COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE

MAGISTRATE
DR RACHEL MONTEBELLO B.A. LL.D.

Case Number: 239/2021

THE REPUBLIC OF MALTA
-Vs-
Omissis 1
Omissis 2
AYUB ALI KHAN MOHAMMED

Today, 15th December 2023

Having seen the charges brought against *Omissis 1, Omissis 2* and **AYUB ALI KHAN MOHAMMED**, born in India on the 15th of June 1998, residing at The Forum, Blk F, Flt 2, Uqija Street, Swieqi, holder of Maltese Identity Card number 0212634A and Indian passport number P8496509 who were charged with having in these Islands, during the months of January, February, and March of the year two thousand and nineteen (2019), by several acts done by them even at different times, and in breach of the same provisions of Law, and made by a single resolution:-

1. Committed acts of money laundering by:

i. Converted or transferred 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. concealed or disguised the true nature, source, location, disposition, movement, rights with respect of, in or over, or ownership pf property, knowing or suspecting that such property was derived directly or indirectly from criminal activity or from an act of participation in criminal activity:

iii. acquired, possessed or used 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. retained 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. attempted any of the matters or activities defined in the above foregoing sub-paragraph (i), (ii), and (iv) within the meaning of article 41 of the Criminal Code:

vi. Acted 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. And also in the same date, time, place and circumstances, in Malta knowingly received or purchased and property which was stolen, misapplied or obtained by means of any offence, whether committed in Malta or abroad, or knowingly took part, in any manner whatsoever, in the sale or disposal of the same:

And we hereby also charge -omissis-, with breaching his bail conditions which were imposed on him by a decree dated 11 August 2017 and revised by a decree dated 28 May 2018 issued by Magistrate Dr Nathasha Galea Sciberras in the case 'The Police vs Eguaveon Collins'

This Court was kindly requested that in case of guilt, in addition to inflicting the penalties laid down in the Law and in addition to the said punishment, it also order the confiscation of all the exhibited goods, of the corpus delicti and the instruments which served or were intended to be used to commit the crime, and of all that has been contained by the crime, as well as order the confiscation in favor of the Government of the proceeds offense or of such property the value of which corresponds to the value of such proceeds as well a of all the property of the accused of Chapter 373 as well as articles 23 and 23B of the Criminal Code:

This Court was also requested to seize from third parties in general all moneys and movable or immovable property which are due to or pertain to the accused or are their property, as well as prohibiting them from transferring or otherwise disposing of any movable or immovable property in terms of article 5 of Chapter 373 even as applicable under article 23A of Chapter 9:

The Court was also requested to order in case of guilt, the accused to pay costs related to the appointment of experts in the proceedings as contemplated in article 533 of Chapter 9 of the Laws of Malta.

Having seen the respective orders given by the Attorney General on the 18th April 2021 in terms of subarticle 2A(a) of Article 3 of the Prevention of Money Laundering Act (Cap. 373 of the Laws of Malta)[1], that the persons accused, Omissis 1, Omissis 2 and Ayub Ali Khan Mohammed, are brought before the Criminal Court in order to

[1] Dok. SZ9, Dok. SZ7 and Dok. SZ11, respectively.

answer for the charges brought against them for the breach of the provisions of the said Act.

Having seen the decree dated 18th April 2021 whereby the proceedings were ordered to be conducted in the English language;

Having heard the Prosecuting Officers read out and confirm the charges on oath;

Having heard the persons accused plead not guilty during their arraignment on the 18th April 2021;

Having seen the Order issued on the 18th April 2021 for the purposes of article 5 of Chapter 373 of the Laws of Malta, and articles 23A and 23D of the Criminal Code;

Having seen the decree dated 30th June 2021 in virtue of which the trial in respect of the accused person and *Omissis 1* on the one hand, was ordered to continue separately from the trial of *Omissis 2*;

Having seen the decree dated 11th January 2022 in virtue of which the trial in respect of the accused person was ordered to continue separately from the trial of *Omissis 1*;

Having heard the defence exempt the Prosecution from producing a representative of Revolut in order to exhibit the statements pertaining to the accused's Revolut account since these were already exhibited as part of the record, by Inspector Sarah Zerafa;

Having seen the counter-order issued by the Attorney General on the 25th February 2022 in terms of subarticle 2A(b)(c) of Article 3 of the Prevention of Money Laundering Act (Cap. 373) ordering that the accused person is tried before this Court as a Court of Criminal Judicature regarding the charges brought against him for the breach of the provisions of the said Act;

Having seen that in virtue of the same note, the Attorney General also sent the accused for trial by this Court in respect of the crimes prescribed in terms of:-

(a) Article 334 of Chapter 9 of the Laws of Malta;
(b) Article 17, 18, 23, 23A, 23B, 28H, 31, 532A and 533 of Chapter 9 of the Laws of Malta.

Having heard the accused declare during the hearing of the 22nd March 2023 that he has no objection that his case is tried and decided summarily by this Court as a Court of Criminal Judicature;

Having heard the accused declare at the same hearing of the 22nd March 2023 that he has no further evidence to produce;

Having seen that this cause was assigned to this Court as presently presided by virtue of a decree issued by the Chief Justice on the 3rd October 2023;

Having heard the Prosecution during the hearing of the 15th December 2023, exempt the Court as presently presided from hearing all witnesses who already testified before the Court when it was differently presided;

Having heard the defence during the same hearing of the 15th December 2023, exempt the Court as presently presided from hearing all witnesses who already testified before the Court when it was differently presided, including the accused unless the Courts deems otherwise fit;

Having seen that the accused had testified in detail regarding all aspects of the case even though he had testified before the conclusion of the inquiry in terms of article 401(2) of the Criminal Code, which testimony was transcribed to the letter and inserted in the record of the proceedings;

Having seen the statement released by the accused person during his interrogation on the 17th April 2021[2];

Having seen the reports filed by the court expert Keith Cutajar and examined the extraction of data from Dok. SZ17 that is, the mobile phone pertaining to the accused person;

Having seen all the evidence, transcripts of testimonies and documents produced as part of the record of proceedings;

Having read the transcript of the final oral submissions of the Prosecution and the defence, made during the hearing on the 28th June 2023 and having heard the parties declare that they have no additional submissions to make;

Having seen all the acts forming part of the record of proceedings;

Having considered;

The accused person is charged with the crime of money laundering and also the crime receipt of stolen property.

The facts of the case, as would result from an examination of the testimony and evidence submitted by the Prosecution, are as follows.

On the 16th December 2018 Attilia Attard recieved a friend request on Facebook brom a Facebook account with profile name "Victor Scarlett" claiming that he was a US soldier stationed with the US Army in Syria. They began to communicate and subsequently, communication between them continued by means of messages and daily phonecalls over several hours via Whatsapp on the number she was provided, and a personal relationship developed. Eventually "Victor Scarlett" requested that she

[2] Transcript Dok. MTT.

correspond with his Commander Jack Wilson on com.wilsonjackusmilitary89@gmail.com in order that he would be granted leave from his post in Syria and allowed to come to Malta. She complied and sent an email as requested and by way of reply from a person who purported to be Commander Jack Wilson, she was told that she would need to pay in order that her fiance' would be granted clearance to travel to Malta as well as for his travel arrangements and expenses. Victor explained to her that he could not use his own money as a soldier deployed abroad. Commander Wilson also eventually told her that since her fiance' was effectively applying for emergency leave, his taxes, amounting to over €20,000, would need to be cleared.

This person directed her what payments to make and to whom and the first payment that he instructed her to pay was the sum of $2,850 into an account held with HSBC Bank Malta plc in the name of Marvic Iyeke, who she was told was a representative of the United Nations who would need to receive the monies on behalf of the Army[3]. This she did by going personally to the HSBC branch in San Ġwann where she deposited the funds in cash in the indicated account 10th January 2019[4]. She was subsequently instructed by 'Commander Wilson' at comm.wilsonjackusmilitary89@gmail.com to collect the monies that she had deposited in the said account and she confirmed that this amount was eventually refunded to her when she returned to the San Gwann branch. Subsequently, Commander Wilson asked her to deposit the same amount in a Revolut account in the name of Ayub Khan.

She was eventually also asked to communicate with Ahmed Cole on deliveryagent341@gmail.com in order to co-ordinate the transfer of the funds, which person also sent her the details of a bank account in the name of Collins Eguavoen having IBAN number GB90REVO00997074385719 and BIC REVOGB21[5]. Attilia Attard was also supplied with other account numbers by 'Commander Wilson' in

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[3] IBAN number MT58MMEB44646000000064120215050.

[4] Vide Dok. AA4 (€2,456.90). Also Dok. SC1: page 444.

[5] Vide exchange of emails Dok. AA10 and emails Dok. AA6, paġna 241 tal-atti tal-kawża.

order to effect the transfer of funds, including into a bank account in the name of *Omissis 1*. When her bank refused to allow further transfers of funds from her account, in March 2019 she gave the monies requested by 'Commander Wilson' in cash to two friends, Mark Anthony Gerada and Marlon Bugeja, who agreed to transfer the funds requested into the indicated bank account of *Omissis 1* from their own personal bank accounts[6]. Eventually, when Commander Wilson asked her to send more monies and she refused since she had exhausted all her funds, he informed her that they would be unable to send her fiance' to Malta.

In all, Attilia Attard was asked to transfer and effectively transferred the total sum of circa €27,000 by means of six separate transactions to *Omissis 1*, *Omissis 2* and the accused person, individually:

- The sum of $2,850 on the 14th January 2019 from her bank account bearing number 14806089020 held at Bank of Valletta plc[7], to Revolut account number GB90REV00997078140052 in the name of Ayub Ali Khan. Once converted into Euro, the sum of €2,430 was received into this Revolut account on the 16th January 2019;[8]
- The sum of $4,500 on the 15th January 2019 from her bank account bearing number 14806089020 held at Bank of Valletta plc[9], to Revolut account number GB90REV00(997074385719)7077438571 in the name of *Omissis 1*[10];
- The sum of €10,000 on the 22nd February 2019 - made up of one payment of €5,000 pertaining to Attilia Attard[11] and another payment of €5,002.91 pertaining to her son Zane Attard[12] – deposited directly into bank account

[6] See testimony of Mark Anthony Gerada, 16th June 2021 and Dok. MAG.
[7] Dok. SC1: page 444 – withdrawl/transfer of €2,559.08.
[8] Dok. AA1.
[9] Dok. SC1: page 444 (withdrawal/transfer of €4,038.48.
[10] Dok. AA9.
[11] See withdrawal of €5,000 on 22nd February 2019, Dok. SC1: page 446.
[12] Dok. SC1: page 449. Withdrawal from bank account number 40022376688 "Attilia Attard A/C Zane Attard".

number 073091241050 in the name of *Omissis 2* with HSBC Bank Malta plc by means of a bank draft bearing number 395157 payable to said *Omissis 2*[13];

- The sum of €5,000 on the 9th March 2019 transferred by SEPA payment from Bank of Valletta plc IBAN number MT59VALL22013000000040020446646 pertaining to Mark Anthony Gerada[14] to HSBC bank account number 049040546050 in the name of *Omissis 1*[15], received in said account on the 11th March 2019[16];
- The sum of €350 on the 9th March 2019 by means of SEPA payment from bank account number 4002044664-6 pertaining to Mark Anthony Gerada to HSBC bank account number MT51MMEB44495000000049040546050 in the name of *Omissis 1*, credited to said account on the 12th March 2019[17];
- The sum of €5,000 deposited in cash at the Qormi Branch of HSBC Bank (Malta) plc on the 8th March 2019 by Marlon Bugeja into HSBC bank account number 049-040546-050 in the name of *Omissis 1*[18].

The accused, Ayub Ali Khan Mohammed, chose to testify before the Court on the 4th May 2021 prior to the conclusion of the inquiry in terms of article 401 of the Criminal Code.

He stated that he does not know Attilia Attard nor any one of the other person who were previously co-accused in these proceedings. As for the sum of USD2,830 that he received in his account from Attilia Attard he declared that while he was aware of the receipt of such funds, these were sent to him by his flat-mate's sister. He explained that his Nigerian flat-mate, Godwin, with whom he had been sharing a rented apartment in Msida, had asked him for his Revolut account number as he said that his

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[13] Dok. AA2 and corresponding Dok. AA3. Also, testimony of Dr. Amanda Buhagiar Camenzuli, 28th April 2021 and Dok. ABC1: bank account statement at page 266 and copy of bank draft and relative deposit at page 278/279. See also statement at page 672.

[14] Dok. SC1: page 450.

[15] Vide Dok. AA5; testimony of Dr. Amanda Buhagiar Camenzuli, 28th April 2021.

[16] Bank account statements Dok. ABC1, at page 337.

[17] Dok. AA5, page 240 and Dok. AA10, page 249. Also testimony of Dr. Amanda Borg Camenzuli, 28th April 2021, Dok. ABC1: page 338. See also testimony of Silvio Chetcuti,

[18] Dok. AA8 and Dok. ABC1: page 337.

sister who lived in Canada was going to send him money, but his Nigerian ATM card was expired and he would not be able to use it to withdraw the funds from his own bank account. Godwin had told him that he had no money to pay the rent and to buy food and he had asked either to borrow some money from him or to receive the money sent by his sister into his Revolut account, withdraw it and pass it onto him. He agreed to the latter option as he had no money to lend to Godwin. Godwin had also told him that his father was rich however they had fought over the phone - in the presence of the accused, several months before - and he refused to continue to help Godwin out financially although he would help his sister, which is why according to Godwin, his sister would be sending him the funds which she would have received from their father. The accused also stated that around one or one and a half months earlier, he had once spoken to Godwin's sister via a videocall but does not recall her name and does not know whether she was married, although he did recall that she looked Nigerian. He was also aware that the funds were transferred into his account by a certain Attilia Attard and that the name was new to him. When the money was received into his Revolut account, he withdrew it in its entirety and passed it onto Godwin as requested.

He explained that after recieving the monies he went together with Godwin to the ATM at the University of Malta, which was close to their apartment, and tried to withdraw the entire amount in Godwin's presence but the transaction failed, following which he made separate withdrawals in different amounts within a few minutes. He then gave his his bank card to Godwin to buy some food from the Convenience Shop and also to make the last two withdrawals, as it was late and he had to go to work. He stated that Godwin wanted the money urgently and had asked him to withdraw it immediately and called him several times to get the money as he needed it. The accused could not explain the transaction made on the following day, 17th January 2019 where his account was credited with €144, and he stated that since he only uses his Revolut card and never uses cash for any transaction, this money might have been payment for extra work or funds borrowed from friends.

Asked to explain why despite having testified that he withdrew all the money credited into his account from Attilia Attard, it results that a balance of €150 remained in his account which was not withdrawn, the accused stated that the following day, Godwin made some purchases from the Convenience Shop and Miracle Foods using his Revolut card, in order to that he may take the rest of the money transferred. He then stated that he had lent Godwin money on so many previous occasions, that it could be that the €150 was set off with debts owed to him by Godwin, but he does not remember clearly. He denied however that these funds represented compensation for Godwin having used his Revolut account to receive the money. He stated that since Godwin was his friend and flat-mate and he had financial problems, he helped him several times, by lending him money which he did not always repay and even by bringing him food from the restaurant where he worked at the time, because he was his friend.

The accused also testified that the day following the withdrawal of the money, he went to Barcelona as he had received his salary in cash.

In his statement released while under interrogation as a suspect, the accused stated that he used to live at 44, Newman, Block 6, Triq l-Universita', Msida together with a Nigerian person named Godwin and two Romanian friends. While he refused to reply to most questions put to him, he did affirm that he does not know Attilia Attard and that he gained nothing from the transaction whereby Attilia Attard transferred money into his Revolut account. He confirmed that in 2019, Godwin had resided with him in the Msida apartment for a year and a few months, had asked him for his Revolut account and the sum of €2,830 was transferred to his account. He provided to the Police the password of his mobile phone as well as Godwin's mobile number. He also stated that did not know what Godwin did for a living and he had lost contact with him after they had to move out of the rented apartment in Msida, although after a few months Godwin would contact him occasionally via messenger and Whatsapp. In fact, he declared that he never met him again after the outbreak of

the Covid-19 pandemic. He also voluntarily trasmitted to the Police all passcodes and passwords to his devices when these were seized.

Having considered;

It is undisputed common ground that the sum of USD2,830, converted into €2,450, was transferred to the accused's Revolut account on the 16th January 2019. It is undisputed that these were received into the accused's Revolut account as a direct result of criminal activity, that is fraud. It is not alleged by the Prosecution that the accused Ayub Ali Khan Mohammed was the person or persons communicating with Attilia Attard via email, that is, Commander Wilson Jack, Victor Scarlett or Ahmed Cole and in any event, this does not result from the evidence adduced. In fact, the accused is not charged with complicity in the fraudulent scheme that led Attilia Attard to transfer her money into his Revolut account.

However it has been proved to the required standard that Attilia Attard was instructed to make a payment to the accused's Revolut account and that he did indeed receive the corresponding payment into his account in the sum of USD2,830, or €2,430 converted in Euro. In any event, this is not contested by the defence.

The Prosecution submits that the co-accused persons not only received the illegally-derived monies in their bank or Revolut accounts but they also withdrew the said funds from the bank accounts where they were received, and or transferred the said funds to third parties. It is the Prosecution's thesis that the accused, Ayub Ali Khan Mohammed, accepted to receive these monies into his bank account knowing or suspecting that they were derived from criminal activity and was promised a percentage of those funds credited into his account as compensation for his assistance.

The link between the criminal activity perpetrated by the persons who defrauded Attilia Attard, and the monies received into the accused's Revolut account is manifest and in the Court's view, the Prosecution successfully proved the first element of the

offence of money laundering, that is that the property which the accused is alleged to have concealed or disguised, constitutes the proceeds of criminal activity.

Article 2(2a) of Chapter 373 states: "*A person may be convicted of a money laundering offence under this Act even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without it being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity and without it being necessary to establish precisely which underlying activity*"

It is therefore not necessary for a conviction for the offence of money laundering under the Prevention of Money Laundering Act (Chapter 373), that there is also a judicial finding of guilt in respect of the underlying criminal activity. It is also settled case-law that the existence of the underlying criminal activity constituting the source of the property subject of the offence, may be established on the basis of circumstantial or other evidence without it being incumbent on the Prosecution to prove a conviction in respect of the underlying criminal activity, and also without it being necessary to establish precisely the nature of the underlying criminal activity.

However, this having been established, for a conviction in respect of the offence of money laundering, the Prosecution needs to prove beyond reasonable doubt not only that the property constitutes the proceeds of criminal activity[19] but also that accused committed the *actus reus* – that is at least one of the prohibited acts listed in Article 3 of the Act - and that when he committed the prohibited act or acts, he acted with the required *mens rea*. This means that the accused, when committing one of the prohibited acts, must have had the knowledge, or at least the suspicion, that the property in question originated directly or indirectly from an underlying criminal activity.

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[19] It would therefore be incumbent on the accused to give a reasonable explanation as to the source of the money; however in this case, the accused contends that the formal not the material elements of the crime are lacking.

In this case, it is established from the evidence that the accused committed one or more of the acts that, when accompanied with the required *mens rea*, would constitute money laundering. The accused acquired the funds he received from Attilia Attard in his Revolut account - which funds constitute proceeds of a criminal offence – thereby allowing such funds to be passed through his account. The subsequent withdrawal of the funds from his account enabled the conversion of the funds into cash and also the concealment of their source. Moreover, since these these funds were transferred by the accused to a third party, it is evident that the accused also played a positive and key role in the disposal of the criminal property. These acts each constitute successive and separate acts of conversion of money laundering.

However, apart from the commission of acts which would constitute the offence of money laundering, the Prosecution must also prove beyond a reasonable doubt that the accused knew or suspected at the time of the commission of one or more of the acts constituting money laundering, that the property consituted the proceeds of criminal activity.

The defence contends that from the acts of the case it clearly results that the formal element of the crime had not been proven since there is no evidence which indicates that when the accused received the proceeds of illegal activity committed to the detriment of Attilia Attard, into his Revolut account, withdrew them and passed them onto a third party, he knew or suspected that these funds were the proceeds of a fraud racket or some other criminal activity.

The accused claims in his testimony to have had no knowledge of the origin of these funds, specifically that they were derived from a fraud racket to the detriment of Attilia Attard or any other person, and or that she was the victim of romance or any other type of fraud. Thus, the defence contends that although the *actus reus,* being the receipt, withdrawal and onward transmission of the illegally-derived funds, does result, the accused did not act with the necessary criminal intent as he did not know and had no suspicion that these were the proceeds of criminal activity.

The Court must therefore establish whether sufficient evidence, direct or circumstantial, has been adduced by the Prosection to show beyond a reasonable doubt that the accused did know or at least have a suspicion as required by law, that the money was linked to an illegal activity.

Having considered;

At the Conference of the Parties, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[20] at Strasbourg on the 12th May 2021, interpretative issues relating to article 9, paragraph 3[21] of the Convention (Laundering Offences) were discussed:-

"*One of the underlying issues in effective prosecution of ML offence is a need to prove mens rea – i.e. that the money launderer knew that the proceeds he/she dealt with were proceeds of crime. In complex ML cases, where professional money launderers are involved (i.e. asset managers, bankers, trust and companies service providers, etc.), a defendant commonly denies that he/she had a firm knowledge that the funds he/she dealt with, were proceeds of crime. Consequently, demonstrating that the "mental element" of the defendant has reached the relevant threshold is one of the most challenging tasks in proving the ML offence.*

… … …

A number of international standards, such as UN Vienna and Palermo Conventions, provide comprehensive definitions of the money laundering offence. As noted above, these standards require that the perpetrator knew that the proceeds were generated through a criminal activity.

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[20] Warsaw, 16.V.2005, Council of Europe Treaty Series - No. 198.

[21] 9.3). *Each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 of this article, in either or both of the following cases where the offender : a. suspected that the property was proceeds; b. ought to have assumed that the property was proceeds.*

The Vienna Convention as well as FATF Recommendation 3 lay down that the intent and knowledge can be inferred from objective, factual circumstances. However, the evaluations carried out so far suggest that proving the intent or knowledge of the launderer about the origin of proceeds might be a requirement, which many jurisdictions struggle to attain. Mindful of difficulties in proving mens rea, the drafters of the Warsaw Convention introduced new elements in its Article 9, where the ML offence is set out. Apart from the elements already embedded in Vienna and Palermo Conventions, Article 9 of the Warsaw Convention, in its paragraph 3, goes a step further (than paragraph 2[22]*), establishing that the money laundering offence occurs even when the offender only suspected or ought to have assumed that the proceeds were generated by crime.*

The Explanatory Report to the Warsaw Convention provides an overview of this lesser standard of mens rea, as opposed to the standard mentioned in article 9 paragraphs 1 and 2 (specific knowledge and intent):-

"*Paragraph 3.a provides for a lesser subjective mental element and could cover a person who gives the origin of the proceeds some consideration (it is sufficient that he/she suspects the property was proceeds) but does not have a firm knowledge that the property is proceeds. Paragraph 3.b establishes the criminalisation of negligent behaviour where the court objectively weights the evidence and determines whether the offender should have assumed the property was proceeds, whether or not he/she gave any consideration to the matter.*

It is worth noting that, depending on national legislation and case law, the lesser mental elements of "suspected" or "ought to have assumed" could also be covered by the "dolus eventualis" level of mental awareness of the illicit nature of the proceeds. This could even be implicit in the law, without an explicit criminalisation of such

[22] Knowledge, intent or purpose in the commission of the money laundering offence.

activity in the description of the ML offence, provided that it is demonstrable by a sufficiently consolidated practice by the courts."[23]

In fact, for the purpose of establishing the knowledge of the perpetrator *vis-à-vis* the origin of proceeds, article 3 of the Money Laundering Act (Chapter 373) criminalises not only the obvious specific knowledge/positive intention, but also the lesser mental element of suspicion mentioned in paragraph 3 of article 9 of the Warsaw Convention, defining money laundering, *inter alia*, as a conversion, transfer, concealment, etc. of property suspected to be directly or indirectly deriving from a criminal activity. Knowledge or suspicion inferred from the specific circumstances of the case may be enough to establish *mens rea*, and further knowledge about the predicate offences is not necessary.

The nature and degree of the lesser knowledge (*suspicion*) that has to be proven for the required *mens rea* of the offence under article 3 of the Money Laundering Act, while it may also be inferred from objective factual circumstances, nonetheless requires proof of a positive state of mind as opposed to an indirect or negligent state of mind (ought to have known).

In *'Money Laundering Offences'*[24] one finds the following definition of the term '*suspicion*' as used in the Proceeds of Crime Act (UK):-

"The term 'suspects' is one which the court has historically avoided defining; however because of its importance in English criminal law, some general guidance has been

[23] The language of paragraph 3 of article 9 of the Warsaw Convention, particularly the words 'Each Party may adopt', suggests that this provision is not mandatory – it only provides a possibility for State Parties to introduce one or both elements ('suspected', 'ought to have assumed', or both) when establishing the money laundering offence requiring a lesser mental element of the perpetrator.
EU Directive 2018/16731, adopted on 23 October 2018, introduced into article 3(2) the requirement of the elements mentioned in Article 9 of the Convention:- *"Member States may take the necessary measures to ensure that the conduct referred to in paragraph 1 is punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity."* The language of the Directive is also non-mandatory.
[24] The Law Society, Chapter 5, 2013, October Practice Notes.

given. In the case of Da Silva [1996] EWCA Crim 1654, which was prosecuted under the previous money laundering legislation, Longmore LJ stated:

'It seems to us that the essential element in the word 'suspect' and its affiliates, in this context, is that ***the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice****.'*

There is no requirement for the suspicion to be clear or firmly grounded on specific facts, but there must be a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation*.* [25]

The test for whether you hold a suspicion is a subjective one.

If you think a transaction is suspicious, you are not expected to know the exact nature of the criminal offence or that particular funds were definitely those arising from the crime. You may have noticed something unusual or unexpected and after making enquiries, the facts do not seem normal or make commercial sense. You do not have to have evidence that money laundering is taking place to have suspicion."[26]

It was also held in the judgement quoted in the above text:

"*... the prosecution must prove that the defendant's acts of facilitating another person's retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefitted from criminal conduct.*"[27]

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[25] Emphasis made by this Court.

[26] **The Police v. Omissis, Vladimir Omar Fernandez Delgado**, decided by this Court, differently presided, on the 29th April 2015.

[27] The judgement continues: "*But the statute* (Proceeds of Crime Act, 2002 [UK]) *does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts', or based upon 'reasonable grounds'. To require*

In **K Ltd v. National Westminster Bank plc** [2006] EWCA Civ 1039, a civil case relating to suspicion of money laundering, it was held:

"*... the existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for suspicion.*"

In the judgement delivered by the Court of Criminal Appeal on the 19th November 2015 in the names **The Police v. Vladimir Omar Fernandez Delgado**, it was held:-

"*This is being said since the Prosecution need only prove a mere suspicion on the part of accused regarding the source of the money, the degree of suspicion, as opposed to the certainty brought about by proof of full knowledge, being merely subjective and personal. In the past the courts have extended the definition of knowledge beyond actual knowledge and included situations where the facts would be clear to an honest and reasonable person. It would also include turning a blind eye. Suspicion, on the contrary, is essentially a subjective issue and so is less than knowledge. The Court of Appeal in England had this to say on the matter: (Regina vs Hilda Gondwe Da Silva):*

'The word suspect means that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.'

The Court added that: 'using words such as "inkling" or "fleeting thought" in directing a jury is liable to mislead'. In particular they considered that a person who temporarily held a suspicion but honestly dismissed it from their mind upon further consideration should not be liable to be convicted."

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the prosecution to satisfy such criteria as to the strength of the suspicion would, in our view, be putting a gloss on the section."

Unfortunately our law does not give a definition of what amounts to "suspicion" and consequently if the prosecution manages to prove such suspicion of the illegal source of the money, then their job is done. It is incumbent on the accused to bring forward evidence to rebut the alleged "suspicion", as being fanciful or a mere possibility. It is then up to the judge or jury to evaluate both sides of the coin in order to establish whether that suspicion is such as can lead to a conviction."

As drafted, the law in The Prevention of Money Laundering Act (Chapter 373) does not require the suspicion to be clear or grounded on specific facts or based upon reasonable grounds. Although in theory 'suspicion' may be less difficult to prove than 'knowledge', in order to prove 'suspicion' as one of the elements of the crime of money laundering the Prosecution needs to prove beyond reasonable doubt that accused must have actually thought that there is a possibility, which is more than unlikely, that the relevant fact exists.

Having considered;

In this case the Prosecution set out the following as the facts on which it relies and the inferences which it asks the Court to draw, as proof that the monies received by the accused in his Revolut account, were derived from criminal activity and that the accused knew that these monies constituted another person's benefit from criminal conduct:-

- The accused accepted to receive into his personal Revolut account, monies paid by Attilia Attard on instructions of third person who was unknown to him.
- Attilia Attard was defrauded into making this payment into the accused's Revolut account.
- The accused proceeded to withdraw most of the funds in cash that same day that they were received, 16th January 2016, from an ATM in four separate transactions and passed them onto a third person.

The Prosecution further contends as is evident from the final oral submissions, that even if the accused's version that he agreed to receive the funds into his account as a favour to his flat-mate Godwin, is to be accepted *ex gratia argomenti*, there are sufficient factual and objective circumstances to show that the accused knew or at the very least must have suspected, that the funds credited to his account were proceeds of criminal activity and that thereforethe required *mens rea* of the offence of money laundering has been duly proved:

- A balance of circa €140 was left in the account which does not appear to have been withdrawn and transmitted to the third party.
- The accused failed to provide a plausible explanation for the fact that a balance of €140 remained in his account to his credit. When confronted with this fact, his explanation that this balance represents repayment of monies that he had lent his flat-mate in the past, contradicts his later statement that he did not always care to ask his flat-mate to repay all amounts that he used to borrow since these were largely small amounts.
- This statement also contradicts the accused's testimony that Godwin himself withdrew the balance remaining in the Revolut account and also used his Revolut card to make further purchases following the withdrawals made by the accused from the ATM. In fact, the transactions that were allegedly effected by Godwin using his Revolut card after the cash withdrawals from the ATM on the 16th January 2019, do not appear on the statement of the accused's Revolut account.
- The accused's explanation that Godwin was going to receive a substantial amount of money from his sister, a student, when he had financial problems and was repeatedly asking to borrow money from him, is improbable as is also implausible his explanation, when confronted with this fact, that Godwin's father was rich but had fallen out with him.
- In any event, the accused knew that Attilia Attard who transferred the funds into his account, was not the name of Godwin's sister who was Nigerian. The accused himself testified that he had conversed with Godwin's sister via video-

call and was told her name although he could not remember it. Having already lived in Malta for a few years, the accused therefore must have known that Attilia Attard was not Godwin's sister.

According to the Prosecution, the accused's version that he did not know or suspect that the money received into his account was not derived from criminal activity is not credible and neither supported by the circumstantial evidence which, according to the Prosecution, provides a firm inference that the accused knew or at the very least, suspected that the monies received into his account, which he then withdrew and according to his version, transferred to a third party, were proceeds of criminal activity.

The Court agrees with the Prosecution and is of the firm view that taken collectively, the evidence conveys a patent inference of a state of mind on the part of the accused, which is compatible with knowledge that the funds transferred into his account, were proceeds of criminal activity or, at the very least, with a suspicion that the funds credited into his account, were proceeds of criminal activity.

It therefore remains to be examined whether the accused provided clear evidence to counter-balance the evidence tendered by the Prosecution, and show on a balance of probabilties that he had no knowledge or suspicion of the underlying criminal activities involved in this operation.

The Court examined the accused's version as would result from his statement to the Police and his testimony before the Court when differently presided, and also heard his direct testimony and considers that even if his version that he received these funds as a favour he made to his flat-mate Godwin and was unaware of their provenance, is to be deemed credible and given any credence, several factual and objective circumstances are established from the body of evidence which show that the accused, at the very least, must have suspected that the funds were proceeds of criminal activity.

In addition to the arguments submitted by the Prosecution during final oral submissions, the following factual observations are to be made:-

The accused was clearly not in a comfortable financial situation. From an examination of his Revolut account statements it would transpire that prior to his account being credited with the funds paid out by Attilia Attard, his Revolut card balance stood at €5.09, with the last significant payment credited into his account was on the 28th December 2018 from RK Limited in the sum €785. He did not seem to have a regular or stable income at the time of the facts in issue and in fact, after the 17th January 2019, only erratic payments in negligible amounts were deposited into his account. It was only several months later, on the 5th May 2019, that the accused received another substiantial payment, in the sum of €510, from a certain Jennlyn Flores. The accused claimed that all his financial transactions are carried out using his Revolut card and he never uses cash. However, he later declared that he was paid his salary in cash the day following the transfer of the funds, and went abroad to Barcelona. He also received into his account on the 17th January 2019, a payment of €144 from an unidentified source, which he could not explain, having declared that it could represent either a payment for extra work he carried out, or repayment of a loan.

In this context, the Court finds the accused's version that he would lend money to Godwin on various occasions, including on the day when Attilia Attard's funds were withdrawn from his account, improbable, more so when he went on to testify that the payment of the sum of €144 credited into his account the following day, 17th January 2019, could have possibly been a loan from friends as he might have not had any money, and that he never chased Godwin to reimburse the monies he lent him on various occasions.

The statements of the accused's Revolut account show that he withdrew the sum of €960, €500, €500 and €330 (a total of only €2,290) in separate successive transactions on the same day that the funds paid out by Attilia Attard were credited into his

account, 16th January 2019, in the space of a few minutes only. Despite him having initially testified that he withdrew all in cash all the funds that were transferred into his Revolut account and handed them to Godwin, he changed this version when confronted with the fact that a balance of approximately €150 remained in the account and were not withdrawn. As already pointed out by the Prosection, the accused at this point claimed that he gave his Revolut card to Godwin to withdraw the balance himself and or make puchases in that amount that very same day or the following day. However no transactions of the sort appear on the statement of the Revolut account. The accused then explained that the balance might have been set off against monies owed to him by Godwin, a version also contradicted by the accused himself when he later explained that he did not always expect to be repaid amounts he loaned to Godwin since they were small amounts.

These inconsistencies in the accused's testimony serve to detract significantly from the credibilty of his version that he did not know or suspect that the funds were derived from criminal activity, leaving also many insurmountable doubts in the Court's mind as to the veracity of the explanations he provided.

The Court also observes that nowhere in his testimony did the accused declare that he had asked Godwin to indicate the amount of the funds that he intended or expected to receive from his sister, which in the Court's view is odd, also because it is reasonable to assume that should the deposit be of a substantial amount – particularly when compared to other deposits into the account and in the context of the accused's modest financial situation - the banking institution might be alerted to a possibly suspicious transation leading to potential problems for the accused as the destinee of the funds.

It does not result either, on a balance of probabilities, that Godwin was a person of good repute. Despite having known him for over one year, the accused could not state the nature of Godwin's employment or source of income, in addition to the fact that as would result from the accused's testimony, Godwin never seemed to have money despite having informed him that his father was rich. Neither does it result from the

accused's version that Godwin's financial means were any healthier prior to falling out with his father – an event that occurred, according to the accused himself, over a phonecall with the father during the time that they were sharing the rented apartment in Msida. Moreover, according to the accused, Godwin repeatedly asked to borrow money from him and did not always refund the amounts that he lent to him. This state of affairs does not strike the Court as being suggestive of a reliable or trustworthy person. **Therefore, when this person who, according to the accused, is clearly in a dire financial situation, suddenly declares that he is to receive a substantial payment from his sister, a student, suspicion as to the legitimate nature of the funds, is objectively and reasonably aroused, particulary when these funds were allegedly to be received from Godwin's sister, purportedly a student in Canada**. The explanation provided by the accused, when confronted in cross-examination with the fact that a student should not be expected to have substantial means, is evidently far-fetched and not in the least plausible.

In addition to all this, the fact that the accused declared to have known that the funds were received from Attilia Attard, who he must have known and did indeed know was not in fact the name of Godwin's sister (he could not remember the name of the sister but never suggested that it might have been Attilia Attard), continue to reinforce an already-strong inference of suspicion about the legitimate origin of the monies received into his account and would have provoked much more than a vague feeling of unease about the nature of the transaction. **However, the accused never mentioned at any point during his testimony that he asked Godwin for an explanation regarding the name of the person who transferred the funds, or why his friend needed a Revolut account and not a regular bank account, or why the transfer could not have been carried out directly in his friend's own name through other international money transfer instruments and channels such as Western Union**.

The suspicion which would have been reasonably evoked at this point in the accused's mind as to the illegitimate source of the funds - if his version is to be

given any credence - should have then been unconditionally confirmed when *ex admissis*, he declared that Godwin pleaded with him to withdraw the funds that same day that they were received into the account, because he needed them urgently, purportedly to pay rent which according to the accused, was a mere €350 per month, and when Godwin even insisted on accompanying him to the ATM to have the funds withdrawn. This is an undoubtedly suspicious move.

The defence argued that at that point, even had the accused reason to suspect that the funds were not derived from the claimed source and that they derived directly or indirectly from an underlying unlawful activity, he could not have done anything further to divest himself of responsibility. However the Court disagrees: even if the accused began to suspect the legitimacy of the source of the funds only after having received them into his account, the offence of money laundering is also committed so soon as the property was acquired and possessed by him knowing or suspecting that it was derived or originated directly or indirectly from criminal activity.

In the case under examination, on the basis of all the ambiguities and contradictions in the accused's testimony and the unquestionable improbability of his version, the Court is of the firm view that he has failed to prove on a balance of probabilities that he did not know or suspect that the property received and converted by him was derived directly or indirectly from or proceeds of, criminal activity. The circumstances in which the transations took place leave no room for a reasonable doubt that the accused knew or at the very least (should one give credence to his version that he received and transferred the funds to a third party), had firm suspicion that the proceeds were of criminal origin.

In fact, the Council Meeting Interpretative Note[28] provides a typical example of a money laundering offence that would subsist on the basis of Article 9(3) of the Convention, where a person uses a bank account of a friend or relative with the

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[28] Council of Europe Convention, *ibid.*

approval of the account holder and with a purpose to launder the proceeds. The Note states:-

"*... if a person is known to the account holder as someone prone to criminal activity, then there is an assumption that the account holder either suspected or should have known that his/her account could be used for laundering purposes. If, despite this fact, the account holder still approves a person to use the bank account, and a laundering activity occurs, the Prosecution then needs to prove that the account holder suspected or ought to have known that the person who used the holder's account was generating funds from illegal activities. ... Consequently, the scope of the mental element, extended to "suspicion", and the range of means for proving it (objective factual circumstances), while of course different, can both concur to determine a broad range of the ML offence and should both be considered during the monitoring procedures.*"

As already considered earlier, even if the accused's improbable version is to be believed even for a moment, the Court's analysis shows that in any event, he could not have reasonably failed to suspect that Godwin was involved in criminal activity when he asked to use his Revolut account for a questionable transaction in unrealistic circumstances. The Court remains wholly unconvinced that the evidence shows he was merely negligent or even reckless as to the nature of the transaction in the face of the circumstances as recounted in his own testimony. On the contrary, the facts and circumstances that emerge from this version show that there was no logical and plausible explanation as to the legitimate origin of the property transferred to the accused's Revolut account, and give rise to an irresistible and objective inference of knowledge, or at minimum a suspicion which could not have been honestly dismissed, that such funds could only have been derived from criminal activity. Consequently, the requirement of the *mens rea* consisting in suspicion has also been proven by factual objective circumstances emerging from the accused's own testimony.

The general facts of this case are similar to those in **R. v Fazal** (2010)[29] where the accused was found guilty of the offenec of money laundering having allowed his bank account to be used by a friend who allegedly had a problem with his own bank account, to deposit the proceeds of criminal activity consisting of fraudulent transactions, and having assisted his friend to convert the monies deposited in his account. In that case, several deposits were made into the bank account over a period of time, the accused had no salary and had been living off money received from his parents, and the version of events given by the accused during his interrogation - where he claimed no knowledge of the deposits, thinking them a bank error – contrasted greatly with his testimony during the trial where he claimed to have allowed an old friend who had a problem with his bank account, to have his salary deposited due to a problem with the bank. Although the particular circumstances of the case differ to the facts of the case at hand, the Court is nonetheless entirely unconvinced of the accused's version that his assistance in receiving the monies into his account was given without knowledge or suspicion that he was assisting in the conversion of funds illegally derived.

In any event, the accused's knowledge is proved to have existed at the time when the property was not only received into his account but also, naturally, when it was converted or transferred – which is when the alleged money laundering offence occurred - and that it was so converted or transferred for the purpose of concealing or disguising the origin of the property or of facilitating another person's retention or control of the criminal property.

It therefore follows that the accused must also be found guilty of the crime of receiving property which was obtained by means of a criminal offence, whether committed in Malta or abroad, or having knowingly taken part, in any manner whatsoever, in the disposal of the same property, in terms of article 334 of the Criminal Code, specifically under paragraph (c), since the property was obtained by fraud, which crime is punishable in terms of article 310(1) of the Criminal Code.

[29] EWHC, Crim. LR 309.

Having considered;

Having established defendant's guilt beyond a reasonable doubt for the offence of money laundering under article 2 of the Prevention of Money Laundering Act, the Court for the purposes of punishment, considered the accused's clean criminal conduct as well as the fact that the transaction appears to have been an isolated one. Above all the fact that the amount involved was not, by any extent, a substantial amount. However, at the same time, the Court cannot but take into account the fact that the accused did not reimburse the sum he received to the detriment of Attilia Attard notwithstanding that he knew from the inception of the proceedings, at the very latest, that she was defrauded into crediting his account with the amount of USD 2,830 in January 2019.

For these reasons, the Court after having seen articles 17, 18, 310(1)(b) and 334(c) of the Criminal Code, Chapter 9 of the Laws of Malta, and articles 2(1) and 3(2A)(a)(ii) of The Prevention of Money Laundering Act, Chapter 373 Laws of Malta, finds AYUB ALI KHAN MOHAMMED guilty as charged and condemns him to eighteen (18) months imprisonment but on application of article 28A of the Criminal Code, orders that this sentence shall not take effect unless the offender commits within a period of three (3) years another crime punishable with imprisonment.

The Court explained to the person sentenced, in clear and simple terms, the legal consequences of this judgement, should he commit any other offence punishable by imprisonment within the operative period of the suspended sentence.

Upon application of article 3(5) of the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta, and in view of the fact that it was not possible to identify and forfeit the proceeds of the crime or to order the forfeiture of such property the value of which corresponds to the value of those proceeds, the

offender is condemned to the payment of a fine (multa) of two thousand four hundred Euro (€2,400), that is, the equivalent of the amount of the proceeds of the offence. The said fine shall be recoverable as a civil debt and for this purpose this sentence shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure.

Upon application of article 3(7) of the Prevention of Money Laundering Act, Chapter 373 Laws of Malta, which refers also to article 22(3A)(b)(d)(7) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, orders the forfeiture in favour of the Government of all moneys or other movable property, and of the entire immovable property of AYUB ALI KHAN MOHAMMED even if the immovable property has since passed into the hands of third parties, and even if the said monies, movable property or immovable property are situated in any place outside Malta.

To this end and for the purposes of Article 23D of the Criminal Code, orders the Director of the Asset Recovery Bureau to conduct the necessary enquiries to ascertain any assets pertaining to the defendant and thus liable to forfeiture in favour of Government.

In terms of Article 533 of the Criminal Code, Chapter 9 of the Laws of Malta, orders AYUB ALI KHAN MOHAMMED pay to the Registrar of Court the sum of five hundred and forty Euro (€540) representing one third (1/3) of the sum paid in connection with the employment of Keith Cutajar as court expert in these proceedings[30], within six (6) months.

In terms of article 15A of the Criminal Code, Chapter 9 of the Laws of Malta, condemns the offender, AYUB ALI KHAN MOHAMMED to pay unto Attilia Attard the sum of two thousand four hundred Euro (€2,400) within six (6)

[30] Dok. KC.

months, by way of restitution of the proceeds knowingly obtained unlawfully to her detriment.

This order shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure.

Orders that a copy of this judgement is served on the Registrar of Courts for the purposes of article 28A(8) and article 533 of the Criminal Code and also for the purposes of article 19(1) of Chapter 621 of the Laws of Malta.

DR. RACHEL MONTEBELLO
MAGISTRATE.