



The Court of Criminal Appeal

His Honour the Chief Justice Dr Mark Chetcuti LL.D.

The Hon. Judge Dr Edwina Grima LL.D.

The Hon. Judge Dr Giovanni Grixti LL.D.

Today the 4th day of October of the year 2023

Bill of Indictment No : 11/2015

The Republic of Malta

vs.

Izuchuku Morgan Onourah

The Court:

1. Having seen the Bill of Indictment bearing number 11 of the year 2015 filed against appellant Izuchukwu Morgan Onourah, wherein he was charged:

In the First Count of having, on the 18th February 2010 and in the preceding year of being in possession of a dangerous drug (cocaine), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any

valid and subsisting import or possession authorization granted in pursuance of the said law, and with intent to supply same in that such possession was not for the exclusive use of the offender.

In the Second Count, of having on the 18th of February 2010 and in the preceding year of being guilty of conspiracy to trafficking in dangerous drugs (cocaine) in breach of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or of promoting, constituting, organising or financing the conspiracy.²

In the Third Count, of having, on the 18th February 2010 and in the preceding year, with criminal intent, supplied or distributed or offered to supply or distribute the dangerous drug cocaine in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

In the Fourth Count, of having on the 18th of February 2010 and in the preceding year, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, being guilty of carrying out acts of money laundering by:

- i. converting or transferring property knowing or suspecting that such property is derived directly or 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, rights 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, possessing or using 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;
- iv. retaining property without reasonable excuse knowing 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 paragraphs (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) and (v);

2. Having seen the note filed by appellant on the 14th of July 2015 wherein he gave notice that he does not have any preliminary pleas to raise to the bill of indictment filed against him.
3. Having seen the decree of the Criminal Court of the 22nd of November 2022 wherein appellant was authorized to raise a preliminary plea relating to the lack of accreditation of the forensic laboratory wherein the alleged drug was analyzed.
4. Having seen that appellant formally raised the said preliminary plea in note filed on the 23rd of January 2023, wherein he requested the removal from the acts of the report and testimony of court expert Godwin Sammut since such evidence is inadmissible at law.
5. Having seen the judgment of the Criminal Court of the 28th of March 2023 wherein the preliminary plea filed by appellant was dismissed.
6. Having seen the appeal application filed by appellant Izuchuku Morgan Onourah on the 4th of April 2023 wherein the Court was requested to annul and revoke the appealed judgment, whereby it rejected applicant's request to remove from the acts of the proceedings the testimony of the chemist, his report, together with any direct, indirect or ancillary reference to it, and instead uphold appellant's plea to remove from the acts of the proceedings the testimony of the chemist, his report together with any direct, indirect or ancillary reference to it and this under any condition that this Court may deem fit to impose.
7. Having heard oral submissions by the parties.
8. Having seen all the acts of the case.

Considers:

9. Appellant Izuchuku Morgan Onourah feeling aggrieved by the judgment of the Criminal Court wherein the preliminary plea raised by him with regard to the inadmissibility as evidence of the report and testimony of court appointed expert Godwin Sammut was dismissed, has registered his grievance affirming that such

evidence cannot be regarded as reliable, safe and satisfactory and goes against the best evidence rule thus violating the fundamental principles of criminal law and procedure. He raises this objection due to the fact that the analysis of the drug found in his possession was not carried out in a laboratory accredited in terms of ISO17025 laying out international standards to be adhered to attesting to the technical competence and skills of laboratories, thus rendering the subsequent results at the basis of any analysis carried out by such a laboratory unsafe and unsatisfactory. This was confirmed, in appellant's opinion, by the witness Engineer Claudio Boffa, produced by the defense before the Criminal Court, who confirmed that the accreditation process amounts to a review and audit of the technical ability of a laboratory certifying its competence to carry out specific tests and analysis. Thus, according to the defense, the fact that Council Framework Decision 2009/905/JHA, which was transposed into our law in Subsidiary Legislation 460.31, refers solely to DNA profiles and dactyloscopic data, in no way detracts from the best evidence rule, necessitating the duty on the Prosecution to bring forward safe and reliable evidence, which evidence in this case cannot satisfy this rule once the analysis of the substance found in accused's possession was not carried out in a technically compliant laboratory with international standards.

10. The Attorney General disagrees with this line of defense, since in his opinion the issue of reliability or otherwise of this piece of evidence should be left up to the decision of the jurors during the trial, in whose hands rests the final decision as to which evidence to discard and which to rely on in reaching their verdict, and this after being so directed by the trial judge. He further submits that to date there is no effective legislation and international standards applicable in Malta which oblige a court expert to carry out drug analysis and/or examinations in an accredited laboratory, apart from the fact that the analysis of illicit substances falls outside the scope of the said Council Framework.

11. Now, this Court has already expressed its views with regard to this oft-raised plea dealing with the inadmissibility of evidence regarding the scientific analysis of

illicit substances¹. Apart from the fact that the analysis of illicit substances, as rightly pointed out by the Attorney General, and as already decided by this Court, falls outside the scope of Subsidiary Legislation 460.31 and consequently Council Framework Decision 2009/905/JHA, the fact that the laboratory wherein the analysis of the drugs found in accused's possession was not carried out in an accredited laboratory in terms of ISO 17025 does not necessarily lead to the inadmissibility of the said analysis as evidence in the proceedings. First and foremost a distinction ought to be made between the admissibility of evidence adduced by the Prosecution in the trial and its probative value.

12. There is no doubt that the evidence sought to be discarded by the defense is relevant to the facts in issue. There is no doubt also, that there is no disposition at law which renders the report and testimony of court appointed expert Godwin Sammut inadmissible, since as already pointed out the accreditation of the forensic laboratory carrying out examinations on illicit substances is not required by law. What the defense is arguing at this stage, is that the fact that the forensic laboratory was not accredited according to international scientific standards renders the subsequent results emanating from analysis carried out in such laboratories unsafe and unsatisfactory, and therefore without any evidentiary weight. What the Court is being asked to do is to assess the probative value of this evidence and to establish whether this is substantially outweighed by the dangers of unfair prejudice which could be created by misleading the jury as to the reliability of the conclusions reached by the said expert. Now, appellant alleges that the fact that the laboratory wherein the drug analysis was carried out has no certification attesting to the fact that it adheres to international standards regarding its competence and technical ability in carrying out the tests on the drugs exhibited in the acts, renders the results automatically unsafe and thus could mislead the jury in relying on the same when reaching their verdict.

¹ Vide *ir-Repubblika ta' Malta vs Etienne Farrugia* decided by this Court on the 26th April 2023

13. The Court cannot agree with this line of thought. The fact that the laboratory is not accredited according to the international standards applicable does not necessarily and automatically mean that the said laboratory is in any way sub-standard and producing unreliable results. The court-appointed expert Godwin Sammut, in his testimony before the Criminal Court, confirms that although there is no obligation at law for a laboratory performing drug analysis to be accredited according to international standards, however the laboratory where he carried out the analysis in this case adheres to these standards and to the ENFC² standards for sampling and validation procedures just the same, and thus confirms that the test and consequent results carried out by him are reliable. The witness states as follows, after testifying at length with regard to the procedures adhered to in carrying out his analysis:

“We follow the normal forensic procedures li huma l-ewwelnett the chain of custody jigifieri the scene of crime officer passes the exhibit in a sealed envelope jew inkella sealed evidence bag. We make sure it is sealed imbaghad once we start working store the exhibits in a room which is only accessible to the Court experts jigifieri this room is a highly secured room which is only accessible to Court experts. Issa, we perform the analysis on that substance which the scene of crime officer handle over to me. I make note of any issues which may be against the chain of custody, fis-sens jekk kien hemm a broken seal I take note of it jigifieri all these are taken into consideration. Imbaghad I start the procedure of analysis. Before I perform the analysis on the actual sample, I run a blank to make sure the instrument is in good working order jigifieri when I inject the blank it is giving me a blank, imbaghad I inject the sample. Issa the sample may give me a hit in this case cocaine. Issa to be sure I inject a positive control. A positive control huwa a standard which we buy from an international standard company jigifieri obviously you can only buy from these companies. The standard comes with a certificate li it contains cocaine, jigifieri that I confirm li my results are correct. Imbaghad there is the procedure of interpretation of results writing up the results, resealing the evidence and presenting them to Court.”

14. Now, apart from the fact that the evaluation of this evidence relating to fact-finding is to be entrusted to the jury, after being properly directed by the trial judge, the Court reiterates that the issue on whether the laboratory carrying out the analysis is or is not accredited according to international standards does not affect the uses to

² European Network of Forensic Science institutes

which this evidence may be put, although it could have a bearing on its strength or sufficiency needed to establish proof. This means that there is no legal obstacle to the report and testimony of the court expert to be adduced as evidence in the trial by the Prosecution. As already pointed out, there is no doubt that this piece of evidence has a bearing on the material facts relevant to the issue, there is no doubt that there is no provision of law which excludes its admission as evidence, like for example the exclusionary rule of evidence regarding hearsay. And this is why judgments, on the issue raised by appellant in his plea, are all in accordance with the fact that the law as it stands with regards to accreditation of laboratories refers solely to DNA and fingerprint analysis, and that drug analysis falls outside the scope of the law.

15. In the Recital to the Council Framework, the scope of the law is clearly laid out as referring solely to DNA profiles and dactyloscopic data since these forensic analysis *“are not only used in criminal proceedings but are also crucial for the identification of victims, particularly after disasters”*. And this is so since *“Pursuant to Article 7(4) of Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of crossborder cooperation, particularly in combating terrorism and cross-border crime, Member States shall take the necessary measures to guarantee the integrity of DNA profiles made available or sent for comparison to other Member States and to ensure that these measures comply with international standards, such as EN ISO/IEC 17025 ‘General requirements for the competence of testing and calibration laboratories’ (hereinafter ‘EN ISO/IEC 17025’)”*.

“That objective is to be achieved by preventing and combating crime through closer cooperation between law enforcement authorities in the Member States, while respecting the principles and rules relating to human rights, fundamental freedoms and the rule of law on which the Union is founded, and which are common to the Member States”.

17. This means that the scope of the law is clear, being that of establishing common standards applicable in all member states with regard to the detection of cross-border crimes and in combating terrorism, particularly with the sole aim of arriving at a common identification of the persons involved in the commission of such offences and their victims. With Recital 16, then, clearly stating that:

This Framework Decision does not aim to harmonise national rules regarding the judicial assessment of forensic evidence.

Necessarily implying that the sole fact there is no adherence to these rules does not in any way affect the judicial assessment which is carried out in criminal proceedings of forensic evidence on a national basis, thus including even the assessment of DNA profiles and fingerprint reports.

18. Finally, article 656 of the Criminal Code provides the necessary safeguards to the judicial process with a view to adversarial arguments, wherein it is stated that *“those who are to judge are not bound to abide by the conclusions of the experts against their own conviction”* and this after hearing evidence to the effect whether the scientific procedure adopted is valid, and whether the forensic practitioner is proficient with the said procedures. *Ergo*, the accreditation of the laboratory wherein the analysis of the illicit substance was carried out, or rather the lack thereof, does not render the resulting analysis inadmissible, *a priori*, but can only have a bearing on the weight to be given to the results emanating from the said analysis and the probative force of the said proof. The lack of accreditation on its own does not render the resultant analysis unsafe and unsatisfactory if the scientific procedures were adhered to, and in any case any defect in the methods utilised in order to carry out the relevant examinations can only affect the weight to be given to that piece of evidence and not its admissibility.

19. Having thus premised, the Court cannot uphold the grievance put forward by appellant, and this first and foremost, since there is no legal disposition of the law rendering such evidence inadmissible, since the scientific analysis of illicit substances falls outside the scope of Subsidiary Legislation 460.31, and also since the reliability of the forensic results carried out by the court appointed expert can only have a bearing on the weight to be given to that evidence and therefore can affect its probative value, but does not render such evidence inadmissible as argued by the defense.

Consequently, for the above-mentioned reasons, the appeal is being dismissed and the appellate judgment confirmed. The Court orders that the acts of the

proceedings be remitted before the Criminal Court for the case to proceed according to law.

The Chief Justice Mark Chetcuti

Judge Edwina Grima

Judge Giovanni Grixti