



**Court of Magistrates (Malta)
As a Court of Criminal Judicature**

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

Criminal Inquiry No.: 564/2017

**The Police
(Inspector Matthew Vella)**

-vs-

Prepelita Petrisor, holder of Romanian Identity Card No. 014723

Today, the 10th day of December, 2019

The Court,

Having seen the charges brought against the accused **Prepelita Petrisor** for having:

On these islands, on the 16th December, 2017, and in the preceding days and months, in various parts of Malta and outside Malta, 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. For having, made part or belonged to an organisation referred to in Sub Article (1) of Article 83A of Chapter 9 of the Laws of Malta;

2. For having, in Malta conspired 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;

Furthermore, with having on these islands, on the 16th December, 2017, and in the preceeding days and months, in various parts of Malta and outside Malta, 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:

3. Been found to be in possession or having had under his control any article for use in the course of or in connection with any fraud;
4. With having, 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 a gain of more than five thousand euros (€5,000) to the detriment of several persons and/or banking entities;
5. With having, knowingly made use of any of the false acts, writings, instruments or documents mentioned in Article 184 of Chapter 9 of the Laws of Malta;
6. With having, committed any other kind of forgery, or knowingly made use of any other forged document;

Furthermore, the accused is being charged with having on these islands, on the 16th December, 2017, and in the preceeding days and months, in various parts of Malta and outside Malta, 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:

7. Without authorisation took possession of or made use of any data, software or supporting documentation;
8. For having used another person's access code, password, username, electronic mail address or other means of access or identification information in a computer or in any manner infringed any security measure to gain access without authorization to the whole or to any part of any information system;
9. And for rendering himself a recidivist as per Articles 49 and 50 of Chapter 9 of the Laws of Malta, following several judgements delivered by several foreign courts, which decisions are final.

The Court was requested to apply *mutatis mutandis* the provisions of Article 5 of the Money Laundering Act, Chapter 373 of the Laws of Malta, as per Article 23A(2) of Chapter 9 of the Laws of Malta.

The Court was also requested that in case of a finding of guilt of the accused, apart from inflicting the punishment prescribed at Law, also orders the forfeiture of all the objects exhibited in these proceedings.

The Court was also requested that, in pronouncing judgement or in any subsequent order, sentence the person convicted, 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 Article 533 of Chapter 9 of the Laws of Malta.

Having seen the note by the Attorney General indicating the Articles of Law in terms of Article 370(3)(a) of Chapter IX of the Laws of Malta dated the 28th December, 2018, namely:¹

1. Articles 18 and 83A(1)(2)(5) of Chapter 9 of the Laws of Malta;
2. Articles 18 and 48A of Chapter 9 of the Laws of Malta;
3. Articles 18 and 301BA(1)(3) of Chapter 9 of the Laws of Malta;
4. Articles 18, 308, 309 and 310(1)(a) of Chapter 9 of the Laws of Malta;
5. Articles 18 and 184 of Chapter 9 of the Laws of Malta;
6. Articles 18 and 189 of Chapter 9 of the Laws of Malta;
7. Articles 18, 337C(1)(f)(i) and 337F(1) of Chapter 9 of the Laws of Malta;
8. Articles 49 and 50 of Chapter 9 of the Laws of Malta;
9. Articles 17, 18, 23, 23A, 23B, 31 and 533 of Chapter 9 of the Laws of Malta;

Having heard the accused declare that he does not object to the case being tried summarily by this Court.

Having heard witnesses.

Having seen all the acts and documents exhibited;

Having heard the prosecution and defence counsel make their submissions;

¹ Fol. 367

Considers,

Inspector Matthew Vella explained² how the police were informed by HSBC Bank Malta (hereinafter referred to as HSBC) that a person was carrying out a number of suspicious transactions on various HSBC clients' accounts from the Bank of Valletta (hereinafter referred to as BOV) ATM in Msida. A unit from the Rapid Intervention Unit (RIU) was despatched to the scene whereupon the accused, who at the time was still making use of the ATM, was arrested by PS918 Clayton Azzopardi.³ He was informed that this person was refusing to answer questions put to him. On his person were found false bank cards on which there were written PIN numbers as well as a considerable amount of cash. He was taken to Sliema Police Station to enable a receipt of the seized items to be issued namely, a sum of €10,800, 49 false bank cards with PIN numbers written on them, a wallet a pouch, a scarf, a SIM card⁴ and a cap.⁵ **Upon being interrogated, the accused admitted that all items except the pouch in which the money was found were his.** With regards to the pouch he stated that he had found it in the garden opposite the Bank of Valletta branch. Upon being asked to indicate where he found it, he pointed towards the first place he set his eyes upon, a patch of soil covered with flowers. The next morning another statement was taken but when the accused was asked to indicate his place of abode he refused to do so.⁶ He also refused to answer whether he had made previous use of ATMs but said that this was his first visit to Malta; however Police records showed that he had visited Malta previously from the 12th until the 28th November, 2017, and upon being confronted with this fact he refused to comment any further.⁷ Investigations regarding skimming from the HSBC ATM in Republic Street, Valletta, near Wembley Food Store, were ongoing.

Skimming is the theft of a person's credit card details using electronic equipment which enables the illegal access of the said person's account.

² Defence exempted the Court from ordering a translation of the evidence. Vide Minutes of 30.01.2018 a fol.94

³ Fol.14

⁴ Fol.20

⁵ Fol.15

⁶ Fol.16-17.

⁷ **Dok.MV10** a fol.48

On cross-examination Inspector Vella clarified that the police were informed that suspicious transactions were being carried out and that upon apprehension at the ATM, the accused was found making use of four false cards which were described as 'fantasy cards' by the officer drawing up the **Current Incident Report**.⁸ No search of his residence could be carried out since he refused to give details as to where he was residing.⁹

A **criminal conviction sheet** of the accused sent by the Romanian authorities was exhibited.¹⁰ From its translation into English,¹¹ it transpires that on the 10th September, 2009, the accused was convicted by the Tribunal of Busto Arsizio in Italy, to 5 years imprisonment relating to drug trafficking. He was also convicted to 182 days imprisonment by the Central London Magistrates' Courts on the 17th March, 2015, for fraud and on the 14th March, 2017, convicted by a German Court for theft.

The **Current Incident Report** indicates that upon apprehension the accused "*was found with his head tilted downwards towards the ATM machine ...with the hat he was wearing covering part of his face. At the time he was withdrawing money and also had 4 fantasy cards in his hands. This male person promptly replied "lawyer Lawyer" to PS918. He also refused to give his details.*". Inside the pouch he was found in possession of there was a considerable amount of money as well as "*various bank cards together with their respective pin numbers.... was asked if he has an address in Malta but refused to reply.*"¹²

This report was confirmed by **WPS256 Leanne Sant**¹³ who drew up the report based on the version given to her by PS918 Clayton Azzopardi. She added that she asked the accused for his personal details as well as his address in Malta, but he refused to give her the requested information.¹⁴ The receipt of items seized from the accused *inter alia* shows 49 bank cards, a total of €10,800 cash, a black baseball cap and a scarf.¹⁵ Copies of

⁸ **Dok. MV2** a fol. 28-30

⁹ Fol.23

¹⁰ Fol.256.

¹¹ **Dok.IPM** a fol.270-271

¹² Fol.29

¹³ Fol.261

¹⁴ Fol.262

¹⁵ **Dok.MV3** a fol.31

his statements were also exhibited.¹⁶ In his first statement he said he was a tourist agent but *“Now I do nothing”* indicating that he arrived in Malta only on the 10th December, 2017, and it was his first visit on the island.¹⁷ He refused to answer whether he brought any luggage with him and indicated he lived in Msida in a private apartment situated close to the police station. He refused to comment on the cards found in his possession and whether he had made previous use of ATMs.¹⁸ A receipt of items handed back to the accused was also exhibited.¹⁹

Stills passed on to the Police by Bank of Valletta were exhibited by the prosecuting officer which show **the accused making bank withdrawals until his moment of apprehension by members of the RIU.**²⁰ Both the originals of the cards found in his possession as well as copies²¹ thereof and copies were also exhibited; **on the said cards one notes 4-digit numbers written on them with a permanent marker.** A still passed on to the police from HSBC relating to the ATM near Wembley Stores in Valletta on the same day in the morning as that when the Msida withdrawals were effected (namely the 16th December, 2017) clearly shows the accused wearing similar attire as to that when he was arrested.²² **Stills from the same ATM clearly show the accused attaching a device to the ATM!**²³

Renato Vella in representation of Bank of Valletta Ltd., after confirming the authenticity of the emails featuring the stills he had passed on to the police and to which reference has just been made,²⁴ identified the accused as the person appearing on a number of the stills *“I took the photos, then I downloaded the sequence and then I presented it to the Inspector Vella”.*²⁵ He exhibited enlarged stills of the moments when the accused was using the ATM until his arrest.²⁶ On cross-examination he confirms that there were

¹⁶ Dok.MV7 a fol.35 et seq and Dok.MV10 a fol.47 et seq.

¹⁷ Fol.36

¹⁸ Fol.37

¹⁹ Fol.96. Dok. MVZ a fol. 98-99

²⁰ Dok.MV11 a fol.50-56

²¹ Dok.MV13 a fol.60-71

²² Dok.MV15 a fol.72-75. Vide fol.52,54, 55 and 75.

²³ Fol.337-338

²⁴ Fol.208-209 with reference to Dok.MV8 a fol. 39 et seq and to Dok.MV 11 a fol. 50 et seq

²⁵ Fol.210 with reference to stills at fol. 52-56

²⁶ Dok.RV a fol. 212-220

two suspects and the person appearing in Doc.MV8²⁷ was not the accused although it was the same Msida ATM from which withdrawals were being made. The footage depicting this unidentified individual coincides with transactions effected at Msida ATM amongst which at 21:22; 21:32 and 22:10²⁸ which transactions, it later transpired, were fraudulent and as a consequence of which the bank suffered losses.

PS918 Clayton Azzopardi from the RIU, testified²⁹ how on the 16th December, 2017, whilst on patrol with PC514, they were despatched to BOV Msida after it was suspected that a person making use of that ATM could be carrying out fraudulent acts or theft from bank accounts. They approached the bank in stealth and as they alighted, they saw the accused using the ATM. He was wearing a baseball cap and a scarf and his head was lowered facing the ATM failing to notice the police who had approached him. **He was seen inserting a card in the bank slot.** PS918 gives a vivid account of the moments leading to the arrest *“hriġtlu idejha jiena stess, kellu erba cards f’idejha, innutajt li l-cards ma kienux cards komuni tal-bank ..jew persuni normali. Kellhom fuqhom erba digits miktubin bil-gem marker fuq kull card li kellu f’idejha u jien qbadtlu l-cards hekk u għidtlu stop what are you doing sir. Iccekjajtlu, kellu pouch imwahaal miegħu ...ma qaddu...zammejtlu idejha il-fuq ftaht il-pouch, **rajt ammont kbir ta’ notes ta’ fifty euro, kollha mremblin tondi magenb xulxin...bundles tondi hdejn xulxin...Rombli tondi, flus rrumblati magenb xulxin go pouch..ammont kbir, ta’ hamsin Euros.***”³⁰ At that point the pouch was zipped and the accused was informed he was being placed under arrest, informed of his rights and escorted to Sliema Police Station where he was handed over to Inspector Mark Mercieca. The money was then counted together with Inspector Mercieca and a receipt given to the accused.³¹

PS918 identified items exhibited by the prosecuting officer: the pouch³² which at time of apprehension was *“mliibes ma qaddu”* and which contained the large amount of cash described. In a second pouch he found a number of cards but stopped short of counting them at the time; the

²⁷ Fol.39-45

²⁸ Fol.209

²⁹ Defence exempted the Court from ordering a translation of the evidence tendered in Maltese. Vide Minutes of 30.01.2018 a fol.94

³⁰ Fol.78

³¹ Fol.78-79

³² Dok.MV16

scarf³³ and the baseball cap³⁴ the accused was wearing whilst making use of the ATM.³⁵ He adds *"kellu ammont ta' cards f'idejh, kellu erba cards bazikament f'idejh, kellu f'but minnhom mal-gakketta kellu ghaxar cards ohra u l-kumplament tal-cards kienu kollha fuq il-pouch ta' quddiem, fiz-zip ta' quddiem tal-pouch"*. Upon being shown the cards exhibited earlier he states *"iva rajthom, kien hemm dawk il-cards li rajthom f'idejh u kien hemm dawk il-cards li jiena hrigt personalment minn gol-but tal-gakketta tieghu, pero l-cards kollha rajthom ghand l-ispettur ghax hadhom l-ispettur quddiemu...ngharaf hafna minn dawn is-simboli u stampi, kien hemm diversi...forty-nine cards meta ghoddejnihom b'kollox."*³⁶

Sergeant Azzopardi identifies the accused, himself and his colleague in the stills exhibited and to which reference was made above.³⁷ The four cards which were in the accused's hands when he was apprehended were handed over separately to Inspector Mercieca whilst the pouch was still being worn by him.³⁸ Whilst being taken to Sliema Police Station he was seated at the back with two officers, one of whom held the four cards, the identity card, the driving licence and the mobile phone found on him on arrest; this was done so that at all times the accused had the cards in his line of vision.³⁹ He mentions how upon conducting a frisk search and finding identification documents which were put back in the wallet in the accused's presence, Petrisor refused to confirm his identification details. In the pocket where the wallet was found he noticed that he had more cards but left them there *"dawk il-cards baqghu fuqu, fuq il-persuna tieghu. L-unika cards li hadtlu jiena hadtlu dak il-hin kienu cards li kienu f'idejh"*. He saw the rest of the cards once they reached the police station.⁴⁰

PC514 Christopher Mallia stated how upon approaching the Msida BOV ATM they found a person *"he was wearing a cap and when the Sergeant made a search on him, he found a lot of money, a lot of credit cards. He gave him the rights and from there the PS informed me to search for other persons and for the vehicle. I did it but it resulted in negative results. Came back and we escorted him*

³³ Dok.MV17

³⁴ Dok.MV18

³⁵ Fol.80

³⁶ Ibid.

³⁷ Fol.81. Vide Dok.MV11 fol.52--53

³⁸ Fol.82-83

³⁹ Fol.85

⁴⁰ Fol.85-86

to the Sliema Police Station". He identified the accused as being the said person,⁴¹ as well as himself and PS918 affecting the arrest as appeared on the exhibited stills.⁴² He described how the accused was wearing a pouch around his waist whilst having a credit card in hand, *"he had loads of things in his pockets. Money and credit cards... There was stuff in the pouch.... we saw him near the ATM, we saw that he was suspicious and my Sergeant stopped him and he told him that we need to search you and when he opened the pocket, we found a lot of money and credit cards and we stopped over there"*.⁴³

Inspector Mark Mercieca confirmed the receipt⁴⁴ listing items seized from the accused⁴⁵ and explained how on the 16th December, 2017, at around 10.15pm he was informed that a person was making suspicious transactions on the Msida ATM. The accused was brought to Sliema police station and the items listed were seized by himself. The 49 cards and the cards in the wallet were separated *"He had a pouch, which was situated under his belly. The cards were inside, even a considerable amount of cash was all disposed in this pouch and they were separated about 500 or 600 each.... In the pouch he had the 8,500 and 2,260 and 40 euros. They are listed because they are different notes. 50 euros. 170 notes of 50 euros, 130 notes of 20 euros and 4 notes of 10 euros. They were all in his possession."* No monies or cards were found in his jacket.⁴⁶

PS1444 Kenneth Brignano confirmed his signature on the receipt which described the items seized from the accused in his presence.⁴⁷ He also confirmed that the money was found in the accused's pouch.⁴⁸ **PC8 Tyrone Bugeja** after confirming his signature on the receipt also testified that he had seen the money in a pouch around the accused's waist. He adds that the accused had a lot of cards on him and he was tasked with escorting the accused from the Sliema precinct to lock-up.⁴⁹ He too was present when the list was being compiled as was his colleague PS1444. The accused remained silent during the said time.⁵⁰

⁴¹ Fol.221-222

⁴² Fol. 222

⁴³ Ibid.

⁴⁴ **Dok.MV3** a fol.31

⁴⁵ Fol.154

⁴⁶ Fol.155

⁴⁷ Fol.224

⁴⁸ Fol.225

⁴⁹ Fol.229

⁵⁰ Ibid.

PS122 Arthur Borg explained how on the 17th December, 2017, he was tasked by the prosecuting officer to photograph items seized from a person.⁵¹ The items were handed over to him by the same officer.⁵²

Evidence relating to the Fraudulent Acts

Elisa Buttigieg in representation of HSBC Bank Malta explained that she covers the night shift, 7pm-7am, which amongst other things is tasked with monitoring fraudulent transactions.⁵³ Referring to the night between the 16th and 17th December, 2017⁵⁴, *“about quarter [to] ten at night I saw an increase in telephone calls coming in and also my fraud alert system was reporting something which was irregular, so dealing with both contemporarily I took calls from the customers where primarily I learnt that **the customers were at home and cash was being withdrawn from their bank account.** I asked questions as to narrow to where ATMs were being used due to the fact that customers were receiving messages on their phone advising them about this which the bank calls SMS alerts. After that obviously **I narrowed it down to two particular ATMs being used and that would be in Msida and in Sliema, and the fraud alert system also detected his.....[the ATMS] were different ones, both HSBC anda BOV ATM.** After that I immediately contacted my management following my bank procedures and also contacted the police. Management as well confirmed that I should be contacting the police, I did not call the police directly due to the amount of the incoming calls, and I contacted my control room and they contacted the police on my behalf. I made sure to check after fifteen minutes that the police were contacted and the control room have confirmed that they actually did and the police were going on site.”⁵⁵. The witness clarified that **calls stated being received around 21:45 and estimated that there were “between 50 and 75 calls.... all related to the fraud alert because of the messages the customers were receiving, every time the case was being withdrawn from an ATM the customer is alerted and obviously the customers were at home and obviously were calling me to tell me listen money is being withdrawn and I did not do this transaction”** with calls being made solely by HSBC customers. Two ATMs were identified as being involved,*

⁵¹ Dok.AB a fol. 163-184

⁵² Fool.161-162

⁵³ Fol.100

⁵⁴ Fol.285-286

⁵⁵ Fol.101-102

namely in Msida and Sliema.⁵⁶ Reproduced she clarified that the night in question was that of the 16th December, 2017.⁵⁷

John Galea also representing HSBC bank in his capacity of card fraud manager, testified how on the 16th December, 2017, he received a call from the contact centre *"They told me that some persons were calling the Call Centre that they were receiving SMSs, they were withdrawing funds from their account when they were present at home. I immediately told the Contact Centre to send the police to the ATM, apparently one of the ATM was the Msida Bank of Valletta ATM, and they sent the police there. I immediately reported to work to identify where the compromise took place and **the dates of the compromise. I managed to establish the dates and the place. The date was between the 13th and the 17th November** were skimmers were placed on two of our ATMs, one of which was the Balluta ATM and the other was placed on Archbishop Street ATM. They were placed on these two separate ATMs and they managed to take information of the cards, the maxtripe, because the third parties managed to put a skimmer on the ATM and also a camera to capture the pin of the card. Between the 16th and 17th I had to report to work just to identify this compromise and my colleague and I managed to block around 480 cards which were skimmed during these four days. I also told them to send the police but they did not find anything, but still. [Spettur: What was the locality?] ...Wembley ATM this time Valletta. We managed to go through the CCTV and we saw someone just putting a camera and a skimmer on the ATM, and we also had to block those cards as well."*⁵⁸

The cctv footage from the Wembley Food Store ATM was exhibited⁵⁹ Also exhibited were footages from ATMs in Archbishop Street and Balluta⁶⁰ together with relative stills of the persons installing the skimmers.⁶¹ Galea continues *"And I've got also the Balluta ATM Sliema for the dates 13, 14 and also on the 26th November because on the 26 there was another attack, somebody tried to attach a skimmer but this was discovered by us and managed to retrieve the skimmer and the camera. In these cases we didn't have to stop the cards because the attempt failed. Still I have got the image. I also have some screenshots of these images of the persons which were attaching the*

⁵⁶ Fol.103-104

⁵⁷ Fol.285-286

⁵⁸ Fol.106

⁵⁹ Dok.JG fol.111

⁶⁰ Dok.JG1 and Dok.JG2

⁶¹ Dok.JG3 a fol.112 et seq.

skimmers."⁶²John Galea then proceeded to identify the accused as the person who installed the skimmer on the Wembley Food Store ATM on the 16th December, 2017.⁶³ The call was received from the call centre agent at around 10pm-10.30pm "According to the Call Centre there could be alerts generated either through our fraud monitoring system or from calls that were received by our customers....the ATMs were Bank of Valletta Msida and Sliema."⁶⁴

Reproduced he exhibits a list covering the fraudulent ATM withdrawals, which had been authorised by the bank, effected from Bank of Valletta Sliema ATM, Bank of Valletta Msida ATM, ATMs in Costa Rica and ATMs in the United Kingdom.⁶⁵ Another list was presented indicating also a number of declined transactions from the ATMs involved.⁶⁶ The transactions involving fraudulent withdrawals (after having been authorised) from BOV Msida resulted in HSBC bank suffering a loss of €22,900. Fraudulent withdrawals from the ATM of BOV Sliema €20,400, ATMs in Costa Rica €9,769.39 and from ATMs in the U.K. €7,886.90 thus totalling €60,956.29c.⁶⁷The cost for replacing the cards was that of €364.07.⁶⁸

Dr. Alexander Miruzzi, head of security within Bank of Valletta plc., also gave evidence. "On the 16th December of last year I was contacted by the Police Control Room and I was informed that there was an attack on the ATM network, more precisely at BOV ATMs in Preluna, High Street and Msida. I was also told by the police officer who contacted me that HSBC had reported that several clients are calling at HSBC centre whereby they were alleging that the withdrawals done by their clients were fraudulent in the sense that they did not actually do the transactions. I obviously contacted our BOV Customer Service Centre and triggered the alert myself whereby I instructed the BOV officials to keep an eye on the said ATMs, that is Preluna, High Street and Msida. I was also in contact with Inspector Vella about this incident which we consider as serious and also informed my superiors. Basically during the night we were in close contact with the police authorities and obviously our fraud section which was called in to investigate these cases, and **throughout the night we managed to locate the**

⁶² Fol.107. Vide **Dok.JG3** a fol.112-222. For clearer stills Vide **Dok.MB** a fol.307 et seq.

⁶³ **Dok.JG3** a fol.117

⁶⁴ Fol.109

⁶⁵ Fol.187-188; **Dok.JGZ** a fol. 189-193

⁶⁶ **Dok.JGZ1** a fol. 233-249

⁶⁷ Fol.233

⁶⁸ Fol.233

point of compromise which was an HSBC ATM in Valletta and the point of compromise was actually compromised between the 15th and 17th November of last year. We began the process whereby we blogged [recte: blocked] our cards because the alleged culprits were not only using HSBC cards but actually they were using BOV cards as well and also cards pertaining possibly to other banks, and in fact we managed to block 100 BOV and APS cards, because APS and BOV have a common agreement on these cards. This was an attack which was coordinated by several people, our cards were used not only on these locations, Preluna, High Street and Msida but also in Costa Rica and UK, so obviously more than one person was involved and these were attacks which were done concurrently by several people in Malta and also abroad. I can present actually the transactions which were approved worldwide in this attack and also a list of transactions which were attempted but were declined. The total loss for the bank was 7087.23 Euros and the attempted transactions amounted to 17,958.58Euros.”⁶⁹

The list of transactions was presented⁷⁰ together with specific transactions carried out on the Sliema BOV High Street ATM⁷¹ and Sliema BOV Preluna ATM.⁷² Footage from the cctv of the BOV Msida ATM⁷³ was exhibited showing the culprit being apprehended by the police. Stills taken from the same footage, a copy of which had been exhibited by the prosecuting officer,⁷⁴ was presented. Also exhibited were “*stills of the person who was allegedly withdrawing from our ATM at Preluna. As I stated besides the illicit withdrawals we also replaced 142 cards for a total cost of 1459 Euros.*”⁷⁵ The witness identified the accused as the person who made withdrawals from the Msida ATM.⁷⁶

Dr. Martin Bajada exhibited stills taken from the footage exhibited by Bank of Valletta⁷⁷ and HSBC.⁷⁸ In his report the expert states “*These stills*

⁶⁹ Fol.124

⁷⁰ Dok.AM a fol. 129-133

⁷¹ Dok.AM2 a fol. 136

⁷² Dok.AM1 a fol. 134

⁷³ Dok.AM3 a fol. 138

⁷⁴ Dok.AM4 a fol. 139-147. Vide MV8 a fol.39-45

⁷⁵ Fol.125

⁷⁶ Fol.126

⁷⁷ Dok.AM

⁷⁸ Dok.JG-JG2

show various persons tampering and attaching devices, known as skimmers, with the ATMs reflected in the CCTV footages.”⁷⁹

The Footage & Stills

Upon viewing the footage, the relative stills exhibited by both HSBC and BOV Bank and Bajada’s report which unfortunately reproduced only a limited number of the images downloaded from the footage of the Msida ATM thus leaving it to the court to view the whole footage, it became evident that the unidentified individual shown in stills 3-8⁸⁰ first approached the ATM at 21:32:57⁸¹ and left for the last time at 22:15:54⁸². During this time this person is seen returning several times to the ATM to effect further withdrawals. In fact, whilst constantly checking his surroundings he leaves the Msida ATM at 21:35:09 returning at 21:37:32⁸³; he leaves again at 21:42:11 and returns at 21:43:33 leaving at 21:48:51.⁸⁴ On these three occasions a total of €7,300 was withdrawn through 16 authorised transactions (with 8 further transactions having been declined by the bank).⁸⁵

The accused then first appears at the Msida ATM at 21:58:58 and leaves at 22:06:48. In that time-span a total of 8 transactions were carried out (plus an additional two that were declined) with a resulting total withdrawal of €4,150.⁸⁶

The previous individual returns one final time, after the accused leaves, and spends from 22:07:05 until 22:15:54 at the ATM. Bank records show that within this last period a total of 14 transactions totalling €4,300 were carried out.⁸⁷

⁷⁹ Fol.310

⁸⁰ Vide also **Dok.MB** a fol.320-322

⁸¹ Fol.320: Still 3 & 4

⁸² Vide BOV Msida ATM footage - **Dok.AM**

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ **Dok.JGZ1** a fol.236

⁸⁶ **Dok.JGZ1** a fol.237

⁸⁷ Ibid.

The accused returns one final time at 22:23:35 and by 22:24:31 the police arrive. There is no record of any transactions being carried out after 22:19.

Resulting Evidence

The Court can summarise the findings which result from the evidence tendered and produced before it as follows:

1. The injured parties were the two major banks who were constrained to refund their clients who had their monies fraudulently withdrawn from their respective accounts following the installation of skimming devices on HSBC ATMs. The banks also suffered damages when having to make good for the replaced cards which they had blocked upon learning of this scam.
2. Investigations by both BOV and HSBC revealed that the said fraudulent activity took place following *skimming*, a technique wherein banking information is stolen through the fixing of equipment on ATMs which allows the perpetrators to record an unsuspecting ATM user's PIN number thereby enabling them to gain unfettered access to the user's bank accounts.
3. Bank of Valletta traced the skimming device to an HSBC ATM in Archbishop Street, Valletta: *"we managed to locate the point of compromise which was an HSBC ATM in Valletta and the point of compromise was actually compromised between the 15th and 17th November of last year".⁸⁸ John Galea from HSBC corroborates this testifying *"The date [of compromise] was between the 13th and the 17th November were skimmers were placed on two of our ATMs, one of which was the Balluta ATM and the other was placed on Archbishop Street ATM."* and explained how the skimming devices *"were placed on these two separate ATMs and they managed to take information of the cards, the maxtripe, because the third parties managed to put a skimmer on the ATM and also a camera to capture the pin of the card"*⁸⁹. Another skimming device was placed at *"Wembley ATM this time Valletta. We managed to go through the**

⁸⁸ Fol.124

⁸⁹ Fol.106

CCTV and we saw someone just putting a camera and a skimmer on the ATM, and we also had to block those cards as well.”.⁹⁰

4. Stills from HSBC show unidentified individuals fiddling with the ATMs clearly fixing something on it on the 13th November 2017⁹¹ and that of Wembley Food Store where it is now **the accused** who is seen affixing a device to the ATM on the **16th December, 2017**,⁹² on the morning of his arrest, yet the police found no trace of such a device.⁹³ The Court notes that police were only sent to examine that ATM the following day, on the 17th December, 2017, the day after the accused had been arrested. Thus, the fact that they found no evidence of the skimming device comes as no surprise.
5. The total loss⁹⁴ suffered by Bank of Valletta, was that of €7,087.23⁹⁵ representing paid out/authorised withdrawals, and an additional €1,459 for replacing 142 cards.⁹⁶
6. HSBC Bank (Malta) plc. lost in total €60,956.29 with €22,900 being the loss incurred on the Msida ATM. Cards had to be replaced totalling €364.07.⁹⁷
7. **However, one notes a scarcity of evidence linking the accused to the coordinated scam or to the other individuals captured in the footages and stills.**
8. The Court can only speculate on the accused’s involvement with these group of individuals given the similarity in which the scam was carried out, the *modus operandi* where the individuals logistically targeted ATMs and local banks’ clients’ accounts at the same time across Malta from Bank of Valletta ATMS in High Street, and Preluna, Sliema and Msida but also in the United Kingdom and as far as Costa Rica.

⁹⁰ Fol.106

⁹¹ Fol.359-362

⁹² Fol.335-338

⁹³ Fol.106

⁹⁴ **Dok. AM-AM2** a fol. 129 et seq

⁹⁵ Fol.124

⁹⁶ Fol.125

⁹⁷ **Dok.JGZ1** a fol.233

Why else would the accused lie about ever having been in Malta before when the dates of his previous visit coincided squarely with the dates when the ATMs were compromised and skimming devices installed upon them? Despite the accused's denial of ever visiting Malta before, it resulted that before flying in to Malta on the 10th December, 2017,⁹⁸ the accused had travelled to on the 12th of November 17 leaving Malta on the 28th of November 2017.⁹⁹

Why was the accused reluctant to give details of his place of abode and to answer a harmless question regarding whether he made use of other ATMs or brought any luggage with him? His inconsistent versions given to the police did not go unnoticed by the Court. It is remembered how whilst in the first statement he had mentioned he was residing in a private apartment mentioned "*I rented an private apartment. This is a private apartment in Msida very near to the police station*",¹⁰⁰ in the second statement he states it was a guest house to which "*I do not have the key*"¹⁰¹ ; a guest house with no name!

9. Yet speculation and conjectures are simply that and thus, find no place in criminal proceedings. The level of proof required to be met in the criminal arena is what differentiates these proceedings from those instituted before the civil courts claiming damages.

10. No footage was produced showing the accused using other ATMs which were used to perpetrate the fraud and consequently it is only with regards to the 10 transactions totalling €4,150¹⁰² which were carried out between 21:58:58 and 22:06:48 that the Prosecution can be said to have proven its case. As defence counsel rightly submits in final submissions, the accused could not have been in two places at the same time and it remains to be seen whether he can be said to have formed part of the organization responsible for the wide-spread attack.

⁹⁸ Fol.185

⁹⁹ Fol. 186

¹⁰⁰ Fol.37

¹⁰¹ Fol.48

¹⁰² **Dok.JGZ1** a fol.237

11. No evidence was produced by the accused on a basis of probability that he had effected withdrawals from his personal account or from some other account having been so authorised. Instead upon his arrest he was found, as PS918 testified, "*kellu erba cards f'idejh, innutajt li l-cards ma kienux cards komuni tal-bankjew persuni normali. Kellhom fuqhom erba digits miktubin bil-gem marker fuq kull card li kellu f'idejh.*"¹⁰³

The Charges

First and Second Charges: Belonging to an organization with a view to commit criminal offences and Conspiracy

Given the lack of evidence linking the accused to other individuals, as rightly contended by learned defence counsel in the course of final submissions, the charges of participation in a criminal organization and that of conspiracy have not been adequately proven.

Only for completeness' sake and owing to the submissions made by learned counsel or the defence, it is being underlined that contrary to other multilateral international and European Union instruments and arrangements, Maltese law in no way attempts to define when a group of persons is tantamount to a criminal organization. To the contrary, Maltese law purposely makes no reference to such term but only refers to **an organization with a view to commit criminal offences** refraining from qualifying this set-up as '*a criminal organization*'.

In fact, after being introduced by *Act III of 2002* the present article 83A of the Criminal Code was substituted through *Act XXIV of 2014* to bring Malta in line with the provisions of *Council Framework Decision 2008/841/JHA on the fight against organised crime*.¹⁰⁴ The said Framework Decision in Article 1 provides:

¹⁰³ Fol.78

¹⁰⁴ Bill 53 of 2014

For the purposes of this Framework Decision:

1. 'criminal organisation' means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;
2. 'structured association' means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

Article 83A(1) of the Code however simply refers to "*organization with a view to commit criminal offences*" without qualifying it any further, going on to provide, in sub article (4) thereof, that in cases where the number of persons in the organisation is ten or more the punishment shall be increased from one to two degrees, whilst the mere fact of belonging to such an organization is sanctioned in sub article (2) thereof.

This flexibility also emanates from the very nature and spirit of Framework Decisions. A framework decision only lays down the minimum legislative requirements a Member State is to implement thereby allowing States absolute freedom to provide for a wider interpretation if deemed warranted.¹⁰⁵ Article 83A of the Code is a case in point!

This was a conscious decision on the legislator's part wherein it deemed it fit and appropriate to allow the Maltese Courts flexibility in determining whether, in cases falling under Article 83A of the Code, on a case by case basis having regard to the evidence before it, a group of persons coming together with the aim of committing criminal offences, can tantamount to "*an organization*". The legislator refrained from qualifying it in vague and uncertain terms simply as 'a **criminal organization**', barring the one exception in relation to Article 337A of the Code.

¹⁰⁵ Framework decision were not directly applicable. They first had to be transposed into national legislation. The member states were free to choose the 'form and method' to achieve the objectives set out in the framework decision. The aim of framework decision was to facilitate cooperation between the member states in the field of justice and home affairs by means of a certain degree of harmonisation of national legislation: <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dotmxlyyu>

This *ratio legis* is readily evident given that in transposing various other international instruments into Maltese law, when making reference to “*a criminal organization*”, our Code emphasizes that the said phrase is to be interpreted “**within the meaning of Article 83A(1)**” as is the case in Articles 203, 204A-204D both inclusive, 208A-208AB both inclusive, 248E(2)(c) of the Criminal Code.

Ubi lex voluit dixit, ubi noluit tacuit! Indeed in our Code there are instances where the legislator specifically provides for a different interpretation to the phrase ‘a criminal organization’, going as far as indicating that in those specific instances, the phrase was to have the meaning assigned to it by a particular legal instrument; reference is made to Articles 208AC(1)(h) and 337F(2)(d) of the Criminal Code, where specific reference is made to the above-cited Council Framework Decision 2008/841JHA.

Consequently, the choice of terminology in Article 83A of the Code, in no uncertain terms **circumvents, nay obviates, the need to draw upon definitions, further qualifications or additional requisites which other instruments chose fit to assign to this phrase.**

Third Charge: Possession of articles for use in fraud.

The accused is also being charged with the crime sanctioned by Article 310BA of the Criminal Code.

The accused was found with cards carrying four-digit numbers when he was apprehended making use of the ATM. None of these cards were normal banking cards registered in his name or in that of other individuals. Evidence showed that coupled to the skimming technique and the information obtained therefrom, he was using the said cards to commit the fraudulent transactions to the banks’ detriment by making withdrawals from their clients’ accounts.

Article 310BA of the Code was introduced through Act XXIV of 2014 and reflects almost *verbatim* Sections 6 and 7 of the *Fraud Act, 2006*:¹⁰⁶

¹⁰⁶ **6 Possession etc. of articles for use in frauds**

Section 6 makes it an offence for a person to possess or have under his control any article for use in the course of or in connection with any fraud. This wording draws on that of the existing law in section 25 of the Theft Act 1968 and section 24 of the Theft Act (Northern Ireland) 1969. (These provisions make it an offence for a person to "go equipped" to commit a burglary, theft or cheat, although they apply only when the offender is not at his place of abode.) The intention is to attract the case law on section 25, which has established that proof is required that the defendant had the article for the purpose or with the intention that it be used in the course of or in connection with the offence, and that a general intention to commit fraud will suffice. In *R v Ellames* 60 Cr. App. R. 7 (CA), the court said that:

"In our view, to establish an offence under s 25(1) the prosecution must prove that the defendant was in possession of the article, and intended the article to be used in the course of or in connection with some future burglary, theft or cheat. But it is not necessary to prove that he intended it to be used in the course of or in connection with any specific burglary, theft or cheat; it is enough to prove a general intention to use it for some burglary, theft or cheat; we think that this view is supported by the use of the word 'any' in s 25(1). Nor, in our view, is it necessary to prove that the defendant intended to use it himself; it will be enough to prove that he had it with him with the intention that it should be used by someone else."¹⁰⁷ [underlining by the Court]

The *Crown Prosecution Service* offers the following explanatory notes:

There is no defence of "reasonable excuse". Those who are, in particular, properly in possession of or involved in the development of computer software or other items for use to test the security of computer or security systems must rely on their lack of intention that the items or programmes are "for use in the course of or in connection with any fraud." Prosecutors will be alert to such circumstances and the possible abuses.¹⁰⁸ [underlining by the Court]

This charge has thus been adequately proven.

(1) A person is guilty of an offence if he has in his possession or under his control any article for use in the course of or in connection with any fraud

7 Making or supplying articles for use in frauds

(1) A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article –

(a) knowing that it is designed or adapted for use in the course of or in connection with fraud, or (b) intending it to be used to commit, or assist in the commission of, fraud.

¹⁰⁷ <https://www.legislation.gov.uk/ukpga/2006/35/notes/division/5/6>

¹⁰⁸ <https://www.cps.gov.uk/legal-guidance/fraud-act-2006>

Fourth Charge: Fraud

In the course of final submissions, learned counsel for the defence distinguishes between the crimes of theft and fraud as well as those of forgery and fraud, submitting that there was no *mis-en-scene* in the case under review.

Reference is made to the judgement **Il-Pulizija vs Enrico Petroni u Edwin Petroni**¹⁰⁹ where the Court underlined the differences between the crimes of fraud, theft and that of misappropriation:

Dan ir-reat [ta' approprijazzjoni indebita] jiddistingwi ruhu mir-reat ta' serq, ghax l-oggett li jkun, jigi moghti mill-agent volontarjament u mhux jittiehed kontra l-volonta` jew minghajr il-kunsens tad-detentur; u jiddistingwi ruhu ukoll mit-truffa ghax id-detentur tal-haga ma jigix ingannat permezz ta' raggiri jew artifizi biex jitlaq minn idejh dik il-haga favur l-agent.

In **Il-Pulizja vs Carmela German** the Court of Criminal Appeal provided:¹¹⁰

In tema legali gie ritenut minn din il-Qorti fis-sentenza taghha tat-12 ta' Frar, 1999 fl-ismijiet Il-Pulizija v. Anthony Francis Willoughby li:

*"Fil-Ligi taghna biex ikun hemm it-truffa jew il-frodi innominata irid ikun gie perpetrat mill-agent xi forma ta' ingann jew qerq, liema ingann jew qerq ikun wassal lill-vittma sabiex taghmel jew tonqos milli taghmel xi haga li qgibilha telf patrimonjali bil-konsegwenti qligh ghall-agent (Il-Pulizija v. Emmanuele Ellul, App. Krim., 20/6/97; ara wkoll Il-Pulizija v. Daniel Frendo, App. Krim., 25/3/94). Dan it-telf hafna drabi jkun jikkonsisti filli l-vittma, proprju ghax tkun giet ingannata, volontarjament taghti xi haga lill-agent (Il-Pulizija v. Carmel Cassar Parnis, App. Krim., 12/12/59, Vol. XLIII.iv.1140). Jekk l-ingann jew qerq ikun jikkonsisti f' "raggiri o artifizi" – dak li fid-dottrina jissejjah ukoll *mise en scene* – ikun hemm it-truffa; jekk le, ikun hemm ir-reat minuri ta' frodi innominata (jew lukru frawdolent innominat) (ara, fost ohrajn, Il-Pulizija v. Carmelo Cassar Parnis, App. Krim., 31/10/59, Vol. XLIII.iv.1137; Il-Pulizija v. Francesca Caruana, App. Krim., 25/7/53, Vol. XXXVII.iv.1127; ara wkoll Il-Pulizija v. Giuseppe Schrainer, App. Krim., 3/3/56)."*

Kwantu ghall-kwistjoni mqajjma mill-appellanti u cioe` jekk il-"gidba semplici" – a differenza tal-artifizi u raggiri – tistax tammonta ossia twassal ghar-reat ta' frodi innominata, ir-risposta hija certament fl-affermattiv, basta li tali gidba tkun effettivament tammonta ghal "qerq", cioe` tkun intiza jew preordinata sabiex il-persuna l-ohra (il-vittma) taghmel jew tonqos milli taghmel xi haga li qgibilha telf patrimonjali bil-konsegwenti arrikkiment ghal min jghid dik il-gidba, u basta, s'intendi, li tkun effettivament waslet ghal dan it-telf minn naha u arrikkiment min-naha l-ohra. [sottolinejar tal-Qorti]

¹⁰⁹ Per Hon. Mr. Justice Vincent Degaetano; Dec. 9th June, 1998

¹¹⁰ Per Hon. Mr. Justice Vincent Degaetano; Dec. 30th December, 2004

In **Il-Pulzija vs Marjanu Zahra**¹¹¹ the Court of Magistrates (Malta) examined in great detail the elements of the offence of fraud:

*Biex jissussti ir-reat tal-frodi jew truffa gie ritenut kostantement fil-gurisprudenza u fis-sentenzi tal-qradi taghna illi iridu jinkonkorru diversi elementi. Ibda biex irid ikun hemm ness bejn is-suggett attiv u is-suggett passiv tar-reat u cioe' bejn minn qieghed jikkometti ir-reat u il-vittma. Hemm imbaghad l-element materjali ta' dana ir-reat u cioe' l-uzu ta' ingann jew raggieri li iwasslu lil vittma sabiex isofri it-telf patrimonjali. Finalment huwa necessarju li ikun hemm l-element formali tar-reat konsistenti fid-dolo jew fl-intenzjoni tat-truffatur jew frodatur li jinganna u dana sabiex jikseb profitt jew vantagg ghalih innifsu. Jekk xi wiehed jew iktar minn dawn lelementi huma nieqsa, allura ir-reat tat-truffa ma jistax jisussisti. Illi f'sentenza moghtija mill-Qorti ta'l-Appelli Kriminali (per Imhalef Carmel. A. Agius) deciza fit-22 ta' Frar 1993, fl-ismijiet **Il-Pulzija vs Charles Zarb**, il-Qorti ghamlet esposizzjoni ferm preciza studjata u dettaljata ghar-rigward ta' l-elementi ta' dana ir-reat. Il-Qorti bdiet sabiex esprimiet ruhha b'dan ilmod ghar-rigward ta' dana ir-reat:*

“Id-delitt tat-truffa huwa l-iprem fost il-kwalitajiet ta' serq inpropriji u hu dak li fl-iskola u fil-legislazzjoni Rumana kien maghruf bhala steljolat u li jikkorrispondi ezattament ghat-truffa tal-Codice Sardo, ghal frodi tal-Kodici Toskan, ghal Engano jew Estafa fil-kodici Spanjol, ghal Bulra f'dak Portugiz, u ghal Esroquerie fil-Kodici Francis ... Id-disposizzjonijiet tal-Kodici taghna li jikkontemplaw ir-reat ta' truffa kienu gew mehuda minn Sir Adriano Dingli mill-paragrafu 5 ta' l-artikolu 430 tal-Kodici delle Due Sicilie li hu identiku hlief ghal xi kelmiet insinjifikanti ghal Kodici Franciz (artikolu 405) avolja dan, il-Kodici delle Due Sicile, it-truffa kien sejhilha Frodi”. Skond giurisprudenza kostanti, lingredjenti ta' l-element materjali ta' dan id-delitt ta' truffa, huma dawn li gejjin.

Fl-ewwel lok bhala suggett attiv ta' dan id-delitt jista' ikun kulhadd.

Fit-tieni lok il-Legislatur, aktar mill-interess socjali tal-fiducja reciproka firrapport patrimonjali individwali, hawn qed jittutela l-interess pubbliku li jimpedixxi l-uzu ta' l-ingann u tar-raggieri li jinducu bniedem jiddisponi minn gid li fil-kors normali tan-negozju ma kienx jaghmel.

Fit-tielet lok hemm l-element materjali tat-truffa u jikkometti d-delitt tat-truffa kull min:

- a. b'mezzi kontra l-ligi, jew*
- b. billi jaghmel uzu minn ismijiet foloz jew*
- c. ta' kwalifiki foloz jew*
- d. billi jinqeda b'qerq iehor u*
- e. ingann jew*
- f. billi juri haga b'ohra sabiex igieghel titwemmen l-ezistenza ta' intraprizi foloz,*
- g. jew ta' hila*
- h. setgha fuq haddiehor jew*
- i. ta' krediti immaginarji jew*
- j. sabiex iqanqal tama jew biza dwar xi grajja kimerika, jaghmel qliegh bi hsara ta' haddiehor.*

.... Hu necessarju biex ikun hemm ir-reat ta' truffa, li l-manuvri jridu jkunu ta' natura li jimpressjonaw bniedem ta' prudenza u sagacija ordinarja, li jridu jkunu frawdolenti u li hu

¹¹¹ Per Magistrate Dr. Edwina Grima; Dec. 2nd March, 2011

necessarju li jkun impjegati biex jipperswadu bl-assistenza ta' fatti li qajmu sentimenti kif hemm indikat filligi."

*Dwar l-artifizji intqal mill-Qorti illi "hemm bzonn biex ikun reat taht l-artikolu 308 illi l-kliem jkun akkumpanjat minn apparat estern li jsahhah il-kelma stess fil-menti ta' l-iffrodat. Din it-tezi hija dik accettata fil-gurisprudenza ta' din il-Qorti anke kollegjalment komposta fil-kawza "**Reg vs Francesco Cachia e Charles Bech** (03.01.1896 – Kollez.XV.350) li fiha intqal illi "quell' articolo non richiede solamente una asserzione mensioniera e falza, ma richiede inoltre che siano state impiegate, inganno, raggiro o simulazione, ed e' necessario quindi che la falza asseriva sia accompagnata da qualche atto diretto a darla fede."*

Ghar-reati ta' truffa komtemplat fl-artikolu 308 tal-Kodici kriminali, il-Qorti iccitata lill-Imhalef Guze Flores fejn qal illi "kif jidher mid-dicitura partikolari deskrittiva adoperata, hemm bzonn li tirrizulta materjalita' specifika li sservi ta' supstrat ghall-verosimiljanza talfalsita prospettata bhala vera u b'hekk bhala mezz ta' qerq. Ma huwiew bizzzejjed ghal finijiet ta' dak l-artikolu affermazzjonijiet, luzingi, promessi, minghajr l-uzu ta' apparat estern li jirrivesti bi kredibilita' l-affermazzjonijiet menzjonjieri tal-frodatur. Il-ligi taghti protezzjoni specjali kontra l-ingann li jkun jirrivesti dik ilforma tipika, kwazi tejratri, li tissupera il-kawtela ordinarja kontra s-semplici u luzingi, u li taghti li daww l-esterjorita ta' verita kif tirrendi l-idea l-espressjoni felici fid-dritt Franciz mise-en-scene."

"....Kwantu jirrigwarda l-element formali, cioe' kwantu jirrigwarda d-dolo ta' dan ir-reat ta' truffa, jinghad illi jrid jkun hemm qabel xejn l-intenzjoni tal-frodatur li jipprokura b'ingann l-konsenja tal-flus jew oggett li jkun fi profit ingust tieghu. Lingustizzja tal-profitt tohrog mill-artikolu 308 tal-Kodici Kriminali fejn il-kliem "bi hsara ta' haddiehor" ma jhallux dubbju dwar dan. Jigifieri biex ikun hemm l-element intenzjonali tar-reat ta' truffa, hemm bzonn li s-suggett attiv tar-reat fil-mument talkonsumazzjoni tieghu ikun konxju ta' l-ingustizzja tal-profitt u b'dan il-mod il-legittima produttivita tal-profitt hija bizzzejjed biex teskludi d-dolo."

The prosecution amply proved that the accused made use of data illegally obtained to effect cash withdrawals thereby causing a loss to HSBC Bank which loss was, ultimately, his gain as it was proven that several were the withdrawal transactions he effected.

Contrary to what learned defence counsel submits, the cards through which the fraud was perpetrated, were not meant to act as copies of debit/credit cards *per se* but coupled with the personal banking information pertaining to a number of the bank's clients, obtained through the fraudulent act of phishing, allowed the by-pass of the bank's security system and access to the said clients' accounts; this allowed him to **deceive the bank's operating system into authorizing transactions believed to be being carried out by legitimate clients** of the said bank. This was indeed a mis-en-scene and a grandly devised one at that!

Thus, there was absolutely no cause for the prosecution to prove which particular card found on the accused's person, was used for each and every particular transaction, as learned defence counsel contends. The injured party in this case was the bank itself which listed the client's whose accounts were debited without due authorization and thus illegally through fraud. Thus this offence was amply proven by the prosecution.

The Fifth and Sixth Charges: Malicious use of false documents & Other kinds of forgery and use of forged documents.

Evidence has shown that the cards through which the accused was committing the fraud were not bank cards but loyalty and membership cards from establishments such as Primark, Debenhams, Odeon, Rewe Market and Boots.¹¹² Thus, the offence envisaged by Article 184 - which refers to acts drawn up by public officers, public instruments, commercial documents or documents of a private bank - clearly finds no application to these cards. Moreover, nowhere was it even remotely proven that these cards were forged.

The Seventh and Eight Charges: Unlawful access to, or use of, information.

Ample evidence was produced showing that the fraud was carried through after skimming devices were installed on ATMs. It was these devices which enabled fraudulent cash withdrawals "*they managed to take information of the cards, the maxtripe, because the third parties managed to put a skimmer on the ATM and also a camera to capture the pin of the card*"¹¹³.

Upon installation of these skimming devices possession of banking information was immediately taken given that skimming devices are purposely designed to interface with banking operating systems. Whilst it is unknown if it was the accused who actually had a role in initially obtaining this data, he certainly took possession of same and made use thereof when embarking on his fraudulent withdrawal spree.

¹¹² Dok.MV13 a fol.60-71

¹¹³ Fol.106

Through the use of the same skimming devices and cameras strategically placed on the ATMs passwords, the pin codes of unsuspecting clients were obtained and subsequently made use of by the accused when effecting the withdrawals. In this way the accused managed to by-pass the bank's security measures thereby gaining unauthorised access to the bank's information and operating systems.

Consequently, the Court finds that the prosecution proved its case with regards to the third, fourth, seventh and eight charges.

Ninth Charge: Recidivism

The accused's criminal conviction sheet from Romania was presented by the prosecuting officer. The said document was signed by the Director within the Directorate for Criminal Records, Statistics and Operational Registers of the General Inspectorate of the Romanian Police and sent to the Malta Police via email thereby satisfying article 49(4) of the Criminal Code. This sub article states:

(4) Any document which is to be sent in connection with proceedings under this article may be transmitted by any secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity.

Learned counsel for the defence in the course of final submissions raises the issue that the said documentation does not satisfy authentication requirements.

The Court does not share this view and finds that the document conforms to the dictates regulating authenticity of criminal records, an article introduced through *Act XXIV of 2014* to implement *Council Framework Decision 2008/675/JHA on taking account of convictions in Member States of the European Union in the course of new criminal proceedings*.¹¹⁴

Article 49 of the Code provides:

49. (1) A person is deemed to be a recidivist if, after being sentenced for any offence by a judgement, even when delivered by a foreign court, which has become *res judicata*, he commits another offence.

¹¹⁴ Bill 53 of 2014

(2) In any proceedings under or for the purposes of this article, a document, duly authenticated, which certifies that a person was convicted on a date specified in the document of an offence against the law of that State, or part of that State, shall be admissible as evidence of the fact and date of the conviction without any need for further evidence.

(3) A document shall be deemed to be duly authenticated if one of the following conditions applies:

(a) it purports to be signed by a judge, magistrate or officer of the sentencing State; or

(b) it purports to be certified, whether by seal or otherwise, by the Ministry, department or other authority responsible for justice or for foreign affairs of the sentencing State; or

(c) it purports to be authenticated by the oath, declaration or affirmation of a witness.

.....

(5) In this article, "oath" includes an affirmation or a declaration; and nothing in this article shall be construed as prejudicing the admission in evidence of any document which is admissible in evidence under any other provision of law.

The documentation is signed by the Director and bears the seal of the above-cited Directorate. In the said document one finds a declaration to the effect that *"There are convictions registered in the criminal record of the person concerned"*.

In *The Police vs MORE Christopher Guest*¹¹⁵ the Court of Criminal Appeal examined *funditus* the provisions of Regulation 73A of the Extradition (Designated Foreign Countries) Order, S.L.276.05. That provision, in sub article (3)(b) thereof dealing with authenticity, is almost identical to Article 49(3) of the Code with the latter going further and providing also for authentication by means of a mere declaration besides *"the oath or affirmation of a witness"*. The Court considered:

The Court agrees with Defence that in this case, the evidence that was brought by the Prosecution did not consist of sworn declarations or original documents. However, as shown above, in particular in the work of **Nicholls, Montgomery and Knowles** that does not mean that they are not admissible in evidence. To the contrary, applying by analogy the principles that clearly transpire from this excerpt, the process of authentication in terms of regulation 73A of the Order makes potentially admissible in evidence in these proceedings documents containing written statements of fact, even though under Maltese Laws of Evidence what appears in the statement would only be admissible in the form of oral testimony given on oath by the maker of the statement.....

¹¹⁵ Per The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit); Dec. 23rd July, 2019; Appeal number – 180/2019.

First of all these are documents that purport to be signed by officers of the scheduled country transmitted by secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity. If not personally or digitally signed by the officers themselves, these documents were electronically inserted on the SIS II database, that is a restricted access database operative only among Sirene Bureaux in the EU and taken from the said database⁴ or transmitted to the Maltese Police by the UK Police Authorities in line with the provisions of regulation 5(9) of the Order,.....

Secondly, even though the witness statements and accompanying or referring documents were not executed under oath, they may still be received as evidence in EAW proceedings, as **Nicholls, Montgomery and Knowles** argue in their work.

Thirdly because even though these witness statements were not taken on oath, they still satisfy the minimum requirements of Maltese Law given that regulation 73A of the Order dispenses with the mandatory requirement of witness testimony being exclusively admissible if tendered on oath by the contemporaneous inclusion of the form of affirmation alongside the oath.

Thus, the accused is also being found to be a recidivist in terms of articles 49 and 50 of the Criminal Code.

In its consideration regarding punishment the Court took into consideration the serious nature of the offences of which the accused is being found guilty. Offences aimed at undermining the security of banking systems and depriving individuals of their property. One cannot ignore or make light of the panic such offences cause, instilling fear and insecurity in those making use of banking facilities. An attack on a banking system goes a long way in destabilizing not merely the banking sector of a country but potentially its financial stability.

Consideration was also taken of the fact that these offences were carefully planned out besides being committed over a period of time, wherein initially a malicious plan of obtaining banking data of clients by circumventing the banks' security and information structures was set into motion, culminating in the fraudulent use of that data to access the banks' information and operating systems. The fact that the accused is no stranger to crime as evidenced by his criminal record tarnished by no less than three separate jurisdictions, was also a factor which weighed in on the Court's considerations.

Whereas the third, seventh and eight offences were offences designed for the commission of the offence of fraud, the fourth offence. Article 17(h) of the Criminal Code provides:

(h) when several offences, which taken together do not constitute an aggravated crime, are designed for the commission of another offence, whether aggravated or simple, the punishment for the graver offence shall be applied.

In this case the punishment for the graver offence is that provided for by Article 337F of the Criminal Code.

The Court must make mention of the fact that the Attorney General in its note of remittal for judgement chose solely to indicate Article 337F(1) of the Code when there is no doubt that this was case wherein the offence was committed through the misuse of personal data of another person, with the aim of gaining the trust of a third party, thereby causing prejudice to the rightful identity owner in terms of Article 337F(2)(e) of the Code.

The Court of Appeal in its judgement **Il-Pulizija vs Omissis** held:¹¹⁶

Issa meta “ir-rinviju għall-gudizzju jsir skond is-subartikolu (3) tal-Artikolu 370 (u allura wiehed qed jitkellem fuq għall-anqas reat wiehed, fost dawk imputati, li huwa ta’ kompetenza tal-Qorti Kriminali), in-nota ta’ rinviju għall-gudizzju tassumi rwol simili għal dak ta’ l-att ta’ akkuza quddiem il-Qorti Kriminali. Fin-nota ta’ rinviju għall-gudizzju skond l-Artikolu 370(3) ma jistghux jizjed reati li dwarhom ma tkunx saret il-kumpilazzjoni; l-Avukat Generali, naturalment, jista’ jnaqqas reat jew reati u anke jzid skuzanti. [Il-Pulizija vs Michael Carter – 07/12/2001 App.Krim].”

Illi bhal kif jagħmel meta jigi biex jirredigi l-att ta’ l-akkuza, l-Avukat Generali wara li jifli l-atti tal-kumpilazzjoni irid jara liema huma dawk ir-reati li jistghu jigu imputati lill-persuna akkuzata fejn allura huwa jista’ inaqqas reat jew reati minn dawk li kienu qed jigu investigati tul l-atti kumpilatorji. Issa għalkemm l-Avukat Generali għar-reat mahsub fl-artikolu 198 tal-Kodici Kriminali cioe’ dak ta’ l-istupru, kif ukoll dak mahsub fl-artikolu 203, ma jindikax ic-cirkostanza aggravanti imsemmija għall-ewwel reat fl-artikolu 202(b) u għat-tieni reat imfisser fis-sub-inciz (1)(c) għall-istess artikolu tal-ligi u cioe’ l-fatt illi r-reati gew komeffi fuq il-persuna ta’ dixxendenti taht l-eta ta’ tmintax-il sena, l-Ewwel Qorti għaddiet biex sabet htija għal dawn ir-reati bic-cirkostanzi aggravanti. L-appellanti jilmonta allura illi b’hekk ir-reat gie rez iktar gravi minn dak indikat fin-nota ta’ rinviju għal gudizzju. Jinsisti inoltre illi din ic-cirkostanza aggravanti kellha tohrog mill-provi ikkumpilati, haga li fil-fehma tieghu ma tirrizultax ippruvata, u gjaldarba l-Avukat Generali ma hassx il-htiega li jindika dan l-aggravvju allura kellu jkun evidenti għall-Ewwel Qorti illi din il-prova ma saritx.

Illi l-artikolu 589 tal-Kodici Kriminali jitkellem dwar dak li għandu ikun fiha l-att ta’ l-akkuza meta fis-sub-inciz (b) li jikkontempla l-parti narrativa ta’ l-att ta’ l-akkuza hemm dispost illi l-Avukat Generali “għandu fisser il-fatt li jikkostitwixxi r-reat, bil-partikularitajiet li jkun jistghu jingħataw dwar iż-żmien u l-lok li fihom ikun sar il-fatt u dwar il-persuna li kontra tagħha r-reat ikun sar, **flimkien maċ-cirkostanzi kollha li, skont il-ligi u fil-fehma tal-Avukat Ġenerali, jistghu jkabbru jew inaqqsu l-piena.**”

¹¹⁶ Per The Hon. Mdme Justice Edwina Grima, Dec. 26.10.2017; Appeal No. 178/2014

lkompli s-sub-iniz (c) hekk meta jitkellem fuq il-part akkuzatorja ta'l-att ta'l-akkuza meta hemm dispost illi din tikkostitwixxi:

“ġabra fil-qosor li fiha l-imputat jiġi akkużat tar-reat kif miġjub jew imfisser fil-liġi, u bit-talba sabiex jitmexxa kontra l-akkużat skont il-liġi, u sabiex l-istess akkużat jiġi ikkundannat għall-piena stabbilita mil-liġi (hawn jingħad l-artikolu tal-liġi li jikkontempla r-reat) jew għal kull piena oħra li skont il-liġi tista’ tingħata skont kif jiġi iddikjarat ħati l-akkużat.”

Mela allura għalkemm fil-parti narrattiva ta'l-att ta'l-akkuza l-Avukat Generali ghandu jindika c-cirkostanzi kollha ta' fatt li jistghu jkabbru jew inaqqsu l-piena u allura jirrendu ir-reat iktar gravi, madanakollu imbagħad fil-parti akkuzatorja huwa bizzejjed illi jiġi indikat l-artikoli tal-liġi li jikkontempla ir-reat. Dan x'aktarx għaliex huwa rimess għal gudizzju tal-gurija popolari biex jiddeciedu jekk il-fatti esposti mill-Avukat Generali jirrizultawx ippruvati mill-evidenza li tingieb waqt il-guri, fejn imbagħad il-kwistjoni dwar il-piena li għandha tigi erogata f'kaz ta' sejbien ta' htija għal fatti kif decizi mill-gurati tigi, imhollija f'idejn l-Imhallef toġat.

Ekwiperata n-nota ta' rinviu għal gudizzju ma'l-att ta'l-akkuza allura huwa bil-wisq evidenti illi huwa bizzejjed illi l-Avukat Generali jindika l-artikoli tal-liġi li jikkontempla r-reat u dan kif hemm indikat b'mod specifiku fl-artikolu tal-liġi su-iccitat. Issa huwa minnu illi n-nota ta' rinviu għal gudizzju ma fijiex dik il-parti narrattiva bħalma fiha l-att ta'l-akkuza, izda l-indikazzjoni tal-fatti tal-kaz johorgu mill-imputazzjonijiet kif originarjament mfassla kontra l-imputat. Illi fis-sentenza fl-ismijiet ***“Il-Pulizija vs Francesco sive Godwin Scerri”*** deciza 18 ta' April 2012 minn din il-Qorti kif diversament ippresjeduta gie deciz illi:

“Fin-nuqqas ta' indikazzjoni differenti mill-Avukat Generali, l-artikoli citati mill-Avukat Generali u l-akkuza originali jridu jigu ezaminati flimkien għal dak li jirrigwarda l-fattispecji partikolari tal-kaz.”

Dan għaliex, kif ingħad għalkemm in-nota ta' rinviu għal gudizzju hija imqabbla mal-att ta'l-akkuza, madanakollu fiha hija mankanti dik l-parti narrattiva bħalma hemm fl-att ta'l-akkuza li titkellem dwar il-fattispecje tal-kaz li abbazi tagħhom huma imsejjsa ir-reati li jigu hemmhekk imputati. Xejn ma kien josta lill-Ewwel Qorti allura stabbilit ir-reat, illi teroga dik il-piena li fil-fehma tagħha kienet tapplika għac-cirkostanzi partikolari tal-kaz kif imfissra fl-imputazzjonijiet. Għalhekk stabbilit illi l-appellanti kien qed jiġi akkużat bir-reati ta'l-istupru vjolenti u l-korruzzjoni tal-minorenni, kien jispetta lill-Ewwel Qorti sabiex misjuba l-htija għal dawn ir-reati, meta tigi tqies il-piena li għandha tigi erogata, tara jekk mill-fattispecje din kellhiex tizdied minhabba xi cirkostanza aggravanti. Għal dawn il-motivi għalhekk dan l-ewwel aggravju qed jiġi michud.

In view of the foregoing, although nothing restricts a Court from applying a provision setting out the applicable punishment, the mere fact that in the charges brought against the accused no mention is made of these circumstances, the Court is precluded from applying this graver punishment.

For the said reasons the Court whilst acquitting the accused from the first, the second, the fifth and the sixth offences, after seeing articles 17(b)(h), 18, 31, 49, 50, 308, 310(1)(b), 310BA(1)(3), 337C(1)(f)(i) and 337F(1) of the Criminal Code, finds the accused guilty of all other offences (offences numbers three, four, seven, eight and nine) and condemns him to **forty (40) months imprisonment and a fine of ten thousand euros (€10,000)**.

In terms of Article 533 of the Criminal Code the accused is being ordered to pay the sum of **€1,309.38c** as expert fees.

Furthermore, in terms of Article 23 of the Criminal Code orders the forfeiture in favour of Government of all items, including the monies, exhibited in the acts of these proceedings.

In terms of Article 532A of the Criminal Code, read jointly with Article 24 of the Probation Act, Chapter 446 of the Laws of Malta, the Court is ordering the offender to compensate HSBC Bank with the sum of **€4,150**.¹¹⁷ This order may be enforced in like manner as if it had been given in a civil action between the offender and the bank. This order shall in no way derogate from any right of such person to recover any greater amount by any other means from the offender or any other person liable to pay the same.

Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law).
Magistrate

¹¹⁷ Dok. JGZ1 a fol.237