



Court of Magistrates (Malta) as a Court of Criminal Judicature
Magistrate: Dr Victor G. Axiak

LOCAL ENFORCEMENT SYSTEM AGENCY V. FIONA CNG LYNDLEY
(ID. 80690A)

CONTRAVENTION NO. 071-20716-4

26 January 2023

THE COURT,

Having seen the charge brought against the appellant Fiona Cng Lyndley who was accused before the Commissioner for Justice of having:

- On 31/01/2021 at 11:05 hrs in Triq tad-Dahar, Mellieha, failed to abide by the provisions issued by the Superintendent of Public Health in relation to the Mandatory Use of Medical or Cloth Masks Regulations, 2020.

Having seen the decision of the Commissioner for Justice taken on 16 March 2021 whereby the appellant was found guilty and fined the amount of one hundred euro (€ 100);

Having seen the appeal application filed by the appellant on 12 April 2021 by means of which the Court was requested to reverse the decision taken by the Commissioner for Justice on 16 March 2021 and acquit her of the charge on the grounds stated therein;

Having seen that in the sitting held on 6 October 2022 the Court raised *ex-officio* the plea of nullity of the proceedings taken against the appellant for the reasons therein stated;

Having seen that in the sitting held on 6 October 2022 the parties agreed that the case can proceed to judgement.

Considered:

That the Court raised *ex-officio* the plea of nullity of the proceedings taken against the appellant since it does not appear that the Local Enforcement System Agency (commonly known as LESA) has the power to enforce the Regulations under which the appellant was found guilty.

That according to Art. 3 of the Subsidiary Legislation 595.14 ("Local Enforcement System (Establishment as an Agency) Order"):

'3. There shall be an Agency, to be known as the Local Enforcement System Agency, which shall carry out the functions and duties of the public administration in the following matters:

(a) providing for the enforcement of any law, regulation or bye-law, the enforcement of which has been delegated to regional committees, local councils or to such other local or regional authorities as are designated by the Local Government Act ...'

That such enforcement that was delegated to local councils and regional committees is regulated by Subsidiary Legislation 363.41 ("Local Councils and Regional Committees (Delegation of Enforcement) Order") that provides *inter alia* as follows:

'2. (1) In terms of article 33(1)(n) of the Local Government Act, hereinafter referred to as "the Act", the enforcement of –

(a) Bye-Laws made, or which may from time to time be made, by each Local Council under the provisions of article 34(1) of the Act;

(b) contraventions for such of the offences listed in the Schedule to the Commissioners for Justice Act which are shown under the First Schedule to this Order (emphasis made by the Court), shall be a function which is hereby being delegated to each Local Council in relation to contraventions committed in its locality or to the Joint Committee or Regional Committee with regards to contraventions that are committed in any locality falling under its under its responsibility according to this Order.'

That the appellant was accused before the Commissioner for Justice of having committed an offence regulated under Subsidiary Legislation 465.48 ("Mandatory Use of Medical or Cloth Masks Regulations" – LN 326 of 2020).

That although these Regulations are listed in the Schedule to the Commissioners for Justice Act (Chap. 291) which means that breaches of said regulations fall within the competence of the Commissioners under Chapter 291 of the Laws of Malta, this

notwithstanding they are not listed in the First Schedule to the Subsidiary Legislation 363.41 ("Local Councils and Regional Committees (Delegation of Enforcement) Order"). Therefore as things stand no local council or regional committee (or agency for local enforcement) has any power to enforce or bring forward proceedings against any person accused of breaching the **Mandatory Use of Medical or Cloth Masks Regulations**" (Subsidiary Legislation 465.48).

That it is an established legal principle that "*ubi lex voluit dixit, ubi noluit tacuit*" and given that such power is not expressly provided for in the law, which being a subsidiary legislation is a special law, then the Local Enforcement System Agency cannot bring forward proceedings and prosecute persons for a breach of the regulations in question.

That it's been argued in some quarters that under Subsidiary Legislation 595.14 the law in stating the functions and duties of the public administration delegated to the Agency does not specifically provide for the prosecution of offenders before the Commissioner for Justice, that there is a distinction between the enforcement of law and the prosecution of offenders and that the Agency's power to prosecute offenders in breach of the regulations in question arises instead from Chapter 291 of the Laws of Malta (where the regulations in question are scheduled offences).

The Court does not agree with this line of thought. There is indeed a fine distinction between the enforcement of laws and regulations and the prosecution of offenders charged with their breach. However this distinction ends in the case of contraventions or scheduled offences that fall under the competence of the Commissioners for Justice under Chapter 291 so much so that under Art. 5(1) of that law the Executive Police, local council or other authority, have both the duty to enforce the law and collect evidence and that of charging offenders. Furthermore it wouldn't make sense that LESA has the power to prosecute offenders in breach of the Regulations in question under Chapter 291 but not the power to enforce such Regulations and collect evidence under Subsidiary Legislation 363.41 (given that such Regulations are not scheduled under this law).

The Court strongly recommends that the necessary amendments to Subsidiary Legislation 363.41 are carried out such that the list of scheduled offences is identical to the list of scheduled offences under Chapter 291. Moreover for the sake of clarity the functions and duties of LESA under Art. 3 of the Subsidiary Legislation 595.14 should be amended to expressly include the power to prosecute offenders before the Commissioners for Justice.

Decision

For these reasons the Court declares that the proceedings against the appellant are null and void, revokes the decision of the Commissioner for Justice and acquits the appellant of the charge brought against her.

V.G. Axiak
Magistrate

Y. M. Pace
Dep. Registrar