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

MAGISTRATE NATASHA GALEA SCIBERRAS B.A., LL.D.

Case Number: 25/2016

Today, 9th March 2016

The Police
(Inspector Raymond Aquilina)

vs

Thorsten Koenig
(Maltese ID Card 0118984A)

The Court,

After having seen the charges brought against the accused Thorsten Koenig, 46 years of age, son of Hartmut and Merbel nee` Herbst, born in Hanover (Germany), on 27th January 1969, presently residing at 64, Ta' Xbiex Seafront, Flat 1, Ta' Xbiex Court, Msida and holder of German Passport Number 129765536, Maltese Identity Card 0118984A and Maltese residence Permit MT 5528324;

Charged with having on these Islands, from 14th January 2016 and in the preceding months and years, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law;

1. By means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to

create the expectation or apprehension of any chimerical event, made gain of over five thousand Euro (€5,000) to the prejudice of Omissis;

2. Without authorisation used a computer or any other device or equipment to access any data, software or supporting documentation held in that computer or any other computer, or used, copied or modified any such data, software or supporting documentation;

3. Without authorisation made output of any data, software or supporting documentation from the computer in which it was held, whether by having it displayed or in any other manner whatsoever;

4. Without authorisation prevented or hindered access of any data, software or supporting documentation;

5. Without authorisation hindered or impaired the functioning or operation of a computer system, software or the integrity or reliability of any data;

6. Without authorisation took possession of or made use of any data, software or supporting documentation;

7. In order to gain any advantage or benefit for himself or others, had in any document intended for any public authority, knowingly made a false declaration or statement or given false information;

8. Committed any other kind of forgery or knowingly made use of any other forged document, not provided for in the preceding article 188 of the Criminal Code.

The Court was requested to attach in the hands of third parties in general any monies and other movable property due or pertaining or belonging to the accused and further to prohibit the accused from transferring, pledging, hypothecating or otherwise disposing of any movable or immovable property in terms of Article 5(1)(a)(b) of the Prevention of Money Laundering Act Chapter 373 as well as to issue orders as provided for in Articles 5(1) and 5(2) of the same Act and Article 23A of the Criminal Code, Chapter 9 of the Laws of Malta.

The Court was also requested to appoint an expert to draw up an inventory of all properties as described in Article 2 of Chapter 373 due, pertaining or belonging to [the accused].

The Court was also requested that, in pronouncing judgement or in any subsequent order, sentence the person/s convicted, jointly or severally, to the payment, wholly or in part, to the Registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, within such period and in such amount as shall be determined in the judgement or order, as per Section 533 of Chapter 9 of the Laws of Malta.

The Court was also requested that the provisions of Article 24 of the Probation Act concerning the power of the court to order the offender to pay damages shall *mutatis mutandis* apply whenever a person is sentenced upon conviction for any crime as per Section 532A.

Having heard the evidence and having seen the records of the case.

Having heard the accused plead guilty to the charges brought against him, during his examination held in terms of Sections 390(1) and 392 of the Criminal Code, which guilty plea was confirmed by the accused after the Court in terms of Section 453(1) of the Criminal Code, informed him of the consequences of such plea and also gave him sufficient time to reconsider the said plea and retract it;

Having heard submissions by the parties about the penalty to be inflicted.

Considered that:

In view of the guilty plea registered by the accused, the Court cannot but find him guilty of the first, second, third, fourth, fifth, sixth and eighth charges brought against him, although with respect to the seventh charge brought against him, since it does not result from the records of the case, to the degree required by law, that the documents in which the accused provided false information were intended for any public authority, the Court is not finding the accused guilty of the said charge.

As regards the punishment to be inflicted, the Court heard lengthy submissions by the parties. As to whether the Court should take into consideration the early guilty plea filed by the accused and his cooperation during the investigation, the Prosecution stated that although the accused registered a guilty plea at the initial stages of the proceedings and cooperated with the police during its investigations, yet the injured party provided substantial evidence against the accused. Dr. Kathleen Grima, appearing on behalf of the injured party, submitted that despite

the fact that the accused registered an early guilty plea, yet the crimes he committed were corroborated by substantial evidence provided by the injured party and that he finally confessed to having defrauded a larger amount than the amount he confessed to initially, only after further evidence was provided. According to the injured party, a guilty plea on the part of the accused was inevitable. On its part, the defence submitted that the guilty plea was filed by the accused at the earliest opportunity, that he cooperated with the police immediately and when he was presented with an amount higher than that to which he had initially confessed, he also confirmed this higher amount. He further submitted that the injured party had initially reported that it had been defrauded of a much higher sum of circa €84,000, which sum was subsequently substantially reduced and that since the accused was kept under preventive custody, he did not have the means or the possibility to verify the actual amounts involved.

In this regard, the Court refers to the judgement delivered by the Court of Criminal Appeal in the names **Il-Pulizija vs Emmanuel Testa** on 17th July 2002, where the Court stated as follows with regards to an early guilty plea:

"*L-appellant jilmenta li l-ewwel qorti ma tatx konsiderazzjoni bizzejjed ghall-fatt li hu ammetta mill-ewwel, kemm mal-pulizija kif ukoll quddiem il-Qorti Inferjuri. Din il-Qorti tosserva qabel xejn li kif gie ritenut (minn din il-Qorti kolleggjalment komposta) fis-sentenza* ***Ir-Repubblika ta' Malta v. Mario Camilleri*** *(5 ta' Lulju, 2002) l-ammissjoni bikrija mhux bilfors jew dejjem, jew b'xi forma ta' dritt jew awtomatikament, tissarraf f'riduzzjoni fil-piena. Ir-regoli generali li ghandhom jigwidaw lill-qrati meta jkun hemm ammissjoni gew imfissra mill-Qorti Kriminali fis-sentenza preliminari taghha tal-24 ta' Frar, 1997 fl-ismijiet* ***Ir-Repubblika ta' Malta v. Nicholas Azzopardi****, u dan b'referenza ghall-prassi fil-Qrati Inglizi. F'dik is-sentenza kienet saret referenza ghal bran mill-edizzjoni tal-1991 ta'* ***Blackstone's Criminal Practice*** *(Blackstone Press Limited). Din il-Qorti ser tirriproduci il-bran relevanti mill-edizzjoni tal-2001 ta' dan il-manwal, u dan peress li hija taqbel mal-principji espressi f'dana l-bran u qed taghmilhom taghha:*

"***Although this principle [that the length of a prison sentence is normally reduced in the light of a plea of guilty] is very well established, the extent of the appropriate 'discount' has never been fixed. In Buffery (1992) 14 Cr. App. R. (S) 511 Lord Taylor CJ indicated that 'something in the order of one-third would very often be an appropriate discount', but much depends on the facts of the case and the timeliness of the plea. In determining the extent of the discount, the court may have regard to the strength of the case against the offender. An offender who voluntarily surrenders to the police and admits a crime which***

could not otherwise be proved may be entitled to more than the usual discount (Hoult (1990) 12 Cr. App. R. (S) 180; Claydon (1993) 15 Cr. App. R. (S) 526) and so may an offender who, as well as pleading guilty himself, has given evidence against a co-accused (Wood [1997] 1 Cr. App. R. (S) 347) and/or given significant help to the authorities (Guy [1992] 2 Cr. App. R. (S) 24). Where an offender has been caught red-handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris (1988) 10 Cr. App. R. (S) 216; Landy (1995) 16 Cr. App. R. (S) 908). Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage (Hollington (1985) 82 Cr. App. R. 281; Okee [1998] 2 Cr. App. R. (S) 199). Similarly, some or all of the discount may be lost where the offender pleads guilty but adduces a version of facts at odds with that put forward by the prosecution, requiring the court to conduct an inquiry into the facts (Williams (1990) 12 Cr. App. R. (S) 415. The leading case in this area is Costen (1989) 11 Cr. App. R. (S) 182, where the Court of Appeal confirmed that the discount might be lost in any of the following circumstances: (i) where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, be passed; (ii) cases of 'tactical plea', where the offender delayed his plea until the final moment in a case where he could not hope to put up much of a defence, and (iii) where the offender had been caught red-handed and a plea of guilty was practically certain. It was also established in Costen that the discount may be reduced where the accused pleads guilty to specimen counts. In Byrne [1997] 1 Cr. App. R. (S) 165 it was held that an offender who had absconded and remained at large for 19 months was not entitled to expect a discount for his guilty plea when he pleaded guilty after being re-arrested." [emphasis of that Court]

In this case, although the accused pleaded guilty at the earliest opportunity, upon his arraignment, yet it is also true that the Prosecution, through the injured party, had substantial evidence against the accused and that the Prosecution had already compiled considerable evidence prior to questioning the accused. However, the Court must also take into account that the injured party had initially suspected that the accused had through illicit means obtained a larger sum of circa €89,500, whilst the accused although initially confessing merely to the sum of circa €32,000, immediately confessed to the amount of €44,727.65 indicated by the Prosecution upon further investigation and verification by the injured party. The Court is thus taking into account that through this cooperation on his part, notwithstanding that as already stated, substantial evidence was at the disposal of the Prosecution in this regard, the Prosecution's and the Court's time and resources were saved and in particular, lengthy tendering of evidence by the representatives

of the injured party to explain their findings, the amounts involved and the different transactions carried out by the accused was avoided.

The Prosecution and Dr. Kathleen Grima, on behalf of the injured party, submitted further that the accused has not yet refunded any of the monies due to the injured company and that this should be taken into consideration for the purpose of the punishment to be inflicted. On its part, the defence submitted that the accused has been detained in preventive custody since his arraignment and that this clearly effected his ability to refund any monies. In this regard, the Court notes that apart from being detained in preventive custody since his arraignment, on the request of the Prosecution, the Court ordered the freezing of assets of the accused and that therefore, although in his statement, the accused indicated that he was ready to pay the sum illicitly obtained to the injured party in instalments, yet the circumstances described must be taken into consideration in respect of his failure to make any such payments.

The injured party further submitted that the Court should also take into consideration, upon inflicting punishment and in deciding whether to impose an effective prison term or a suspended term of imprisonment, the position of trust which the accused held with the company and the repercussions suffered by the injured company, which was not only defrauded by the accused but is still forking out money on account of clients who had already paid their dues. The injured party submitted that the punishment inflicted must also reflect the gravity of the crimes committed by the accused and that therefore an effective term of imprisonment would be appropriate in such circumstances. The injured party also argued against a suspended term of imprisonment mainly due to the fact that in this case, it would be very difficult for a restitution order under Section 28H of the Criminal Code to be enforced and that in the present case, there are not any sufficient safeguards to ensure that he will abide by such order. On its part, the defence submitted that the Court should impose a suspended term of imprisonment, that the nationality of the accused should in no way influence the Court in its considerations on punishment, that inflicting such punishment would give the accused the possibility of refunding the injured party and that his immediate guilty plea, his cooperation and the fact that he is a first time offender in these Islands, other offences having been committed abroad not being offences of the same nature with which he is being charged, should mitigate his punishment and allow the Court to impose a suspended term of imprisonment.

After having considered the submissions made by the parties and in addition to what has been stated above regarding the accused's early guilty plea and to what

extent his cooperation shall be taken into account, as well as his failure to compensate the victim of his crimes, the Court cannot but take into consideration also the nature of the charges brought against the accused, the sum involved which was certainly not a negligible sum, the repercussions on the victim of his crimes, that such crimes were committed over a period of time and that these did not merely involve one but a number of transactions and that as an employee, the accused abused of his position of trust within the injured company in order to commit the said crimes. The Court considers that given such circumstances, an effective term of imprisonment is the appropriate mode of punishment.

However, the Court also notes that although the accused agreed that the sum obtained by himself through illicit means amounts to forty four thousand, seven hundred and twenty seven Euro and sixty five cents (€44,727.65) (*vide* Doc. XRA, a fol. 311 of the records of the case), yet it also results from the records of the case and specifically from the evidence tendered by Omissis on behalf of the injured company (*vide* a fol. 129 and 130 of the records of the case) that some of the monies so obtained result from the crime of misappropriation, with which the accused has not been charged. Such monies were received by the accused in cash on account of the injured company and withheld by himself. These are indicated in Doc. XRA under the heading 'Cash Receipts' and amount in total to the sum of six thousand and fifty three Euro and twelve cents (€6,053.12). This sum is being deducted from the total sum which the Court is ordering the accused to pay to the injured party in terms of Section 532A of Chapter 9 of the Laws of Malta.

In determining the quantum of punishment, the Court further took into consideration the provisions of Section 17(h) of Chapter 9 of the Laws of Malta and that the offences contemplated in the second, third, fourth, fifth, sixth and eighth charges as having been designed for the commission of the offence contemplated in the first charge.

The Court also took into consideration the clean criminal record of the accused and although his criminal record in Germany was exhibited by the Prosecution, this is in the German language. Furthermore, although the accused states, in his statement, that he has a sum of €16,000 in a Spanish Bank, BBUA Bank, the Court does not deem that sufficient evidence has been brought in this respect.

Conclusions

For these reasons, the Court after having seen Sections 17(h), 18, 189, 308, 310(1)(a), 337C(1)(a), (b), (d), (e) and (f), 337F(1)(2) and (3)(a) of Chapter 9 of the Laws of Malta, finds the accused not guilty of the seventh charge brought against him and discharges him therefrom, but upon his guilty plea, finds him guilty of the first, second, third, fourth, fifth, sixth and eighth charges brought against him and condemns him to **three (3) years effective imprisonment**, from which term one must deduct the period during which the person here convicted has been detained under preventive custody in connection with the offences of which he is being found guilty by means of this judgement.

In terms of Section 533 of Chapter 9 of the Laws of Malta, the Court condemns the person convicted to pay the expenses relating to the compilation of the compendium of the assets of the accused by the Registrar of Criminal Courts and Tribunals exhibited as Doc. EQ, amounting to one thousand, five hundred and sixteen Euro and ninety one cents (€1516.91).

In terms of Section 532A of Chapter 9 of the Laws of Malta, the Court orders the person convicted to pay the injured party, Omissis in the name and on behalf of Omissis the sum of twenty eight thousand, seven hundred and sixty one Euro and eighty nine cents (€28,761.89), namely, the sum of €44,727.65 (Doc. XRA), less the sum of €6,053.12, indicated in the above considerations and the sum of €9,912.64, in respect of which the Court has issued a separate decree today.

In terms of Section 23B(2) of Chapter 9 of the Laws of Malta, since it is not possible to order the forfeiture of such property the value of which corresponds to the value of the proceeds of the offence, the Court sentences the person convicted to the payment of a fine (multa) of thirty eight thousand, six hundred, seventy four Euro and fifty three cents (€38,674.53), as the sum equivalent of the amount of the proceeds of the offence, namely the sum of €44,727.65 (Doc. XRA) less the sum of €6,053.12 (indicated in the above considerations).

In terms of Section 392A(2) of Chapter 9 of the Laws of Malta, the Court orders that the records of the case, together with a copy of the judgement are transmitted to the Attorney General within six working days.

Natasha Galea Sciberras
Magistrate