



MALTA

**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.
GABRIELLA VELLA**

Sitting of the 22 nd July, 2014

Number. 1324/2012

Police

**(Inspector Victor Aquilina
Inspector Jeanne Farrugia)**

Vs

Omissis

Omissis

Sherif Said Mohamed Osman El Sherif

The Court,

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After having considered the charges brought against Sherif Said Mohamed Osman El Sherif, thirty two (32) years of age, son of Said and Hamda Salama, born in Kalubia, Egypt, on the 10th October 1980 and residing at “Bruce Court” Flat 1, Mensija Street, St. Julian’s, holder of Egyptian Passport No. 5037010 and of Maltese Identity Card No. 47714(A), of having on the 14th December 2012 and during the previous period from this date on these Islands, committed several acts, even if at different times, which constitute violations of the same provision of the law and are committed in pursuance of the same, which acts shall be deemed to be a single offence, called a continuous offence:

1. Conspired with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta;
2. Counterfeited any seal, stamp or other mark used for sealing, stamping, marking, authenticating or certifying, in the name of the Government or of any of the authorities thereof, documents or effects, whether public or private property, or which are under the public guarantee;
3. Knowingly in order to gain any advantage or benefit for himself or others, made a false declaration or statement, or gave false information in any document intended for any public authority;
4. Received a passport transferred to him by any other person;
5. Altered or tampered with any passport or used or had in his possession any passport which he knows to be forged, altered or tampered with (rubber stamp);
6. Forged any document or true copy of a document or an entry made in pursuance of the Immigration Act.

After having heard the accused plead that he is not guilty of the charges brought against him;

After having seen the Articles issued by the Attorney General dated 23rd January 2013 whereby in view of the fact that from the preliminary investigation held by the Court of Magistrates (Malta) as a Court of Criminal Inquiry it transpired that there might result an offence or offences under Sections 17, 18, 23, 31, 42, 48A, 172, 179 and 188 of Chapter 9 of the Laws of Malta, Section 32(1)(d) of Chapter 217 of the Laws of Malta and Sections 3(b) and 5 of Chapter 61 of the Laws of Malta, it has been decided that in terms of Section 370(3) of Chapter 9 of the Laws of Malta the accused be sent for trial before the Court of Magistrates, provided that the accused finds no objection to his case being dealt with summarily the said Court;

After having heard the accused declare that he finds no objection to his case being dealt with summarily by this Court, and this after having been given reasonable time within which to consider his position and reply to the said question;

After having heard and considered testimony given by Inspector Victor Aquilina during the sitting held on the 16th December 2012, by Inspector Jeanne Farrugia during the sittings held on the 16th December 2012, 17th December 2012 and on the 4th February 2013, by Ahmed Mohamed Mohamed Abougomaa during the sittings held on the 16th

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December 2012 and on the 17th December 2012, by Raymond Portelli and Clyde Joe Cassar during the sitting held on the 17th December 2012, by PS 1145 Dunstan Sammut during the sitting held on the 4th February 2013 and by the accused during the sitting held on the 9th May 2013;

After having seen and considered the documents submitted during the hearing of these proceedings namely the documents at folios 11 to 18, folio 19, folios 31 to 36, folio 37 and folios 62 to 73 of the records of the proceedings;

After having heard and considered oral submissions by the Prosecution and Defense Counsel;

After having considered all the records of the proceedings;

Considers:

The accused is being charged with having on the 14th December 2012 and during the period previous to the said date, committed several acts, even if at different times, which constitute violations of the same provision of the law and are committed in pursuance of the same design, which acts shall be deemed to be a single offence, called a continuous offence, and specifically of having: (1) Conspired with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta; (2) Counterfeited any seal, stamp or other mark used for sealing, stamping, marking, authenticating or certifying, in the name of the Government or of any of the authorities thereof, documents or effects, whether public or private property, or which are under the public guarantee; (3) Knowingly in order to gain any advantage or benefit for himself or others, made a false declaration or statement, or gave false information in any document intended for any public authority; (4) Received a passport transferred to him by any other person; (5) Altered or tampered with any passport or used or had in your possession any passport which he knows to be forged, altered or tampered with (rubber stamp); and (6) Forged any document or true copy of a document or an entry made in pursuance of the Immigration Act, in violation of Sections 17, 18, 23, 31, 42, 48A, 172, 179 and 188 of Chapter 9 of the Laws of Malta, Section 32(1)(d) of Chapter 217 of the Laws of Malta and Sections 3(b) and 5 of Chapter 61 of the Laws of Malta.

The facts of this case revolve round the departure from Malta on the 14th December 2012 of a certain Ahmed Mohamed Mohamed Abougomaa, an acquaintance of the accused. The said Ahmed Mohamed Mohamed Abougomaa had been in Malta since the end of September 2012 and he entered the country duly covered by a Visa which was

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valid from the 27th September 2012 till the 9th November 2012¹. Even though Ahmed Mohamed Mohamed Abougomaa could validly remain in Malta up until the 9th November 2012, he was still on the Island well after said date, namely till the 14th December 2012 on which date he left with the assistance of Clyde Joe Cassar, Raymond Portelli and, according to the Prosecution, of the accused.

Even though the Visa covering his permanence in Malta had expired, on the 14th December 2012 Ahmed Mohamed Mohamed Abougomaa managed to leave the country via Malta International Airport on a flight to Libya because Clyde Joe Cassar, an Immigration Officer who tampered with Abougomaa's passport by inserting a departure stamp dated 9th November 2012, arranged for the said Ahmed Mohamed Mohamed Abougomaa to leave on a day when he, that is Cassar, would be on duty at the departures gate so that he, that is Abougomaa, could pass through all checks without difficulty. Clyde Joe Cassar liaised with Ahmed Mohamed Mohamed Abougomaa through Raymond Portelli and, according to the Prosecution, through the accused.

Both Clyde Joe Cassar and Raymond Portelli admitted to their involvement in this whole matter and faced with the same charges with which the accused is being faced, they both pleaded guilty to the said charges, with Clyde Joe Cassar pleading guilty to the additional charge of having as a public officer or servant charged with the direction, custody or proper application of the seals, stamps or other instruments committed such crimes. Following their admission Clyde Joe Cassar and Raymond Portelli have been, in separate proceedings from these proceedings, found guilty of the charges brought against them and both have been duly condemned for the same. The present proceedings are now centered round the involvement or otherwise of the accused in this whole matter and whether or not he actually conspired with Raymond Portelli and/or Clyde Joe Cassar to commit the crimes with which he is being charged.

The Court is of the opinion that the first issue with which it must deal is whether the accused actually conspired with Raymond Portelli and/or Clyde Joe Cassar to commit a crime, namely one or more of the crimes with which he is being presently charged, since this is the main issue around which this case revolves.

The general crime of conspiracy², which has been introduced in the Maltese legal system fairly recently, is dealt with under Section 48A of Chapter 9 of the Laws of Malta, which section provides that *(1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence. (2) The conspiracy referred to in subarticle (1) shall subsist from the moment in which any mode of action whatsoever is*

¹ Vide Doc. "GV2" at folios 31 to 36 of the records of the proceedings and Dok. "GV2" at folios 63 to 73 of the proceedings.

² As opposed to the crime of conspiracy against the safety of the Government.

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planned or agreed upon between such persons. (3) Any person found guilty of conspiracy under this article shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees. (4) For the purposes of subarticle (3), in the determination of the punishment for the completed offence object of the conspiracy account shall be had of any circumstances aggravating that offence.

From the wording of the said section it clearly results that one of the essential elements for the crime of conspiracy to subsist is the existence of an agreement between two or more persons to commit a crime. Whether the common plan between these persons actually succeeds or not is irrelevant since the *actus reus* necessary for the consummation of the crime of conspiracy is the said agreement between the conspirators. Not any simple agreement will give rise to the crime of conspiracy but, and this as clearly results from subsection (2) of Section 48A, there must be an agreement as to any mode of action which is aimed at committing a crime. This does not mean that any detail in the plan would constitute conspiracy but it refers to the *modus operandi* that is, which illegal actions the parties are going to commit with the aim of achieving their ultimate goal. In fact the agreement within the context of conspiracy is the mutual understanding on what is to be done, the acceptance that the parties will actually carry out a particular act or acts which is or are illegal. The subject matter of the agreement involves the details of the crime which is to be conducted such as the time, the place and/or the *corpus delicti*. For there to actually be the crime of conspiracy the plan of the conspirators has to be complete and detailed to the extent that the next step would actually be the commission of the crime. Apart from the agreement on the mode of action there is another essential element which must result for the crime of conspiracy to subsist and this is the common design of the conspirators that the offence be committed and the common result that they wish to achieve. If any one of these elements does not result then the crime of conspiracy cannot be said to subsist.

Even though the general crime of conspiracy has been introduced fairly recently under the Maltese legal system, the elements constituting the said crime were already highlighted by the Courts prior to its introduction as can be seen from a number of judgments given within the context of Extradition proceedings. One such example is the judgment in the names **Il-Pulizija v. Raymond Gauci et** delivered by the Court of Criminal Appeal on the 25th September 2001, where the Court observed that *b'mod generali, normalment, l-elementi rikjesti sabiex jissussisti dan ir-reat ta' 'conspiracy', partikolarment f'dawk is-sistemi legali fejn dan huwa reat 'ut sic', bhal ma hu fl-Italja fejn jezisti r-reat ta' "associazione a delinquere", huma s-segwenti, u cioè (1) irid ikun hemm xi forma ta' ftehim milhuq bejn tnejn/tlieta minn nies jew iktar (2) bl-intenzjoni specifika li jaghmlu attività kriminali.*

In the present case the fact that the passport belonging to Ahmed Mohamed Mohamed Abougomaa was tampered with by Clyde Joe Cassar is now, following the admission by Cassar to having tampered with the said passport, an undisputed fact. The accused however categorically denies any involvement in this whole matter. He argues that even

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though he asked Raymond Portelli for help with regard to the Visa on Ahmed Mohamed Mohamed Abougomaa's passport, he never instructed or agreed with Portelli to commit any crime least of all to get someone, and particularly a public officer, to tamper with said passport, nor did he ever instruct or agree with Clyde Joe Cassar, whom he claims not to know, to tamper with the said passport. The accused also denies having handed over Ahmed Mohamed Mohamed Abougomaa's passport to Raymond Portelli or Clyde Joe Cassar and then back to Abougomaa and of having helped the said Abougomaa leave the Island on the 14th December 2012 when Clyde Joe Cassar was on duty at the departures gate at the Malta International Airport.

Even though Raymond Portelli and Clyde Joe Cassar both admitted to the charges brought against them, which charges included the charge of having conspired with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta, thus fully confessing to the crimes being attributed to them, it cannot be automatically concluded that the accused conspired with them to commit the said crimes with which he too is being charged, and that therefore he is guilty of the charges brought against him. This observation is founded on the principle set out under Section 661 of Chapter 9 of the Laws of Malta, namely that *a confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person*. Thus, notwithstanding the fact that Raymond Portelli and Clyde Joe Cassar both admitted to the charges brought against them, in so far as concerns the accused the Prosecution must prove its case against him beyond reasonable doubt.

On considering the evidence put forth by the Prosecution in order to prove its case against the accused, the Court is not at all convinced and satisfied that the accused conspired with Raymond Portelli and/or Clyde Joe Cassar to commit a crime, namely the crimes with which he is being charged. This observation is being made without prejudice to what will be observed further down in this judgment with regard to the fourth charge being brought against the accused that is, the charge of having received a passport transferred to him by any other person.

The primary evidence in this case in so far as concerns the alleged conspiracy between the accused and Raymond Portelli and/or Clyde Joe Cassar is the testimony given by the said Raymond Portelli and Clyde Joe Cassar, who both testified during the sitting held on the 17th December 2012. From said testimony the elements which constitute the crime of conspiracy – namely conspiracy between the accused and Raymond Portelli and/or Clyde Joe Cassar – do not result to a satisfactory degree.

In his testimony Raymond Portelli stated that *I have been knowing the accused for about two and a half to three years and I am recognizing him as the person sitting down in the Hall in front of the Magistrate. I got to know the accused at the Barcelona Lounge where he used to work. By time we became friends and at a certain point in time he also*

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asked me if I could help him with some paper work, for example the papers of some electricity bills. Our acquaintance started increasing in fact I used to go there for drinks with my partner and my children. At a certain point in time, the accused asked me whether I could help with the papers of a person who worked in the kitchen of the Barcelona Lounge to be able to leave the Island since this person was in pain. At the time I knew Clyde Joe Cassar who was the brother of my previous partner and I know that he worked at the airport and I thought that he could help me out. I spoke to Clyde and when I explained the situation he told me that it was impossible to help him out. I spoke once again to the accused who insisted with me that his friend wanted to leave since he was in severe pain. The person who was not well and wanted to leave the Island actually spoke to me once. I did not know who he was and I still do not know what his name is. All I know is that he is a very tall person. He told me to try and help him out because he was in pain and wanted to leave the Island. I and the accused had applied for him to have a work permit however his work permit was not issued. I am being asked by the Court whether this tall person who wanted to leave the Island gave me any other reason other than medical reasons why he wanted to leave the Island, I reply that that was the only reason he gave me. In fact he told me that he could have died after this condition if he did not leave Malta. I spoke to Clyde once again and I explained to him that this person needed to leave the Island since he was not well. Clyde told me to give him this person's passport number to see what he could do. I gave him the passport and he returned it to me. The passport was handed to me by the accused and I had to forward it to Clyde Cassar. After some time, even though I don't recall exactly how long, Clyde had called me to meet him a few doors from his house as I cannot go to his house because of my previous partner, he gave me the passport back. I then returned the passport to the accused. When Cassar gave me the passport back he did not explain exactly what he did to the passport, he told me that everything was in place. I don't know what sort of arrangements were made by Cassar since I don't understand these matters. From what I can understand, there must have been some form of stamp on the passport. After a few days that I had returned the passport to the accused, the same accused spoke to me again and he told me whether we could do anything to help this other person to leave the Island as soon as possible since he was in severe pain. I spoke to Cassar once again and told me that he would have been on duty on Friday of last week and we discussed the whole matter. When I told them that Clyde Cassar would be on duty on Friday, they told me that there was no direct flight from Malta to Egypt and so it was decided that the person would leave Malta to go to Libya. ... I want to insist that the accused, myself and Clyde Cassar, we did what we did for no form of compensation but merely because we wanted to help this person to leave the Island since he was in pain. The accused never offered me any form of payment for this service. Even though I am aware that we may have not been following the correct procedures I must insist that the accused, Cassar and myself merely acted because we wanted to help the third person to be able to leave the Island. I must state that I could have asked to see what we were doing was within the limits of the law however at that point in time it didn't cross my mind.

Even though from this testimony it results that the accused asked Raymond Portelli, who accepted, to help him out with regard to the Visa of Ahmed Mohamed Mohamed Abougomaa and that this help was not necessarily within the limits of normal procedure, it does not result that there was an agreement between them or with Clyde

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Joe Cassar as to a mode of action aimed at committing a crime, which agreement is necessary for the crime of conspiracy to subsist. It is very evident that between them there was no agreement with regard to an illegal *modus operandi* aimed at achieving their ultimate goal that is, helping Abougomaa to depart from Malta. There was no mutual understanding and relative acceptance between them on what had to be done for Abougomaa to be able to leave the Island, there was no plan neither a common design between them which detailed the action or actions to be taken for Abougomaa to be able to leave Malta.

From the evidence submitted before the Court it clearly results that it was Clyde Joe Cassar who alone and on his own initiative, without any form of explanation to let alone an agreement with Raymond Portelli and the accused, whom he hardly knows, decided to tamper with the passport belonging to Ahmed Mohamed Mohamed Abougomaa and stamp the same with a departure date when in fact Ahmed Mohamed Mohamed Abougomaa was still in Malta. All of this is confirmed by the testimony given by Clyde Joe Cassar who admitted to having tampered with Ahmed Mohamed Mohamed Abougomaa's passport but categorically denied that he acted in agreement with or upon instructions by the accused. On being asked *kindly explain what happened, your involvement?* Clyde Joe Cassar replied *he told me listen I have a friend that needed an operation, he needed it quickly and daringly he gave me the passport to see if I could help him so he don't loose his work permit and basically I was considering that I was doing something for the righteousness which cost me my job yesterday, I gladly helped him.* On being asked *who was the person who spoke to you? And asked you to do this?* Clyde Joe Cassar replied *Raymond, he wanted to help* and on being asked *and did Raymond tell you whether Mr. Sherif was in any way involved in this whole thing?* he replied *as far as I know what I was told was that this poor man worked for Mr. Sherif, that is all I know...* and on being further asked *so Raymond didn't tell you in so many words Mr. Sherif asked you to do this for me? He did or he didn't mention Mr. Sherif, Raymond?* Clyde Joe Cassar replied *No, no. He mentioned that this guy worked with Sherif and as Raymond is a consultant with Sherif, I really do not know.*

The Court therefore reiterates that from testimony given by Raymond Portelli and Clyde Joe Cassar, allegedly the conspirators together with the accused, the elements which constitute the crime of conspiracy do not result beyond reasonable doubt. The absence of the elements which constitute the crime of conspiracy also results from testimony given by Ahmed Mohamed Mohamed Abougomaa who repeatedly stated that the accused was helping him to obtain an extension of his valid Visa. At no point in time did Abougomaa state or declare that the accused agreed with one or more persons to obtain a false stamp on his passport, so much so that when his passport was returned to him with a false departure stamp he got angry at the accused because that is not what they sought to obtain.

In the light of the above the Court cannot find the accused guilty of having conspired with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta and consequently neither can it find him guilty of having: (a)

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counterfeited any seal, stamp or other mark used for sealing, stamping, marking, authenticating or certifying, in the name of the Government or of any of the authorities thereof, documents or effects, whether public or private property, or which are under the public guarantee; (b) knowingly in order to gain any advantage or benefit for himself or others, made a false declaration or statement, or gave false information in any document intended for any public authority; (c) altered or tampered with any passport or used or had in his possession any passport which he knows to be forged, altered or tampered with (rubber stamp); (d) and/or forged any document or true copy of a document or an entry made in pursuance of the Immigration Act. Therefore the Court must acquit the accused of the first, second, third, fifth and sixth charges brought against him.

The situation is somewhat different in so far as concerns the fourth charge brought against the accused, namely the charge that he received a passport transferred to him by any other person in violation of Section 3(b) of Chapter 61 of the Laws of Malta.

Section 3(b) of Chapter 61 of the Laws of Malta provides that *any person who receives a passport transferred to him by any other person, shall on conviction be liable to imprisonment for a term not exceeding two years*. The interpretation of this provision of the Law is clearly set out in the judgment in the names **Il-Pulizija (Spettur Carmelo Bartolo) v. Khaled Yussef M. Lamlum, Appeal No. 157/00** delivered by the Court of Criminal Appeal on the 9th March 2001, where the Court of Appeal observed that *ir-reat dedott kontra l-appellant huwa dak kontemplat fl-Artikolu 3(b) ta' l-Ordinanza Dwar il-Passaporti, cioè, il-Kapitolu 61 tal-Ligijiet ta' Malta. Dan ir-reat jikkonsisti fis-semplici fatt li wiehed "jircievi passaport li jigi trasferit lilu minn persuna ohra". Din mhix xi kwistjoni ta' mens rea, kif qed jissottometti l-appellant. Jigifieri, il-fatt biss li wiehed jircievi l-passaport minghand persuna ohra, ghal kwalunkwe raguni, minghajr ma jkun awtorizzat skond il-Ligi biex jaghmel hekk, jikkostitwixxi dan ir-reat li bih huwa akkuzat l-appellant. Ovvjament dan it-trasferiment ta' xi passaport minn persuna ghal ohra, minghajr ebda forma ta' awtorizzazzjoni skond il-ligi, irid jigi pruvat mill-provi li tressaq il-prosekuzzjoni. Din l-interpretazzjoni stretta ta' dan l-Artikolu imsemmi hija dik li gja' inghatat minn din il-Qorti, diversament presjeduta, fl-Appell Kriminali 166/94 fl-ismijiet "Il-Pulizija -vs- Generoso Sammut" deciz fit-13 ta' Marzu 1998 u f'iehor kif presjedut minnha, Appell Kriminali 334/1999 fl-ismijiet "Il-Pulizija -vs- Albert Laferla" deciz 9 ta' April 1998.*

In his testimony given during the sitting held on the 9th May 2013, the accused repeatedly denied that he handed over the passport belonging to Ahmed Mohamed Mohamed Abougomaa to Raymond Portelli for further forwarding the Clyde Joe Cassar. The Court however is not at all satisfied of the veracity of said denial since from the testimony given by Raymond Portelli and Ahmed Mohamed Mohamed Abougomaa it results that Abougomaa's passport was handed over to Raymond Portelli by the accused and was returned to Abougomaa via the accused once again. The Court is of the opinion that the Prosecution has indeed proved beyond reasonable doubt, through the testimony given by Raymond Portelli and Ahmed Mohamed Mohamed Abougomaa,

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that the accused effectively received Abougomaa's passport first from Abougomaa himself and subsequently from Raymond Portelli without being authorized by law to receive such passport. Therefore the accused is beyond reasonable doubt guilty of the fourth charge brought against him.

The Court therefore concludes that the accused is not guilty of the first, second, third, fifth and sixth charges brought against him and must therefore be acquitted of the said charges but he is guilty of the fourth charge and must be duly condemned for the same. In so far as concerns punishment the Court took into account the particular circumstances of this case and also the fact that the accused has a clean criminal record.

In the light of the above considerations the Court declares that the accused is not guilty of the first, second, third, fifth and sixth charges brought against him and therefore acquits from said charges but after consideration of Section 3(b) of Chapter 61 of the Laws of Malta, finds him guilty of the fourth charge brought against him and condemns him to one (1) year imprisonment. However, since the Court is of the opinion that there are sufficient reasons which warrant that the said term of imprisonment be suspended, including the fact that the accused has a clean criminal record, in terms of Section 28A of Chapter 9 of the Laws of Malta suspends the said term of one (1) year imprisonment for a period of one (1) year from date of this judgment.

In terms of Section 28A(4) of Chapter 9 of the Laws of Malta the Court has explained to the accused in plain language his liability under Section 28B of Chapter 9 of the Laws of Malta if during the operational period he commits an offence punishable with imprisonment.

After having considered Section 392A of Chapter 9 of the Laws of Malta, the Court orders that the acts of these proceedings together with a copy of this judgment be transmitted to the Attorney General within the period of time stipulated by law.

< Final Judgement >

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