

**The Court of Magistrates (Malta)**  
As a Court of Court of Criminal Judicature

*Magistrate Dr Aaron M. Bugeja M.A. Law, LL.D. (melit)*

**The Police**

**(Inspector Joseph Mercieca)**

**vs**

**Lela Ristic**

The Court after seeing the charges brought against Lela Ristic holder of Maltese Identity card number 42603A and who was accused of having with several acts committed by the offender even if at different times but which constitute violations of the same provision of the law and committed in pursuance of the same design, on the 23<sup>rd</sup> May 2014 and/or before and/or after the given date, from the premises "Il-Farfett", Triq il-Qantar, Swieqi committed theft of cash and/or other belongings, which theft is aggravated by value and exceeding two thousand three hundred twenty nine euros and thirty seven cents, by person and by place, to the detriment of Louis Zammit and Mareike Kohler-Zammit and/or other peron/s and/or entities.

Having seen that during the sitting of the 2nd July 2014 this Court ordered that proceedings be carried out in the English language after that it ascertained that the accused is English speaking in terms of law.

Having seen that on the same date the Prosecuting Officer confirmed the charges on oath and during the examination of the accused in terms of Article 392(1)(b) of the Criminal Code the accused declared that she was not guilty.

Having seen that in terms of a formal written accusatory document issued on the 13th February 2015 the Attorney General found that from the preliminary investigation in this case there might result an offence or offences under the provisions of :

- a. Articles 17, 18, 30, 31, 261(c)(d)(e), 267, 268(a), 269(g), 279(b), 280(1), 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;

And decided in terms of Articles 370(3)(a) of the Criminal Code to send the accused for trial by this Court subject to no objection being made by the accused in accordance with Article 370(3)(b)(c)(e) of the Criminal Code.

Having seen that during the sitting held on the 24th February 2015 the Prosecuting Officer declared that the Prosecution had no further witnesses to produce and that it was resting its case. During the same sitting in terms of Article 370(3)(b) of the Criminal Code, the Court, after

reading out the contents of the formal accusatory document to the accused, requested the accused whether she found any objection to her case being dealt with summarily. After giving the accused a reasonable time within which to reply, and after consulting his Legal Counsel, she declared that she had no objection to her case being dealt with summarily. The Court therefore took note of this declaration in writing in the records of these proceedings in terms of Article 370(3)(c) of the Criminal Code.

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accused the Court adjourned this case for judgment in terms of Article 377 of the Criminal Code.

Having analysed the documents that were exhibited and all the records of the proceedings;

**This Court considered that :-**

The testimony of Louis Zammit is clear. He was sure that he left €2000 in a pouch following his return to Malta from abroad and a couple of days later, on the 23<sup>rd</sup> May 2014 this amount of cash money went missing. None of his family members saw the money and none of them touched it. By elimination, Zammit states that it must have been the accused.

Mareike Kohler-Zammit testifies that she did not touch this €2000 cash money from her husband's pouch. Indeed she did not know about this money and she never saw it. It was her husband who told her that there was that amount of cash money in his pouch. However she adds that she was noticing strange incidents of things disappearing from her residence that started to raise her suspicions that someone was stealing from her house. Again by a process of elimination, this witness pointed her fingers to the accused.

These two witnesses confirm that apart from them, there are also two other persons living in their household – their daughters, aged then 23 and 10.<sup>1</sup> The elder daughter of this couple, Rachel testified that on the date of the alleged theft she did not have friends around in the house, even though sometimes her friends visited her. Louis Zammit states that sometimes the technician came to their house, but he was sure that he did not call to their house during the week in question.

*Considered further that : -*

Louis Zammit is sure that the amount of €2000 went missing on the 23<sup>rd</sup> May 2014. He is the only witness who can give direct testimony on the existence of this amount of money – but he cannot furnish direct

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<sup>1</sup> In his later testimony Zammit mentions a step father.

testimony on the fact whether it was the accused or not who stole this amount of money. His wife corroborates his version only limitedly insofar as she states to have noticed some missing items along the years. However even Mareike Kohler-Zammit, while being sure that it could have only been the accused who stole the money, could not furnish direct testimony as to the involvement of the accused in this alleged theft.

Therefore, by elimination, this Court is invited to find the accused's guilt on the basis of circumstantial evidence.

This couple claims that a turning point that led their suspicions in the accused as being the author of the theft to fact resulted from the excerpts of the CCTV recordings taken on the 20<sup>th</sup> June 2014. Through this recording it transpires clearly that on the 20<sup>th</sup> June 2014 between 11:15 and 12:33 the accused is seen entering the main bedroom of the couple where she starts rummaging and searching in the wardrobe of the main bedroom of the couple as well as in one of the bedside table drawers. The video clips show her very clearly doing certain highly suspicious manoeuvres that are also described by Louis Zammit and his wife in their testimony. However both Zammit and Kohler-Zammit confirm that on the 20<sup>th</sup> June 2014 nothing was reported missing from their residence.

The Court considers this behaviour of the accused as highly suspicious and very much uncalled for. In her statement to the police she states that she was searching for Panadols because of a developing headache. However the Court does not believe this version of events, especially when considering that searching for panadols in the top open drawer of a wardrobe is both highly unusual and highly compromising. Her rummaging the bedside table drawer over and over again compromises her version further. The Court is morally convinced that the accused was not searching for Panadols but she was after something else. Furthermore, at one stage, while searching the wardrobe top drawer, she is seen searching in a sort of pouch that was on the right hand corner. According to Mareike Kohler-Zammit it was one of her husband's pouches where money used to be placed. And the Court does not consider it reasonably to be the proper place where to look for Panadols.

Even more compromising are those excerpts where she is seen looking at the camera installed in the main bedroom – clearly without realizing whether it was recording her movements or not – or at least being reckless as to whether she was being recorded. Whatever thoughts crossed the accused's mind at that stage, one thing is for sure :- she looks at the camera more than once as if she was suspecting that something was going on with that device recently installed up there by the ceiling. Yet, she proceeded with her rummaging nonetheless.

Minutes later she is seen in the living room – however this time she decided to cover the camera with a piece of cloth. This camera was therefore not in a position to record her movements for around forty seconds – only for the cloth to be taken off after the lapse of the said forty seconds circa and the accused appears to be continuing cleaning the floor. The accused states that she was trying to remove a “spider thing” from this camera and hence the use she makes of the cloth. Again this version of events is highly improbable given that the camera was just installed the day before and in any case it does not normally take around forty seconds to clean a spider’s web while leaving a piece of cloth obstructing the camera’s lens without the cloth being seen making any movement.

This CCTV recording indeed puts the accused in a very compromising position. However the Court has to interpret this piece of evidence from a legal perspective and only by reference to the theft that allegedly happened on the 23<sup>rd</sup> May 2014. Despite its importance to instill suspicions in the accused this recording on its own does not show the accused stealing money on the 23<sup>rd</sup> May 2014. Hence its relevance lies in the fact that it can be deemed to be part of the circumstantial evidence in this case that could lead to an inference of fact pointing to the possibility of a course of conduct adopted by the accused. In a few words the prosecution and *parte civile* invite the Court to find guilt in the accused also on the basis of this recording in the sense that once she was clearly

caught on camera rummaging in their personal belongings and drawers on the 20<sup>th</sup> June 2014 then this raises a presumption of fact that she did the same on the 23<sup>rd</sup> May 2014 and that therefore it was the accused who stole the €2000.

The issue here is whether the Court can on the basis of this circumstantial evidence alone convict a person to a criminal charge? The Court must analyse whether this circumstantial evidence coupled by the testimony of Zammit is strong enough to convince the Court beyond a reasonable doubt that on the 23<sup>rd</sup> May 2014 it was the accused who committed the alleged theft of the €2000.

At law the position in Malta relative to circumstantial evidence that can lead to a conviction was analysed in various judgments, including *Il-Pulizija vs. Abderrah Berrad et* decided by the Court of Magistrates (Malta) where the main principles were outlined as follows : -

Huwa minnu wkoll kif rapportat aktar 'l fuq li fl-Artikolu 638(2) tal-Kap. 9 ix-xhieda ta' xhud wiehed biss, jekk emnut minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Ghalhekk jispetta lill-Qorti tara liema hija l-aktar xhieda kredibbli u vero simili fic-cirkostanzi u dan a bazi tal-possibilita'.

Huwa veru wkoll li l-Qorti ghandha tqis provi cirkostanzjali jew indizzjarji sabiex tara jekk hemmx irbit bejn l-imputat u l-allegat reat. Dan qed jinghad ghaliex ghalkemm huwa veru li fil-kamp penali l-provi ndizzjarji hafna drabi huma aktar importanti mill-provi diretti, pero' hu veru wkoll li provi ndizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex il-gudikant jaccerta ruhu li huma univoci.

Fil-fatt il-Qorti hawnhekk taghmel referenza ghall-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-hmistax (15) ta' Gunju, 1998 fil-kawza fl-ismijiet 'Il-Pulizija vs Joseph Lee Borg', fejn kien gie ritenut li provi jew indizzji cirkostanzjali ghandhom ikunu univoci, cioe' mhux ambigwi. Ghandhom ikunu

ndizzji evidenti li jorbtu lill-akkuzat mar-reat u hadd iktar, anzi l-akkuzat biss, li hu l-hati u l-provi li jigu imressqa, ikunu kompatibbli mal-presunzjoni tal-innocenza tieghu.

Illi ghalhekk huwa mportanti fl-isfond ta' dan il-kaz li jigi ppruvat li kien l-imputat biss li ghamel dak li gie akkuzat bih u ghalhekk il-Qorti sejra tikkonsidra kwalunkwe prova possibilment cirkostanzjali li tista' torbot lill-imputat b'mod univoku bir-reati addebitati lilu.

Fil-fatt kif gie ritenut fis-sentenza moghtija mill-Qorti tal-Appell Kriminali fissitta (6) ta' Meju, 1961 fil-kawza fl-ismijiet 'Il-Pulizija vs Carmelo Busuttil', "Il-prova ndizzjarja ta' spiss hija l-ahjar prova talvolta hija tali li tipprova fatt bi precizjoni matematika."

Illi huwa veru li fil-kamp penali, il-provi ndizzjarji hafna drabi huma aktar importanti mill-provi diretti. Hu veru wkoll li l-provi ndizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex wiehed jaccerta ruhu li huma univoci.

Archbold fil-ktieb tieghu Criminal Parctice (1997 edition para 10-3) b'referenza ghal dak li qal Lord Normand fil-kaz Teper vs R (1952) jghid:

"Circumstantial evidence is receivable in Criminal as well as in Civil cases; and indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye witnesses or by conclusive documents much more than in civil cases; and where such testimony is not available. The Jury is permitted to infer the facts proved other facts necessary to complete the elements of guilt or establish innocence. It must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure taht there is no other co-existing circumstance which would weaken or destroy the inference."

Illi din hija ezattament il-posizzjoni hawn Malta, kif fil-fatt giet konfermata b'sentenza moghtija mill-Qorti tal-Appell Kriminali nhar d-disgha ta' Jannar, 1998 fil-kawza fl-ismijiet 'Il-Pulizija vs Emanuel Seisun'.

Din il-Qorti thoss u tghid li provi cirkostanzjali huma bhal katina li tintrabat minn tarf ghal tarf, b'sensiela ta' ghoqiedi li jaqblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni. Il-Qorti hija rinfaccjata b'zewg versjonijiet ta' kif sehhet il-grajja.....

Ghalhekk m'hemmx dubju li l-Qorti hija rinfaccjata b'zewg verzjonijiet dijametrikament opposti ghal xulxin ghalkemm inghad sa minn dan l-istadju bikri tas-sentenza jidher li l-imputati li gew investigati a tempo vegine tal-investigazzjoni baqghu konsistenti fil-verzjoni tal-fatti taghhom sa meta xehdu l-Qorti viva voce minn jeddom hames snin wara l-incident.

Illi ghalhekk m'hemmx dubju li kollox jiddependi fuq il-kredibilita` tax-xhieda u dan billi bhala gudikant il-Qorti ghandha tqies l-imgieba, il-kondotta u l-karattru

tax-xhieda, tal-fatt jekk ix-xhieda ghandhiex mis-sewwa jew hiex kostanti u ta' fatturi ohra tax-xhieda tieghu u jekk ix-xhieda hiex imsahha minn xhieda ohra u tac-cirkostanzi kollha tal-kaz u dan ai termini tal-Artikolu 637 tal-Kap. 9 tal-Ligijiet ta' Malta....

Huwa minnu, kif gie allegat mid-difiza, li jekk il-Qorti hija rinfaccjata b'zewg verzjonijiet konflingenti ghandha tillibera, stante li tali konflitt ghandu jmur a beneficciu tal-imputat, pero' huwa veru wkoll kif gie deciz mill-Qorti tal-Appell Kriminali fid-dsatax ta' Mejju, 1997 fil-kawza fl-ismijiet 'Il-Pulizija vs Graham Charles Ducker':

“It is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one.” Huwa l-oneru tal-Prosekuzzjoni li tressaq l-ahjar provi sabiex tikkonvinci lill-Qorti li l-akkuzi addebitati lill-imputat huma veri u dan ghaliex kif jghid il-Manzini fil-ktieb tieghu Diritto Penale Vol III Kap IV pagna 234, Edizione 1890:-

“Il cosi` detto onero della prova, cioe` il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit”.

Thus in order for a Court of Criminal Jurisdiction to be able to secure a conviction on the basis of circumstantial evidence :-

- (a) it has to assess this evidence with a high degree of circumspection and attention (*if only because evidence of this kind may be fabricated to cast suspicion on another*);
- (b) it has to be sure that a direct link is established between the alleged perpetrator and the offence itself – and no other person apart from the accused;
- (c) it has to be univocal and not equivocal or ambiguous (*It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there is no other co-existing circumstance which would weaken or destroy the inference*);
- (d) it has to ensure the continuity of the chain of evidence;

(e) it has to be such that it leads the Court to conclude, solely on its basis that the accused committed the crime beyond a reasonable doubt.

Now in this case the clear evidence that shows the accused rummaging among the personal property of the Zammit family is taken from an incident that took place on the 20th June 2014 and not the 23rd May 2014. Can this piece of evidence lead to a presumption of fact in the sense that once the accused was seen rummaging on the 20th June 2014 then it was automatically and solely she who did the same and stole the €2000 on the 23rd May 2014? According to law, it is possible for a presumption of fact to arise from circumstantial evidence. According to Blackstone's **Criminal Practice**,<sup>2</sup> Lord Simon in *DPP v Kilbourne*<sup>3</sup> stated the following :-

The Lord Justice-General (Lord Clyde) started his judgment: 'The question in the present case belongs to the department of circumstantial evidence. This consideration is vital to the whole matter ...'

Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities.<sup>4</sup>

On the otherhand, according to Mr Justice Joseph Galea Debono in **II-Pulizija vs James Abela**,<sup>5</sup> a presumption of fact :-

tqum fejn meta il-“fatti pruvati jkunu fihom infushom tant elokwenti li l-interpretazzjoni logika u naturali taghhom necessarjament u ragjonevolment twassal ghall-prova fi grad sodisfacenti ta' certu fatti.”

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<sup>2</sup> 2013, F1.18 to F1.27

<sup>3</sup> [1973] 1 All ER 440 at 462; [1973] AC 729 at 758.

<sup>4</sup> Ara wkoll Exall (1866) 4 F&F 922 at 929 per Pollock CB.

<sup>5</sup> Decided by the Court of Criminal Appeal on the 11<sup>th</sup> July 2002.

Now in this case, the Court is convinced beyond a reasonable doubt that on the 20th June 2014 Lela Ristic was not searching for panadol's – and her manoeuvres especially those with the pouch abovementioned seal this point of view. However this does not necessarily mean that, by elimination and as a unique consequence thereof, it must have been the accused and only the accused who committed the theft of the money almost a month before.

The Court is convinced beyond a reasonable doubt that had money been reported missing on the 20th June 2014 – even not from the bedroom or living room captured by the CCTV camera - the guilty party would have been the accused. However no money or other effects were reported stolen or missing by the Zammit's on the 20th June 2014.

However this interpretation of the circumstantial evidence cannot safely and satisfactorily be made applicable also to the alleged theft of the 23rd May 2014. This Court must interpret facts presented as evidence not only from an ordinary person's point of view – but principally from a legal point of view. Which means that this Court has to interpret the facts of this case in the light of logic expressed through the focus of the relevant law of evidence. It has to interpret the facts presented to it, no matter how eloquent, within the parameters of the law of evidence in general, and the law governing circumstantial evidence in particular. *In primis*, this Court must be sure, beyond a reasonable doubt, that it was

the accused, and no one else, who committed the theft on the 23rd May 2014. While her proven actions on the 20th June 2014 are highly suspicious, the Court cannot, on their basis alone, serenely conclude that the same pattern of behaviour was also followed by her on the 23rd May 2014. While it concedes that from the evidence supplied it may have been **probably** so, this Court cannot say that it was **surely so beyond a reasonable doubt**. It is true that this Court does not need to reach absolutely certainty to secure a conviction; but on the otherhand the level of sufficiency of evidence presented in this case is not enough to secure a conviction according to law.

There is very little direct evidence that links the accused with the alleged theft. The circumstantial evidence produced by reference to the incident of the 23rd May 2014 (and not simply the 20th June 2014) that may link the accused with the alleged theft **is not univocal**. This Court cannot say that the proven behaviour of the accused the 20th June 2014 is sufficient to give rise to an inference of fact, that this same pattern gives rise to an inference whose logical and natural interpretation necessarily and reasonably leads the Court **to conclude beyond a reasonable doubt** that the accused's behaviour on the 23rd May 2014 was the same. Indeed it could have been so; it could have probably been so; but still this court cannot be **sure beyond a reasonable doubt** that it was so.

This evidence does not satisfy **all** the criteria mentioned above on the basis of which circumstantial evidence can secure a conviction. This Court, as a court of criminal jurisdiction **cannot convict an accused person on the basis of a balance of probabilities** – even though this balance could have been satisfied. Being a court of criminal jurisdiction this Court has to reach a higher degree of sufficiency of evidence and a higher level of moral satisfaction to secure a criminal conviction. It has to base itself on such quality of evidence that **proves beyond a reasonable doubt** that it was the accused, and no one else, who committed the crime. This level of sufficiency of evidence and moral satisfaction was not reached in this case and therefore the Court is bound to acquit the accused from the **criminal** charges brought against her.

**Decide :-**

Consequently, this Court, declares the accused not guilty of the charges brought against her and consequently acquits her from all the charges brought against her.

**Delivered today the 15th December 2015 at the Courts of Justice in Valletta, Malta.**

*Aaron M. Bugeja.*