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

Appeal Number: 8980/2023

The Republic of Malta

vs

Dawid Pawel PARUZEL

Today, 28th May 2025

The Court:

Having seen the following:

A. THE CHARGES

1. This is an appeal of the Attorney General from a judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 25th April 2024 against **Dawid Pawel PARUZEL**, 29 years of age, born in Bielsko-Biala, Poland on 1st March 1994 and residing at 433, Rue D'Argens, Gżira, bearer of Polish Passport number FB8822794, after having been charged on behalf of the Republic of Malta with having:

   On the 16th November 2023, between seven in the morning (07:00am) and ten in the morning (10:00am), in Welbees Supermarket, Old Railway Track Road, Santa Venera and/or elsewhere in these Islands:

1. With the intent of committing a crime, manifested such intent by overt acts which were followed by a commencement of execution of the crime, which crime was not completed in consequence of some accidental cause independent of his will and if it had been completed such crime would have been the crime of theft, which theft would have been aggravated by amount, which amount of the things stolen does not exceed two thousand and three hundred and twenty nine euros and thirty seven cents (€2,329.37) and this was done to the detriment of Welbees Supermarket and/or any other person/s and or any other entity and/or other entities and this in violation of Articles 41(1)(a), 261(c), 267 and 279(a) of Chapter 9 of the Laws of Malta;

2. Committed an offence, punishable with imprisonment, during the operational period of a suspended sentence that was given to him on 15th November 2023 by the Court of Magistrates (Malta) presided by Magistrate Dr. Caroline Farrugia Frendo LL.D., in violation of Article 28B of Chapter 9 of the Laws of Malta;

3. And furthermore when not being in possession of property of any kind, and having no other means of subsistence, failed to show that he has habitually endeavoured to engage in or exercise some art, trade or other occupation, in violation of Article 338(i) of Chapter 9 of the Laws of Malta.

The Court was requested to consider Dawid Pawel PARUZEL as a recidivist, in case of guilt, by virtue of a sentence that has become *res judicata*, in terms of Articles 49, 50 and 289 of Chapter 9 of the Laws of Malta.

In case of guilt, the Court was requested to apply against the offender, the provisions of Article 15A of the Criminal Code, and this, in addition to inflicting the penalty or penalties established by law.

The Court was also requested to apply Articles 532B and 533 of Chapter 9 of the Laws of Malta with regards to the expenses incurred by the Court appointed experts.

B. THE APPEALED JUDGMENT

2. By means of the above-mentioned judgement, the Court of Magistrates (Malta) as a Court of Criminal Judicature, declared the accused (today, the respondent) not guilty of all the charges brought against him and acquitted him thereof.

C. THE APPEAL

3. The Attorney General appealed from the judgement delivered by the Court of Magistrates (Malta) whereby this Court was requested "..*to vary the judgment appealed in meaning that:*

   i) It confirms that part of the judgment where it found the defendant not guilty of the third charge;

   ii) It varies that part of the judgment where the defendant was found not guilty of the first and second charge, and also the charge of recidivism, and instead it finds the defendant guilty of the first and second charge, and also the charge of recidivism and imposes a punishment according to law."

D. SUBMISSIONS BY THE PARTIES

4. The Court heard the Attorney General's submissions during the hearing held on 29th January 2025. During the hearing held on 10th March 2025, the Court heard oral submissions by legal aid counsel, Dr. Josette Sultana for the respondent.

E. THE CONSIDERATIONS OF THIS COURT

5. It transpires from the records of these proceedings that on 16th November 2023, at around 09:00hrs, a report was lodged at the Ħamrun Police Station in connection with an attempted theft of whiskey bottles, from Welbees Supermarket, situated in Santa Venera. The supermarket's

personnel, who lodged the report, were on duty at the said supermarket at the time and held the suspect, namely the respondent **PARUZEL**, from leaving the premises. Police officers from the Rapid Intervention Unit were dispatched on site and arrested respondent.

6. It further transpires that respondent was administered his rights at law and after consulting with legal aid lawyer, Dr. Mark Mifsud Cutajar, he released a statement to the Police, which he also chose to sign. Subsequently, on 17th November 2023 **PARUZEL** was arraigned under arrest before the Court of Magistrates (Malta) and as held above, by means of a judgement delivered on 25th April 2024, the said Court acquitted him of all the charges brought against him. The Attorney General proceeded to appeal from the said judgement.

7. In the first and second grievances, which may be deemed as one grievance, the Attorney General disputes the decision of the Court of Magistrates (Malta) to acquit respondent **PARUZEL** of the attempted offence of aggravated theft on the ground that the said judgement consists of a wrongul appreciation of the evidence adduced and the resulting facts. According to the Attorney General, the First Court completely ignored important evidence and relied on irrelevant facts in acquitting respondent. The Attorney General maintains *inter alia* that the Court of Magistrates (Malta) erroneously failed to appreciate that the mere handling and displacement of the whiskey bottles from the shelves of the said supermarket by respondent, with the intention of appropriating himself thereof, was sufficient for the finding of guilt of the offence of attempted theft, even if respondent failed to completely execute his plan. The Attorney General refers *inter alia* to the statement released by respondent, wherein he admits to having tried to steal the said whiskey bottles, to the CCTV footage exhibited in the records of the proceedings, and to the testimonies of Jason Friggieri and Aidan Micallef respectively, both employees at the said supermarket, and other circumstantial evidence, which according to the Attorney General, points in one direction, namely to the guilt of respondent. The Attorney General thus maintains that the elements of the attempted offence of aggravated theft have been sufficiently proved. Furthermore, and consequently, in his third and

fourth grievances, the Attorney General holds that the respondent should have been also found guilty of the second charge and of being a recidivist.

8. It is clear to this Court therefore that the Attorney General's appeal refers solely to the First Court's wrongful appreciation of the facts and evidence adduced. The First Court's considerations regarding the first charge brought against the respondent were as follows:

> That various employees of the Supermarket who testified, stated that the accused was seen through CCTV footage allegedly putting 10 Whiskey bottles in his haversack, and when he noticed that he was being watched, he put them back on the shelf before he proceeded to the counter with 2 wine bottles. When he was asked for payment for these wine bottles, he proceeded to inform the cashier that he did not have the money to pay for them, and that he needed to phone his mother to come and settle the bill.
>
> The employee that was walking close to where the accused was, at the time that the accused was allegedly stealing, stated that he did not actually see the accused put the bottles in the haversack, or take them out of the haversack and put them back on the pellet, and neither did the same employee speak to the accused to warn him or inform him that he saw him stealing.
>
> That the haversack belonging to the accused was not searched at this point in time, and the search was only carried out when the accused was kept temporarily in the Management Office of the supermarket until the Police arrived. During this search, no whiskey bottles were found in the haversack.
>
> That although security footage was presented by the Prosecution showing the accused in front of a row of bottles and clearly showing a black haversack, the footage does not clearly show the accused putting the bottles in the haversack and then back again on the shelf. Hence the **first (1) and second (2) charge being brought against the accused cannot be proven beyond reasonable doubt.**

9. As held above, the Attorney General disputes the conclusion reached by the Court of Magistrates on the basis that sufficient evidence was adduced by the Prosecution to find the respondent guilty as charged. This is not merely evident from the content of the Attorney General's appeal application, but also from the headings of the first and second grievances respectively, namely, '*Misappreciation of Evidence and Facts*' and '*The Elements of Attempted Theft have been sufficiently proven*'.

10. This Court notes that the attempted crime in the first charge brought against the accused is one, which in terms of Articles 41(1)(a) and 279 of the Criminal Code, is punishable, at most, with imprisonment of two years and thus, in terms of Article 370(1)(b) of the Criminal Code, is cognizable by the Court of Magistrates as a Court of Criminal Judicature. Consequently, in terms of Article 413 of the said Code, the judgement delivered in this case by the said Court, being one "*relating to summary proceedings for offences within the jurisdiction of the Court of Magistrates as a Court of Criminal Judicature under article 370(1)*", could only be appealed from by the Attorney General in the instances laid down in Article 413(1)(b)(iv), namely:

> The accused or defendant is acquitted on the ground –
> (i) that the fact does not contain the ingredients of an offence,
> (ii) of extinguishment of action,
> (iii) of a previous conviction or acquittal;

11. It is clear that (ii) and (iii) do not apply in this case. The Court here refers to the judgement delivered by this Court, differently presided, on 3rd April 2025, in the names **Il-Pulizija vs Pauline Marie Chetcuti**, in which ample reference was made to this Court's jurisprudence on the right of the Attorney General to appeal in terms of Article 413(b)(iv)(i) of the Criminal Code. Hence, the said Court referred to the judgement **Il-Pulizija vs Wayne Lee Mario Cassar**, decided by this Court differently presided on 28th July 2023, wherein it was held as follows:

> Illi imbagħad is-sub-inċiż (1)(b)(iv) għall-Artikolu 413 jindika illi l-Avukat Ġenerali jista' jappella minn sentenza tal-Qorti tal-Maġistrati f'dawk il-każijiet li ma jġorrux piena ta' aktar minn

sentejn priġunerija, jew li huma punibbli permezz ta' multa jew ammenda, u li allura jaqgħu taħt il-kompetenza oriġinali tal-Qorti, f'każ li l-imputat ikun illiberat unikament meta jikkonkorru xi waħda mit-tlett ċirkostanzi hemmhekk ravviżati, u ċioè illi l-fatt ma jkunx fih l-ingredjenti ta' reat, l-azzjoni tkun estinta, jew ikun hemm sejbien ta' ħtija jew liberazzjoni preċedenti.

Illi huwa pależi illi l-appell intentat mill-Avukat Ġenerali ma jinkwadrax ruħu fl-aħħar żewġ istanzi indikati u allura l-Qorti tifhem illi l-appell ntentat jista' biss jkun ikkunsidrat li jaqa' taħt dak dispost fis-sub-inċiż (1)(b)(iv)(i) u ċioe' illi "*il-fatt ma jkunx fih l-ingredjenti ta' reat*".

Illi minn qari tal-aggravji mqanqla mill-Avukat Ġenerali huwa evidenti illi l-ilment ewlieni jistrieħ fuq il-fatt illi l Ewwel Qorti meta ġiet biex tagħmel apprezzament tal-provi erronjament qieset illi l-aħjar prova li l-każ kien jagħti kellu jkun il-kuntratt lokatizju u allura li kienet żbaljata meta qieset illi l-provi l-oħra li kien hemm fl-atti ma kinux biżżejjed sabiex setgħet issib ħtija fl-appellat, lil hinn minn kull dubbju dettat mir-raġuni.

Illi hija l-fehma tal-Qorti għalhekk illi l-appell tal-Avukat Ġenerali jaġġira ruħu unikament madwar l apprezzament tal-provi li sar mill-Ewwel Qorti li waslet biex tillibera lill-appellat għaliex qieset illi l-provi li kien hemm fl-atti ma kienux biżżejjed b'saħħithom biex jistabbilixxu illi l-appellat fil-fatt kien sid il-kera u allura seta' kien is-suġġett attiv tar-reat. L-Ewwel Qorti ma wasslitx għal liberatorja minħabba xi "*error iuris*" u allura għaliex il-fatt ma kienx jikkostitwixxi l-ingredjent tar-reat.

Illi l-ġurisprudenza kostanti u paċifika tal-qrati tagħna fissret hekk dan il-jedd ta' appell ta' l-Avukat Ġenerali. Fis-sentenza fl-ismijiet "Il-Pulizija vs. Antonio Caruana"[1] ġie ritenut illi –

> **"B'liġi l-Attorney General ma jistax jappella dejjem, imma biss f'ċerti każijiet speċifikat mil-liġi stess. Wieħed minn dawn il-każijiet hu dak li fih il-maġistrat ikun illibera għaliex ikun irritjena li ma kienux jikkonkorru fil-fatt il-kostituttivi tar-reat.**

[1] "Qorti tal-Appell Kriminali, deċiża nhar il-31 ta' Ottubru 1953."

Għal raġunijiet kemm il-darba spjegati fil-ġurisprudenza, dan il-każ ġie dejjem limitat għal meta l-Maġistrat, bla ma jkun daħal fl-eżami tal-fatti tal-kawża, ikun iddikjara li l-fatt "kif-dedott" (apparti mill-provi, u għalhekk mhux il-fatt kif pruvat) ma jikkostitwixxix reat. Sussegwentement, il-ġurisprudenza, ormaj paċifika, estendiet l-interpretazzjoni ta' dan il-każ li fih l-Attorney General jista' jappella billi nkludiet fih anki l-każ meta l-Maġistrat ikun applika għall-fatti enunċjazzjoni żbaljata jew inkompleta tar-rekwiżiti tar-reat, għaliex intqal li l-appell ikun allura fuq punt ta' dritt."

Illi l-kompjant Imħallef William Harding, fil-ktieb tiegħu ntitolat "Recent Criminal Cases Annotated" jgħid li –

"The Attorney General may enter an appeal, *inter alia*, whenever the party accused has been acquitted on the ground that the fact does not contain the ingredients of an offence. The word "fact" in this provision had at all times been held to mean the fact as contained in the charge apart from the evidence, and not the fact as it subsequently appears from the evidence. If the Magistrates acquits the accused because the fact is not proved, or because the fact, as it appears from the evidence, does not amount to an offence, then no appeal lies. An appeal will lie if the Magistrate, considering the fact solely and simply as contained in the charge, apart from the evidence, has come to the conclusion that that fact does not constitute an offence. In effect, this means that on a question of fact no appeal lies, but an appeal will lie on a question of Law.

An appeal will also lie – under the provision afore quoted if the Magistrate, after hearing and weighing the evidence, has, in applying the Law to the fact as proved, made a wrong interpretation of construction of the Law. In any such case, although

the Court below has considered the fact as proved, still in as much as a wrong construction of the Law has been made, the question raised on appeal is, in reality, a question of Law.

For the purpose of examining whether a judgement be subject to appeal or not, in accordance with the aforesaid rules, it is essential to look more at the substance of the judgements than at the words which the Magistrate may have used, not always, perhaps, with the denied accuracy.[2]"

Illi, ukoll fis-sentenza fl-ismijiet "Il-Pulizija vs. Gaetano Cuschieri et" deċiża minn dina l-Qorti diversament preseduta nhar il-25 t'Ottubru 1984 ġie ritenut li –

"Fil-fatt jiġi ribadit dak li ormai għandu jkun jaf kulħadd li biż-żmien din il-Qorti u qabilha l-Qorti Kriminali (Sede Appell) kienu estendew il-każ fejn il-Maġistrat ikun illibera lill-imputat għaliex ikun irritjena li ma kinux jirrikorru fil-fatt il-kostituttivi tar-reat biex jinkludi fih ukoll il-każ meta l-Maġistrat ikun applika għal fatt enunzjazzjoni żbaljata jew inkompleta tar-rekwiżiti tar-reat. B'ġurisprudenza kostanti għalhekk ġie konċess ukoll id-dritt ta' l-appell lill-Avukat Ġenerali anke f'dan il-każ għax kif tant tajjeb spjegat fis-sentenza in re Pol. vs A. Caruana, mogħtija minn din il-Qorti fil-31 ta' Ottubru, 1953, l-appell ikun allura fuq punt ta' dritt. Però għandu jiġi mfakkar illi fl-applikazzjoni ta' dan il-prinċipju dawn il-Qrati dejjem addottaw linja dritta u inekwivoka ta' raġunament li assikurat li ma jsirx tiġbid ta' argumenti mill-Avukat Ġenerali biex jottjeni dritt ta' appell meta ma għandux u għalhekk dejjem għamlitha ċara din il-Qorti li dak li trid tara hi s-sustanza tas-sentenza fil-kumpless tagħha u jekk essenzjalment il-bażi tkun verament apprezzament

[2] "Paġna 64, kif anke ċitata minn din il-Qorti diversament presjeduta fl-appell kriminali fl-ismijiet "**Il-Pulizija vs. Joseph Ellul Sullivan et**", deċiza nhar id-29 ta' Novembru 1982."

ta' fatti ma jingħatax lill-Avukat Ġenerali d-dritt ta' Appell. Ir-raġuni hi ovvja u ċjoè għaliex ma għandux jintuża hawn qed nitkellem mhux fuq dritt ġdid ta' appell imma fuq estensjoni tal-massima li l-Avukat Ġenerali għandu dritt ta' appell meta l-Maġistrat ikun illibera għax ikun irritjena li ma kinux jirrikorru fil-fatt il kostituttivi tar-reat.

Illi dan kollu din il-Qorti qalitu mhux għax kien hemm xi parti minnu li s'issa ma kienitx ċara iżda għax l-allegata enunzjazzjoni żbaljata jew inkompleta li l-Avukat Ġenerali qed jimputa li kien hemm fis-sentenza meritu ta' l-appell odjern din il-Qorti sempliċiment ma tistax taraha. Fil-fatt anzi hu bl-iktar mod ċar li fis-sentenza appellata ma hemm assolutament ebda enunċjazzjoni ta' liġi u għalhekk ma jistax jiġi ssostitwit dak li qed jiġi allegat.

Fil-fatt l-għaref Avukat Ġenerali qed jallega illi l-Ewwel Qorti għamlet distinzjoni bejn dak li "ma irriżulta b'ebda mod ippruvat" u dak li "ma rriżultax sodisfaċentement ippruvat stante konflitt fil-provi" u din hi distinzjoni li ma għandha ebda fundament fil-liġi. L-appellant fil-fatt qed jikkontendi illi l-grad ta' prova rikjest mill-prosekuzzjoni skont il-liġi huwa wieħed u uniku u ċjoé l prova "Mingħajr dubbju raġonevoli". L appellant ikompli ukoll jargumenta illi: "Il-Liġi ma tirrikjedix li l-prosekuzzjoni għandha tipprova l-każ tagħha "sodisfaċentement". Dan hu grad ta' prova li mhux magħruf fis-sistema penali Malti u huwa priv minn kull sinifikat. Inoltre, l-"konflitt fil-provi" ma jwassalx, kif irriteniet l-Ewwel Qorti għall-konsegwenza li l-prosekuzzjoni ma jirnexxilhiex tipprova l-akkużi skont il-liġi. Il-konflitt fil-provi huwa parti integrali mill-proċess kriminali u l-apprezzament ta' tali konflitt mill-ġudikant jifforma parti mill-eżerċizzju li hu mistenni jagħmel fir-riċerka tal-verità. Il-ġudikant ma jistax jagħmel, bħal ma għamlet l-Ewwel Qorti,

li appena jidhirlu li hemm konflitt fil-provi allura jasal għall konklużjoni li r-reati ma rriżultawx. Fil-każ ta' tali konflitt iżda, jispetta lill-ġudikant li jagħmel l-apprezzament tal-provi ggwidat mill-kriterji tal-liġi stess (ara artikoli 633 u 634 tal-Kodiċi Kriminali) u jiddeċiedi skont ir-regoli tal-liġi liema provi għandu joqgħod fuqhom u liema provi għandu jiskarta. Dan l-eżerċizzju ma sarx mill-Ewwel Qorti li kull ma għamlet hu li appena dehirlha li rriskontrat konflitt fil-provi waslet għall-konklużjoni li r-reat ma ġiex ippruvat".

Illi fuq dawn is-sottomissjonijiet kollha din il-Qorti għamlet il-konsiderazzjonijiet tagħha u hi tal-fehma opinjoni li n-nullita' eċċepita għall-appell ta' l-Avukat Ġenerali hi inekwivokalment fondata u radikata. Infatti mhux biss ċerti asserzjonijiet indikati huma totalment gratuwiti iżda din il-Qorti tinsab kompletament konvinta li anke jekk kellha tagħti valur assolut li s-sottomissjonijiet ta' natura legali li għamel l-appellant xorta trid neċessarjament tasal għall-unika konklużjoni li tista' raġonevolment tiġi raġġunta u ċjoè li fis-sentenza appellata hemm biss apprezzament ta' fatt u xejn iżjed. U mhux korrett dak li sostna l-appellant li fis-sentenza hemm anke minimament xi indikazzjoni li l-Ewwel Qorti ttrattat il-każ leġġerment u għamlet apprezzament tal-fatti superfiċjalment biss. L-apprezzament sar u jekk l-Avukat Ġenerali ma jaqbilx miegħu ma jfissirx li b'daqshekk ottjena dritt ta' appell meta ma għandux anke jekk l-istess appellant iħossu konvint li ma jistax jaqbel ma' dak l apprezzament. L-istess liġi ma ttihx dritt ta' appell f'każijiet bħal dan u għalhekk ma baqgħalha xejn din il-Qorti ħlief li takkolji l-eċċezzjoni tan-nullità tal-appell."

Illi, similment fil-kawża fl-ismijiet "Il-Pulizija vs. Giorgia Zammit", kien deċiż hekk dwar l-interpretazzjoni li għandha tingħata lil dan is-sub-inċiż tal-liġi u d-diċitura adoperata illi l-"Fatt" ma jkunx jikkostistwixxi reat:–

> **".... Il-fatti jistgħu jkunu dawk imputati u jistgħu jkunu dawk li jirriżultaw. Fl-ewwel każ hu prospettat il-każ fejn il-Qorti bla ma tisma prova tiddeċiedi li l-fatt imputat ma fihx l-elementi ta' reat u allura hemm l-appell tal Avukat Ġenerali u dan ikun purament appell fuq punt ta' dritt. Similment jekk wara li jinstemgħu l-fatti tiġi applikata ħażin il-liġi ikun propjament qed jiġi deċiż li l-fatti ma jikkostitwux reat mhux għax neċessarjament hu hekk iżda għax tkun saret enunzjazzjoni żbaljata jew inkompleta tal-liġi. F'dan il-każ l-appell hu mogħti lill-Avukat Ġenerali jekk veru jkun sar dan l-*error juris* biss u l-fatti fil fatt jistennew l-eżitu ta' din il-kwistjoni."**
>
> Illi, ifisser għalhekk illi jkun ammissibbli appell f'żewġ każijiet biss, "**jiġifieri meta l-Maġistrat ikun waqaf fil-fatt kif dedott, apparti l-provi, u ddikjarah mhux reat, jew inkella meta jkun daħal fil-provi, imma jkun applika għall-fatti riżultati interpretazzjoni ħażina tal liġi.**""

12. Given the principles enunciated above, which it fully embraces, this Court once again refers to the fact, stated above, that the Attorney General's appeal application is limited to the wrongful appreciation of the evidence adduced before the First Court. Indeed, although the Attorney General raises the issue that in this case, the respondent was charged with attempted theft and not with the completed crime, stating therefore that it was not necessary for the respondent to be apprehended with the whiskey bottles in his haversack for a finding of guilt of attempted theft, this Court notes that the First Court decided that the resulting evidence was not sufficient for a finding of guilt beyond any reasonable doubt, erroneously reaching the conclusion that it had not even been proved that the accused had placed the whiskey bottles in his backpack and then back again on the shelving. The Court of Magistrates did not wrongfully apply the law by considering that the attempted crime did not take place on the basis that the respondent had not actually taken the whiskey bottles in his backpack. This was merely one of the considerations of the Court in concluding that there was not sufficient proof that the attempted theft had been committed. Indeed, apart from considering that no whiskey bottles had been found in

respondent's backpack when he was searched, the Court also considered that none of the employees had seen the respondent placing the whiskey bottles in his backpack or back on the shelving and that the security footage exhibited by the Prosecution did not clearly show the respondent doing so. Thus, there was no wrongful interpretation of the law by the Court of Magistrates, but merely a wrongful evaluation of the evidence brought forward, having clearly ignored the respondent's statement altogether, as well as having failed to see that which could clearly be seen from the footage exhibited by the Prosecution. The appealed judgement merely evaluated the facts, albeit wrongly. Indeed, the Attorney General's appeal merely contests the First Court's analysis of the evidence adduced and points out that evidence which could have led that Court to a finding of guilt. However, the fact that the Attorney General does not agree with the evaluation carried out by the Court of Magistrates does not give him the right to appeal, once the law precludes him from so doing.

13. As held in the jurisprudence above quoted, once the Court of Magistrates acquitted the respondent because the fact was not proved, no appeal lies on the part of the Attorney General.

DECIDE

For these reasons, the Court raises *ex officio* the nullity of the appeal filed by the Attorney General, declares the said appeal null and abstains from taking any further cognizance thereof.

Natasha Galea Sciberras
Judge