MALTA

COURT OF CRIMINAL APPEAL

HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO

Sitting of the 16 th July, 2010

Criminal Appeal Number. 151/2010

The Police

v.

Siddy Sangari

1. This is a decision pursuant to an appeal filed by the Attorney General from a judgment delivered by the Court of Magistrates (Malta) on the 17th March 2010 whereby that court acquitted Siddy Sangari of the charge of aggravated theft, but found him guilty of having caused slight bodily harm and sentenced him to a fine of €100.

2. Siddy Sangari (son of Salif and Salmata nee Samake, born in Monrovia, Liberia, on the 22nd September 1980, and holder of Maltese identity card number 33756A) was arraigned under arrest before the Court of Magistrates (Malta) as a Court of Criminal Inquiry on the 19th November 2008 charged with having (**i**) at St Paul's Bay on the 9th November 2008 committed theft of a laptop

computer (make HP), which theft was aggravated by "place", "violence" and "amount" which exceeds 232.94 euro but does not exceed 2,329.37 euro to the detriment of Marcelen Kone and/or other persons; he was also charged (**ii**) with having on the same date, at the same time and under the same circumstances caused slight bodily harm on the person of Marcelen Kone, as certified by Dr R. Busuttil MD of the Mosta Health Centre. On the same day of arraignment Sangari was granted bail (see fol. 7). On the 3rd December 2008 the Inferior Court ruled that there were sufficient grounds for committing the accused for trial on indictment and ordered the record of the inquiry to be transmitted to the Attorney General. After a number of referrals, the Attorney General, on the 14th August 2009, remitted the case to the Inferior Court for decision in terms of Article 370(3)(b)(c) of the Criminal Code. On the 7th October 2009 the accused Siddy Sangari declared that he had no objection to his case being dealt with summarily by the Inferior Court instead of going to trial on indictment before the Criminal Court.

3. On the 17th March 2010 the Court of Magistrates (Malta) as a Court of Criminal Judicature delivered judgment in this case, acquitting the accused Sangari of the first charge (that is, of aggravated theft), but found him guilty under the second charge. Sangari was fined, as already indicated, one hundred euro.

4. In his application of appeal the Attorney General – who is appealing solely in connection with Sangari's acquittal in respect of the first charge – claims that the Inferior Court erroneously interpreted the facts of the case as falling within the definition of the offence of "arbitrary exercise of a pretended right" (*ragion fattasi*) contemplated in Article 85(1) of the Criminal Code rather than that of aggravated theft as originally charged. According to the appellant, there was no evidence of any "underlying debt or obligation" owed by Kone to Sangari, and therefore, in the absence of such evidence, there could never be a "pretended right" for the purposes of Article 85(1). The Attorney General's second grievance is that, even assuming that Kone really owed money to

Sangari, the latter took the laptop to sell it and not merely to hold on to it by way of security for the payment of the debt. In such circumstances – argues the Attorney General – there was the *animus lucrandi* required for the offence of theft, and this automatically excluded the offence of arbitrary exercise of a pretended right.

5. The facts of the case, as they emerge from the record of the proceedings, are pretty straight forward and, apart from the issue of whether Sangari intended to sell the laptop in order to obtain thereby payment, or to hold on to it by way of security, to which reference will be made later on, this Court is of the opinion that the Magistrates Court correctly stated the facts in its judgment of the 17th March. Sangari claimed that Kone owed him money – Lm100 which Kone had borrowed some time in September 2007, and Lm13 for some work that Sangari had performed for Kone in a hotel: a grand total, therefore, of Lm113. On the 9th November 2008, which was a Sunday, Sangari, having found out through a friend where Kone was living, went to the latter's place of residence and insisted that he be paid there and then the amount in question. Kone refused, whereupon Sangari proceeded to take hold of a laptop computer, and made for the door of the apartment. Kone tried to stop him, and in the ensuing scuffle, both Kone and Sangari suffered some minor injuries. Sangari, nonetheless, managed to leave the apartment with the laptop. The computer was eventually retrieved by the police and exhibited in court, and Kone was authorised to retake possession of it (see the minute of the sitting of the 14th January 2009, fol. 42-43).

6. It is trite knowledge that for the offence of arbitrary exercise of a pretended right to subsist, the interference with another's property, moveable or immoveable, must be effected "<u>without</u> intent to steal or to cause any wrongful damage, <u>but only</u> in the exercise of a pretended right". The words underlined clearly imply that in the first place there must be the exclusion of the intent to steal; the intent to exercise a pretended right <u>coupled with</u> the intent to steal (that is, the intent to steal <u>for the purpose of exercising</u> a pretended right) would put the material

element of the offence outside the ambit of Article 85(1) (see *inter alia* **Il-Pulizija v. Godwin Zammit**, Court of Criminal Appeal, 20/11/1998). Although as was stated by this Court in its judgment of the 15/11/1996 in the names **Il-Pulizija v. Mario Lungaro** the particular intent with which the material act is committed will generally determine whether the offence is one of *ragion fattasi* or some other offence, such as voluntary damage to property or theft, the starting point must always be to examine whether the intent to steal can be excluded.

7. The Inferior Court, in the judgment which is now under review, correctly referred to Carrara's classical definition of theft: *la contrettazione dolosa della cosa altrui, fatta invito domino, con animo di farne lucru*. Theft, therefore, requires both a generic intent (*dolo generico*) and a specific intent (the *animo di farne lucro* or *animus lucrandi*). In the words of Luigi Maino (***Commento al Codice Penale Italiano*** [*terza ristampa della terza edizione*], UTET, 1922, vol. IV, pp. 13-14, para. 1842:

"Nel reato di furto il dolo e` di doppia specie, cioe` generico, o consistente nella scienza e volonta` di fare cosa illegittima, e specifico, ossia dipendente dall'animo di lucro, che differenzia questo delitto da altra specie di reati contro la proprieta`. Per mancanza di dolo generico non risponde di furto chi abbia preso la cosa altrui per semplice disavvertenza; chi per errore creda esservi il consenso del proprietario al suo impossessarsi della medesima; chi in buona fede ha creduto trattarsi di cosa abbandonata."

As was pointed out by this Court (Galea Debono, J.) in its judgment of the 30/1/2003 in the names **Il-Pulizija v. John Galea u Paul Galea**, the gain envisaged by the *animus lucrandi* – the specific intent – for the purpose of theft is not necessarily a pecuniary gain. There would be "gain" if the person takes something, belonging to another person, simply for the former to enjoy the thing so taken (e.g. a painting or other piece of art). Again in the words of Maino:

"…per *lucro* o *profitto* nel furto si intende non soltanto il lucro borsuale che puo` ritrarsi dalla cosa rubata vendendola, oppure un effettivo aumento del patrimonio del ladro, ma qualunque godimento o piacere, qualunque soddisfazione procurata a se` stesso, onde anche chi rubi per donare o chi sottragga per mero diletto artistico un'opera d'arte, anche lasciando al proprietario il prezzo od altro oggetto di pregio equivalente o superiore, e` responsabile di furto." [1]

But then this same author goes on to qualify the gain required for the purpose of theft as being an illicit or unlawful gain – *profitto illecito* – and on the basis of this qualification goes on to state (and the following quotation was reproduced, apparently with approval, in the **Galea** case, abovementioned):

"…non sara` dunque applicabile il titolo di furto, ma quello di ragion fattasi, a chi prenda una cosa del suo debitore per rivalersi o garantirsi del suo credito e a chi sotragga una cosa litigiosa nella credenza di avervi diritto: e cio` perche` in tali casi la coscienza del diritto esclude il dolo del furto, sostituendo al proposito di procurarsi un *illecito* profitto quello di evitarsi un danno." [2]

This Court, as now presided, cannot completely agree with this proposition. Carrara's definition of theft does not require that the gain should be an illicit or illegal gain – *animo di farne lucro* and not *animo di farne ingiusto lucro*. Moreover, the definition of the offence of *ragion fattasi* in the *Codice Zanardelli* – to which Maino was evidently referring when writing – *Articolo 235* – did not, unlike our Article 85(1), require specifically, as a starting point, the exclusion of the intent to steal; that provision merely provided *"Chiunque, al solo fine di esercitare un preteso diritto, nei casi in cui potrebbe ricorrere all'Autorita`, si fa ragione di se` medesimo…"*. Our law, as we have seen,

[1] *Op. cit.* para. 1843.
[2] Para. 1844.

specifically requires not only the intent to exercise a pretended right, but also that this pretended right should not be exercised concurrently with any intent to steal: *"…without intent to steal…but only in the exercise of a pretended right…"*. Consequently it is immaterial whether the gain is *giusto* or *ingiusto*. This also appears to be the position taken by modern Italian jurists. Thus Francesco Antolisei, in his ***Manuale di Diritto Penale – Parte Speciale I*** Giuffre` Editore (Milano) 1986, pp. 255-256 comments as follows:

"…il legislatore non ha voluto permettere che colui il quale vanta una pretesa legittima possa soddisfarla, prendendosi senz'altro le cose altrui. La tutela del possesso realizzata con l'incriminazione del furto sarebbe molto affievolita se si ammettesse una facolta` cosi` estesa…Riteniamo, pertanto, che l'ingiustizia del profitto sia estranea alla nozione del furto, il quale, percio`, sussiste anche se il vantaggio a cui mirava l'agente non presentava quel carattere, e cioe` era legittimo."

8. Applying the above principles to the instant case, if Sangari took the laptop with the intent of selling it and thereby getting paid what he claimed was owed to him by Kone, then that would be a case of theft – the *animo di farne lucro* – in this case a tangible pecuniary gain – would be definitely satisfied, even in the event of the claim that he was owed money by Kone being perfectly justified at civil law. If, on the other hand, the laptop was taken only to be retained by way of a security, then there would be no intention of making a gain, and therefore no intent to steal for the purpose of our, and Carrara's, definition of theft, since the retention of an object merely as a security for the repayment of a debt cannot be viewed in itself as constituting a "gain" (*lucro*) in the sense described above – a security is merely a way of guaranteeing a future gain and is not an actual gain or profit in itself. Now, from the evidence it transpires that Sangari was always consistent in his assertion that he took the computer merely to keep it as a security in view of the fact that, according to him, Kone had defaulted on his promise to pay him what he

was owed, and also in view of the difficulty of finding out where Kone actually lived. It is true that in his statement to the police, later confirmed on oath in court during the sitting of the 3rd December 2008 (see fol. 35 *et seq.*) Kone says that Sangari said "that he was taking the laptop in order to sell it" (fol. 26). Sangari consistently denies this. The Inferior Court, which had the benefit and advantage of hearing both Sangari and Kone give evidence *viva voce*, was clearly of the opinion that, indeed, Sangari simply wanted to keep the laptop by way of security – in fact in the judgment under review the learned Magistrate stated as follows: "Upon full payment he would return the said laptop to Kone". This Court finds absolutely no reason for coming to a different conclusion. Consequently the Attorney General's second grievance is being dismissed.

9. As to the first grievance, this presents little difficulty. The Attorney General claims that there was no evidence of any "underlying debt or obligation" owed by Kone to Sangari. Now although it is true that Sangari, even when asked by the police during his interrogation (fol. 24) and in cross-examination in court (fol. 87), could not produce any document to show that he had lent Lm100 to Kone (not to have any written document is something which is quite normal for a small loan *brevi manu*), nor any document in support of the further Lm13 he was owed, all the evidence points to the fact that Sangari genuinely believed that he was owed the said sum of Lm113. In other words, this was not an excuse which was trumped up by him to try and justify the taking of the computer. For the offence under Article 85(1) of the Criminal Code to subsist, it is not necessary that evidence should be produced of an actual right at civil law; it is sufficient if the right is a pretended one, that is one which the agent could normally be expected to pursue in civil proceedings. Maino once more:

"A completare la nozione del primo estremo del delitto di ragion fattasi, e` opportuno aggiungere qualche altra considerazione intorno al valore della locuzione *un preteso diritto*. Il progetto ministeriale

del 1887…diceva semplicemente *un diritto*. Fu la Commissione senatoria a proporre che si aggiungesse la parola *preteso*, onde abbracciare anche l'ipotesi che il diritto realmente non esista: e questa proposta fu seguita nel testo definittivo, considerando eziandio che anche un diritto effettivo e` sempre *preteso* quando lo si esercita, e che la locuzione in questione esprime meglio l'apprezzamento subiettivo che del diritto fa l'agente…Neppure si richiede la liquidita` e certezza del diritto: basta che sia certa l'opinione nell'agente di esercitare un diritto." [3]

And in like vein, Antolisei:

"Non importa che la pretesa sia fondata o infondata ed e` pacifico che essa puo` riferirsi tanto ad un diritto reale (proprieta`, comproprieta`, servitu`, ecc), quanto a un diritto di obbligazione (es.: pagamento di un debito, riconsegna di un oggetto, ecc.). [4]

Consequently even the Attorney General's first grievance is unfounded and is being dismissed.

10. Before concluding, this Court wishes to make a minor observation in connection with something that was stated by the Inferior Court in its judgment. In its judgment the first court seems to have held that for the *contrectatio* and/or for the *animus lucrandi* to subsist for the purpose of theft under our law, it was necessary "that the intention of the thief must be to appropriate himself of an object belonging to another without the intention of returning it to him". The first court then proceeded to make a distinction between theft in terms of Article 261 of the Criminal Code the "so called *furto d'uso* as contemplated in Section [recte: Article] 288 of the Criminal Code". With all due respect this is a totally incorrect exposition of the law. A thing may be stolen even if the gain to be derived therefrom consists merely in the temporary use of that

[3] *Op.cit.* vol. II, pp. 386-387, para. 1188.
[4] *Op. cit.* ***Parte Speciale – II***, pp. 964-965.

thing. The offence of theft for the mere use of the thing stolen, contemplated in Article 288 of the Criminal Code, is theft for all intents and purposes of law. That provision merely provides that when the gain – the *animus lucrandi* – is the mere use of the thing stolen with the intention to restore the thing immediately, and provided that there are no other aggravations (i.e. it is a case of simple theft in terms of Article 284), then the agent is liable to the punishments established for contraventions. The requirement in this provision that the theft should be a simple theft (therefore without, among others, the aggravation of "amount") meant that during the time when Malta hosted thousands of British service men and women, any such service person who stole a car for a joyride – and whisky, rum and beer were known to provoke several such incidents – could not be arraigned under Article 288, since the value of the car, or, indeed, motorcycle meant that the theft was no longer a simple one but was aggravated by amount, necessitating, therefore, full committal proceedings, with the possibility of the case ending up in a trial by jury before the Criminal Court. For this purpose in 1956 a new offence was introduced in the Traffic Regulation Ordinance (Cap. 65) which is today found in Article 61 of that law. The provision applies only to a vehicle, whether propelled by mechanical means or otherwise, and creates a special offence, which remains within the competence of the Inferior Court, consisting of the driving away of the vehicle without the consent of the owner or other lawful authority, when the intention is merely that of making temporary use of the vehicle. Many British servicemen, and many Maltese later, were thus spared trial by jury! Were it not for this special provision, such driving away of a motor vehicle would amount to an aggravated theft.

11. For the reasons given in paragraphs **6** to **9**, above, the appeal by the Attorney General is therefore dismissed, and the decision of the first court is confirmed.

< Final Judgement >

----------END----------