COURT OF CRIMINAL APPEAL

JUDGE

The Hon. Dr. Antonio Mizzi LL.D., Mag. Juris (Eu Law)

Appeal no. 425/2014

The Police
Vs

Charity Ofame Ovbiagele

Daughter of Anthony, born in Nigeria on the 23rd July, 1986, holder of Nigerian Passaport number A1992841 and Maltese Id card number 26826A

This, 5th day of April, 2017

The Court,

Having seen the charges brought against the appellant Charity Ofame Ovbiagele before the Court of Magistrates (Malta) :

On the night between the 3rd October, and the 4th October, 2009 and during the previous weeks, on these Islands, with several acts committed, even if at different times and which constitute violations of the same provisions of the Law, and are committed in pursuance of the same design:

a. Had in her possession the drug heroin specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, when she was not in possession of an import or an export authorisation, issued by the Chief Government

Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance, and when she was not licensed or otherwise authorised to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorised by the Internal Control of Dangerous Drugs Regulations (GN 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to her for her personal use, according to a medical prescription as provided in the said regulations, and this in breach of the 1939 Regulations, of the Internal Control of Dangerous Drugs (GN 292/1939) as subsequently amended by the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for her personal use;

b. Carried out acts of money laundering by:

i. Converting or transferring property knowing or suspecting that such property is derived directly of indirectly from or the proceeds of criminal activity or from an act or acts of participation in criminal activity, for the purpose of or purposes of concealing or disguising the origin of the property or of assisting any person or persons involved or concerned in criminal activity;

ii. Concealing or disguising the true nature, source, location, disposition, movement, right with respect of, in or over or ownership of property, knowing or suspecting that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;

iii. Acquiring property knowing or suspecting that the same was derived or originated directly or indirectly from criminal activity or from act or acts of participation in criminal activity;

iv. Retaining without reasonable excuse of property knowing or suspecting that the same was derived or originated directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;

v. Attempting any of the matters or activities defined in the above foregoing sub-paragraph (i, ii, iii and iv) within the meaning of Article 41 of the Criminal Code;

vi. Acting as an accomplice within the meaning of Article 42 of the Criminal Code in respect of any of the matters or activities defined in the above foregoing sub-paragraphs (i, ii, iii, iv & v).

Be it premised that due to amendments effected in the Money Laundering Act, Chapter 373 of the Laws of Malta, these charges were amended very late in the course of the proceedings, to include and mirror such charges (vide folio 798).

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 16th October, 2014, by which, the Court, after having seen Chapter 373 of the Laws of Malta, Article 2(1)(b), 2(2A), 2(3); Chapter 373 of the Laws of Malta, and Section 22(1)(C)(b) of Chapter 101 of the Laws of Malta, decided not to inflict a custodial punishment but to award her a non-custodial prison sentence in its full, thus sentenced her to two(2) years suspended for four(4) years, after having seen Section 28 Chapter 9 of the Laws of Malta;

Seen also Section 533 of Chapter 9 of the Laws of Malta all the legal expenses incurred to the amount of four thousand four hundred and eighty-eight Euros and nineteen cents (€4,488.19).

Ordered the destruction of drugs exhibited and marked as KB356.2009;
And objects KA 155.2011 seized are forfeited in favour of the Government of Malta.

Having seen the application of defendant Charity Ofame Ovbiagele filed on the 28th October, 2014, wherein they humbly pray this Court to vary and reform the judgement of the first Court delivered on the 16th October 2014 in the names above-captioned in the sense that whilst it confirms it in that part where the first charge was considered abandoned it revokes that part of the judgement where applicant was found guilty of the charge of money laundering and consequently acquits her of all charges and punishment.

That the grounds of appeal of defendant Charity Ofame Ovbiagele consist of the following:

That the wrong interpretation of the law resulting in an erroneous interpretation of the facts to the elements constituting the offence of money laundering stem *inter alia* from the following considerations.

1. That the first Court eventually concluded that applicant was guilty of money laundering since she ‘’was a main player in the retention of the converted proceeds’’. Thus for the first Court the act of money laundering which applicant had committed was that envisaged in Section 2 (iv) of Chapter 373. The said Section provides that money laundering includes;

‘’Retention without reasonable excuse of property knowing or suspecting that the same was derived or originating directly or indirectly from criminal activity or from an act or acts of participation in criminal activity’’.

Thus, in reality eventually for the first Court the fact that applicant received gifts (consisting in items of clothing, items to furnish and embellish the flat she rented) from Ferdinand Onovo, with whom she had an extra-marital relationship amounts to this act of money laundering as explained in paragraph (iv) of Section 2.

With all due respect the flaw in the argument emanates from the fact that it does not suffice for the purpose of this offence to have received such property and retained it. In order to be guilty of this offence it is also necessary that the recipient of such property did so with a view to be part of the laundering process. In other words, an element of this offence requires not only that one retained such property but that such retention was done with the very scope of laundering. Indeed had one to apply the logic of the first Court then any wife / partner of a person whose husband’s /partner’s income derives, in whole or in part, from a criminal activity, is susceptible to being found guilty of money laundering whenever her husband/partner buys her a gift. Indeed such an interpretation launders the very notion of money laundering.

It is not amiss to keep in mind two particular points. Firstly that a criminal activity is defined in the Second Schedule to Chapter 373 as being any criminal offence – ranging therefore from drug trafficking to tax evasion.

Secondly when construing the elements of this offence one must not forget that applicant does not qualify as ‘’a subject person’’ as defined in L.N. 180/2008 for indeed she was

not carrying out any relevant financial business or activity as defined in the same L.N. Undoubtedly applicant falls outside the applicability of the said L.N. 180/2008. It is also by keeping this in mind that one necessarily has to understand that for a person like applicant to be found guilty of an offence of money laundering by the retention of gifts made by Onovo, it is also necessary that she is doing so with the scope of laundering Onovo's proceeds.

2) The first Court was also legally incorrect when it concluded that for the purpose of Section 2(iv) of Chapter 373 it sufficed if applicant suspected that the gifts purchased were so purchased by monies which were illicit proceeds of an offence. Section 2(iv) of Chapter 373 at the time of the commission of the alleged offence (3rd October and the previous weeks) only required 'knowledge' in order for this offence to subsist.

In fact while Act XXXI of 2007 added the criterion of suspecting to Section 2 (i)(ii)(iii) of Chapter 373, it was only Act VII of 2010 which added the criterion of suspecting to Section 2 (iv) of Chapter 373.

This manifest error of Law nullifies the very reasoning adopted by the first Court in that it is based on a wrong application of the Law.

3) The first Court completely ignored the final submissions made by the defence. One of the arguments put forward by the defence related to the fact that the prosecution was claiming that the act of money laundering took part in a specific period – namely that indicated in the charge. (3rd October 2009 and in the previous weeks).

That such submissions where totally ignored is evidenced *inter alia* by the fact that the first Court opted to mention as one of the reasons that applicant was involved in the alleged laundering, the money transfers which result from the acts of the proceedings. Now, what the first Court so clearly forgot to consider that these money transfers pre-date the date of the charge and moreover pre-date applicant's extra-marital relationship with Onovo!!

In reality, had the first Court to gone through the computer analysis of expert Dr. Martin Bajjada, the first Court would have noticed that stored within the computer were files which were created before applicant's relationship with Onovo.

4) The first Court concluded also that the element of proceeds resulting from a criminal offence was also satisfied. But how? On what basis? To these questions the first Court replied that it was morally convinced that Onovo's monies derived from illegal proceeds from the very fact that a bill of indictment had been issued and secondly from the fact that such cases are usually reported in the press.

Hence, to the argument put forward by the defence that from the bill of indictment it results that the alleged offence committed by Onovo pre-dates the alleged period of money laundering indicated in the charge proffered against applicant, the first Court implies that applicant would have got to know about this charge from the reports in the press. To this conclusion reached by the first Court applicant feels that it is pointless commenting on its legal depth.

What the first Court however omitted from mentioning was that from the very bill of indictment it is clearly stated that the importation of cocaine was intercepted by the Police and a subsequent controlled delivery took place in which Onovo himself participated. It is therefore amply clear that no proceeds emanated from this.

For the first Court it was more relevant that in a subsequent investigation in respect of Onovo (again an investigation that occurred after the date of the charge and also after the termination of the extra-marital relationship) money was found in a sofa and a wardrobe. This is what impressed the first Court and what it commented upon in reaching its conclusion that exponent had more than a good suspicion that Onovo's money was dirty money.

It does not seem the first Court was impressed however, by the fact that both the Executive Police and the Inquiring Magistrate were satisfied it was not dirty money and that consequently it was returned to Onovo.

These considerations and the probative value they had were however considered irrelevant by the first Court – what was relevant was that the money was found in a sofa and a wardrobe!! What was relevant for the first Court was that Onovo, notwithstanding an attachment order, was still in a position ‘’ to enjoy a degree of affluence as he is still purchasing for his wife and himself branded items’’. Applicant cannot but ask – but how and on the basis of what did the first Court reach this conclusion? And what about the fact that the Executive Police and the Inquiring Magistrate (who are the only persons who know the details of this investigation) concluded that there was nothing illicit in all this?

What the first Court omitted to understand was that from the acts of the proceedings there was no evidence that;

a) Onovo made any proceeds from the drug trafficking he is charged with.

b) That there was evidence that he earned money from means which for the Executive Police and Inquiring Magistrate were not tantamount to illicit earnings.

c) That even in the remote and inexistent scenario that Onovo had dirty money there was also evidence that he had money which was not dirty.

d) That there was no evidence that these gifts were purchased with the use of illicit proceeds or licit proceeds.

The only thing the first Court considered was that he was still buying expensive clothes for himself and his wife (sic). Strange therefore how neither Onovo or his wife where ever charged with money laundering.

5) The first Court commented upon the relationship between the applicant and Atinuke Ugoyi as another consideration pointing towards exponent being a main player in the laundering process. What was important for the first Court in reaching this conclusion was the fact that applicant referred to Ugoyi as ‘’Aunty’’ and her name was written on the business card found in her possession.

What was however clearly and undoubtedly more important and relevant for the purpose of determining guilt was that from the deposition of Inspector Yvonne Farrugia it transpires that from the investigation vis-a-vis Ugoyi it resulted that exponent was extraneous to the money found in Ugoyi’s possession at the airport. Unfortunately the first Court missed this point.

6) The first Court commented that applicant was storing a cutting agent of heroin. Now apart from the fact that the Court expert concluded that the substances found (Caffeine and paracetamol) are used as a cutting agent, nowhere does it result that it was in fact being used as a cutting agent. Moreover, nowhere does it result that this substance, isolated as it was, was a substance that applicant was aware of or indeed claimed to be aware of. On the contrary applicant denied any knowledge of it and the finger print examinations carried out by the Court appointed experts confirmed this or at least that applicant was never in possession of this substance. This substance which was not illegal and which indeed formed the basis of the first charge of which applicant was acquitted, was not only found in an isolated cupboard which had no kitchen utensils belonging to exponent but was also found in an apartment which she had rented a mere two months before.

Having seen the records of the case.

Having seen the updated conviction sheets of the defendants.

Now therefore duly considers.

The fact that triggered this case was that a certain Atinuke Ugoji was arrested at the Malta International Airport on the 2nd October, 2009. This lady was found to be carrying €29,815 on her person. She was supposed to declare this amount of money to customs. She failed to do this and so an investigation was commenced. A search of her belongings was effected and a visiting card of Ivy Property Sales Ltd. was found. On the black there was written an address in Naxxar and the name Charity. This is how the present appellant found herself involved in this case.

From the evidence produced it results that Atinuke Ugoji ruled out completely that the appellant was involved in this case. Not only that, but the Prosecution produced no evidence linking the appellant with the above-named lady except that they knew each other.

As a consequence of the finding of appellant's name and address on the visiting card, the police went to the appellant's residence with the intention of arresting her. It happened that she was not at home but was at work. Two police officers were detailed to remain near her hose just in case she returns. It happened that very soon afterwards a certain Ferdinand Onovo passed by with his car, who when he saw the police sped away. He

was noticed by one of the police officers who knew Onovo and his action raised a suspicion that he could be involved also. The appellant was arrested at work or rather she was waiting for the police outside her place of work. A search of her apartment was effected. Several items of branded clothes, shoes, a television, custom jewellery and accessories were found. Moreover, a bag containing a brown powder, thought to be drugs, and weighing scales were found in the kitchen. the only monies found amounted to €370 which were found on her person.

From the evidence produced it results that the bag did not contain any illicit drugs, nor was any evidence of drug use found on the weighing scales. This Court agrees with the conclusion reached by the first Court with regards to the first charge proffered against the appellant.

In brief these are the facts of this appeal. The next step to be undertaken is to analyse whether the appellant is guilty of money laundering which is the second charge proffered against the appellant.

From the evidence produced it results that Ferdinand Onovo was having an extra marital affair with the appellant. Onovo was being investigated by the Police because they suspected that he was involved in the sale of illicit substances. A search was also conducted in his house and the police found branded clothes, shoes and other accessories. Ferdinand Onovo gave evidence in this case. From the evidence he gave in front of the first Court, he admitted that several of the items found in the apartment of the appellant were given to her by him. In her statement the appellant confirmed this fact and added that other items were bought by herself or were given to her by other boyfriend or boyfriends.

The charge of money laundering stems from the fact that Ferdinand Onovo was known to the police. As a matter of fact, a Magisterial enquiry was commenced because found a considerable sum of money in his house on the 21st August, 2011. However, no action was taken by the police because at that time no evidence resulted linking Ferdinand Onovo to drug trafficking. Consequently, the money was returned. It results that Onovo bets on games and many a time he has won large sums of money. The police were given evidence to substantiate his claim. However, it must be pointed out that a bill of indictment (no.5 of 2012) bearing date, 1st February, 2012, was issued against Ferdinand Onovo relating to drug trafficking. The appellant is in no way involved in this case. It must be pointed out that in this case the police had intercepted the haul of drugs. Consequently, the drugs were not placed on the local market and hence Ferdinand Onovo did not receive one single euro from a potential sale of these drugs. The above relates to the fourth grievance of the appellant.

The first grievance of the appellant is that she was a main player in the retention of the converted proceeds. The act that the first Court was envisaging relates to section 2(1) definition of 'money laundering (iv) of Chapter 373 of the Laws of Malta. This means that the receipt of gifts from Ferdinand Onovo is an act of money laundering. This means that the retention of such property was done with the very scope of laundering the proceeds emanating from a criminal offence. In this case, one cannot case that a criminal offence was executed bearing in mind that as late as 2011, monies were found in possession of Ferdinand Onovo that were not in his possession due to criminal activity.

Here we are talking of gifts, even if expensive gifts, given to a girlfriend. Such a situation cannot give rise to an issue of money laundering. Taking this situation to extremes, it would mean that the wife, friend, girlfriend or otherwise of any person who can issue a VAT receipt must ask the donor if he has issued diligently all the VAT receipts and have evidence of this, otherwise no present can be accepted. This extreme example illustrates the fact that a reasonable and logical approach on this issue must be followed. Hence, the first grievance of the appellant must succeed.

The second grievance is that the appellant does not qualify as a 'subject person' as defined in L.N. 180 of 2008 as she was not carrying out either relevant financial business or relevant activity. This Court agrees with this grievance.

In a nutshell, it can be concluded that Ferdinand Onovo could have been in possession of monies which could be described as 'dirty money'. However, at the same time he was in possession of monies which were in his possession because he earned these monies in a licit way. So a further question arises. How is one to distinguish, if for argument's sake, the licit from the ill begotten monies? In this case, any person would not be able to distinguish especially when we are talking of gifts to your loved one.

In the circumstances, this Court is of the opinion that the appeal entered by the appellant cannot but succeed.

Consequently, for the foregoing reasons this Court confirms the judgement of the first Court in relation to the first charge proffered against the appellant. It upholds the appeal of Charity Ofame Ovbiagele in relation to the second charge proffered against her. It revokes and cancels the judgement of the first Court and sets her free of any charge or punishment.