# Criminal Court of Appeal

**Hon. Judge Edwina Grima**

**Appeal No: 441/2023**

**The Republic of Malta**

**vs**

**Oliver Chamberline Chibuike**

Today, the 13th day of September 2024.

The Court,

Having seen the charges brought against appellant Oliver Chamberline Chibuike, holder of identity card bearing number 0395316L, wherein he was accused before the Court of Magistrates (Malta), together with *Omissis 1* and *Omissis 2* of 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 subparagraph (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 subparagraphs (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.

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature dated the 27th of November 2023, wherein the same Court, after having seen articles 310(1)(a) and 334 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 of the Laws of Malta, found Oliver Chamberline Chibuike, upon his own admission, guilty as charged and sentenced him to two (2) years imprisonment, however, upon application of article 28A of the Criminal Code, Chapter 9 of the Laws of Malta, ordered that such sentence shall not take effect unless, during a period of three (3) years, the offender commits another offence punishable with imprisonment. The Court also condemned him to a fine (multa) of twenty thousand Euro (€20,000), which upon application of article 14 of the Criminal Code, Chapter 9 of the Laws of Malta, shall be paid within a term not exceeding two (2) years. Moreover, since the victim has been fully compensated by the offender, the Court chose not to apply the

provisions of article 23B of the Criminal Code and article 3(5)(a) of the Money Laundering Act, Chapter 373 of the Laws of Malta, and consequently did not order the forfeiture in favour of the Government of the proceeds or of such property the value of which corresponds to the value of such proceeds of the crime unlawfully received by the offender. 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, the Court ordered the forfeiture in favour of the Government of all moneys or other movable property, and of the entire immovable property of Oliver Chamberline Chibuike 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. Furthermore, in terms of Article 533 of the Criminal Code, Chapter 9 of the Laws of Malta, The Court ordered Oliver Chamberline Chibuike to 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, within six (6) months.

Having seen the appeal application filed by appellant Oliver Chamberline Chibuike, on the 6th of December 2023, wherein he requested this Court to:

i. Confirm the said appealed decision in so far as he was found guilty, upon his own admission, of the charges proferred against him; and
ii. In light of grievance "A", on the basis of article 46(3) of the Constitution of Malta as well as on the basis of article 4(3) of Chapter 319 of the Laws of Malta, refer the constitutional matter expounded therein to the First Hall of the Civil Court in its Constitutional Jurisdiction so that the said Court may decide whether the imposition of the punitive measure set out in article 3(7) of Chapter 373 of the Laws of Malta, which renders applicable *mutatis mutandis* article 22(3A)(b)(d)(7) of the Dangerous Drugs Ordinance, which measure has as its effect the blanket forfeiture in favour of the Government of Malta of all assets (whether in Malta or overseas), has violated his right to property as safeguarded by Article 1 to Protocol 1 of the European Convention on Human Rights and Article 37 of the Constitution of Malta and if in the affirmative, to accord all necessary effective remedies to remedy such violation; and

iii. Subsequently, in furtherance of grievance "A" and request number (ii), proceed to cancel, revoke and annul or alternatively proceed to proportionately attenuate the applicable punitive measure set-out in article 3(7) of Chapter 373 of the Laws of Malta whereby the Court of First Instance ordered the forfeiture in favour of the Government of all money or other moveable property, and of the entire immoveable property of the appellant even if such immoveable property has since passed into the hands of third parties and even if the said monies, moveable property or immoveable property are situated in any place outside Malta;

And/Or

iv. In light of grievance "B", proceed to reform the pecuniary punishment inflicted on him by substituting it with a less onerous and more equitable punishment.

Having seen the reply filed by the Attorney General on the 6th of May 2024.

Having seen all the records of the case.

Having seen the updated conduct sheet of appellant, exhibited by the Prosecution as requested by this Court.

Having heard submissions by the parties.

**Considers:**

That, in his first grievance, appellant Oliver Chamberline Chibuike criticizes what he considers as the excessively disproportionate measures, legal arbitrariness and the lack of judicial discretion resulting from the application of Article 3(7) of Chapter 373 of the Laws of Malta, in a finding of guilt for the charge of money laundering. He laments that this same provision of the law, which renders applicable *mutatis mutandis* Article 22(3A)(b)(d)(7) of the Dangerous Drugs Ordinance, on the basis of which the Court is bound to order the forfeiture in favour of the Government of Malta of <u>all</u> assets (whether in Malta or overseas) pertaining to him is arbitrary, disproportionate, excessive and has effectively violated his right to the enjoyment of his property as safeguarded by Article 1 to Protocol 1 of the European Convention on Human Rights and Article 37 of the Constitution of Malta. Due to this, the appellant is requesting this

Court to refer this constitutional matter for a decision regarding a potential violation of his fundamental human rights to the First Hall of the Civil Court in its Constitutional Jurisdiction.

**Considers:**

That, Article 3(7)(b) of Chapter 373 of the Laws of Malta, prior to the amendments enacted by Act VI of 2024, provided for the forfeiture in favour of the Government of Malta of all monies or other movable property, and of the entire immovable property of the person so found guilty even if the immovable property has, since the offender was charged, 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.

The Court had no discretion in applying this punitive measure together with the punishment inflicted upon a finding of guilt for the charge of money laundering and thus the First Court, in its judgment was correct in applying the provisions of the above-mentioned article of law as that was the word of the law as it stood on the day it delivered judgment. However, this Court also notes that after judgment was delivered by the First Court, the said provision of the law was amended by means of Act VI of 2024, wherein in its transitory provisions the legislator bound the Courts in the following manner with regards to cases pending before it on the date of the entry into force of the new proviosn of the law, wherein article 32 of the Act provides that:–

> **32.(1) Except as otherwise provided in this article, the provisions of articles 17A and 17B of the Malta Financial Services Authority Act, of articles 3, 4 and 5 of the Prevention of Money Laundering Act, of articles 18 and 19 of the Prevention of Financial Markets Abuse Act, and of articles 35, 36 and 41 of the Proceeds of Crime Act, as amended by the Act to amend Various Laws relating to the Proceeds of Crime, 2024 shall apply to investigation procedures and to criminal proceedings which are commenced after the coming into force of the said Act.**
>
> **(2) The provisions of the articles referred to in sub-article (1) as in force before the coming into force of the Act to amend Various Laws relating to the Proceeds of Crime, 2024 shall remain in force and shall apply after the coming into force of the said Act in relation to investigations and criminal**

**proceedings which were commenced before the coming into force of the said Act, except as otherwise provided in this article.**

**(3) The provisions of the articles referred to in sub-article (1) as amended by the Act to amend Various Laws relating to the Proceeds of Crime, 2024 shall apply in respect of Attachment Orders and Seizing and Freezing Orders issued in relation to investigations or criminal proceedings which were commenced before the date of coming into force of the said articles as amended by the Act to amend Various Laws relating to the Proceeds of Crime, 2024 but which are still pending on the said date of coming into force, subject to the following conditions:**
**(a) the suspect, the person charged or the accused files a request by application to the Criminal Court in the case of an Attachment Order or to the Court before which the case is heard in the case of a Seizing and Freezing Order in which he requests that the order issued in his regard be regulated by the said articles as amended by the said Act instead of the articles as were in force prior to being so amended;**
**(b) the Court, after having heard the prosecution and every witness who it considers appropriate to hear, considers that it should accede to the request; and**
**(c) the Court issues a decree by which it shall regulate the manner and the time frame according to which the Attachment Order or the Seizing and Freezing Order shall proceed to be regulated in accordance with the articles referred to in sub-article (1) as amended by the said Act:**
**Provided that, without prejudice to the generality of this sub-article, in the case of a Seizing and Freezing Order the provisions of article 36(4) of the Proceeds of Crime Act as amended by the Act to amend Various Laws relating to the Proceeds of Crime, 2024 shall, as from such date as may be established in the said decree, commence to apply mutatis mutandis to the Seizing and Freezing Order in such manner so however that the two (2) periods of ninety (90) days provided for in article 36(4)(b) may also be extended by the Court upon a request by the prosecution by another subsequent period of ninety (90) days if the Court is satisfied that such extension is justified.**

**(4) Where the law applicable to an Attachment Order or a Seizing and Freezing Order is modified in accordance with sub-article (3), the investigation or the criminal proceedings with reference to which the said modification is made shall, <u>except in the case of criminal proceedings which are adjourned for final submissions or for judgment</u>, be regulated from that time onwards in their entirety, including but not limited to the procedure for the confiscation of any proceeds of crime, by the provisions of the law as amended by the Act to amend Various Laws relating to the Proceeds of Crime, 2024.**

**(5) The provisions of article 7 of the Prevention of Money Laundering Act and of article 38 of the Proceeds of Crime Act as amended by the Act to amend Various Laws relating to the Proceeds of Crime, 2024 shall apply to**

**all investigations and criminal proceedings also including those which are pending on the date of the coming into force of the said Act <u>except for criminal proceedings which on the date of the coming into force of the said Act are adjourned for final submissions or for judgment in which latter cases the said proceedings shall continue to be regulated by the provisions of the said articles as in force before the coming into force of the said Act and those provisions shall, for the purposes of this sub-article, be deemed to have remained in force.</u>**

**(6) The provisions of all articles of the Act to amend Various Laws relating to the Proceeds of Crime, 2024 which are not referred to in sub-article (1) or sub-article (5) shall apply to all proceedings, whether they are pending on the date of the coming into force of the said Act, or if commenced subsequent to the coming into force of the said Act.**

That, *inter alia*, these transitory provisions mean, therefore, that as a general rule, Article 3 of the Money Laundering Act, as amended, together with the other articles of law mentioned, applies only in relation to proceedings that commenced <u>after</u> the coming into force of Act VI of 2024. With regards to proceedings that had already started on the date of the coming into force of this Act, the previous legal regime should be applied. Furthermore, in terms of sub-article 5 of Article 32, above cited, the provisions of Article 7 of Chapter 373 of the Laws of Malta and of Article 38 of the Proceeds of Crime Act, as amended, shall also apply to all pending proceedings, <u>except those who are adjourned for final submissions or judgement</u>.

It follows that those persons accused of the offence of money laundering whose case is at the very final stages of submissions or awaiting judgment cannot benefit from the amendments made to the punitive measures consequential to a finding of guilt. This applies to the present case as on the 9th of February 2024, when Act VI of 2024 came into force, the case was already at appeal stage, awaiting final submissions by the parties before this Court. It is this Court's opinion that the application of punitive measures upon the delivery of judgment which are more severe and harsh in those cases which though still pending before the Courts, however have arrived in their final stage, as opposed to the application of a more lenient punishment in those cases which although still pending, are still further away from conclusion, is discriminatory and in violation of a person's fundamental human rights, such a discriminatory stance

being in direct contrast to the scope behind the recent legal amendments, being that of creating a degree of proportionality between the safeguards exercised by the State with a view to the confiscation of those assets which have an illegitimate source, consisting of the proceeds from crime, and the right of the convicted person to the enjoyment of his property with only said proceeds, or an equivalent value thereof, being subject to forfeiture upon conviction. In fact, the new Article 3(7)(b) of Chapter 373 of the Laws of Malta now reads as follows –

> **The court shall order the forfeiture in favour of the Government of such moneys or other movable property and such immovable property of the person found guilty of the offence of money laundering <u>which constitute the proceeds of the said offence</u> even if the movable or immovable property has since the offender was charged passed into the hands of third parties and even if the said moneys, movable property or immovable property are situated in anyplace outside Malta. (underlining by this Court)**

Thus, it is evident to this Court, that the law, as amended, is more favourable to the accused and this because, in the case of a conviction, the court does not order the forfeiture in favour of the State of all his/her assets in an indiscriminate fashion, with the person found guilty having to initiate proceedings before the civil courts in order to recuperate those assets which have a legitimate source, but will proceed to confiscate only those assets which, from the acts, have been determined to constitute the proceeds of the crime with which accused is found guilty.

In a judgement delivered by this Court, in the names of "<u>Il-Pulizija vs Mario Cassano</u>" delivered on the 28th of September 2017, the Court relying on the rulings delivered by the ECtHR applied the more favourable criminal law to the person charged when it decided:-

> ***"Illi fir-rigward tat-tieni akkuza li hija imfassla fuq l-artikolu 97(f)(i) tal-Kapitolu 10 tal-Ligijiet ta' Malta, ghandu jinghad illi din id-disposizzjoni tal-ligi giet imhassra permezz tar-regolament 42 ta' l-Avviz Legali 376 ta' l-2012. Illi allura ghalkemm l-att vjolatur kien jikkostitwixxi reat meta sehh, dan madanakollu ma baqax jigi hekk ikkunsidrat ftit xhur wara l-akkuza. Illi in linja mad-decizjonijiet moghtija mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem il-qorti ghalhekk hija tal-fehma illi fir-rigward tat-tieni akkuza ebda piena ma ghandha tigi imposta fuq l-appellanti u l-Qorti ghaldaqstant ser***

*tghaddi biex tastjeni milli tiehu konjizzjoni ta' dina l-akkuza u tirrevoka konsegwentement is-sejbien ta' htija li wasslet ghaliha l-Ewwel Qorti:*

**"The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties …. The Court …. affirms that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."[1]**

The European Court confirmed this position in a number of subsequent judgments, including that in the names of "Ocolan vs Turkey" dated 18th of March 2014 –

**"The court notes that the principle of retrospectiveness of the more lenient criminal law, considered by the court in Scoppola (no. 2), as guaranteed by Article 7, is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."[2]**

This same reasoning was also made by our Courts in the judgment delivered in the names of "Il-Pulizija vs Hany Abdullatif Tawkif Elkhawiny" dated 13th April 2021:–

*"Il-punt huwa jekk u safejn Qorti ta' Ġustizzja Kriminali tista' tapplika l-piena l-anqas gravi fil-każ fejn il-piena marbuta ma reat fiż-żmien meta jkun seħħ reat tiġi mibdula matul iż-żmien li imputat ikun qiegħed jiġi mixli b'reat partikolari li l-piena tiegħu tiġi mibdula – b'piena anqas – fil-mori ta' dawk il-proċeduri.*

The legal principle expounded in these judgments finds its basis in Article 27 of the Criminal Code which reads as follows:–

**If the punishment provided by the law in force at the time of the trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment shall be awarded.**

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[1] **Scoppola vs Italy**, App. No. 12049/03 – 17/09/2009 (Grand Chamber).

[2] Reference is made **Ruban vs Ukraine** – 12/07/2016 and to **Koprivnikar vs Slovenia**.

In fact, even Professor Sir Anthony Mamo wrote on this subject in his "Lectures in Criminal Law", wherein he states that while the ignorance of the law is not an excuse for whosoever breaches it, on the other hand criminal law has no retroactive effect, subject to the following exception: -

> **An apparent exception to the rule that a penal law cannot have retrospective effect occurs where a new law enacted after the commission of the offence is less severe or more advantageous to the offender than the law in force at the time the offence was committed. This hypothesis is twofold:-**
>
> **a) The law against which the offence was committed is subsequently repealed, so that the act is no longer criminal;**
>
> **b) The law against which the offence was committed is subsequently amended or changed so that, though the act is still criminal, the punishment or the conditions of liability and prosecution are varied.**
>
> **…**
>
> **The 'communis opinio' among continental writers is that where the law in force at the time of the commission of the offence and the subsequent law are different, the offender should be dealt with according to the law which is more favourable to him. This means that if the law in force at the time of the trial is less favourable to the accused than the law in force at the time of the commission of the offence, it is the latter law that should be applied retrospectively to his prejudice (*sic*). If, on the contrary, the new law is more favourable to the accused than the law which was in force at the time the offence was committed, then it is the new law that should be applied; for, if the old law were to be applied, it would have, as to the excess of punishment or other aggravation, an effect beyond its limit of valid operation.**
>
> **Section 28 of our Criminal Code provides that "if the punishment prescribed by the law in force at the time of the trial is different from that prescribed by the law in force at the time of the commission of the offence, the less severe of the two punishments (Old Italian text : "pena di qualita' meno grave") shall be applied.**
>
> **…**
>
> **The above-quoted provisions of our Criminal Code applies 'expressis verbis' where the difference is between the punishment as at the time of the commission of the offence and the punishment as at the time of the trial. This means that if, when the new law reducing the punishment comes into force, proceedings in respect of the offence have already been definitely concluded, such new law does not affect the sentence already awarded; saving, of course, even in this case, the Prerogative of Mercy. If, however, when the new law comes into operation an appeal from the sentence is still pending, then the accused is entitled to the benefit of the less severe punishment (V. Crim.**

**Appeal 'The Police vs. S. Chircop et' 13.XI. 1943; Roberti, op. cit. Vol II, 315). .....**

That, it is worthy to note that in fact, when Mamo's Notes were written, our Interpretation Act had not as yet come into force as it was in fact promulgated on the 4th of February 1975. Today, Article 12 of the same reads as follows –

> **(1) Where any Act passed after the commencement of this Act repeals any other law, then, unless the contrary intention appears, the repeal shall not –**
> **(a) revive anything not in force or existing at the time at which the repeal takes effect;**
> **(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any law so repealed;**
> **(c) affect any right, privilege or liability acquired or accrued or incurred under any law so repealed;**
> **(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed, or any liability thereto;**
> **(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.**
> **(2) Where an Act, whether passed before or after the commencement of this Act, amends any other Act passed either before or after the commencement of this Act, or any provision of any such other Act, the Act or provision so amended, as well as anything done thereunder or by virtue thereof, shall, unless the contrary intention appears, continue to have full effect, and shall so continue to have effect as amended, and subject to the changes made, by the amending Act.**
> **(3) For the purposes of sub-article (2) "amendment" means and includes any amendment, modification, change, alteration, addition or deletion, in whatsoever form or manner it is made and howsoever expressed, and includes also a provision whereby an Actor a provision thereof is substituted or replaced, or repealed and substituted, or repealed and a different provision made in place thereof.**

That, even in the "**Guide on Article 7 of the European Convention on Human Rights**", entitled, "**No punishment without law: the principle that only the law can define a crime and prescribe a penalty",** published by the European Court of Human Rights, in Part V, dealing with the principle of retrospective application of the more favourable criminal law it is stated thus:–

**55. Even though Article 7 § 1 of the Convention does not expressly mention the principle of the retroactivity of the lighter penalty (unlike Article 15 § 1 in fine of the United Nations Covenant on Civil and Political Rights and Article 9 of the American Convention on Human Rights), the Court held that Article 7 § 1 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (Scoppola v. Italy (no. 2) [GC], §§ 103-109, concerning a thirty-year prison sentence instead of a life sentence). The Court considered that "inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive" (ibid., § 108). The Court noted that a consensus had gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, had become a fundamental principle of criminal law (ibid., § 106)."**

This issue was also dealt with by this Court, as otherwise presided, in the judgment in the names of "Il-Pulizija vs Mario Brignone", delivered recently on the 7th of August 2024 wherein basing itself on these principles of law and on jurispridence delivered both by the Constitutional Court as well as the EctHR, the Court proceeded to apply the more lenient punsihment and thus that law which is most favourable to the accused, even though the legislator deemed fit to exclude the applicability of the amendments to those cases which although pending, are in their final stages adjourned either for final submissions or for judgment: –

***Dan ifisser illi minkejja illi d-dispożizzjonijiet tranżitorji tal-Att VI tas-sena 2024 jirrendu inapplikabbli l-emendi li daħlu fis-seħħ bl-istess Att għall-proċeduri odjerni, la darba dawn bdew qabel id-dħul fis-seħħ tal-istess Att u jinsabu issa fi stadju ta' appell, bl-applikazzjoni tal-prinċipji fuq esposti, u sabiex ma ssir l-ebda vjolazzjoni tal-Artikolu 7 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, din il-Qorti jidhrilha illi fil-każ odjern, għandha tapplika d-disposizzjonijiet li daħlu fis-seħħ bis-saħħa tal-Att VI tas-sena 2024, u dan in kwantu l-ordni ta' konfiska hija piena konsegwenzjali għas-sejbien ta' ħtija tal-appellant u in kwantu wkoll il-liġi kif emendata hija iżjed favorevoli għalih.***

In fact, the exclusion by the legislator laid out in the transitory provisions to Act VI of 2024 is so far reaching as to even exclude from its application all cases pending before this Court as a Court of Appeal, since all cases brought before an appellate court, although not as yet *res judicata*, are limited to the hearing of final submissions with regards to the grievances put forward from the appealed judgment. This is even more so evident from the wording of article 38(5) of Chapter 621 as introduced by Act VI of 2024, which grants a right of appeal from a Confiscation Order issued by the court upon a finding of guilt, thus implying that such a procedure enacted by the new legal regime is not applicable at appellate stage. An amendment to the law in this regard should be forthcoming even more so since the law is discriminatory with regards to those cases which, although not yet considered *res judicata,* preclude the accused person from benefitting from the more lenient punishment even though there have been several pronouncements in this regard concerning a human rights' violation.

Given that the grievance regards the imposition of punishment, and this in view of the fact that the forfeiture of the totality of the assets pertaining to the person found guilty is consequential to a conviction, and in view of the fact that the Court will apply the more lenient punishment and the more favourable law in favour of appellant in line with the law and constitutional pronouncements on the matter which supercede the dicatates of the transitory provions found in Act VI of 2024, the request for a constitutional reference at this stage is considered superfluous. This also in the best interests of justice.

Having thus premised although the new legal regime lays out a procedure wherein the court after a declaration of guilt is to carry out an assessment with a view to establishing the *quantum* of the proceeds of the crime, the Court deems that such an exercise would be futile in this case since the Frist Court has already established in detail in its judgment the said *quantum,* from which part of the judgment no appeal has been lodged by the parties to the proceedings. The First Court carried out the following exercise in its judgment:

**"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 the accused, Oliver Chamberline Chibuike, Omissis 1 and Omissis 2:**

**• The sum of $2,850 on the 14th January 2019 from her bank account bearing number 14806089020 held at Bank of Valletta plc, to Revolut account number GB90REV00997078140052 in the name of Omissis 2. Once converted into Euro, the sum of €2,430 was received into this Revolut account on the 16th January 2019;**

**• The sum of $4,500 on the 15th January 2019 from her bank account bearing number 14806089020 held at Bank of Valletta plc, to Revolut account number GB90REV00(997074385719)7077438571 in the name of Omissis 1;**

**• The sum of €10,002.91 on the 22nd February 2019 - made up of one payment of €5,000 pertaining to Attilia Attard and another payment of €5,002.91 pertaining to her son Zane Attard – deposited directly into bank account number 073091241050 in the name of the accused, Oliver Chamberline Chibuike, with HSBC Bank Malta plc by means of a bank draft bearing number 395157 payable to said accused person.**

**• The sum of €5,000 on the 9th March 2019 transferred by SEPA payment from Bank of Valletta plc IBAN number MT59VALL220130000000400204466 46 pertaining to Mark Anthony Gerada to HSBC bank account number 049040546050 in the name of Omissis 1, received in said account on the 11th March 2019;**

**• 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;**

**• 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.**

**Having considered;**

**It is undisputed common ground that the sum of ten thousand and two Euro and ninety one cents (€10,002.91) was received into and withdrawn from, Oliver Chamberline Chibuike's bank account with HSBC Bank (Malta) plc and it also results that these funds were received as a direct result of criminal activity, that is fraud. It was not alleged by the Prosecution that the accused 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 bank account held with HSBC Bank (Malta) plc, but is charged with receiving property derived from this fraudulent scheme or having knowingly taken part, in any manner whatsoever, in the disposal of the same property, as envisaged in article 334 of the Criminal Code, as well as with acquiring, possessing, retaining, converting and transferrring such property in breach of the provisions of the Prevention of Money Laundering Act.**

**The accused pleaded guilty as charged to the crime of money laundering and receiving property which was obtained by means of a criminal offence in terms of article 334 of the Criminal Code, specifically under paragraph (c), since the property was obtained by fraud.**

**For purposes of punishment the Court cannot fail to take into account the fact that the accused acted in concert with third parties in a fraudulent scheme that caused much suffering and hardship to Attilia Attard, the victim of the crimes, who ended up penniless simply because the perpetrators of this fraudulent scheme exploited and preyed on her generosity and kindness for their own personal and unlawful gain. The amount which the accused received fraudulently into his bank account, in the sum of €10,000, is also a significant amount."**

Consequently, on the basis of this analysis carried out by the First Court which is not being contested, the Court will pass on to order the forfeiture in favour of the Government of Malta, solely, of the sum of 10,000 euro or of property having a value equivalent to the said sum.

**Considers further:**

That, in his second grievance, appellant laments that the fine imposed of €20,000 is disproportionate to the crime committed and of which he was found guilty upon his own admission. He also goes on to make a comparison with various other judgments delivered by our Courts where the *quantum* of the fine imposed was less than the one imposed upon him, and this with particular reference to that delivered against his accomplice in separate proceedings where the fine imposed was less than meted out by the First Court.

That, as has been oft-decided this Court in its appellate jurisdiction, and with its powers limited as a court of revision, as a rule, will not vary the punishment meted out by the lower court unless it results that that same punishment was in some way or another "wrong in principle" or "manifestly excessive".[3]

Now, the First Court condemned appellant to two years imprisonment, which term of imprisonment was suspended for three years, in terms of article 28A of the Criminal

[3] The Republic of Malta vs v. Kandemir Meryem Nilgum and Kucuk Melek, deċiża nhar il-25 ta' Awissu 2005.

Code, together with a fine of €20,000. Appellant finds no objection with regards to the term of imprisonment imposed upon him, as suspended. The objection lies in the imposition of the €20,000 fine. The First Court gave valid reasons when exercising its discretion in deciding the nature and *quantum* of the sentence. In fact the punishment imposed was at its absolute minimum and this when taking into account various considerations made by the First Court, foremost amongst which the serious nature of the offence wherein the victim was duped into parting with her life savings, appellant's admission of guilt, although this was not forthcoming at an early stage, and his clean criminal record.

Appellant was found guilty of two offences being that of money laundering and the offence enivisaged in article 334 of the Criminal Code which by itself carries a punishment between 2 and 9 years imprisonment, in terms of article 310(a), the procceds of the crime exceeding €5000. The First Court then opted to impose the punishment of a fine with regards to the offence of money laundering since where it to impose an additional term of imprisonment, this would have exceeded the limit imposed by statute granting appellant the right to an alternative punishment to that of an effective prison term.

Now, appellant laments that the fine imposed on his co-accused Collins Eguavoen by the Court of Magistrates in its judgment of the 29th September 2021 was much less, when the said Eguavoen was accused of the same offences in identical circumstances as those appellant is presently facing.

It although a disparity in the sentence handed down to persons being co-accused even in separate proceedings of identical offences, in identical circumstances, is, in this Court's opinion, contra-indicated, however the courts upon a request on appeal on the basis of disparity must analyse whether the punishment was too severe when compared to the other offender, and must ensure that in granting a reduction it would not create a situation where there would result two lenient punishments, instead of one.

Archbold, in his book **Criminal Pleading, Evidence and Practice**, 2001 (para. 5-174, p. 571) comments thus with regards to this issue of disparity:

> "**Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: 'would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?' (per Lawton L.J. in R. v. Fawcett, 5 Cr. App.R.(S) 158 C.A.). The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see R. v. Large, 3 Cr.App.R.(S) 80, C.A.). There is some 29 authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see R.v. Stroud, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as R. v. Wood, 5 Cr.App.R.(S) 381. C.A., Fawcett, ante, and Broadbridge, ante. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in Fawcett is satisfied.**

Thus, the Court must ask whether the sentence was "the right sentence" in the circumstances and above-all whether it was within the parameters laid out by law. Now, article 3(2A)(a)(ii) of Chapter 373 of the Laws of Malta prescribes the punishment on conviction by the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), of imprisonment for a term of not less than twelve months but not exceeding nine years, or to a fine (multa) of not less than twenty thousand euro (€20,000) but not exceeding two hundred and fifty thousand euro (€250,000), or to both such fine and imprisonment. Therefore, it is clear that the fine imposed by the First Court was at its absolute minimum, and consequently appellant's request for a further reduction cannot be entertained as this would be contrary to law. For this reason, this second grievance is also being rejected.

**Consequently, for the above-mentioned reasons, the Court accedes partly to the appeal filed by appellant Oliver Chamberline Chibuike and thus reforms the appealed judgment by –**

**(i) Confirming it in the part where it found appellant, upon his own admission, guilty of all the charges brought against him; and**

**(ii) Confirming it in the part where it sentenced appellant to two (2) years imprisonment, which sentence however, upon application of article 28A of the Criminal Code, Chapter 9 of the Laws of Malta, will not take effect unless, during a period of three (3) years, appellant commits another offence punishable with imprisonment; and**

**(iii) Confirming it in the part where it condemned appellant to a fine (multa) of twenty thousand Euro (€20,000), which upon application of Article 14 of the Criminal Code, Chapter 9 of the Laws of Malta, shall be paid within a term not exceeding two (2) years; and**

**(iv) Confirming it in the part where the First Court chose not to apply the provisions of Article 23B of the Criminal Code and Article 3(5)(a) of the Money Laundering Act, and consequently it did not order the forfeiture in favour of the Government of the proceeds or of such property the value of which corresponds to the value of such proceeds of the crime unlawfully received by the offender, in view of the fact that the victim has been compensated; and**

**(v) Confirming it in the part where it ordered appellant to pay the Registrar of Court the sum of €540 representing one third of the sum paid in connection with the employment of Keith Cutajar as court expert in these proceedings, within six months; and**

**(vi) <u>Revoking</u> it in the part where, 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, the First Court ordered the forfeiture in favour of the Government of the amount of <u>all</u> monies or other movable property, and of the entire immovable property of Oliver Chamberline Chibuike 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 <u>and instead, after having seen article 38(7) of Chapter 621 of the Laws of Malta as</u>**

**amended by Act VI of 2024, orders the forfeiture in favour of the Government of Malta of the sum of ten thousand Euro which constitute the proceeds of the said offence, in the form of monies or other movable property and such immovable property of the appellant Oliver Chamberline Chibuike even if the movable or immovable property has since the appellant was charged 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.**

**The Court explained to appellant the consequences according to law should he commit another crime during the operational period of his sentence, and this in terms of Article 28A of Chapter 9 of the Laws of Malta.**

**Edwina Grima**
**Judge**