



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
JOSEPH GALEA DEBONO**

Sitting of the 12 th February, 2009

Criminal Appeal Number. 265/2008

**The Police
(Insp. Angelo Gafa')**

Vs

Andrei Dragos Opincaru

The Court,

Having seen the charges brought against the appellant Andrei Dragos Opincaru before the Court of Magistrates (Malta) as a Court of Criminal Judicature for

A. having in these Islands, in various parts of Malta and outside Malta, on the 1st of September, 2008 and preceding days, by means of several acts, even if at different times, that constituted violations of the same provision of the law, and committed in pursuance of the same design:

1. made part or belonged to an organisation of two or more persons with a view to commit criminal offences liable to the punishment of

imprisonment for a term of four years or more referred to in Subarticle (1) of Article 83A of Chapter 9 of the Laws of Malta; 2.

conspired with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the

punishment of imprisonment, not being a crime in Malta under the Press Act;

B. for having also in these Islands, on the 1st of September, 2008 and preceding days, by means of several acts, even if at different times, that constituted violations of the same provision of the law, and committed in pursuance of the same design :

1. by means of an unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made gain in excess of two thousand, three hundred, twenty nine Euros and thirty seven cents (€ 2329.37) to the prejudice of Bank of Valletta plc and APS Bank;

2. knowingly made use of any false acts, writings, instruments or documents mentioned in Article 183 of Chapter 9 of the Laws of Malta;

3. committed any other kind of forgery, or knowingly made use of any other forged document; and

4. used another person's access code, password, user name, electronic mail address or other means of access or identification information in a computer.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 3rd September, 2008, by which, after that Court had seen articles 18, 83A(2)(4)(5, 48A, 184, 308, 309, 310(1)(a), 337C(1)(i) of Chapter 9 of the Laws of Malta, found appellant guilty as charged and after having seen

the clean conduct sheet, this being the appellant's first offence, and having heard that he cooperated with the police in their investigations and that all the monies had been recovered and considering also the gravity of the offence, condemned appellant to a prison term of fifteen months.

The Court also ordered the forfeiture of Doks AG6, AG7, AG9 of which only €453.00 are to be forfeited and the rest were to be returned to the appellant, AG10, AG11, and ordered that Doks AG12 (clothes), AG13 (2 genuine cards pertaining to accused) and AG8 (3CD's) be returned to the appellant.

The Court ordered that a copy of this judgement together with the records of this case be sent to the Attorney General in terms of law.

Having seen the application of appeal filed by appellant on the 16th September, 2008, wherein he requested this Court to uphold this appeal and vary the judgement appealed from by :

1. confirming it in the part where the Court of Magistrates found the appellant guilty as charged; and
2. reforming it in the part where the Court of Magistrates condemned the appellant to a prison term of fifteen (15) months, substituting such punishment with a more appropriate one considering the particular circumstances of this case.

Having seen the records of the case.

Having seen that the appellant's grounds of appeal are limited to the punishment to which he was sentenced by the first Court which, when having regard to the particular circumstances of the case, appellant considers to have been excessively harsh. They may be summarised as follows:- 1.The appellant is a first time offender both in Malta and abroad in Romania. 2. He collaborated with the Police in the most absolute manner and showed remorse. Although he was apprehended red-handed, his voluntary collaboration and co-operation with the Police facilitated the investigations considerably. 3. He gave a comprehensive statement to the Police recounting all the

information he knew. 4. He filed an early guilty plea. 5. He was more an instrument of crime than “*part of an international ring of criminals*”. 6. All the *res furtiva* was returned to its rightful owners. Although the first Court stated that it took these factors into consideration, it still sentenced him to a term of imprisonment of fifteen months, when people convicted of similar crimes have been given countless suspended jail sentences. He therefore requested that the effective term of imprisonment be likewise substituted by a suspended sentence.

Having heard and considered the submissions of learned Counsel;

Having seen the notes of appellant dated 17th December, 2008 and the documents attached thereto.

Having seen the note of the Attorney General of the 7th January 2009 and the documents attached thereto.

Duly considers;

That this appeal is limited to the punishment meted out by the First Court. It has been constantly held by our Courts that this Appeals Court, as a court of review, does not normally disturb the discretion of the First Court in awarding punishment unless the punishment meted out exceeds the parameters of the law or appears to be manifestly excessive (vide : “**Ir-Repubblika ta’ Malta vs. David Vella**” [14.6.1999], “**Ir-Repubblika ta’ Malta vs. Eleno sive Lino Bezzina**” [24.4.2003] and countless other judgements.)

There is no question that the punishment inflicted does not exceed the maximum that is laid down by law for the concurrent offences to which he pleaded guilty. Indeed it is much closer to the minimum punishment in Article 83A (2) and is probably even lower than the minimum having regard to the other concurrent offences to which appellant pleaded guilty, when one applies the rules of

punishments for concurrent offences under section 17 (b) of the Criminal Code.

Now from an examination of the judgement of the first Court, it is clear that that court, in awarding judgement, considered his : *“clean conduct sheet, this being the accused’s first offence, and heard that he co-operated with the Police in their investigations and that all the monies have been recovered “* but, in view of *“the gravity of the offence”* , sentenced him to a prison term as aforesaid. Therefore, as appellant duly conceded in his application, these factors were already taken into account in the judgement being appealed from.

Appellant also invokes in mitigation of punishment the fact that he filed an early plea of guilt. Now this Court considered both local and foreign case law regarding the plea in mitigation of punishment when the accused person files an early plea of guilt and in particular **“Ir-Repubblika ta’ Malta vs. Nicholas Azzopardi”** [24.2.1997] (Criminal Court); **“Ir-Repubblika ta’ Malta vs. Mario Camilleri”** [5.7.2002] (Court of Criminal Appeal); **“Il-Pulizija vs. Emmanuel Testa”** [17.7.2002] (Court of Criminal Appeal) and others) In these cases it was stressed that the filing of an early guilty plea does not automatically and invariably always guarantee the accused a lighter sentence. Reference was made to **BLACKSTONE’S CRIMINAL PRACTICE** (Blackstone Press Limited 2001 edit); wherein it is stated that:-

“Where an offender has been caught red handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris [1998] 10 Cr. App. R. (S) 216; Landy [1995] 16 Cr. App. R. (S) 908)”;

This being a case where appellant was in fact caught red-handed, and photographed by CCTV or security cameras at the time of the commission of the offences, he could hardly not have co-operated with his investigators and not filed an early plea of guilt. And apart from the fact that the punishment inflicted was very much on the moderate side in this case, this factor should not be a determining one in

absolving him from the sanctions of the criminal laws of this country.

Regrettably, in recent years it has become an increasing practice for non-Maltese nationals to abuse of the hospitality granted to them by the citizens of these Islands to indulge in their nefarious activities, at times on an organized scale and in conspiracies with other criminals in Malta and outside Malta and the Courts have a duty to curb these ever increasing practices by meting out effective but just punishments.

As to appellant's submission that his sentence to a term of imprisonment should be a suspended one, this Court is of the view that even if such a provision were possible, in cases of serious offences like those under review in this case, without in any way wanting to discriminate against foreign offenders, the granting of a benefit of a suspended sentence to a non-resident offender is not always and in all cases the best way to ensure compliance with the law of the land.

First of all, although it results that in this case appellant also has a clean criminal record in his home country, most non residents falling foul of the criminal laws are likely to claim that they are first-time offenders in Malta because they would not have been on the Islands for a long enough time to have been caught, prosecuted and sentenced for other offences, and if suspended sentences were awarded automatically merely on this score, it would be tantamount to granting instant immunity to all those foreign offenders found guilty of crimes falling within the applicable parameters of section 28A of the Criminal Code.

Secondly, the aim of a suspended sentence is to ensure that a particular offender is placed under the proverbial "sword of Damocles" to ensure that he does not relapse, at least during the operative period of a suspended sentence. In other words, during this period, the offender knows that he is being indirectly monitored and, with this knowledge, he might be more inclined to repent and

reform, whereas with non resident offenders, who are likely to spirit themselves away from these Islands as soon as they have been awarded such a suspended sentence, there can be no monitoring whatsoever by the State organs to ensure that they become reformed and better citizens in the fresh pastures they may decide to venture to. As such, the Courts have to be very perspicacious when applying this measure with non residents as very often it can be interpreted as a “*mere slap on the back*” of the offender who will be all too pleased to have been let off so lightly by Maltese justice. Certainly the reformatory purpose of such measure is very doubtful and the deterrent effect of such sentencing would be minimal in such cases and might be even very counter-productive in the long run, especially where internationally organized crime is concerned, as results to be the case here from appellant’s statement to the Police (pages 7 to 11 of the records of the case).

Having therefore considered all these factors, this Court finds no valid and cogent reason for disturbing the First Court’s discretion in the awarding of the punishment it meted out to the appellant.

For the above reasons, the Court rejects the appeal and confirms the judgment of the first Court.

< Final Judgement >

-----END-----