

# Misappropriation in the case law of the Maltese Courts

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In this article, **Dr Elizabeth-Mary Quintano** analyses the interpretation of the Maltese Criminal Code provisions on misappropriation, and the grounds and elements required for this crime to subsist.

**TAGS:** Criminal law; Misappropriation

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## **1. Introduction**

The crime of misappropriation is regulated by Sections 293 and 294 of the Criminal Code<sup>1</sup>. The two sections run as follows:

*293. 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, shall be liable, on conviction, to imprisonment for a term from three to eighteen months:*

*Provided that no criminal proceedings shall be instituted for such offence, except on the complaint of the injured party.*

*294. Nevertheless, when the offence referred to in the last preceding article 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, criminal proceedings shall be instituted ex officio and the punishment shall be of imprisonment for a term from seven months to two years.*

In the marginal note, the law summarises Section 294 by the phrase ‘Aggravating circumstances’. The section tries to cover a wide range of situations where the trust in particular persons is of paramount importance. One need not be employed to find himself facing a charge of misappropriation under Section 294, as the word ‘service’ is not only limited to an employer-employee relationship. Of course, the kind of service offered may fall under one or more of the other terms used in the section. The last three words used in the section; that is, ‘management’, ‘office’ or ‘service’, embrace circumstances where one is responsible for the carrying out of a mandate, without necessarily being on somebody else’s payroll.

In fact, in the case *Police vs Maria Bezzina*<sup>2</sup> the Court held that:

*Misappropriation may be considered as aggravated by circumstances when the object has been entrusted to the person who has converted to his own profit because of the service he is rendering; it is not necessary that one is employed against payment in such a service; it is enough if the service is rendered from time to time and may be compensated in other ways than money.*

<sup>1</sup> Criminal Code, Chapter 9 of the Laws of Malta.

<sup>2</sup> XLII(E).iv.1324, *Police vs Maria Bezzina*, Court of Criminal Appeal (Inferior) 19 April 1958.

## 2. The Complaint of the Injured Party

Now, under Section 294, no complaint by the injured party is necessary because proceedings can be instituted *ex officio*. However, what happens if a person is charged under Section 294 but the Court concludes that the person is guilty of violating Section 293? The point arose in the case ***Police vs Ramiro Farrugia***<sup>3</sup> of the 13 January, 1947. In that case the Court held:

*That if the person is found guilty under Section 293 only then the procedure originally filed ex officio, as a result of the judgement becomes one where the complaint of the injured party is indispensable. So if the person found guilty of Section 293 files an appeal and the injured party appears at this stage of the proceedings and renounces the complaint, the criminal action comes to a halt and the appellant has to be declared not guilty.*

The role of the complaint of the injured party in proceedings concerning misappropriation has been examined time and time again under Section 293. The Courts have had to determine whether a complainant has genuinely renounced his complaint or not. Sometimes, the complainant may have promised to withdraw his complaint on condition that he receives the money back from the person who has taken it illegally away. However, he reserves his right to go on if the periodical payments fail to materialise. The Court of Criminal Appeal (Inferior) examined such a case in ***Police vs Paolo Galea***<sup>4</sup>. The Court held that:

*The defrauded owner, during misappropriation proceedings may have accepted periodical payments but on condition that he would insist on pressing on with his complaint once the payments are suspended. This does not mean that the owner has renounced his complaint because his intention is quite clear that he will not insist on continuing with the proceedings if he is paid all that is due to him. Conversely he still has an interest in the proceedings if he is not paid.*

The question may arise whether the document attesting the complainant's 'report' has to be filed in the records of the case. This all depends on whether the person charged has asked for the production of such a document. The Court of Criminal Appeal (Inferior) had to resolve this problem in ***Police vs Salvu Depares***<sup>5</sup>. The Court held that where a charge involving misappropriation under Section 293 was involved, there is a presumption that the injured party has filed his complaint. If the person accused failed to ask for the production of the document and the Court did not order it, then there is a presumption that the alleged victim has filed a complaint. The Court felt that it had to deal with this point for future reference, though the question had

<sup>3</sup> XXXIII(F).iv.581, *Police vs Ramiro Farrugia*, Court of Criminal Appeal (Inferior).

<sup>4</sup> XXXIII(G).iv.971, *Police vs Paolo Galea*, Court of Criminal Appeal (Inferior) 14 November 1949.

<sup>5</sup> XXXVIII(C).iv.822, Court of Criminal Appeal (Inferior) 6 March 1954.

been resolved during the proceedings because the injured party had entered a renunciation of the complaint in the records of the case.

Sometimes there may be doubts whether a complaint has been withdrawn or not. This happens when the ‘withdrawal’ is a tacit one and is not explicitly stated. The Court of Criminal Appeal (Inferior) examined this point in the case *Police vs Alfred Debono* decided on the 25 June 1993<sup>6</sup>. Appellant referred to the case *His Majesty vs Loreta wife of Emmanuel Cremona* dated 28 January 1918<sup>7</sup>. In that case, a compromise had been reached between the parties after procedures were already under way. The Court had held:

*Attesocchè tale transazione importerebbe una rinunzia avanzata dalla querelante e quindi sorge la questione se al tempo in cui fu iniziato un procedimento istruttorio contro l'accusata, l'azione penale non fosse estinta per effetto di remissione della parte lesa, e quindi ancora la questione se tale estinzione non importa la nullità degli atti di istruzione e conseguentemente anche quella dell'atto di accusa su cui è fondato il presente giudizio.*

In the 1993 case, the Attorney General insisted that the decision of the 1918 case should not apply to this case, as in the 1918 case, the complaint had been filed after an agreement had been reached whereas in this case the agreement followed the filing of the complaint.

The Court of Appeal rejected the submission of the Attorney General. It held that there should not be any difference between a case where the compromise had been reached before or after the proceedings had started. Just as the complaint of the injured party is indispensable for the start of the proceedings, in the same way the proceedings should stop once a compromise has been reached while the action is still pending.

### **3. The Mens Rea in Misappropriation**

Our Courts have also had to grapple with the ‘mens rea’ in misappropriation. One leading case about this point is *Police vs Siegfried Borg Cole* decided on the 23 December, 2003<sup>8</sup>. Two parties were involved in a preliminary agreement and one of them deposited the money in the hands of Dr Siegfried Borg Cole. The latter was also instructed by the depositor to pass some of the money to the other contracting party. Eventually, the depositor did not want to buy the property and asked the depositary to hand over any money still left in his hands. The lawyer admitted to not having returned any money to the depositor because, owing to pressure of work, he was still checking his accounts to see what the depositor owed him by way of professional fees. The depositor and the lawyer settled matters after the writ of summons had been filed, but before the proceedings were under way.

<sup>6</sup> LXXVII.v.ii.423.

<sup>7</sup> XXIII(E).i.1064, Court of Criminal Appeal (Inferior).

<sup>8</sup> 21/2003, Court of Criminal Appeal (Inferior).

The Court of Magistrates had acquitted the lawyer but had failed to say *expressis verbis* that it had done so, because the action had become extinguished in accordance with Section 413(1)(iv)(ii)<sup>9</sup>. This failure made the judgment null. The Court of Appeal also agreed with the submission of the Attorney General that Section 294 applied, as the money had been deposited with the lawyer in his professional capacity. However, while there is no doubt that the failure to give back the money deposited may amount to misappropriation, in this case there is no evidence of formal element. The lawyer had no intention to keep the money to turn them to his own profit for the benefit of another person. The lawyer was not even aware that he was committing a crime when he took his time to check the accounts. Nor did he voluntarily turn the money to his own use with the intention of making a profit. The Court quoted extensively from Luigi Maino's, *Commento al Codice Penale Italiano*<sup>10</sup> part of which quote appears below:

*il dolo sarà costituito dalla volontarietà della conversione con scienza della sua illegittimità, e dal fine di lucro; onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d'un diritto proprio proprio da far valere, non commette reato per difetto di element intenzionale [...] 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 [...] osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai deviazioni della pratica giudiziale, che diedero spesse volte l'esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale.*

In this case the Court acquitted the defendant.

#### **4. The intention to give the money back**

However, sometimes matters are a little more complicated. In particular what happens if one asserts that one intended to give back the money? In this way the principle '*actus non facit reus nisi mens sit rea*' comes into play once again. The Court of Criminal Appeal (Inferior) examined such a plea in the case ***Police vs Raymond Falzon*** on the 17 April, 1998<sup>11</sup>. The Court held that it was true that certain authors maintain that the intention to give the object or the money back makes the crime of misappropriation impossible because there is a complete absence of the intentional element and because it neutralises the intention to make a profit to the prejudice of the victim. The profit need not be a pecuniary one. However, the Court then went on to say that the intention to give back the money must be a solid one and not simply one based on the hope that eventually the money will be given back. The

<sup>9</sup> Criminal Code, Chapter 9 of the Laws of Malta.

<sup>10</sup> Luigi Maino, *Commento al Codice Penale Italiano*, vol.IV (3rd edn, UTET 1922) para.1953, p. 105-106.

<sup>11</sup> LXXXII.iv.156.

Court insisted that such intention is clearly manifested when the money is given back immediately. Here the Court referred to Antolisei's, *Manuale di Diritto Penale: Parte Speciale I*<sup>12</sup>, where the Italian commentator wrote:

*Per la sussistenza del dolo occorre anzitutto la consapevolezza di ciò che la condotta presuppone, e precisamente del possesso e dell'altruità della cosa.*

*È necessaria inoltre la volontà consapevole di compiere quell'atto di disposizione in cui nel caso particolare si concreta l'appropriazione. In proposito si domanda se l'intenzione di restituire la cosa esclude tale volontà. La risposta non può essere che negativa. Se, però, si tratta di cose fungibili, e particolarmente di denaro, e la volontà di restituzione sia accompagnata dal sicuro convincimento di poterla effettuare subito, in quanto il soggetto dispone dell'equivalente, non si può parlare di appropriazione indebita, perchè in tale ipotesi ci troviamo dinanzi ad un uso momentaneo della cosa a che non pregiudica gli interessi del proprietario. Es: una persona, avuto l'incarico di consegnare una somma ad un terzo, la adopera per un acquisto personale, ma subito dopo preleva dalla sua cassa l'equivalente per eseguire l'incarico che adempie con puntualità.*

## **5. A difference between the Italian Section and the Maltese section on Misappropriation.**

Though quoting from Italian authors time and time again the Court of Criminal Appeal (Inferior) has always been aware that our section of misappropriation and its corresponding section in the Italian Criminal Code are not totally identical. The corresponding Section 646 reads as follows:

*Chiunque, per procurare a sé o ad altri un ingiusto profitto, si appropria il denaro o la cosa mobile altrui di cui abbia, a qualsiasi titolo, il possesso, è punito, a querela della persona offesa con la reclusione fino a tre anni e con la multa fino a euro 1,032.*

*Se il fatto è commesso su cose possedute a titolo di deposito necessario, la pena è aumentata.*

*Si procede d'ufficio, se ricorre la circostanza indicata nel capoverso precedente o taluna delle circostanze indicate nel n.11 dell'articolo 61[c.p. 649](2)(3).*

In the case *Police vs George Bellizzi, Paul Cremona and Joseph Armeni*<sup>13</sup> the Court remarked that our sections on misappropriation are wider in scope than the Italian provisions. In our law, even one who makes a different use of

<sup>12</sup> Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale*, vol I (9th edn, Giuffrè 1986) p. 285-286.

<sup>13</sup> LXXVI.v.733, Court of Criminal Appeal (Inferior) 17 January 1992.

an object entrusted to him for a specific purpose by the person who hands him the object and this different use of the object is done to make a profit out of the object either for himself or for another person is also guilty of misappropriation.

In this case two of the accused were public officers attached to the Public Works Department as heavy plant drivers. While working in a particular town they agreed with a third person to clean his plot of land for the sum of Lm70. But the work was not carried out as an inspector called unexpectedly and consequently the price was not paid.

The Court of Magistrates acquitted the defendants and relied on Italian authors to back its reasoning. The Attorney General filed an appeal submitting that the comments of the Italian authors did not apply to the Maltese section in the Criminal Code. The Court of Appeal upheld the appeal because it acknowledged that there was a difference between the Italian provision and Section 293 of the Criminal Code. The section includes the phrase ‘or that a specific use is made of the thing’. These words which do not have their equivalent in the Italian provision make a great difference and could be applied to the facts of the case. The Court eventually declared guilty two of the accused only, because one of the accused had not actually carried out the work.

## **6. Misappropriation, Theft and Fraud.**

Besides emphasising the difference in the wording of the Italian provision from the provisions in the Maltese Criminal Code, our courts have had to make a distinction between misappropriation, theft, and fraud. In the case *Police vs Enrico Petroni and Edwin Petroni*<sup>14</sup> the defendant issued a number of cheques which could not be paid. The Court of Appeal, first of all, spelled out the elements of the crime under Section 293 as follows: (1) receiving money or a thing from somebody; (2) the obligation to give back the money or the thing or to make a specific use of them; (3) and instead of doing so uses the money or the object for his own profit or for the profit of somebody else. It then distinguished this crime from theft because in the case of misappropriation, the object is voluntarily given to the agent and is not taken away against the will or the consent of the detentor. It also distinguished the crime of misappropriation from fraud which crime involves the use:

*of a deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event.*

Appellants had issued a number of cheques when they were aware that the cheques could not be paid. The Court of Magistrates excluded the crime of

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<sup>14</sup> LXXXII.iv.195, Court of Criminal Appeal (Inferior) 9 June 1998.

fraud and the Court of Criminal Appeal could not do anything about this decision. However, it excluded that Sections 293 or 294 could apply to the issuing of the cheques, but these sections could apply to money received because of the bills of exchange, not because the defendants had accepted the money, but because they had failed to pass on the money to the person that they were intended for.

## **7. Appropriation of things found amounts to theft.**

It is possible for a person to come across an object and the circumstances indicate that the object belongs to somebody and has not been abandoned; that is, it is neither ‘*res nullius*’ nor ‘*res derelicta*’. Maltese courts have followed the principle that in such a case a person commits the crime of theft. The Court of Criminal Appeal (Inferior) in its judgment in the names *Police vs George Ebejer*<sup>15</sup>, held that this doctrine is based on the commentaries of Renazzo (Lib IV, Parte IV, Cap II, 33) of Chaveau et Helie (Vol II, Cap 54, sez.1) and on a decision of the Italian Court of Cassation. The Court also referred to judgements delivered by the Maltese Courts (Criminal Appeal) *Police vs Spiteri* of the 22 October 1902, where the Court confirmed the judgement delivered by Magistrate Dr Pasquale Frendo Azopardi, and *Police vs Filippo Magri* of the 6 February 1909 (Coll. XX Part IV); and the Criminal Court *Rex vs Williams* of the 4 November 1941 and *Rex vs William Leatham* of the 1 July 1941. The Court also affirmed that the principle is also applied in English Law.

The Court did not accept the submission of the appellant that he should be found guilty only of the contravention which covers instances of persons failing to report to the Executive Police any object found within three days. The Court dismissed the plea because it was obvious that the appellant had found the object (a watch) quite some time before and that the evidence showed that he had the intention of keeping it for himself. This time lapse indicated that the appellant did not have any intention of reporting the finding of the watch to the police.

In the Italian Criminal Code there is a specific provision about this. It reads as follows:

*647. Appropriazione di cose smarrite, del Tesoro o di cose avute per errore o caso fortuito.*

*È punito, a querela della persona offesa, con la reclusione fino a un anno o con la multa da euro 30 a euro 309:*

*1). Chiunque, avendo trovato denaro o cose da altre smarrite, se li appropria, senza osservare le prescrizioni della legge civile sull’acquisto della proprietà di cose trovate;*

<sup>15</sup> XLV(E).iv.ii.1075, Court of Criminal Appeal (Inferior) 18 November 1961.

2) *Chiunque, avendo trovato un Tesoro, si appropria, in tutto o in parte, la quota dovuta al proprietario del fondo;*

3) *Chiunque si appropria cose, delle quali sia venuto in possesso per errore altrui o per caso fortuito.*

*Nei casi preveduti dai numeri 1 e 3, se il colpevole conosceva il proprietario della cosa che si è appropriato, la pena è della reclusione fino a due anni e della multa fino a euro 309.*

## **8. Misappropriation and Trust**

Finally, the Court of Criminal Appeal (Inferior) in the case *Police vs Carmelo Grech*<sup>16</sup> referred to the element of ‘trust’ which certain instances may involve. It held that where a person has been given a quantity of petrol to be delivered somewhere else, there is a delivery with a particular trust. If that person turns some of the petrol to his own profit before delivering it to the place assigned, he commits the crime of misappropriation and not of theft. If along with this individual there was somebody sent by the owner to keep everything under his watchful care during the transportation of the fuel, then this would have eliminated the crime of misappropriation. In this way the element of trust would have disappeared, and hence, there is no disloyalty on the part of the person entrusted with the consignment of petrol. The Court also added that if the Court of Magistrates had found the defendant guilty of theft, then it is possible for the Court of Appeal to find him guilty of misappropriation, though this crime had not been included in the writ of summons. This is so as the crime of theft is considered as also comprising the crime of misappropriation.

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<sup>16</sup> XLI(F).iv.i.1341, Court of Criminal Appeal (Inferior) 16 March 1957.

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