



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

**MAGISTRATE DR.
NEVILLE CAMILLERI**

Sitting of the 4 th February, 2013

Number. 143/2012

**The Police
(Inspector Sylvana Briffa)**

vs.

Keith Arthur Mayho

The Court,

Having seen the charges brought against **Keith Arthur Mayho**, of sixty seven (67) years, son of the late Arthur and the late Ester Dorothy neé Bell, born in the United Kingdom on the 2nd. of May 1944, residing at 28, St. Lawrence, Flat 4, Sliem Street, Marsaskala and holder of Maltese Identity Card number 33975A, charged with having, in Marsaskala and on these Islands, on the 12th. of June 2010 till to date, by means of several acts committed by him, even if at different times, which acts constitute violations of the same provisions of the law:

1. misapplied, converting to his own benefit or to the benefit of any other person, the freezer of the “Gelati Mezzan” which amount exceeds two hundred and thirty-two euro and ninety-four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37), which has been entrusted or delivered to him under a title which implies an obligation to return such thing or to make use thereof for a specific purpose to the detriment of “Gelati Mezzan Ltd”, and/or other persons.

Having seen the documents exhibited and all the acts of the proceedings.

Having seen the consent of the Attorney General of the 7th. Of February 2012 for this case to be dealt with summarily (*fol.* 9).

Having seen that the accused did not object to his case being dealt with summarily (*fol.* 11).

Having heard the evidence and oral submissions by the parties.

Considers

That, during the sitting of the 26th. of March 2012, **Inspector Sylvana Briffa** gave her testimony (*fol.* 12 *et seq.*) in which she submitted the complaint (marked as Doc. “SB 1”) sent by Dr. Mario Scerri on behalf of Noel Mercieca of Gelati Mezzan in which he stated that the accused had misapplied the freezer of the mentioned Gelati Mezzan that was entrusted to him on behalf of the Marsascala band club. The Prosecuting Officer stated that the accused confirmed that he did sign the contract (marked as Doc. “SB 3”) on behalf of Marsascala band club and that after a few months he suggested to the committee of the same band club that it would be in the club’s best interest to give it back to the suppliers since it was consuming a lot of money and electricity. She further says that when the accused was asked where the freezer

was placed, since it was never returned to the supplier, he replied that after he came back from holiday in Thailand the freezer was gone and that the band club did not know what had happened to it. During cross examination, the Prosecuting Officer was asked why proceedings were initiated against the accused and not against someone in the band club, and the reply was that the accused had signed the contract in his name and he was responsible for the bar. The Prosecuting Officer further noted that from the statement released by the accused, which statement was marked as Doc. "SB 4", the accused replied that he leases the bar from the band club and that he is responsible for the bar and even pays for the electricity of the said bar.

That, during the sitting of the 26th of March 2012, **Noel Mercieca** gave his evidence (*fol. 22 et seq.*) where he stated that he is a director of Gelati Mezzan and that he had reached an agreement with the accused wherein the accused was supplied with a freezer so that he could place their products in it and that the freezer was given on lease to the accused as long as they supplied him with their products, i.e. ice cream. He further says that when summer was over, they went to pick up the freezer but the freezer was not there. He says that after he had spoken to the accused, the accused informed him that the committee of the band club had thrown it away. During cross examination, when the witness was asked what his concern was, he replied that he wanted his property back. When he was asked why he did not file a civil court case, his reply was that he wanted back the freezer or its value. He further says that the accused used to contact him in the capacity of a barman. When Mercieca was asked whether he had made contact with the committee of the band club, Mercieca replied in the negative since he had no connection with them.

That, during the sitting of the 16th of July 2012, the accused gave his evidence (*fol. 27*) and states that he is the barman of the band club. He says that one day he was informed to sign a document for the freezer and he said that he was not signing anything but then he decided

to sign the agreement on behalf of Marsascala band club. He says that inside the band club the televisions, the freezers, everything is property of the committee. He states that when he took over the bar of the band club, the freezer was already there and that he had suggested to the committee of the band club to get rid of it since it was consuming a lot of electricity. Eventually he went on holiday and when he came back the freezer was no longer in the band club. The accused said that physically he did not touch the freezer and, on being asked whether he had instructed any other person, he replied that he was not in Malta at the time the freezer was taken. He also states that he was abroad during March of 2011 and says that the person who actually put the freezer away was a certain Manuel Grogan, who was one of the committee members. The accused also mentioned two witnesses who actually saw the mentioned Grogan putting away this freezer. During cross examination, the accused was asked whether he confirms that at the time the freezer was taken away he was in control of the bar and his reply was in the affirmative. He also confirms that the bar was called by the following name "St. Anna Band Club". When he was asked whether he was aware of the agreement signed by him and which is exhibited in the Court file, he replies in the affirmative and adds: *"I have signed on behalf of the Band Club"* (fol. 28). When he was asked whether at the time he was solely in control of the bar, he replied in the affirmative. He further says that all the fittings are the band club's responsibility and not his. The accused states that the agreement was signed on their behalf. He also confirms that he was given a copy of the agreement which he had signed and which he had passed over to the committee. He says that when he told the committee that they could get rid of this freezer which was signed on their behalf he did not refer them to the agreement but he had just left it in their hands: *"I didn't think it was my responsibility"* (fol. 29). He further says: *"I cannot have televisions, machines, removed from the band club. I have to get the permission of the committee in every instance"* (fol. 29). On being asked who used to pay the utility bills of the bar, he replied that he did so. He further says that when he used to be given the electricity

bill, he used to pay it. When he was asked whether he used this particular freezer not only for ice creams but also for other purposes, he replies that at first he did but then stopped doing so. Reference was made to clause number 3 of the agreement (*fol. 17*) and when he was asked whether, when he had signed the agreement with Gelati Mezzan, he was aware that the purpose was specified, he replies: *“it had been there for many years”* (*fol. 30*). He further says: *“I signed it thinking I am signing it on behalf of the committee of the Club”* (*fol. 30*). He confirms reading the agreement before signing it. Questioned again regarding clause number 3 of the agreement, the accused replies: *“I was aware. That is the reason I approached the committee”*. He confirms that he was also aware of clause number 1 which says: *“The freezer will strictly be used for the exclusive storage and use to sell **GELATI MEZZAN** or if expressly agreed by the Company and other products sold by the Company”*. The accused recognised his signature on the agreement.

That, in the statement released by the accused (Dok. “SB 4” – *fol. 19 et seq.*), the accused states that the freezer was still in the band club when he went for a holiday in Thailand around February or March 2011 and on his return, it was not longer there. He says that he was told that the freezer was gone and that he had no reasons to ask any more questions.

Considers

That this case concerns an agreement reached between the accused and the complainant as a consequence of which agreement, the accused, who had signed the agreement on behalf of the Marsascala band club, had agreed to certain conditions. When the representatives went to pick up the freezer, this was no-where to be found. At the time, the accused was with his family on a holiday in Thailand.

That the accused is being charged with misappropriation under Section 293 of Chapter 9 of the Laws of Malta. The Court will proceed to examine what are the elements of

misappropriation. In the case **Il-Pulizija vs. Enrico Petroni u Edwin Petroni** decided on the 9th. of June 1998, the Court listed the elements of misappropriation:

“Dana r-reat isehh meta wiehed (1) jircievi flus jew xi haga ohra minghand xi hadd; (2) bl-obbligu li jrodd dawk il-flus jew dik ix-xi haga lura jew li jaghmel uzu minnhom b’mod specifiku; (3) u minflok ma jaghmel hekk idawwar dawk il-flus jew dak l-oggett bi profitt ghalih jew ghal haddiehor.”

Hence the author of this offence should have the specific intention to convert to his own benefit or to the benefit of any other person an object which was entrusted to him or delivered to him for a specific purpose.

That the author Francesco Antolisei says:

“La vera essenza del reato [di appropriazione indebita] consiste nell’abuso del possessore, il quale dispone della cosa come se ne fosse proprietario (uti dominus). Egli assume, si arroga poteri che spettano al proprietario e, esercitandoli, ne danneggia il patrimonio” (Manuale di Diritto Penale, Giuffre` (Milano), 1986, Parte Speciale, Vol. 1, p. 276)

That in the judgment **Il-Pulizija vs. Dr. Siegfried Borg Cole** decided on the 23rd. of December 2003, the Court of Criminal Appeal held:

*“[...F]il-kaz ta’ flus li jkunu qed jinzammu minn xi hadd biex dawn eventwalment jigu ritornati lil sidhom, in-non-restituzzjoni taghhom tista’ tammonta ghal approprjazzjoni indebita [...]. Kif jispjega Luigi Majno: **Finalmente, a costituire il delitto di appropriazione indebita e` necessario il dolo. Trattandosi di delitto contro la proprieta`, a scopo d’indebito profitto per se` o per un terzo, il dolo sara` costituito dalla volontarieta` della conversione con scienza della sua illegittimita`, e dal fine di lucro: onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d’un diritto proprio da far valere, non commette reato per difetto di elemento intenzionale. Per la stessa ragione, e per***

difetto inoltre di elemento obiettivo, non incorrerà in reato chi nel disporre della cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo...Il dolo speciale nel reato di appropriazione indebita è (come nel furto e nella truffa) l'animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell'inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai devianti della pratica giudiziale, che diedero spesse volte l'esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale. Rettamente pertanto fu giudicato non commettere appropriazione indebita (e neppure il delitto di ragion fattasi, per mancanza di violenza) il creditore che trattiene un oggetto di spettanza del suo debitore a garanzia del credito; l'operaio che avendo ricevuto materia prima da lavorare, si rifiuta, perché non pagato dal committente, di proseguire nel lavoro e di rendere la materia ricevuta; l'incaricato di esigere l'importo di titoli, che non avendo potuto compiere tale esazione, trattiene i titoli a garanzia del dovuto per le pratiche inutilmente fatte allo scopo di esigere. In generale la giurisprudenza è costante nel richiedere come elemento costitutivo imprescindibile il dolo".

Considers

That, as regards the present case, if reference is made to the three elements mentioned in the judgment above-referred to, **Il-Pulizija vs. Enrico Petroni u Edwin Petroni**, whereas from the evidence brought forward it can safely be said that the first two elements have been satisfied, the same cannot be said as regards the third element. The proof that the accused has converted to his benefit or to the benefit of any other person is surely lacking. It should also be noted that no proof whatsoever was brought forward as to what actually happened to the freezer in question and who actually removed it, which the accused says was removed by someone when he was

Informal Copy of Judgement

abroad on a holiday and who had removed the freezer without him knowing. As regards the fact that there was a time when the accused used to use the freezer to store some ice cubes in it, when he was not permitted to do so, not even this can be considered as misappropriation.

Consequently, in view of the evidence found in the acts of the case and in view of the above considerations, the Court acquits the accused of the charges brought against him due to lack of sufficient evidence at law.

< Final Judgement >

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