



**QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI**

**MAGISTRAT DR.
EDWINA GRIMA**

Seduta tas-17 ta' Lulju, 2013

Numru. 77/2009

**The Police
(Inspector Angelo Gafa')**

Vs

**Artur Arakelyan, 43 years, son of Robert and Elmira
nee' Vardanyan, born in Yerevan, Armenia, on the 11th
February 1970, residing at 72/2, Duke Apartments,
Victor Denaro Street, Msida, and holder of Maltese ID
card number 18658A and Almerian passport number
AG0644567 issued in Armenia on the 2nd February
2006.**

The Court,

Having seen the charges brought against accused, Artur Arakelyan, charged for having in these Islands, between September 2007 and October 2008, by means of several acts, even if at different times, that constituted violations

of the same provision of the law, and committed in pursuance of the same design, misapplied, converting to his own benefit or to the benefit of any other person, anything which has been entrusted or delivered to him under a title which implies the obligation to return such thing or to make use thereof for a specific purpose, that is, the sum of money exceeding two thousand and three hundred and twenty-nine euro and thirty seven cents (€2329.37) to the prejudice of Tigran Arutyunyan (ID:46638A) and Property Consultants ATW Limited (C440774), and which funds were entrusted or delivered to him by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit.

The Court is humbly being requested to apply *mutatis mutandis* the provisions of Article 5 of the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta, as stipulated in Article 23A(2) of Chapter 9 of the Laws of Malta and in the case of guilt, to apply the provisions of Article 23B of Chapter 9 of the Laws of Malta.

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

Having seen the note containing the Articles of Law sent by the Attorney General in terms of Article 370(3)(a) of Chapter 9 of the Laws of Malta dated 21st February 2011.

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

Having heard the evidence.

Having heard submissions by the Prosecution.

Having seen the note of submissions presented by the defence.

Considers,

That from the note of the Attorney General of the 21st February 2011 it results that the accused has been sent for trial by this Court accused of the crime of misappropriation and this in violation of articles 293 and 294 of the Criminal Code.

It will be initially pointed out that although article 293 necessitates the complaint of the injured party for the criminal action to succeed, however article 294 clearly points out that the action can be instituted *ex officio* by the Police when the crime “is committed on things entrusted or delivered to the offender by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit.” Consequently although the defence in its note of submissions maintains that the prosecution has failed to bring forward sufficient evidence with regard to the complaint filed by injured parties, since the written complaint filed in the acts of the proceedings was confirmed on oath not by complainant but by his legal advisor, Dr. Katia Mercieca¹, however in terms of article 294 such a complaint is not necessary and this due to the fact that accused was a director in the company Property Consultants ATW Limited in which company he was also a majority shareholder.

The crime of Misappropriation

In a judgment delivered by the Court of Magistrates (Gozo) it was decided:

“Skond giurisprudenza kostanti u anke skond awturi, generalment huwa ritenut li l-estremi ta’ dan r-reat ta’ approprjazzjoni indebita huma dawn li gejjin:

1. Illi l-pussess tal-haga jkun gie trasferit lis-suggett attiv tar-reat voluntarjament mill-proprjetarju jew detentur, ikun min ikun. Jigi specifikat hawnhekk biex ma jkunx hemm ekwivocita, li l-konsenja da parti tal-proprjetarju jew detentur lil agent jew lis-suggett attiv tad-delitt, trid tkun maghmula *con l’animo di spostarsi*

¹ Document AG1 at folio 43, confirmed by Dr. Katia Mercieca at folio 275

del possesso, ghax altrimenti jiffugura mhux r-reat tal-appropriazzjoni ndebita, imma s-serq.

2. Illi t-trasferiment tal-pussess ma jridx wkoll ikun jimporta t-trasferiment tad-dominju cioe tal-proprjeta' ghalix f'dan il-kaz ma jiffugurax l-element tal-azzjoni ndebita.

3. Illi l-oggett irid ikun mobbli;

4. Illi l-konsenjatarju in vjolazzjoni tal-kuntratt jaghmel tieghu il-haga cioe japproprja ruhu minnha, jew jbiegha, jew jiddistruggiha *a proprio commodo o vantaggio*;

5. Irid ikun hemm wkoll l-intenzjoni tas-suggett attiv tar-reat li japproprja ruhu mill-oggett li jkun jaf li huwa ta' haddiehor” (The Police vs Marbeck Cremona – 15/02/2007)

Also in another judgment delivered by the Court of Criminal Appeal in its inferior jurisdiction, the Court listed the legal elements which constitute the crime of misappropriation (The Police vs Enrico Petroni and Edwin Petroni – 09/06/1998).

“Dana ir-reat isehh meta wiehed (1) jircevi 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.”

Consequently for the prosecution of the crime to be successful, the author of it must have the specific intention to make use of the object entrusted to him for a specific purpose, as if he were the owner and therefore make use thereof or disposing of the same, at a resultant profit for himself or for others. The jurist Francesco Antolisei explains:

“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)²

The key phrases in the law lie in the words **“under a title which implies an obligation”** and **“to make use thereof for a specific purpose”** – a purpose specified by the person delivering the object to the agent or agents, which person has the right to impose an obligation on the agent regarding the use to be made of the object entrusted to his care. If the agent proves that he has made use of such object according to the instructions given to him, then he cannot be found guilty of the commission of this offence.

Finally the *mens rea* or the intention of the agent must be proven beyond reasonable doubt – the intention to make a gain or profit from the misappropriation of the object entrusted to him. In another judgment delivered by the Court of Criminal Appeal in its inferior jurisdiction in the case *The Police vs Dr. Seigfried Borg Cole* (23 December 2003) the Court quoted the jurist Luigi Maino with regards to the intentional element necessary for the commission of this crime. (***Commento al Codice Italiano UTET (1922)*** Vol IV para 1951 pagina 105 – 106):

“Finalmente, a costruire 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 appropriava 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 incorrera in reato chi ne dispone della

² The Police vs Francis Camilleri - 25 June 2001 – Court of Criminal Appeal (Inferior)

cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo ... il dolo speciale nel reato di appropriazione indebita e' [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, perche' 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 dovutogli per le pratiche inutilmente fatte allo scopo di esigere. In generale la giurisprudenza e' costante nel richiedere come elemento costitutivo imprescindibile il dolo."

Consequently from the above it results that the crime of misappropriation is based on the abuse of trust given to the agent, which abuse results in the consequent mishandling of any object by making use of the same for personal gain or profit whether financial or otherwise.

Considers further,

That from a detailed study of the acts of the case it results that, as already pointed out above, proceedings against the accused started out following a letter of complaint filed by Dr. Katia Mercieca on behalf of Russian National Tigran Arutyunyan in his name and on behalf of a Maltese registered company by the name of Property Cosultants ATW Limited. Shareholders of this company were accused, being a majority shareholder, injured party

Tigran Arutyunyan, a certain Victor Kharitonov and a Vagarshak Sagaryan all having 267 shares each in the said company. Company directors were the accused and injured party Tigran Arutyunyan. The purpose behind the set up of this company was to deal in the construction industry and other development projects. It results that accused had lived in Malta for a considerable time and had various connections and acquaintances who could advise him with regards to any development project on the islands. Financing of these projects was to be taken care of by Tigran Arutyunyan. The latter, in fact, had negotiated a loan agreement with three companies based in Moscow, Janson Industrial Inc., Global Business Hall Inc., and Matrix Invest Limited. The first two companies had agreed to give on loan the sum of US\$2,500,000 each to injured party Tigran Arutyunyan and the last company had agreed to give him the sum of US\$150,000. These agreements were signed by injured party in his personal capacity binding himself also as guarantor for the repayment of the said amounts.³ These loan agreements were, however, never finalized, although a preliminary agreement had been signed on the 10 February 2007 in Moscow. The loan had to be made available by means of equal transfers within one year.

After this agreement had been signed and the company set up, the funds were not made available and until the end of March 2007 only the sum of US\$1,400,000 was deposited in the company's bank account number 40015894627 held with Bank of Valletta plc. The rest of the money was never passed on to injured party and was consequently never deposited in the company's accounts. With lack of funds, accused alleges that many projects which were in the pipeline could not be materialized due to lack of financing and as time passed and the money deposited was lying idle and no profit was being generated by the company, accused states that he was travelling far and wide in order to see whether the company could invest in any other project. For this reason he had employed the services of Noel Farrugia since at

³ Vide Documents TA1, TA2, TA3 at folio 190 et. seq of the court records

the time he was a member of parliament and offering consultancy services. Also since the shareholders were not often present in Malta since they lived in Russia, accused had decided to set up a virtual office rather than a real one and this to minimize costs. He had also engaged the services of a Dutch company to set up a company web-site. After the setting up of the company, and being the only person living in Malta, accused was given a power of attorney by injured party, his brother Vardan Arutyunyan, Vagarshak Sagaryan, Victor Kharitonov and Ruben Sagaryan⁴ to purchase property in Malta on their behalf. With regards to Ruben Sagaryan, Vagarshak's brother, the purchase price of the property acquired by him represented a loan given to him by the company Property Consultants ATW Limited and this with the consent of all the directors and shareholders⁵.

In the summer of 2008, accused purchased a car in his own name, a second hand Mercedes SLK bearing registration number GBH217. This car was to serve as a company car to be used by the directors.

With regards to the administration of the company funds, the directors had initially given instructions to the bank that for any withdrawal of funds exceeding the sum of US\$20,000, both directors were to be signatories. This agreement was signed on the 16 February 2007.⁶ Subsequently by another agreement of the 10th April 2008, it was decided that both directors were to sign jointly for withdrawals of all amounts.⁷ However by means of board resolution dated 21st February 2007, accused was duly appointed as system administrator in order to operate all bank accounts of the company via the bank's alternative delivery channels accessed through internet, fixed line telephony and mobile telephony.⁸ This agreement was terminated unilaterally by injured party

⁴ Vide deeds in the acts of Notary Remigio Zammit Pace Documents EA1 – EA5 fol.429 et seq.

⁵ Vide board resolution Document AA2, at folio 1247 and loan agreement folio 1249

⁶ Vide fol.141

⁷ Vide fol.138

⁸ Vide fol.129 et. Seq.

appearing as company secretary on the 20th October 2008.⁹

This occurred after injured party started suspecting that accused was mismanaging the company's funds and that he had misappropriated monies for his own personal use to the amount of US\$265193.14. Injured party alleges that these monies were either transferred to accused's personal accounts or that they were used for purchase of items for accused's personal needs. In fact it results from the acts that injured party not only filed a written report to the police but also instituted civil proceedings against the accused and issued garnishee orders resulting in the seizure of all accused's assets and the freezing of his bank accounts.

Accused is arrested and interrogated on the 30th January 2009.¹⁰ In his written statement to the police, accused denies any wrongdoing and as the Prosecuting Officer himself states in his testimony: **"I showed him a series of suspected withdrawals and he provided an explanation for each."** This phrase is echoed also by injured party half way through these criminal proceedings where in his testimony of the 16th September 2009 he declares:

"In these past summer months I must say that I have spoken to accused Artur Arakelyan, who has provided me with satisfactory explanations with regards to the money that was entrusted to him and consequently I declare that I do not wish to continue with this case. I must say that in actual fact I did not personally approach Mr. Arakelyan and speak to him, however, these discussions took place through our respective lawyers."

Injured party, however, seems to have had a change of mind, once again at a later date in the proceedings, demanding that he take the witness stand once again and this after a long absence from court hearings. This

⁹ Vide fol.135.

¹⁰ Vide written statement of accused Document AG3 at folio 75

request was denied since the Prosecution has already rested its case and the defence was about to start presenting its evidence.¹¹

Considers,

That the Court feels it should point out from the very outset of its considerations that accused has in actual fact presented satisfactory explanations to all the alleged suspicious withdrawals indicated by injured party when filing his complaint from bank account held with Bank of Valletta plc bearing number 4001589627. The Court will, therefore tackle each and every withdrawal and the evidence found in the acts in connection with the same.

1. Withdrawal dated 14th September 2007 for the amount of US\$16415.50 – This amount was transferred to account number 40013280149 held in the name of accused. These amounts referred to various management expenses incurred by accused in his business dealings, including various lunches, bills for telephone communications, payment for rental of cars etc. This amount did not exceed the stipulated US\$20000 and therefore injured party's signature was not required. Accused exhibits a set of documents including credit card statements and his bank account statement held with Bank of Valletta plc. bearing number 40014689383 indicating all monies spent by him in the course of the company's business.¹²

2. Withdrawal dated 25th October 2007 for the amount of US\$5387.04. – This amount was transferred to current account number 40015786353 held in the name of Irina Uspenskaja. This money was paid to Uspenskaja for maintenance works made in the properties purchased by the shareholders in Malta. These works were carried out by Uspenskaja's husband, a certain Samvel Gurjinyan. The payment to be made to Gurjinyan was approved by all the shareholders and directors in an informal meeting

¹¹ Vide bank statement exhibited Document JBC1 at folios 111 to 118

¹² Document AA6 at folio 1271 to 1293

of the 20th August 2007 wherein injured party himself had given his consent for the payment to be made. In fact it results from the minutes that accused had opposed to these payments being made from the company's funds but did not obstruct the payment and this so as not to disappoint his fellow shareholders.¹³ This was also confirmed by Samvel Gurjinyan himself in his testimony wherein he states that the payment for the works carried out was made to his wife Irina Uspenskaja.¹⁴

3. Two withdrawals dated 7th January 2008 for the amounts of US\$37,450.29 and US\$138,937.49. – the amount of €25112.97 was paid to Notary Remigio Zammit Pace and the amount of €93174.94 was paid to FIMET Developments Limited. These sums of money were loaned out to Ruben Sagaryan and this for the purchase of a property in his name. The said payments and loan agreement was approved by board resolution of the company. Again in this instance it results that all shareholders had agreed that the company was to loan the amount US\$176,400 to Ruben Sagaryan, being the brother of one of the shareholders Vagarshak Sagaryan and this for the purchase of a property in Malta. This was agreed to in an informal meeting of the shareholders of the 2nd January 2008, wherein injured party again gave his consent for this transaction. It was agreed that accused was to appear for the finalization of the deed of purchase since he was the only one of the shareholders present in Malta.¹⁵ This was the only transaction carried out by accused in violation of the board resolution wherein any withdrawals from the company's funds exceeding US\$20,000 had to be countersigned by both directors. It results, however from the testimony of accused and documents presented by the bank, that he had queered this fact with the bank, and had received confirmation that the transaction could be carried out. The Bank however realized at a later date that the withdrawal had been erroneously carried out and withdrew the amounts from

¹³ Vide minutes exhibited as Document AA1 at folio.1246

¹⁴ Vide testimony of Samvel Gurjinyan at folio 398

¹⁵ Vide minutes of meeting of the 2nd January 2008 at folio.1247 Document AA2 and loan agreement between Property Consultants ATW Ltd and Ruben Sagaryan.

accused's personal accounts and deposited them once again in the company's account. This resulted in accused having forked out this loan from his own personal account, which monies, he states, have to date not been paid back to him by Sagaryan or the company¹⁶.

4. Two withdrawals dated 27th February 2008 and 10th April 2008 for the sums of US\$925.98 and US\$276.28. – The money was paid in favour of Commercial Services Bureau Limited and this representing payments made for administration and management services rendered in connection with the setting up of the company, opening of bank accounts etc. This results from the testimony of Dr. Richard Bernard and invoices and receipts exhibited by him n behal of CSB Limited.¹⁷

5. Withdrawal dated 19th June 2008 for the amount of US\$52,192. – Transfer of this amount was made by internet banking to personal account of accused for the purchase of vehicle Mercedes, being a director's car. The purchase was approved by board resolution wherein it results that accused was authorized to purchase the vehicle in his personal name which vehicle was to be transferred onto the company's name before the final audit of that year. The board resolution reads: "To purchase second hand car to be used by the directors and shareholders when in Malta on business, to further authorize Artur Arkelyan as a director to source and purchase an appropriate vehicle up to US\$55000 or equivalent and to further arrange the necessary procedure to transfer ownership of the said vehicle in due course to the company as its first registered prior to the first audit of the company books." This never materialised however, since, prior to the drawing up of the said audit injured party had issued a freezing order on the company's business and accused personal assets. Accused confirms that this vehicle was purchased according to the shareholders' wishes.

¹⁶ Vide document exhibited at folio 162 dated 5/12/2008, documents axhbitat at folio163, 164, 166 and 167.

¹⁷ Vide testimony at foliio386 and Documents AB1 and AB2 at folios 388 to 345

6. Withdrawal of US\$11,334.37 dated July 2008. – This amount was transferred to accused's personal account and this in order to cover all travelling expenses made by accused and which had been paid by him from his personal accounts. Accused exhibits not only copies of the airline tickets but various documents and e-mails reflecting the business carried out by him abroad in the interests of the company¹⁸.

7. Four withdrawals dated September/October 2008 for the sums of US\$717.70, US\$433.08, US\$423.66, US\$691.55. – These amounts were paid to Noel Farrugia in connection with consultancy fees. These amounts were confirmed by Noel Farrugia himself in his testimony wherein he gave a detailed explanation of the consultancy services rendered by him in favour of the company. Also all the relative invoices and receipts are found in the acts to substantiate this claim¹⁹. It also results from the acts that a board meeting was held on the 25th August 2008 wherein Noel Farrugia was appointed as the company's general consultant.

8. Withdrawal dated 6th October 2008 for the sum of US\$1385.68 – This amount was paid to a Dutch company by the name of Virtual Access Internet DC. and this for the setting up of the company web site and virtual office. Again with regard to this withdrawal accused provides a sufficient explanation substantiated by documents justifying the amounts paid out. In fact it results from a board resolution that accused was authorised to enter into an agreement with MPPS Solutions Limited to set up a virtual office with a Dutch company by the name of Virtual XS in Holland. These board resolutions are approved by injured party Tigran Arutyunyan.²⁰

¹⁸ Document AA7 at folio 1296 to 1326 and documents at folio 1343

¹⁹ Testimony of Noel Farrugia at folio 501, consultants agreement at folio 511, Document NF and bills Documents NF1 to NF4, receipts Document NF5, board meeting Document AA4 at folio 1260

²⁰ Vide Document AA5 at folios 1263 - 1270

The above evidence and documentation provides sufficient proof that accused made no profit or gain from the funds held in the name of the company Property Consultants ATW Limited. There is no evidence in the acts that in any way could indicate that all withdrawals made by accused were misappropriated by him. On the contrary, all evidence both produced by the Prosecution as well as by the defence point to the contrary. It results that all payments were made either after approval by the board of directors of the company or else made by the accused himself in the course of management of the business of the company. The withdrawals were all made as duly authorized by board resolutions, and according to instructions given to Bank of Valletta plc, being the bankers of the company. The only transaction carried out in favour of Ruben Sagaryan in violation of these instructions, was ultimately approved by the Board of Directors, was not made for any financial gain by accused, and was carried out erroneously by the Bank who at a later date unilaterally withdrew the said amounts from accused's private bank accounts held with the bank, with the consequence that accused suffered a great loss rather than a gain out of this business venture. The Court, necessarily concludes, therefore, that although accused had in his possession the sum of US\$1,400,000 which he could freely administer through internet banking, however there is no shred of evidence to prove that these monies were utilized by accused for his own personal benefit. All the evidence together with the documents exhibited indicate that these monies were always utilized in the course of the running of the company's business, in spite of the fact that no business venture ever materialised.

Consequently on the basis of the evidence found in the acts of the proceedings the Court cannot but acquit accused of all the charges brought against him.

< Sentenza Finali >

Kopja Informali ta' Sentenza

-----TMIEM-----