



MALTA

**COURT OF MAGISTRATES (MALTA)**  
**AS A COURT OF CRIMINAL JUDICATURE**  
**MAGISTRATE**  
**AARON BUGEJA**

Sitting of the 17 th November, 2014

Number. 461/2014

**The Police**

**(Inspector Kylie Borg)**

**vs**

**Marilyn Bandolin**

The Court after seeing the charges brought against Marilyn Bandolin, 45 years of age, daughter of Aquillo Billon and Concepcion nee Canillo, born in Gayusan, Philippines on the 12<sup>th</sup> November 1968 and residing at Town Square Apartments, Flat 204, Ix-Xatt ta' Qui-Si-Sana, Sliema, holder of Maltese identity card number 29503A where she was charged with having, during the month of September 2013 and after this date misapplied, converting to her own benefit or to the benefit of any other person, anything which was delivered to her under a title which implied an obligation to return such thing or to make use thereof for a specific purpose, committed on things entrusted to her by reason of her profession, trade, business, management, office or service or in consequence of a necessary deposit amounting to more than €232.94 but less than €2329.37 to the detriment of FILCOM and/or Veronica Ugates.

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Having seen that during the examination of the accused in terms of Article 392 and 370(4) of the Criminal Code the accused declared that she found no objection to her case being dealt with summarily.

Having also seen that the Attorney General declared by means of a note exhibited at fols 12 and 13 that he granted his consent to this case being dealt with summarily;

Having seen that the accused, in reply to the question posed in terms of Article 392(1)(b) of the Criminal Code by the Court declared that she was not guilty;

Having heard all the witnesses produced and seen the records of the proceedings;

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accused;

### **Considers the following :-**

That from the evidence it transpires that the accused was elected as treasurer to the FILCOM. As part of her duty she held funds belonging to this community. However, due to certain issues arising within FILCOM (which the Court will not go into for obvious reasons) a dispute arose between FILCOM and the accused.

On the one 2nd February 2014 FILCOM, presided by Veronica Ugates, passed a resolution for the indefinite suspension of the accused from her role as treasurer of FILCOM and for the return of the monies belonging to FILCOM that were in her possession. Moreover the accused was on the same date replaced by Estrella Gatt as treasurer of FILCOM. During her testimony, Veronica Ugates exhibited also a letter dated 31st October 2013 (fol 65) that was sent to the accused calling on her to deposit monies in her possession and to provide the Board with financial statements. Ugates claimed that the accused still held to these funds despite FILCOM's repeated request for their return. The accused could not hold on to FILCOM's monies given that she did not have the authority any longer so to do. Despite all

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the efforts of FILCOM, the accused failed to adhere to FILCOM's repeated requests and consequently FILCOM had to file the police complaint leading to this case.

On the otherhand, the accused claims that she was elected treasurer of FILCOM by means of an election that was held on the 16th June 2013. She was obliged to hold monies of FILCOM and to produce receipts and financial statements – which she did. Following activities that were carried out by FILCOM, by the 31st December 2013 she held €320.98. FILCOM had a meeting on the 5th January 2014 during which meeting Veronica Ugates asked the accused to resign from her post because of complaints that were received by FILCOM in relation to the manner in which the accused was conducting her role and because she was told that she was rude to the President. A dispute arose as the accused did not want to submit her resignation and she called on the President to call a general meeting of FILCOM so that the members of FILCOM decide. However on the 19th January 2014 another meeting was called and there was nothing on the agenda calling for her removal. Then on the 3rd February 2014 she received a notification on Facebook informing her that during a meeting of the officers of FILCOM a resolution for her suspension was passed. She was not informed about this meeting.

The accused stated that following this notification she decided not to return the monies to FILCOM. She was not agreeing with the decision of these officers. She was prepared to contest this decision as she felt that this resolution of suspension could not have been legitimate. She still considered herself to be the treasurer and therefore entitled to hold on to the monies of FILCOM, despite the demands that were made to her by FILCOM through their legal letters.

### **Considers further that :-**

This Court cannot go into the Politics of FILCOM and in the reasons whether the decision to suspend indefinitely the accused from her role of treasurer was legitimately taken or not; or whether the reasons leading to her indefinite suspension were founded or not. This Court is being called to analyse whether, in the particular circumstances of this case, when the accused decided to hold on the FILCOM funds, she did or did not commit the crime with which she stands charged.

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This is the crime of whosoever misapplies, 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 an obligation to return such thing or to make use thereof for a specific purpose; and in this particular case it is being considered more serious on account of the fact that it was allegedly 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.

This Court is going to analyse whether, first of all, the formal element of this crime has been proved beyond reasonable doubt.

There is no doubt that the accused held on to FILCOM funds. Even during her interrogation by Inspector Borg, the accused stressed back then that she did not return back the monies held by her (€320.98) because she was still considering herself as the treasurer of FILCOM. At fol 7 she contended that when these monies were collected by her she was treasurer and she still contended the she was entitled to retain those monies qua legitimate treasurer of FILCOM. Her suspension was not legitimate as it was not carried out in accordance with the statute of FILCOM and because the grounds for her suspension were also being contested by her. That was the reason why she was still holding on to the money. She stated that she referred her case to her lawyer who was going to bring this matter to the attention of Professor Kenneth Wain, the Commissioner of Voluntary Organisations. "He will study our complaint and he will be the one to say if my suspension is legal or not. If their suspension is legal I will return the money but if it is not, I will remain as treasurer of the organisation because I have not yet resigned". Later on, in the same statement she states that she did not return the monies to the FILCOM but once that the Police Inspector told her that there could be criminal law consequences against her for her actions, the accused stated that she was willing to return the money to FILCOM and that she was going to use other ways to fight out her case.

In fact it transpires that by means of a deposit made in FILCOM bank account, the accused deposited the amount of €320.98 as can be seen from fol 29.

Another interesting fact that transpires from the deposition of Police Inspector Borg is that when the accused was called to her office for interrogation, the accused brought with her a plastic bag full of coins which the accused claimed were the FILCOM monies and which added up to €320.98.

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This Court considers that the dispute which arose between FILCOM (or at least some of the FILCOM officers) and the accused ought to be addressed before the competent court of civil jurisdiction. This Court, being a court of criminal jurisdiction cannot solve the civil law aspects arising from the dispute. However the above facts show clearly what the intention of the accused was when she was holding on to the monies of FILCOM till the day she deposited the same in FILCOM's bank account.

The Prosecution proved beyond reasonable doubt that the accused was a treasurer, that there was a resolution of the FILCOM officers suspending her indefinitely from her role as treasurer. But it also proved that this suspension was being hotly contested by the accused. The Prosecution proved also that the accused held on to the sum of €320.98 that belonged to FILCOM, despite FILCOM's request for restitution. But it also proved that such restitution did not take place because the accused was contesting the decision to suspend her indefinitely and that should this matter be resolved, she was willing to return those monies to FILCOM if it transpired that she was legitimately removed from office.

In the case "Il-Pulizija vs Siegfried Borg Cole" decided by the Court of Criminal Appeal on the 23rd December 2003, the Court of Criminal Appeal entered into the specific formal element required in order for this crime to be committed and it quoted a very telling excerpt from the author Luigi Majno<sup>1</sup> on this subject which states :

*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 incorrera in reato chi ne disporre della 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*

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<sup>1</sup> Commento al Codice Italiano, UTET, 1922, Vol IV para 1951 p. 105 – 106.

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*giurisprudenza ed ai deviazioni 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 dovutogli per le pratiche inutilmente fatte allo scopo di esigere. In generale la giurisprudenza è costante nel richiedere come elemento costitutivo imprescindibile il dolo."*

This excerpt is very telling because from it one can deduce some important aspects that have a clear bearing on this case :

- (a) *il dolo sarà costituito dalla volontarietà della conversione con scienza della sua illegittimità, e dal fine di lucro* – in this particular case the Prosecution failed to prove that Bandolin was retaining the FILCOM funds in order for her benefit or for the benefit of others;
- (b) *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*. That is Bardolin clearly claimed that she was refusing to return back the monies only because she pretended to have a right to retain such monies as she was still claiming to be the legitimate treasurer. She was claiming a right and so much so that she had instructed her lawyer to fight out her case before the Commissioner of Voluntary Organisations – and she was willing to return back the monies in the event that this Commissioner decided that her suspension was legitimate.
- (c) *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*: in this particular case it transpires that when the accused received the monies in question she was indeed the legitimate treasurer of FILCOM and it was only afterwards that she was suspended indefinitely from her role. It was this FILCOM decision that triggered off the accused's (wrong) reaction to **exercise the pretended right** to retain the monies belonging to FILCOM claiming that she was entitled to as legitimate treasurer while contesting FILCOM's decision before the Commissioner of Voluntary Organisations (which position was later rectified on the 8<sup>th</sup> May 2014 by her deposit of the contested sums in FILCOM's bank account). Indeed whereas Majno claims that "*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*", the position on this point at Maltese Law is different in that the element of violence does not form part of the crime of arbitrary exercise of a pretended right.

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In view of the above, this Court is not convinced beyond reasonable doubt that in this case the Prosecution managed to prove the formal element necessary for the commission of the crime of misappropriation.

### Decide :-

Consequently, this Court, after having seen articles 293, 294 and 310(1)(b) of the Criminal Code finds Marilyn Bandolin not guilty of the charge brought against her.

**Delivered today the 17th November 2014 at the Courts of Justice in Valletta, Malta.**

**< Final Judgement >**

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