3. Committed theft of vehicle Suzuki Alto registration number ABN 596, belonging to Ray Clifton Charles, which theft is aggravated by the amount which value is less than two thousand, two hundred and twenty-nine euro, thirty seven cents (€2,329.37) and by the nature of the thing stolen, as per Art 261(c)(g), 267, 271(g), 279(a), 280(1) of Chapter 9 of the Laws of Malta;

4. Through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, caused damage, spoil to vehicle of make Suzuki to the detriment of Ray Clifton Charles as per Art 328(d) of Chapter 9 of the Laws of Malta.

The Court was requested to provide legal protection to the alleged victim Omissis, as stipulated in Article 412C of Chapter 9 of the Laws of Malta.

Moreover, the Court was also requested, in the case of guilt, to condemn the accused to pay for Court expenses related to the appointing of experts as set out in Article 533 of Chapter 9 of the Laws of Malta.

B. THE APPEALED JUDGMENT

2. The Court of Magistrates (Malta) as a Court of Criminal Judicature, after having seen Articles 15A, 17, 20, 31, 86, 207, 261(c)(g), 267, 271(g), 279(a), 280(1), 328(d), 382A, 383, 384, 385, 386, 532A, 532B and 533 of Chapter 9 of the Laws of Malta, found **Jeffry VARGHESE** guilty of the charges proffered against him and accordingly, condemned him to four (4) years imprisonment.

The Court, having seen Article 382A of the Criminal Code, issued a restraining order against the defendant in favour of Omissis, to remain in force for three years and commencing to run from the date of expiration or remission of the punishment.

The Court, having seen Article 533 of the Criminal Code, abstained from taking further cognizance of the request, due to the fact that no experts were appointed.

C. THE APPEAL

3. **Jeffry VARGHESE** appealed from the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature and requested this Court "*to annul, revoke and set aside the judgment given in the names premised by the Court of Magistrates (Malta) as a Court of Criminal Judiciary as presided over by Magistrate Nadine Lia on the 3rd October 2023, for all the above reasons and consequently acquit the appellant of all guilt and revokes the judgment it inflicted and in the worst case that the judgment is confirmed, a more just and appropriate punishment is given in the circumstances*".

D. THE ATTORNEY GENERAL'S REPLY

4. The Attorney General replied to the said appeal application by stating that this Court should discard appellant's grievances and consequently reject the appeal and confirm the judgement given by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 3rd October 2023, and this for the reasons stated in the said reply.

E. THE PARTIES' SUBMISSIONS

5. The Court heard the parties' submissions about the appeal application during the hearing held on 15th May 2024.

F. THE CONSIDERATIONS OF THIS COURT

6. From the records of these proceedings, it transpires that on 24th August 2021, at around 19:35hrs, the Police received an anonymous phone call to the effect that in Triq it-Turisti, a male making use of a grey vehicle of make Suzuki, with registration number ABN 596, appeared to be of danger to the public.

7. In the meantime, whilst the Police were sent on site, a certain Omissis, reported to PS 419 at the Qawra Police Station that a tall, bearded, foreign man had entered into her vehicle, a grey Suzuki Alto bearing registration number ABN 596 and drove off, stealing her car. She reported how at about 19:20hrs, she was driving the car in Triq it-Tamar, St. Paul's Bay, at which point the street narrowed. Upon thinking that she had hit a parked van with her vehicle, she stopped and exited her vehicle to check whether she had indeed hit the van. Upon returning to her car, the vehicle would not start, at which point, a tall, bearded man standing in front of the van, approached her and offered to help her. She accepted his assistance. At that point, the man grabbed her from her hand or arm, and pulled her outside of the vehicle, entered into the vehicle and managed to start the car. Since he then refused to leave the car, she entered the car from the passenger's side. He insisted upon driving the car to a wider part of the road, he refused to stop the car, and although she told him several times to stop it, he drove on. She recounted how, whilst driving, he proceeded to touch her breasts three times, despite her protestations and attempts to remove his hand. He subsequently moved his hand on to her tighs, inching his fingers towards her private parts, but she moved and managed to remove his hand. He grabbed her from the arm and pulled her towards him, and again touched her breast. He continued to drive and then stopped near the church, by *Maxims Pastizzeria*, where she asked him to leave the car, but he did not, she tried to exit the car but he told her that she could not and that if she exited the car, there were people who were going to shoot her, as he pointed his finger in the direction of the church. She managed to open the door of the car, but he pulled her from her hand. At that stage she shouted at a woman for help and asked her to phone the police. He pulled her back in the car and managed to close the door. Her next attempt to leave the car proved fruitful, at which point she proceeded to the driver's side to try to remove the car key from the ignition, but he closed the car's window. She asked him to give her the key, but instead he drove off. She went back to Triq it-Tamar, thinking he might show up there again, but he did not and so she proceeded to file her report at the Police Station.

8. Omissis testified before the Court of Magistrates, providing basically the same version that she had originally reported to the Police. Her partner,

owner of the mentioned vehicle, Clifton Charles Grech, also testified before the First Court, recounting what Omissis had told him over the phone before proceeding to the Police Station to file her report.

9. It further transpires that PC 979 Daniel Mohr and his colleagues went to Triq it-Turisti, St. Paul's Bay, where they found the vehicle parked in front of a garage, with the engine turned on, but no driver in sight. A pedestrian indicated to them that the driver was some fifteen meters down the road, where they found a man, the appellant, who matched the description given by Omissis, in another vehicle, a Mercedes bearing registration number IQZ 292. At this stage, appellant stated that this was his brother's vehicle. Shortly after, a certain Ivan Kotsev arrived on site, claiming that he was responsible for the vehicle and that he had never granted appellant access to the vehicle and that the car's keys were in his possession. Appellant was arrested, and escorted to Qawra Police station, where Omissis identified him as her aggressor. She was later examined by a doctor, Dr. Rachel Camilleri, who certified that she had two bruises on her right wrist, an abrasion on the right palm, an abrasion on the right forearm and another abrasion on the left index finger.

10. VARGHESE was administered his rights at law, including his right to be assisted by a lawyer of his choice during his interrogation, which he initially refused, but following a change of heart, he released a statement on 25th August 2021 in his lawyer's presence, stating that he was drunk and that he did not remember anything. The Police then proceeded to arraign the appellant before the Court of Magistrates (Malta) as a Court of Criminal Inquiry on 26th August 2021, and as above held, he was found guilty by the First Court of all the charges proffered against him.
11. In his first grievance, appellant complains that the interpreter appointed to assist him during the hearing wherein he tendered his evidence before the Court of Magistrates (Malta), used a different dialect to that used by him and that this made communication difficult between them, to the extent that the assistance he received had not allowed him to testify in the best possible manner, leading to his rights being violated.

12. The provisions of Article 391(2) of the Criminal Code provide for the employment of a sworn interpreter in proceedings before the Court of

Magistrates, where the witness tenders evidence in a language which the presiding Magistrate does not understand. Articles 516(2) and 534AC of the Criminal Code, then, provide for the right of the accused to be assisted by an interpreter to translate the language of the proceedings, or any evidence adduced, into a language which he or she understands. Both provisions make it clear that the appointment of an interpreter that speaks the language of the accused, is required only where the accused does not understand the language of the proceedings. Article 534AC(5) allows the accused the possibility to complain against the quality of the interpretation, as conducted by the chosen interpreter, where this is not considered sufficient to safeguard the fairness of the proceedings. Article 534AC(6) provides that the interpretation provided shall be of sufficient quality to safeguard the fairness of the proceedings, particularly by ensuring that the accused has knowledge of the case against him and is able to exercise his right of defence.

13. The Court notes that during appellant's arraignment before the Court of Magistrates (Malta) as a Court of Criminal Inquiry on 26th August 2021, the said Court registered appellant's declaration that he did not understand the Maltese language, but understood the English language, following which the Court ordered that proceedings be conducted in the English language, in terms of Article 3 of the Judicial Proceedings (Use of English Language) Act. The proceedings continued to be conducted in the English language and all witnesses were heard in the said language, until during the sitting dated 15th November 2022, appellant, through his defence counsel, expressed his wish to testify in his native language, namely in Hindi Mahalia and Tamil. During the sitting held on 28th February 2023, in which appellant testified, the Court of Magistrates (Malta) appointed Sah Chandramani to translate from Hindu to English and vice-versa, in order to assist appellant during his deposition. It transpires from the transcript of the said deposition that at one point, the interpreter noted that appellant had difficulty in understanding Hindu, so that upon hearing appeallant speaking in English, the Prosecuting Officer remarked that "*If you are talking in English you might as well speak in the microphone. Can you explain to the court in English and when you have difficulty the interpreter can help you*"[1], which led the Court to order appellant to

[1] A fol. 177 of the records.

explain himself in English and in Hindu. The Court notes that although appellant spoke in English with some difficulty, yet his version of events was clearly understood, recounting that upon his arrival in Buġibba with his friends, a lady whose car was not parked properly in the road, asked him for help as her car could not start, following which he drove her car around the block to Qawra church and parked it. From then on, he does not remember what happened, except that he was taken to the Police Station and that he had gone into a Mercedes to relax because he was drunk. He does not recall the lady complaining as she was with him, in the car.

14. The Court notes firstly, that during the said hearing, no objection was raised by appellant or his defence counsel in respect of the appointed intepreter and neither was any objection raised at the stage where appellant was requested to testify in English. Any objection in this regard should have clearly been raised at that stage of the proceedings, where the First Court could have remedied the situation, by for instance, ordering that another interpeter be brought to assist appellant. The Court further notes that from the transcript of the said testimony, it is clear that appellant's defence counsel was satisfied with the version of events as recounted by appellant and it does not transpire that ultimately, there was anything in the said version that in defence counsel's view, needed further clarification due to interpretation or communication problems. Furthermore, apart from attacking the alleged victim's credibility, appellant stressed his version of events as his line of defence to the charges proffered against him. Upon a reading of the said transcript, this Court does not find that appellant's version of events could not be sufficiently understood because of inadequate interpretation or due to appellant's spoken English. Indeed, appellant had due knowledge of the case against him and was able to exercise his right of defence, by providing his testimony, as well as producing a witness in his defence.

15. The Court thus deems appellant's first grievance to be unfounded and dismisses the said grievance.

16. In his second grievance, appellant argues that the Court of Magistrates could neither legally nor reasonably, on the basis of the evidence and legal

arguments tendered, arrive at finding him guilty of the charges proffered against him, particularly when considering the version of events as recounted by the alleged victim, which are not credible and truthful, and this for the reasons explained by appellant in his grievance. Appellant contends that the version provided by the alleged victim was a fabrication of lies, which served as a cover up for having herself damaged her partner's car. He also insists that both the alleged victim and her partner conjured a story to cover the expenses incurred after the former had caused damages to the latter's car. The appellant denies having ever inappropriately touched the alleged victim and insists that he had only accepted her request for help, driving the alleged victim's car around the corner in order to restart it.

17. With regards to the second charge proffered against him, appellant laments that one of the elements of the offence, that is the absolute deprivation of liberty of the alleged victim, had not been proved, since it was the alleged victim herself who entered the car after having requested appellant's assistance and again, it was the alleged victim herself who ran to the driver's side of the car, where appellant was seated, after having left the car. Appellant insists that this does not amount to deprivation of liberty in terms of Article 86 of the Criminal Code. As to the third charge brought against him, after referring to Carrara's definition of theft, appellant notes that in respect of the first element of '*contrectatio*', the intention of the accused must be to permanently appropriate himself of an object, that is, without the intention of returning it. Furthermore, according to appellant, the intentional element of making a gain – *l'animo di lucrare* – does not result in the present case. Finally, with regards to the fourth charge proffered against him, appellant contends that the Prosecution did not sufficiently prove that he had caused damage to the said car due to his lack of thought, through negligence, or on account of having failed to observe traffic regulations. Neither was an expert appointed to establish the damage that had been caused to the car.

18. In this regard, the Court refers to the judgement delivered by the Court of Criminal Appeal (Superior Jurisdiction) of 21st April 2005, in the names **Ir-Repubblika ta' Malta vs Emanuel Zammit**, where it was held as follows:

> ... kif dejjem gie ritenut huwa principju stabbilit fil-gurisprudenza ta' din il-Qorti li hija ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-ewwel Qorti jekk tasal ghall-konkluzjoni li dik il-Qorti setghet ragjonevolment u legalment tasal ghall-konkluzjoni li tkun waslet ghaliha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-ewwel Qorti izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-ewwel Qorti kinitx ragjonevoli fil-konkluzjoni taghha. Jekk, izda, din il-Qorti tasal ghall-konkluzjoni li l-ewwel Qorti, fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment jew legalment tasal ghall-konkluzjoni li tkun waslet ghaliha, allura din tkun raguni valida, jekk mhux addirittura impellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni u konkluzjoni.[2]

19. It is clear that conflicting evidence has been tendered on the one hand by the alleged victim, Omissis and on the other hand, by appellant VARGHESE. The alleged victim states that on 24th August 2021, appellant entered the car she was driving after offering to assist her, and after failing to exit the car despite her requests to do so, and molesting her whilst driving the car, he drove off with the said car, leaving her near the Qawra church. On the other hand, appellant denies having ever committed any act of a sexual nature on the person of Omissis without her consent, and simply recalls having assisted her, upon her request, to restart the car and drove around the block, parking the said car. Thus, despite the evident conflict between the two versions, both in terms of Omissis's version as well as that of appellant, the car driven by Omissis could not start, which led appellant to offer his assistance (according to Omissis) or to Bertalaniz requesting his help (according to appellant). The witness produced by appellant, Sinu Thattuparambil Francis confirms that a woman's car was blocking the road, thus causing a lot of traffic, that her car could not start,

[2] Fir-rigward, dik il-Qorti rreferiet ukoll għas-segwenti sentenzi: **Ir-Repubblika ta' Malta vs Domenic Briffa**, 16 ta' Ottubru 2003; **Ir-Repubblika ta' Malta vs Godfrey Lopez** u **r-Repubblika ta' Malta v. Eleno sive Lino Bezzina** 24 ta' April 2003, **Ir-Repubblika ta' Malta vs Lawrence Asciak sive Axiak** 23 ta' Jannar 2003, **Ir-Repubblika ta' Malta vs Mustafa Ali Larbed**; **Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino**, 7 ta' Marzu 2000, **Ir-Repubblika ta' Malta vs Ivan Gatt**, 1 ta' Dicembru 1994; u **Ir-Repubblika ta' Malta vs George Azzopardi**, 14 ta' Frar 1989; u l-Appelli Kriminali Inferjuri: **Il-Pulizija vs Andrew George Stone**, 12 ta' Mejju 2004, **Il-Pulizija vs Anthony Bartolo**, 6 ta' Mejju 2004; **Il-Pulizija vs Maurice Saliba**, 30 ta' April 2004; **Il-Pulizija vs Saviour Cutajar**, 30 ta' Marzu 2004; **Il-Pulizija vs Seifeddine Mohamed Marshan et**, 21 ta' Ottubru 1996; **Il-Pulizija vs Raymond Psaila et**, 12 ta' Mejju 1994; **Il-Pulizija vs Simon Paris**, 15 ta' Lulju 1996; **Il-Pulizija vs Carmel sive Chalmer Pace**, 31 ta' Mejju 1991.

and that she requested help. He further confirms that at that point he left appellant speaking to the lady. Both the alleged victim and appellant agree, in their respective versions, that the car was eventually driven off from the spot where it had first broken down.

20. This Court finds the version given by Omissis as being a truthful and credible account of what had happened on the date. Like the First Court, the Court notes that the alleged victim provided her version of events several times, without any distinct discrepancies. Firstly, she recounted the events that had unfolded, to her partner, whom she phoned as soon as appellant sped off with the car, prior to proceeding to the Police Station, where her version was taken down in writing by PS 419 Anton Buttigieg. She then provided the same version of events during her testimony before the Court of Magistrates, recounting the events that unfolded in the same chronological order, appellant's words and actions, and her reaction to the same. This Court notes how Omissis explained the reason for entering into the car with appellant, that this was done in a moment of panic on her part, upon seeing that appellant had succeeded in starting her car, but yet, rather than exiting the car, he simply closed its door. She states "*I had everything in the car*"[3], at which point she ran into the car from the passenger's side and told him to get out of the car. Yet appellant insisted on driving the car since the road was narrow. She mentions how she told appellant that she needed to go to the left, as she was heading towards Baħar iċ-Ċagħak, and that she had to stop there, namely to the left in the direction in which she was heading, but appellant took a right turn instead. In this regard, this Court understands that in the circumstances, this should not be taken to indicate the intention of the alleged victim to be driven thereto by appellant, but that following his initial refusal to exit the car, she intended for appellant to stop the car in the direction towards which she was headed.

21. This Court, like the Court of Magistrates (Malta) before it, too believes the victim's version of events, when she recounts how appellant incessantly and insistently tried to and managed to touch her breast, and that he further tried to touch her private part, whilst she repeatedly attempted to push his hand away. The injuries which Omissis suffered to

[3] A fol. 40 of the records.

her right wrist, right palm and the palmar side of the distal right forearm, consisting in bruises and superficial abrasions, are all compatible with her version of events as she struggled to push away appellant's unconsensual advances and his later attempts to constrain her to remain in the car. Although appellant deems it absurd that in terms of Omissis's version, his unconsensual acts were concurrent with his driving in a narrow road with cars parked on both sides, the Court notes that nowhere does it result from the records of the proceedings that the entire route taken by appellant was through narrow roads, except for the first part, where appellant initially took off with the victim's car. This Court, as the First Court before it, finds no reason not to believe the version of events as recounted by Omissis. Appellant's version of events, in which he also admits that he was drunk, and his attack on Omissis's credibility do not dissuade this Court, to a degree of probability, from upholding Omissis's testimony as consistent, totally credible and likewise truthful.

22. In light of these considerations, the Court thus deems that the First Court could have reasonably and legally found appellant guilty of the first charge proffered against him.

23. In respect of the second charge, the Court notes that in terms of Omissis's version of events, not only did appellant fail to stop the vehicle despite the victim's insistence to this effect en route to the Qawra church, but once appellant stopped the car near the said church, she found herself unable to exit the car, as appellant continued to pull her inside it. In her words:

> ... the entire time I am screaming at him to stop the car and to stop and get out and he wouldn't and he kept grabbing at me. At one point he pulled me, just pulled me and grabs again and the entire time I am screaming at him to stop ... and then finally he did. He stopped the car next to the church of Qawra where this Maxims and he stops the car and again I tell him: "*Please get out of the car*". And he didn't say anything. So I went to open the car to leave and he told me: "*If you get out of the car they will shoot you*". And he points behind, behind our car and I went anyway to grab the door, I managed to open a bit the door and he puts me back in again telling me that if I get out of the car they are going to shoot me. Then I opened, managed to open the door again and there was a woman and I should out to her and I told her "*Call the*

> *Police*". And he pulls me back in and emm then I hit him off, I open the door and he hit me and I just ran out of the car ...[4]
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> ...
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> He kept grabbing me and pulling me back. If I tried to move he was pulling by my arm. He will not let me get out of the car and threatening that people will shoot me if I try to get out of the car.[5]

24. According to jurisprudence, in order for the offence prescribed in Article 86 of the Criminal Code to take place, it is not necessary that the deprivation of the personal liberty of the victim be protracted in time. That which is required is a form of action or inaction, on the part of the active subject, exercised in respect of his victim, resulting in a restriction on the freedom of movement of the latter, even if for a brief period of time. In the case decided by this Court, as differently presided, on 16th May 2023, in the names **Il-Pulizija vs Jody Pisani, Mark Gauci u Emanuel McKay**, the following was held:

> 15. Dak li huwa neċessarjament rikjest mil-Liġi huwa li s-suġġett attiv irid ikun aġixxa fl-assenza ta' ordni skont il-Liġi mogħtija minn awtorita' kompetenti jew mingħajr ma kellu l-poter skont il-Liġi sabiex ikun jista' jżomm lis-suġġett passiv kontra l-volonta' tiegħu u fi stat ta' kostrizzjoni. Dan ir-reat allura jiġi wkoll integrat meta jirriżulta li s-suġġett passiv ikun ġie miżmum kontra l-volonta' tiegħu fil-post fejn ikun jinstab. Mhux meħtieġ li din iż-żamma sseħħ bl-użu ta' apparat estern bħal ħbula, theddid, użu ta' armi jew restrizzjoni fiżika mis-suġġett attiv. Ir-reat iseħħ meta s-suġġett passiv ikun, f'dak il-mument – qasir kemm hu qasir - inkapaċi li jeżerċita l-liberu arbitriju tiegħu li jagħmel dak li jkun irid b'mod li jkun imqiegħed f'inkapaċita li jiċċaqlaq kif trid u jmur fejn trid.
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> 16. Allura biex jiġi integrat dan ir-reat ma jeħtieġx li jiġi pruvat twettieq ta' xi qerq jew vjolenza mis-suġġett attiv fuq is-suġġett passiv. L-anqas ma huwa meħtieġ li din l-azzjoni tas-suġġett attiv iddum għal xi ħin partikolari. Iżda żgur li jrid jiġi pruvat li kien

[4] *Vide* a fol. 41 and 42 of the records.
[5] A fol. 42 and 43 of the records.

> hemm xi forma ta' azzjoni jew inazzjoni mis-suġġett attiv fir-rigward tas-suġġett passiv li tirriżulta f'restrizzjoni jew kostrizzjoni psiko-fiżika - anke jekk għal ħin qasir ħafna - fuq il-liberta personali tal-moviment u l-azzjoni tas-suġġett passiv; u dan iseħħ fl-assenza ta' awtorità jew poter skont il-liġi minn naħa tas-suġġett attiv tar-reat.

25. It is clear in this case, that the deprivation of the personal liberty of the victim, in breach of Article 86 of the Criminal Code, took place throughout appellant's drive, irrespective of the fact that she had initially voluntarily entered the car due to the circumstances that she found herself in, from the moment that appellant refused to stop the vehicle despite Omissis's insistence that he stop driving, including the stage where she could not leave the vehicle due to appellant pulling her inside the said vehicle, against her will, as she attempted to leave the car. The fact that this incapacity on the part of the victim on account of appellant's actions was not protracted in time, does not exclude the offence under Article 86 of the said Code, and indeed, given the resulting facts in this regard, this Court finds that the first Court could have legally and reasonably found appellant guilty of the second charge proffered against him.

26. In respect of the third charge proffered against appellant, by means of which he has been accused of the crime of aggravated theft, appellant laments that the necessary elements of '*contrectatio'* and '*animo lucrandi*' on his part, for the crime of theft to subsist, do not result from the evidence tendered before the First Court. He argues that he drove the vehicle with Omissis's permission and later parked the car, leaving the keys inside.

27. It is clear from the evidence produced, however, that although initially appellant entered the car upon Omissis's request for assistance, once he had driven the car to the vicinity of Qawra church, he sped off with the said vehicle, despite Omissis's insistence that he exits the car. The said car was later found at a short distance from where Omissis had exited the said car, parked in front of a garage, with the key in the car's ignition. It further results that upon leaving Omissis stranded, appellant had not immediately parked the car in the place where it was subsequently found. Instead he drove on, and it was only at some subsequent stage, despite it being a short time later, seeing that PC 979 Daniel Mohr found the vehicle

parked whilst Omissis was still at the Police Station, that he parked the said vehicle where it was eventually found. Indeed, Omissis states as follows:

> ... while I was at the Police Station emm they told me they have found the car and then I went with the Police officers and I showed them exactly where it happened. I took them the entire route, told them exactly where it happened and they found the car parked a little bit further up which, which he hadn't stopped there because I saw him that he kept driving. So he didn't stop, where they eventually found it wasn't where he stopped it ...[6]

28. According to established jurisprudence of this Court, as differently presided – **Il-Pulizija vs Joseph Galea** dated 3rd September 2021, **Il-Pulizija vs Gianluca Carabott** dated 23rd June 2020, **Il-Pulizija vs Michael Daniel Xuereb** dated 19th February 2014, **Il-Pulizija vs Steve Spiteri, Clayton Cremona** dated 24th September 2009 - the Maltese Courts have adopted Francesco Carrara's definition of theft as comprising five elements which need to be sufficiently proven for a declaration of guilt. As held in **Il-Pulizija vs Gianluca Carabott**:

> Huwa fatt ben magħruf illi l-legislatur naqas milli jipprovdi definizzjoni tar-reat ta' serq fil-Kodici Kriminali. Huwa risaput ukoll illi l-qrati tagħha dejjem għamlu referenza għall-insenjament ta' ġuristi legali sabiex jisiltu definizzjoni ta' dan ir-reat u tal-elementi kostituttivi tiegħu, liema reat huwa mfisser mil-Kodici Penali Taljan bħala "*la contrattazzione doloza di cosa altrui fatta invito domine con l' animo di farne lucro*".
>
> …
>
> Kif inhuwa risaput, illi l-Qrati tagħna jiffavorixxu - u ormai huwa effettivament assodat fil-ġurisprudenza in materja - it-tagħlim tal Carrara in propositu tad-definizzjoni tal-*contrectatio*. Il-Carrara jħaddan it-teorija stretta tal-*amotio* li jekwipara l-*contrectatio* mas-**sempliċi caqlieq tal-oġġett mill-post li jkun fih, b'mod illi r-reat tas serq ikun komplut hekk kif ikun hemm it-tehid tal-oġġett ta' ħaddiehor mill-imputat, bl-intenzjoni li jisirqu**.

[6] A fol. 43 and 44 of the records of the proceedings.

Skont l-interpretazzjoni tal-Carrara tal-element tal-*contrectatio,* hekk kif ġiet rikonoxxuta wkoll statutorjament fil-liġi Ingliza:-

"*... the theft is complete so soon as the thief has laid hands on the thing which he intended to steal and has removed it with such intent from the place where the owner had put it.*"

Fil-fatt il-Professur Mamo fin-noti tiegħu, jiddefinixxi hekk dan l-element:-

"*This is the act of taking possession of a thing divesting the actual owner. 'Contrectatio' therefore represents the act of completion of the theft and all acts which precede it may, if all other conditions are satisfied, constitute an attempt*."

Il-Qorti tal-Appell Kriminali fis-sentenza fl-ismijiet **Il-Pulizija vs Jonathan Grech** deċiża fil-31 ta' Lulju 2008, irrapportat illi fir-rigward tal-*contrectatio*:-

"... jkun hemm dan l-element malli l-oġġett ikun ittieħed mill-post fejn ikun tħalla minn sidu w konsegwentement mhux meħtieg li l-oġġett ikun tneħħa mill-kamra jew mid-dar tas-sid."

29. When commenting on the position at common law as to when the offence of theft is considered completed, Professor Sir Anthony Mamo states that English law is in accordance with Carrara's doctrine of theft as completed when there is displacement of the object from the place where the owner leaves it (provided all other elements are satisfied):

> "..yet the asportation or carrying away – which together with the taking is essential – is satisfied by the **slightest removal of the thing from the place which it occupies and this, even though the thief at once abandon the thing.** Thus there is sufficient asportation in taking plate out of a chest and leaving it on the floor; or in shifting a bale from the back of a cart to the front, or in pulling a lady's earing from her ear, even though the earing be caught in her hair and remain in it**.**" [7] [emphasis of this Court]

[7] Notes on Criminal Law Vol. II, p. 275

30. The relevant position under Italian law is also that which contemplates the consummation of the offence of theft at the moment when the object belonging to another, passes into the direct control and possession, even if for a brief time interval, of the offender:

> Ai fini della consumazione del delitto di furto, e' sufficiente che la cosa sottratta sia passata, anche per breve tempo, sotto l'autonoma disponibilita' dell'agente.[8]

31. It therefore follows that even the slightest displacement of the vehicle, against the consent of its owner amounts to the asportation of the object, and the element of *contrectatio* subsists.

32. Furthermore, as held by this Court, differently presided, in its judgement **Il-Pulizija vs Martin Dimech; *Omissis*** dated 10th July 1998:

> Mill-kumpless tal-provi din il-Qorti hi sodisfatta li kien hemm l-elementi kollha għar-reat ta' serq tal-*Wild Turkey,* u ċjoe`: (i) l-impossessament ta' l-imsemmi *yacht*; (ii) li kien proprjeta` ta' ħaddieħor; (iii) bil-konsapevolezza fl-aġent li qed jieħu oġġett ta' ħaddieħor; u (iv) mingħajr il-kunsens tas-sid jew tal-posessur ta' l-istess oġġett; u finalment (v) bil-ħsieb ta' gwadann. Dan il-ħsieb ta' gwadann – *animus lucrandi* – fis-serq mhux neċessarjament ikun gwadann pekunjarju dovut għar-reċiklaġġ ta' l-oġġett misruq. Il-gwadann magħmul mill-użu tal-ħaġa huwa biżżejjed. Infatti dak li jissejjaħ *furto d'uso* hu *furto,* serq, fejn proprju l-gwadann hu magħmul jikkonsisti mill-użu, ankorke` temporanju, ta' l-oġġett (ara l-artikolu 288 tal-Kodiċi Kriminali). Biex tikkonkludi, din il-Qorti hi sodisfatta li l-appellant sempliċement abbuża mill-ħbiberija li kellu ma' Farrugia u qed jipprova jinqeda b'parti mill-offerta li kien għamillu Farrugia li jekk isib lil xi ħadd li jaf isuq il-*yacht* hu, Farrugia, kien lest li jħallih joħroġ bih ...

33. In respect of the element of *animo lucrandi,* in the judgement **Il-Pulizija vs Philianne Ceci u Jon Lawrence Formosa**, delivered by this Court, as differently presided, on 16th December 2021, it was held as follows:

[8] Cass. pen. n. 21757/2004 7th May 2004 Art. 624 codice penale - Furto - Brocardi.it accessed: 8th February 2025.

42. Fir-rigward ta' dan l-"animus lucrandi", il-Professur Mamo jispjega li l-intenzjoni tal-malviventi ma tridx tkun sempliċement li jieħu oġġett li ma jappartjenix lilu iżda li jieħu dan l-oġġett sabiex jagħmel gwadann minnu u dan anki jekk effettivament ma jkunx irnexxilu fil-ħsieb tiegħu li jagħmel dan il-gwadann:

The intentional element in this crime is not constituted by the mere intent to take but also by the intention to make a gain. The special malice of theft consists in the intent to procure a benefit or satisfaction whatever from the thing belonging to others (lucri causa). Thus 'lucrum' in this connection does not mean an actual gain or profit in terms of money but any advantage or satisfaction procured to one's self. Therefore, even a person who steals intending to make a gift to others of the thing stolen will be guilty of theft, the gain consisting in the pleasure of making a gift. Similarly, a person who steals a work of art to complete a collection and for the pleasure of possessing it. Indeed, the crime could subsist even if the thief leaves in the place of the thing stolen another thing of equal value or its work in money.

43. Fil-kawża **Il-Pulizija vs. John Galea et**, l-Imħallef Joseph Galea Debono jiċċita lil diversi awturi fuq dan il-kunċett ta' 'animus lucrandi':

L-element intenzjonali ta' dan ir-reat ma jikkonsistix biss fl-intenzjoni li wiehed jiehu l-oggett, imma ukoll li dan isir bl-intenzjoni li jsir xi qliegh. Kif jghid il CARRARA [op.cit. Vol. IV, para. 2035
"il dolo specifico del furto consiste nell'intenzione di procurarsi un godimento o piacere qualunque coll'uso della cosa altrui." u "per lucro qui non s'intende un' effettiva locupletazione ma qualsiasi vantaggio o soddisfazione procurata a se stesso."

U l-CRIVELLARI jghid :-
"L'elemento intenzionale nel furto non si costruisce gia' col solo animo di prendere ma coll'animo di lucrare.

Il-Professur Sir Anthony Mamo [Notes on Criminal Law , 1958 , Vol. II , p. 305] jispjega hekk :-

> "The special malice of theft consists in the intent to procure a benefit or satisfaction whatever from the thing belonging to others (lucri causa). Thus "lucrum" in this connection does not mean an actual gain or profit in terms of money but any advantage or satisfaction procured to one's self …"
>
> u l-MAINO fil-"Commento al Codice Penale" Libro II , Titolo X , para. 1843 jghid :-
>
> "il profitto ...deve intendersi cosi' nel senso di lucro potenziale e possibile e di lucro non soltanto materiale , ma nell'ampio senso della parola."
>
> u aktar ' isfel :- ""...per lucro o profitto nel furto si intende non soltanto il lucro borsuale che puo ritrarsi dalla cosa rubata vendendola , oppure un effettivo aumento del patrimonio del ladro, ma qualunque godimento o piacere, qualunque sodisfazione procurata a se stesso."
>
> Umbaghad il-CASSAZIONE ta' Ruma ukoll irriteniet li :- "Per lucro va inteso qualsiasi vantaggio illecito che si tragga o si proponga di trarre materialmente dalla cosa rubata." [21, Novembre , 1916 - Bollett Pen. 1917 , p..140]

34. In the present case, no evidence was adduced by the Prosecution to indicate that appellant had the intention of procuring any monetary or material gain from his actions. However, the victim was clear in insisting that she had implored appellant to get out of her car and yet, he sped off with it against her express consent, after having pulled up the window to prevent her from obtaining the key. Appellant did not merely drive further up from where he had left Omissis, but drove the car for some time, even if briefly, until he abandoned it not far off from where he had sped off away from the victim. It is clear that appellant derived some form of satisfaction in departing with the car against the victim's consent, even if merely for the sake of briefly abandoning the site, where he had left her. This form of satisfaction amounts to the *animo lucrandi*. Therefore, contrary to what appellant maintains, all the elements of the offence of theft subsist, and the First Court could have legally and reasonably found appellant guilty of the third charge as proffered against him.

35. In terms of the fourth charge, appellant has been charged with the offence of involuntary damage in terms of Article 328(d) of the Criminal Code, which refers to "*Whosoever, through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, shall cause any fire or any damage, spoil or injury as mentioned in this Sub-title*", in this case to the vehicle driven by the victim. As stated above, the First Court found appellant guilty also of this charge. In this regard, this Court deems appellant's grievance to be justified. Although Omissis testifies as to the nature of the damages found on the vehicle, after it had been abandoned by appellant, from the evidence tendered it may only be assumed that such damages had been caused through the imprudence, the negligence or the non-observance of any regulation on the part of appellant. Despite the fact that appellant was drunk, as he states in his statement, or the fact that he seemed confused, as recounted by PC 979 Daniel Mohr, there is no evidence indicating the manner in which the damage to the car had been caused. Furthermore, the anonymous phone call received at the Police Station to the effect that a male making use of vehicle ABN596 in Triq it-Turisti, appeared to be of danger to the public – "*li bil-mod kif kien jidher seta' kien ta' periklu ghal pubbliku*"[9] - cannot be deemed to be admissable evidence of dangerous or erratic driving on the part of appellant, since the caller was never identified and clearly did not testify on oath about the manner or the stage in which appellant appeared to be of such danger.

36. Thus, this Court deems that the Court of Magistrates could not have legally and reasonably reached a conclusion of guilt in respect of the fourth charge, thereby, upholding appellant's grievance in this regard.

37. The third and last grievance put forth by appellant relates to the punishment inflicted by the Court of Magistrates (Malta) on the grounds that, in his opinion, the term of imprisonment of four years is excessive and disproportionate to the circumstances of the case, despite it being within the parameters of the law. He further argues that he has a clean criminal record. Furthermore, appellant submits that the Courts have

[9] *Vide* a fol. 12 of the records.

consistently emphasised punishment as a means of rehabilitation rather than deterrance.

38. In this respect, the Court refers to the judgement delivered by the Court of Criminal Appeal on 24th April 2003, in the names **Ir-Repubblika ta' Malta vs Eleno sive Lino Bezzina**, wherein the Court stated as follows:

> ... din il-Qorti taghmel referenza ghall-kawza fl-ismijiet "**Ir-Repubblika ta' Malta vs David Vella**" deciza fl-14 ta' Gunju, 1999 fejn din il-Qorti kienet qalet illi:-
>
> *"Mhux normali pero`, li tigi disturbata d-diskrezzjoni ta' l-Ewwel Qorti jekk il-piena nflitta tkun tidhol fil-parametri tal-ligi u ma jkun hemm xejn x'jindika li kellha tkun inqas minn dak li tkun fil-fatt"*

Furthermore in the judgement dated 25th August 2005 in the names **The Republic of Malta vs Kandemir Meryem Bilgum and Kucuk Melek**, the Court of Criminal Appeal referred to *Blackstone's Criminal Practice 2004* on this matter, whilst reiterating that this is the position consistently adopted by the Court of Criminal Appeal, both in its superior and in its inferior jurisdiction:

> "***The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will…be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '…that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle."***

> ***Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed.***"[10]

Furthermore, reference is made to the judgement delivered by the Court of Criminal Appeal in the names **Ir-Repubblika ta' Malta vs Carmen Butler** of 26th February 2009, where the Court held as follows:

> … meta jkun hemm sentenza li tigi appellata mill-hati, il-Qorti tal-Appell Kriminali, bhala regola, ma tiddisturbax il-piena erogata mill-ewwel qorti sakemm dik il-piena ma tkunx manifestament sproporzjonata jew sakemm ma jirrizultax li l-ewwel qorti tkun naqset milli taghti importanza lil xi aspett partikolari tal-kaz (u anke, possibilment, lil xi cirkostanza sussegwenti ghas-sentenza ta' l-ewwel qorti) li kien jincidi b'mod partikolari fuq il-piena. S'intendi, kif diga` nghad, "sentencing is an art rather than a science" u wiehed ma jistax jippretendi xi precizjoni matematika jew identita` perfetta fit-tqabbil tal-fatti ta' kaz ma' iehor jew tal-piena erogata f'kaz ma' dik erogata f'kaz iehor. [emphasis of this Court]

39. In this case, the Court of Magistrates (Malta), in considering the appropriate punishment to be meted out, gave due consideration to appellant's clean criminal record and that this did not attest to any criminal conviction during his time in Malta. It further considered that in terms of Article 280(1) of the Criminal Code, the punishment could not be given in the minimum.

[10] Page 1695, para. D23.45

40. The punishment imposed by the First Court was clearly close to the minimum prescribed by law. Indeed, the punishment prescribed in Article 207 of the Criminal Code, for the first charge, is that of imprisonment for a term from three to seven years. To this one must add the punishment prescribed for the third charge of aggravated theft, which in terms of Article 279(a) of the Criminal Code is that of imprisonment for a term from five months to three years, which by application of Article 280(1) shall not be awarded in the minimum. This means, in terms of Article 20 of the Criminal Code, that the minimum punishment applicable in this case is 10.33 months. By application of Article 17(b) of the Criminal Code, this latter punishment must be decreased from one-third to one-half, namely, to 6.87 months (by one-third) or to 5.165 months (by one-half), and the maximum punishment applicable is that of 24 months (decreased by one-third) or 18 months (decreased by one-half). Appellant has also been found guilty of the crime under Article 86 of the Criminal Code, which prescribes a punishment of imprisonment for a term from seven months to two years, provided that the Court may, in minor cases, award imprisonment for a term from one to three months or a fine (*multa*). In the present case, although part of the acts which gave rise to the offence under Article 86 of the said Code may be deemed to have been designed for the commission of the offence under Article 207 of the Criminal Code, this was not the case when appellant constrained Omissis to remain in the car near Qawra church, and thus, the punishment under the said Article 86 must be added. Considering this as a minor case, and by application of Article 17(b) of the Criminal Code, the punishment applicable is that of imprisonment for a term from 20 days (deducted by one-third) or fifteen days (deducted by one-half) to two months (deducted by one-third) or one and a half months (deducted by one-half), or a fine (*multa*).

41. Considering, however, that this Court shall not be confirming the judgement of the First Court in so far as appellant was found guilty of the offence under Article 328(d) of the Criminal Code (the fourth charge proffered against him), the punishment awarded by the said Court shall be revisited. The Court notes that the punishment prescribed under Article 328(d) of the said Code is that of imprisonment for a term not exceeding three months or to a fine (*multa*) or to the punishments established for contraventions. Considering the provisions of Article 17(b) of the

Criminal Code, the Court shall deduct two months from the punishment inflicted by the First Court.

DECIDE

Thus in view of the above considerations, the Court accedes partly to the appeal filed by appellant **Jeffry VARGHESE** and reforms the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature, so that whilst it confirms it in so far as it found appellant guilty of the first, second and third charges proffered against him, it revokes that part of the judgement where the First Court found appellant guilty of the fourth charge and where it condemned him to a punishment for a term of four (4) years imprisonment, and instead, condemns him to a punishment of forty-six (46) months imprisonment, from which term one must deduct the period of time during which appellant has been kept in preventive custody in connection with the present case.

Save for the above, the Court confirms the remaining parts of the judgement of the Court of Magistrates (Malta).

(Sgn) Natasha Galea Sciberras
Judge

True Copy

Joyce Agius
Deputy Registrar