



# **THE COURT OF CRIMINAL APPEAL**

**Hon. Mr. Justice Dr. Aaron M. Bugeja M.A. (Law), LL.D. (melit)**

**Today the 15th December 2022**

**Appeal number – 454/2017**

**The Police**

**vs.**

**Tesfaye YIRGU ZEKARGE**

**The Court has seen that:**

1. This judgment relates to an appeal lodged from a judgment delivered by the Court of Magistrates (Malta) on the 7<sup>th</sup> November 2017 against Tesfaye YIRGU ZEKARGE, holder of a Maltese identity card number 75543A, who, following a search done by Customs Officials at 89, Rue D'Argens, Msida, was charged with having been, on the 27<sup>th</sup> October 2017 in Msida, knowingly in possession and/or having under his control, even accepted or otherwise was involved in the transportation, placing, hiding, or depositing of contraband cigarettes and water pipe tobacco, in quantities as shown, and this with the intention of defrauding the Government of Malta by not paying the relevant duties and taxes, and/or to evade or attempt to evade any Customs prohibition or limitation with regards to the items mentioned in the summons consisting of a number of contraband cigarettes the importation of which was prohibited and/or restricted/ and or limited and that had a value of €1276.24, Excise duty due €7,496.64, import duty

€742.38 and value added tax amounting to €1712.75 which duties were not paid or secured. The Court was requested that in case of finding of guilt of the accused, apart from inflicting the punishment prescribed at Law, also order the forfeiture of all objects exhibited during the proceedings. The Prosecution also requested that in pronouncing judgment or in any subsequent order, the Court should sentence the convict to the payment to the Registrar, wholly or in part, of the costs incurred in connection with the employment in the proceedings of any expert or referee, within such period and in such amount as shall be determined in the judgment or order and this in terms of article 533 of the Criminal Code.

2. By means of the said judgment, the Court of Magistrates (Malta) as a court of criminal judicature, after having seen the charges brought against the accused, and after having seen his reiterated guilty plea, found the appellant guilty and condemned him to one year imprisonment which by virtue of article 28A of the Criminal Code was suspended for a period of eighteen months and to a fine (multa) of twenty four thousand, seven hundred sixteen euro six cents of which one third of the said amount was to be condered as a civil debt owed and payable to the Department of Customs. In terms of article 532A of the Criminal Code the Court ordered that the fine be payable within three years in monthly instalments and in default of payment thereof or any part thereof, the said amount was to be converted to an additional term of imprisonment according to law. Moreover, the Court ordered the forfeiture of the contraband cigarettes together with any goods that could be found packed or concealed therein as well as the forfeiture in favour of the Government of Malta of any monies exhibited in the proceedings. The Court abstained from taking cognisance of the request made in terms of article 533 of the Criminal Code in view of the fact that no experts were employed.
3. Tesfaye YIRGU ZEKARGE appealed from this judgment and requested this Court to reform the appealed judgment such that while confirming the conviction, to reform the punishment by cancelling the forfeiture of the monies which the appellant had in his possession and by reducing the fine to the amount that was due as import duty and the value according to article 62 of Chapter 37 of the Laws of Malta and this on account of the following grievances:

- i. There was no basis for the forfeiture of the monies seized from the accused since that they were not proceeds of crime. Hence this money should be returned to the appellant.
- ii. The possession of contraband cigarettes contravened several laws which brought about the “concursum delictorum” such that these should be considered to form one offence. The more serious offence was that committed under the Customs Ordinance imposing a period of imprisonment and a fine. In this case the actual fine was not worked out by the Court but in actual fact on the amount of duty and the value of the cigarettes. This was €1276.25 and €742.38 as import duty respectively. The import duty had to be multiplied by three and consequently the amount of multa was the value together with three times the import duty.

## **Considers**

4. Following a search conducted on the 27<sup>th</sup> October 2017 by Customs officials at 89, Rue D’Argens, Msida, the appellant - who was responsible for the running of the said premises - was found to be in possession of numerous amounts of contraband cigarettes. When the appellant was spoken to, he confirmed that these belonged to him and that he had purchased same from a person referred to as “Romedan” who he knew from the Hal-Far Camp and who he had been purchasing such cigarettes from for approximately three months prior to his arrest.
5. The appellant stated that he would call this “Romedan” by phone and order the cigarettes he required from him, which would then be delivered later in the evening. The appellant explained that he always paid “Romedan” in cash either immediately or after selling the cigarettes. The appellant was also found in possession of €1480. He explained these were monies due to Romedan for the contraband cigarettes which were delivered to him recently. The appellant explained that he earned approximately between €4 and €5 per carton. Apart from cigarettes he also sold other products such as Ethiopian spices, soft drinks as well as coffee or tea.
6. This appeal is limited to the punishment imposed by the Court of Magistrates (Malta) against the accused following his guilty plea. The Court of Magistrates (Malta) ordered the forfeiture in favour of the Government of Malta of the monies seized and exhibited in these proceedings, as per Article 23 of the Criminal Code:

23.(1) The forfeiture of the corpus delicti, of the instruments used or intended to be used in the commission of any crime, and of anything obtained by such crime,

is a consequence of the punishment for the crime as established by law, even though such forfeiture be not expressly stated in the law, unless some person who has not participated in the crime, has a claim to such property.

7. The appellant released a statement to the Police. When asked to explain what the funds in his possession consisted of, he replied:

It is for the cigarettes. Last week Romedan brought me four Master cartons of 50 cartons each, but I paid him for one only. Now I was saving to pay him for another one costing €1300. Before the police came, I was planning to call him today but then I did not call him.

8. When asked by the Police how he generally paid Romedan for the cigarettes, the appellant said that he always paid him :

Sometimes I have cash and I pay him immediately and other times I pay him after I sell the cigarettes.

9. Apart from selling cigarettes, from this shop the appellant also sold Ethiopian spices, soft drinks, coffee or tea, cultural clothes and he also had an international phone connection. He explained that he made a profit between four and five euro per cigarette carton sold.

10. On the strength of the information provided by the appellant himself, the monies found on his person represented the purchase price due to Romedan for the cigarettes that he had already purchased and received from him – which were, the appellant admitted, contraband cigarettes.

11. From the amount of cigarettes found in his shop it was clear that the appellant was highly involved in the retail of contraband cigarettes. This generated a considerable profit since he had acquired these cigarettes from Romedan in bulk over a span of three months prior to his arrest. When the appellant had enough liquidity he admitted paying Romedan for these cigarettes immediately and by cash. But when he was short of cash, the appellant admitted paying Romedan “after I sell the cigarettes”. The monies received by the appellant as purchase price on resale of the contraband cigarettes cannot, by any stretch of legal imagination be considered to be licit and clean funds. This justified the Court of Magistrates’ decision to order the confiscation of both the contraband cigarettes found in the appellant’s shop as well as the monies that the appellant had received on the resale of the contraband cigarettes which he then meant to be pay Romedan for the price of other cigarette cartons bought from Romedan.

12. Consequently, the first grievance is hereby being rejected.

### **Considers further**

13. In his second grievance the appellant claims that the possession of contraband cigarettes in this case violated more than one provision of the law. This brought about formal concursus of offences and punishments. Importation of the contraband cigarettes was the principal offence in this case as the cigarettes and the water pipe tobacco were not produced in Malta. Appellant argues that the punishment that ought to have been meted out therefore should have been that under Chapter 37 of the Laws of Malta which constituted the most important offence, punishable by a term of imprisonment and a fine. Appellant claims that this fine was worked out by the amount of duty and the value of the cigarettes. The value of the cigarettes was €1276.24 while the amount of import duty involved was €742.38. The import duty had to be multiplied by three. Therefore the fine (multa) was to be sum total of the value of the cigarettes (€1276.24) plus three times the amount of import duty involved (amounting to €2227.14). Appellant, without providing the actual sum total in his appeal application, therefore seems to claim that, according to him, the amount of multa (fine) should have been €1276.24 plus €2227.14, thus totalling €3505.38.

14. On review of the appealed judgment, this Court saw that the Court of Magistrates (Malta) considered the concurrence of punishments. While the Court of Magistrates (Malta) found the appellant guilty under articles 60 and 62 of Chapter 37 of the Laws of Malta, as well as under articles 13, 16 and 17 of Chapter 382 of the Laws of Malta and article 80 of Chapter 406 of the Laws of Malta, that Court clearly quoted article 17(b)(h) (by reference to the Criminal Code) which highlights precisely the point raised by the appellant. And as will be seen later, the Court of Magistrates (Malta) applied this article 17 also by reference to articles 60 and 62 of Chapter 37 of the Laws of Malta too.

15. The punishment meted out by the Court of Magistrates (Malta) was within the parameters set by article 62 of Chapter 37 of the Laws of Malta. The Court of Magistrates (Malta) imposed a sentence of imprisonment - within the parameters set by article 62 of Chapter 37 of the Laws of Malta and which it duly suspended for

a period of eighteen months in terms of article 28A of the Criminal Code – and a fine (multa). The Court calculated this fine by multiplying three times the amount of the duties due, as was possible under the law in force at the times of the commission of the offences. The methodology used by the Court of Magistrates (Malta) was therefore different to that suggested by the appellant.

16. The appellant claims that the amount of duty due refers to the amount of importation duty due together with the value of the goods exclusive of duties. That is why the appellant says that the Court of Magistrates (Malta) should have taken the value of the cigarettes (€1276.24) plus three times the amount of import duty involved (amounting to €2227.14) thus totalling €3505.38.

17. However in so doing the appellant is giving an incorrect interpretation both of the law regulating the computation of the fine, as well as the definition of “duty payable on the goods” mentioned in article 62 of Chapter 37. First of all the appellant is interpreting duty payable on the goods as meaning only “the import duties”. That is not correct. According to article 2 of the Customs Ordinance, “duty” for the purposes of this Ordinance means:

any duty charged by the Commissioner for Revenue on imported goods and includes **import duty**, export duty, agricultural duty, anti-dumping duty, countervailing duty **and excise duty**;<sup>1</sup>

18. For the purposes of this Law, both the import duties as well as the excise duties had to be taken into consideration by the Court in calculating the amount of fine (multa) applicable under article 62 of the Customs Ordinance. So the fine was arrived at by adding taking the excise duty and the import duty and then multiplied the result by three.

19. According to document marked YF2<sup>2</sup> the aggregate excise duty due amounted to €7496.64; the import duty amounted to €742.38; whilst the VAT due amounts to €1712.75. The Court of Magistrates (Malta) fined the appellant the sum of €24,716.06. This Court understands that this represents the sum total of excise and import duty multiplied by three. The VAT portion was omitted.

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<sup>1</sup> Emphasis added by this Court.

<sup>2</sup> Folio 18 of the acts of the proceedings.

20. According to the wording of the law as it was on the date of the commission of the offence, this computation should have been conducted for each one of the breaches under article 60 and article 62 of Chapter 37 of the Laws of Malta. However the Court of Magistrates (Malta) applied only one punishment for all breaches mentioned under article 62 of Chapter 37 of the Laws of Malta, much to the favour of the appellant.
21. The Court of Magistrates (Malta) then correctly proceeded to order that one-third of this fine (multa) be considered as a civil debt due in favour of the Department of Customs.
22. This Court concludes that the punishment and the fine imposed were computed to the benefit of the appellant and therefore will not be altered by this Court.
23. The second grievance is therefore being rejected.

## **Decide**

**Consequently, for the above-mentioned reasons this Court rejects all the grievances put forward by the appellant and confirms the judgment of the Court of Magistrates (Malta) appealed from.**

**Aaron M. Bugeja,  
Judge**