



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

**MAGISTRATE DR MARSE-ANN FARRUGIA LL.D.**

**Sitting held today Monday, 6th September 2021**

**The Police  
(Inspector Leeroy Balzan Engerer)**

**vs**

**Martyn Paul Underwood**

The Court,

1. Having seen charges brought against:

**Martyn Paul Underwood**, forty-three (43) years of age, son of Robin and Karen nee' Hawkins, temporarily homeless, holder of British Passport with number: 557795742, born in Gravesend, United Kingdom on the 30<sup>th</sup> January 1978

accused with having on the 9<sup>th</sup> February 2021 between 00:15hrs and 02:00hrs in St. Julian's:

1. Committed a theft of cash from a cash register and alcohol globally amounting to one thousand seven hundred euros (€1700) to the detriment of Mohamed Geriwa ID 500020L, which theft is aggravated by time, amount and means.

2. Wilfully committed any spoil, damage or injury to or upon any movable or immovable property, being a cash register, to the detriment of Mohamed Geriwa ID 500020L, which amount of damage exceeds two thousand five hundred euros (€2500);
3. Failed to abide by the bail conditions imposed by the Honourable Court presided by Judge Consuelo Scerri Herrera on the 24<sup>th</sup> May 2019;
4. Lead an idle and vagrant life.

The Prosecution requested that this Court treats Martyn Paul Underwood as being a recidivist in accordance with articles 49, 50 and 289 of Chapter 9 of the Laws of Malta.

In case of this Court finds guilty the accused in the Articles 261 et sequitur and 325 et sequitur of Chapter 9 of the Laws of Malta, the Prosecution requested this court to apply Article 28H in regards to compensation to Mohamed Geriwa.

2. Having seen the consent of the Attorney General in terms of Article 370(4) of the Criminal Code for this case to be dealt with summarily and having heard the defendant declare that he has no objection that his case be dealt with in this manner.
3. Having heard the evidence and having seen all the records of the case and the documents exhibited.
4. Having seen the note of submissions of the defence. Although the Court also gave the Prosecution the opportunity to file a note of submissions, it failed to do so, within the time-limit prescribed.

## **THE FACTS**

5. The facts in brief which gave rise to these criminal proceedings are the following:

- (i) On the 9<sup>th</sup> February 2021 at about 1.00pm, Mohammed Geriwa informed the Police that a theft had taken place from the outlet called Fuego Speak Easy, and that he was the owner of these premises.
- (ii) From the CCTV footages, it resulted that around 00.53hrs that day, three persons, one of whom was not wearing a mask and had a beard on his face, jumped the gate, one at a time, with an interval of a couple of minutes. They entered the premises by opening a plastic door by means of zip, then they opened an iron shutter, and entered into the bar. From the bar, they stole a number of alcohol bottles. The thief not wearing the mask, also broke dismantled the cash register and the thieves took the drawer with them, with all its contents.
- (iii) From the CCTV footages, it also resulted that two men wearing a mask had gone again inside these premises at different times, once at about 1.14am and another one at about 3.09am. In the latter two instances, more alcohol bottles were stolen.
- (iv) The owner, Mohammed Geriwa, stated that he had a total of €1,506 cash inside the cash, register, the alcohol bottles stolen were worth €2,711, and the cash register was beyond economical repair.
- (v) On the 10<sup>th</sup> February 2021 at 00:50hrs, Mohamed Geriwa informed the Police that he had identified one of the thieves and he was near near Hugo's Burger, St. Julians. The Police went on site and arrested the defendant.

## **CONSIDERATIONS REGARDING THE GUILT OF THE DEFENDANT**

**6.** In his evidence before this Court, Mohamed Geriwa said that he recognised the thief without a mask and with a beard, because he had seen him roaming in the area around the bar for the last month before the theft took place. He identified this thief as the defendant.

7. The defendant chose to give evidence during these proceedings. In his evidence and in his submissions, the defendant admits that he was one of the three thieves who entered the bar at night, but he is contesting the charges on several issues.

8. The Court is going to consider the charges preferred against the defendant individually.

*The First Charge – Theft qualified by time, amount and means*

9. As already stated, the defendant is not contesting that the theft in which he was involved is aggravated by time.

10. However, the defendant is submitting that the theft is not aggravated by means, since from the CCTV footage it is clear that the shutter from where he gained access was unlocked and could easily be opened. From the CCTV footage it is clear that the shutter or plastic door of the premises was unlocked. However, what the defendant conveniently omitted to state is that from the CCTV footage it is also clear that in order to gain access to this shutter or plastic door, the defendant had to climb up a gate, and jump over it.

11. Article 263 of the Criminal Code provides that:

*“Theft is aggravated by "means" –*

*(a) when it is committed with internal or external breaking, with false keys, or by scaling;”*

12. Hence, a theft can be aggravated by means if committed in either one of three ways, by breaking in, with the use of false keys or by scaling. In this case, there is no doubt that the defendant did not break in the premises or make use of false keys to enter the premises.

13. However, Article 266(1) of the Criminal Code provides that:

*“ The entry into any of the places mentioned in article 264 by any way other than by the doors ordinarily intended for the purpose, whether the entry is effected ... .. by clambering in any way whatsoever in order to mount or descend, ... .. shall be deemed "scaling".”*

14. The defendant did not enter into the premises by opening the gate, but he climbed up the gate, which has vertical rods, like he is climbing a ladder and jumped over it. Hence there

is no doubt that this action amounts to “*scaling*” according to law, and consequently the theft is aggravated by means.

**15.** As regards the value of the amount stolen, the defendant testified that the money in the cash register stolen amounted to €600, which amount was subsequently shared between him and the other two thieves, and he denied that the amount was of €1506 as stated by Mohammed Geriwa.

**16.** In the inquiry *in genere*, Mohammed Geriwa stated in the cash register stolen there were the following amounts: €618 in an envelope, the earnings earned on Sunday, €288 in another envelope, the earnings earned on Monday and €600 in another envelope, which were the cash float of the shop.

**17.** In its note of submissions, the defence notes that it is not a normal practice that owners of business premises leave their day’s earnings in the cash register. According to Geriwa’s testimony, he left both Sunday’s and Monday’s earning in the same cash register for Tuesday, when the theft was committed. The defence submits that Geriwa should have produced the best evidence in this regard, specifically the Z-Readings for the earnings made on Sunday and Monday. The Z-Readings would have confirmed the exact amount earned on Sunday and Monday.

**18.** In the opinion of the Court, this submission of the defence is justified. Not only did Geriwa not present the Z-Readings for the earnings of Sunday and Monday, but he also did not give a valid explanation why these earnings were left in the cash register, together with another €600 cash float. The Prosecution did not summon independent witnesses to corroborate his evidence. In his evidence in the inquiry *in genere*, Geriwa stated that he employs three people, but none of his employees were summoned to give evidence on the amount of cash which was left in the cash register.

**19.** Since it is certainly not best practice to keep earnings in the cash register, and the Prosecution failed to bring forward the best evidence to prove the exact amount of money which was in the cash register, the Court must give the benefit of the doubt to the defendant, and consider that only the amount of €600 was in the cash register as stated by the defendant.

**20.** The defence is also contesting the value of the bottles of alcohol stolen, since although Geriwa presented an invoice which appears to have been issued by Favell Wines & Spirits Ltd to a certain Mohamed Samir, neither Mohoman Samir nor the person who drew up this invoice were produced to give evidence. Consequently, the defence is correct in submitting that this invoice has no probative value.

**21.** As regards the amount of alcohol bottles stolen, the defendant stated under oath that he took two bottles of Smirnoff Vodka. However, in the note of submissions, the defence pointed out "*for correctness sake*" that in the CCTV footage, the defendant is seen handling three bottles of alcohol. It is true that Prosecution did not present evidence of the value of the alcohol bottles stolen by the defendant. But in his evidence, the Prosecuting Officer Inspector Leeroy Balzan Engerer stated that "... .. *the amount which was stolen by Martyn Paul Underwood was circa one hundred and fifty euro (€150) in regard to the alcoholic beverages.*"

**22.** Considering that even the defendant himself was not precise on how many bottles of alcohol he handled, and the bottles of alcohol he handled are not identifiable in the CCTV footage, the Court considers that the amount of €150 is a reasonable and realistic estimated value of three bottles of alcohol.

**23.** In the light of the above considerations, although the Prosecution has succeeded in proving beyond reasonable doubt that the theft is aggravated by amount, the amount which the Prosecution has managed to prove to have been stolen in this case is in total that of €750.00 (€600 in the cash register and €150 value of the three alcoholic bottles).

#### The Second Charge – Voluntary Damage

**24.** The defendant is also accused of having wilfully damaged a cash register to the detriment of Mohamed Geriwa, and these damages exceed €2,500.

**25.** During these proceedings, Mohamed Geriwa stated under oath that during the theft, the cash register had sustained irreparable damage, and the cost to replace it was that of €2,950. He exhibited a quotation which appears to be issued by Advanced Telecommunications

Systems Company Ltd for the supply of one PI Point Sales, together with labour and installation amounting to €2,950.

**26.** In this note of submissions, the defence pointed out that this Court cannot actually establish the actual damage caused to the cash register, since:

1. the old cash register was never formally exhibited before this Court;
2. the technician who examined the cash register was not summoned to testify in court to explain the damage caused;
3. no evidence was produced on the condition and value of the cash register on the day the theft took place.
4. The quotation exhibited for a new cash register was not confirmed by the person who drew it up.

**27.** This submission of the defence is legally correct. The evidence mentioned by the defence was not produced by the Prosecution, and in view of this lack of evidence, the defendant cannot be found guilty of the second charge preferred against him.

#### *The Third Charge – Breach of Bail Conditions*

**28.** The defendant is also charged with having failed to abide by the conditions of bail imposed by “*The Honourable Court presided by Judge Consuelo Scerri Herrera on the 24<sup>th</sup> May 2019*”.

**29.** Once again, as the defence rightly pointed out, the Prosecution failed to exhibit an authentic copy of the decree which allegedly granted the defendant bail, referred to in this charge.

**30.** It is true that during his evidence, the defendant admitted that he failed to go and sign at the Police station, the day after the theft took place but this statement alone is certainly not enough to satisfy the level of proof required in criminal proceedings. Hence, the defendant cannot be found guilty of this third charge.

*The Fourth Charge – Lead an idle and vagrant life*

**31.** The defendant does not contest this charge. But in his evidence he states that he was forced to live such a life, because after he came out of prison, he could not find any work, even due to the current pandemic.

**32.** The Court is sceptic of this explanation. Although it does understand that a foreigner coming out of prison, will inevitably have some problems in finding immediate employment, on the other hand, the defendant seems to have given up rather quickly, and has no hesitation in squandering the little money he has on alcohol and drugs, as he stated in his evidence. He said he spoke to the British Embassy about his predicament, but no representative of the British Embassy was summoned to corroborate his evidence.

**33.** Hence, the Court finds him guilty of the fourth charge preferred against him.

*The Charge of Recidivist*

**34.** The defendant was also charged of being a recidivist in terms of Articles 49, 50 and 289 of the Criminal Code.

**35.** Once again as the defence rightly pointed out, the Prosecution failed to exhibit an authenticated copy of the relative judgement/s to prove the defendant's previous convictions. According to established caselaw, the court can use the criminal record of the defendant for the purposes of calibrating the punishment, but the charge of recidivism requires that the proof of the previous conviction/s is made by presenting a legal copy of the previous judgement/s, and the Court has to be satisfied from the evidence or from the same judgement/s (if these give the personal details of the person convicted) that those judgements refer to the person charged with recidivism.

**36.** Since the Prosecution failed to exhibit the relative judgement/s, the defendant cannot be found guilty of this charge.



**37.** The Court regrets to comment that as one can see from its considerations in this judgement, the prosecution of this case was conducted in a very superficial and perfunctory manner.

### **Considerations on Punishment**

**38.** This Court has found the defendant guilty of the first charge, theft aggravated by time, amount (€750) and means and of the fourth charge, the contravention of leading and idle and vagrant life.

**39.** For the purposes of punishment, the fourth charge is absorbed in the first charge in terms of Article 17(d) of the Criminal Code.

**40.** In his statement, the defendant stated that he came to live in Malta in November 2019. From his updated conviction sheet, it results that the defendant, he has been found guilty twice of causing his former partner to fear that violence will be used against her, and of harassing her, by a judgement delivered in 2019 and 2020. The first time he was put under a probation order. The second time, he was *inter alia* condemned to nine (9) months imprisonment. The second judgement was confirmed by the Court of Criminal Appeal on the 24<sup>th</sup> June 2021.

**41.** The defendant requests the Court to take into consideration his personal unfortunate circumstances, his improvement while being retained at the Corradino Correctional Facility and his eagerness to become a better person.

**42.** As regards his alleged personal circumstances, the Court has already stated that it is sceptical of the explanation given by the defendant of why he found himself living in the street, even because no independent evidence was brought forward to corroborate it. The defendant stated under oath that he committed this crime and did not cover his face with a mask whilst doing so, because he wanted to be arrested and be sent to prison, so at least he would have a place where to live. But this statement is contradicted by the fact that the following day he did not go to sign at the Police station, because as he admitted during his evidence, he knew he was going to be arrested.

43. However, from the evidence of Sarah Debattista, psychological assistant at the Correctional Services Agency, the defendant utilised his time under preventive arrest to improve his skills by learning languages. This witness also said that a care plan is also being drawn up to address the needs of the defendant, including his alcohol and drug abuse, homelessness and unemployment.

44. Article 278 of the Criminal Code provides as follows:

*“(1) Whosoever shall be guilty of theft aggravated by "means" only shall be liable to imprisonment for a term from five months to three years ... ..*

*(3) Where the theft, besides being accompanied with the aggravating circumstance of "means", is also accompanied with two or more of the other aggravating circumstances, with the exception of that of "violence", the said punishment shall be increased by one degree and shall not be awarded in its minimum”*

45. Then Article 20 of the Criminal Code provides that:

*“When the law expressly provides that a punishment shall not be awarded in its minimum, the punishment to be awarded shall always include at least one-third of the difference between the minimum and the maximum.”*

46. When one applies these rules to the present case, the maximum punishment which can be meted out is that of 5 years imprisonment, whilst the minimum punishment is that of 17 months and 18 days imprisonment.

## **Conclusion**

47. In view of the above considerations, the Court:

1. Does not find the defendant guilty of the second and third charges, and of the charge of recidivism preferred against him, and consequently discharges the defendant from having committed these offences;

2. after seeing Articles 261(b)(c)(f), 263, 264, 266, 270, 278, 279(a), 280 and Article 338 of the Criminal Code, Chapter 9 of the Laws of Malta, finds the defendant guilty of the first and fourth charges preferred against him, and after taking into account all the circumstances of the case condemns him to twenty (20) months imprisonment, - but the period that the person convicted was kept under preventive arrest in connection only with these proceedings, should be deducted from this period.
3. orders the person convicted to the pay to the Registrar all the costs incurred in connection with the employment in the proceedings of all the experts and referees, in terms of Article 533 of Chapter 9 of the Laws of Malta. These costs are to be paid immediately as soon as the Registrar of the Criminal Courts communicates to him the amount due by him. If the person convicted fails to pay this amount or part of it immediately, the amount, or any balance of it, will become immediately due and payable, and in default of payment thereof, the outstanding amount still due shall be converted into imprisonment at the rate established by law.
4. Moreover, in terms of Article 15A of Chapter 9 of the Laws of Malta, and in terms of Article 24 of Chapter 466 of the Laws of Malta, made applicable to these proceedings by Article 532A of Chapter 9 of the Laws of Malta condemns the guilty person to pay the amount of seven hundred and fifty Euro (€750) to Mohamed Geriwa, as compensation for the damages suffered as a result of the criminal offences committed by the convicted person.

This order shall constitute an executive title for all intents and purposes of the Code of Organisation and Civil Procedure.

**Magistrate**

**Doreen Pickard**  
**Deputy Registrar**