



## **COURT OF CRIMINAL APPEAL**

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

Sitting of the 12<sup>th</sup> February, 2009

Criminal Appeal Number. 309/2008

**The Police  
(Insp. Ian J. Abdilla)**

**Vs**

**Murman Tsiteladze**

The Court,

Having seen the charges brought against the defendant Murman Tsiteladze before the Court of Magistrates (Malta) as a Court of Criminal Judicature :

1. on behalf of the Comptroller of Customs, with having, on the 24<sup>th</sup> January, 2008, following a search effected by Customs and Police Officials on board vessel Sacro Cuor 1, at the Malta Freeport, with the intent to defraud or to evade any prohibition or restriction of Customs or under other Laws, was knowingly found to have been or was in otherwise concerned, in any

fraudulent evasion or attempt of evasion of any Duties/Taxes due, when found in possession of the following goods:

- a) 781 cartons x 200 cigarettes each carton of L & M Brand
- b) 70 cartons x 200 cigarettes each carton of Lucky Strike Brand
- c) 19 bottles x 75cl each bottle of Smirnoff Vodka Brand

The Value, Excise Duty, Import Duty and VAT of the cigarettes and spirits mentioned above are, as shown hereunder:

	<b>Value (€)</b>	<b>Excise Duty (€)</b>	<b>Import Duty (€)</b>	<b>Value Added Tax</b>
a	3,826.90	15,754.33	2,2204.29	3,921.40
b	350.00	1497.30	201.60	368.80
c	65.55	131.10	Nil	35.40
<b>Total</b>	<b>4,242.45</b>	<b>17,382.73</b>	<b>2,405.89</b>	<b>4,325.60</b>

Of which the Excise Duty, Import Duty and VAT were not paid or secured.

2. Furthermore, on behalf of the Commissioner of Value Added Tax, with having on the 24<sup>th</sup> January, 2008, following a search effected by Customs and Police Officials on board vessel Sacro Cuor 1, at the Malta Freeport, with the intent to defraud or to evade any prohibition or restriction of Customs or under other Laws, was knowingly found to have been or was in otherwise concerned, in any fraudulent evasion or attempt of evasion of any Duties/Taxes dues, when found in possession of the following goods :

- a) 781 cartons x 200 cigarettes each carton of L & M Brand;
- b) 70 cartons x 200 cigarettes each carton of Lucky Strike Brand;
- c) 19 bottles x 75cl each bottle of Smirnoff Vodka Brand.

The Value, Excise Duty, Import Duty and VAT of the cigarettes and spirits mentioned above are, as shown hereunder:

	<b>Value (€)</b>	<b>Excise Duty (€)</b>	<b>Import Duty (€)</b>	<b>Value Added Tax</b>
a	3,826.90	15,754.33	2,2204.29	3,921.40
b	350.00	1497.30	201.60	368.80
c	65.55	131.10	Nil	35.40
<b>Total</b>	<b>4,242.45</b>	<b>17,382.73</b>	<b>2,405.89</b>	<b>4,325.60</b>

Of which Value Added Tax was not paid or secured.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 21<sup>st</sup> October, 2008, by which, after that Court had seen articles 62(f)(g)(h)(i) and paragraph (a) of the proviso to Article 62 of Chapter 37, Article 16(1)(j) of Chapter 382, and Article 80 of Act XXII/1998, Article 17 (f) of Chapter 9, condemned defendant to one month's imprisonment for which term there shall be deducted the period that defendant had spent in preventive custody in relation to this case and to an aggregate fine of € 19, 083, of which the sum of € 1,203 are deemed as a civil debt owed and payable to the Department of Customs after having considered that the punishment for the highest fine is that referring to the tax due under Act XXIII/1998 that carries a fine of € 12,975. The fines with reference to customs duty and excise duty are € 3,608 and € 2,500 respectively and are leviable as to one-half each as per article 17(f) of Chapter 9.

After having seen Article 60 (h)(k) of Chapter 37, ordered that the goods seized relating to the cigarettes and spirits be confiscated in the hands of the Comptroller of Customs.

The Court purposely abstained from ordering the confiscation of the vessel and the bunkering oil on account of pending civil proceedings that result to have been instituted prior to these proceedings.

Having seen the application of appeal filed by appellant Attorney General on the 31<sup>st</sup> October, 2008, wherein he requested this Court :

- a) to reform the judgement in the sense that it confirms the part whereby the accused was found guilty of all the charges brought against him and sentenced to one month's imprisonment from which term there shall be deducted the period that accused spent in preventive custody in relation to this case, and
- b) to revoke the part of the judgement concerning the further punishment awarded by the Court and the Court's abstention from ordering the forfeiture of the vessel and the bunkering oil, and
- c) instead proceed to inflict a fresh pecuniary punishment as outlined in the application of appeal or alternatively, any other pecuniary punishment as the Honourable Court deems fit according to Law, and
- d) to order the forfeiture of the vessels and goods (gas oil) or, alternatively, the forfeiture of the bank guarantee in the amount of €405,293 representing and substituting the vessel and the gas oil according to Law.

Having seen the records of the case.

Having heard Counsels' submissions during the hearing of the 27<sup>th</sup> November, 2008.

Now therefore duly considers.

That the grounds of appeal of appellant, the Attorney General, can be briefly summarised as follows:- That the judgement of the first court contained a miscalculation of the fine (multa) and of the civil debt according to The Customs Ordinance (Chapter 37) and those according to the Value Added Tax Act (Chapter 406). That the fine awarded according to The Excise Duty Act (Chapter 382) was disproportionate. That therefore the aggregate fine (multa) should have been that of E71,677.70 composed of E59,365.86 due under the Customs Ordinance, E6,488.40 due under the Value Added Tax Act and E5823.44 under the Excise Duty Act and the application of the Criminal Code. Furthermore, the aggregate Civil Debt owed totals E24,114.22 comprising E19,788.62 due under the Customs Ordinance, to the Customs Department and E4,325 due under the Value added Tax Act to the

Commissioner . Without prejudice, to the above grounds of appeal, the first court should have also ordered the forfeiture of the vessel and the bunkering oil, irrespective of any pending civil proceedings, and this on the basis of article 68 (1) and (6) of the Customs Ordinance.

Having considered that in the course of the oral pleadings before this Court, learned counsel for the defendant declared that he agreed with the Attorney General's fourth ground for appeal, namely that regarding the forfeiture of the vessel and bunkering oil in question.

In view of this declaration and in view of the fact that appellant's fourth grievance on this score appears to be well founded in law and the fact that the reason given by the First Court in not ordering the forfeiture of the vessel and bunkering, namely the fact that there might be pending civil proceedings, does not appear to be well founded in law, this Court upholds this ground of appeal and needs not motivate its decision further.

With regards to the calculations of the fines and the civil debts due to the Comptroller of Customs and the VAT Commissioner, this Court notes that :-

According to article 62 (n) of the Customs Ordinance any person contravening said Ordinance shall be liable to a fine (multa) for each offence equivalent to three times the amount of duty payable on the goods or five hundred and eighty-two Euro and thirty four cents (E582.34c) whichever is the greater. One third of this amount shall be deemed to be a civil debt owed and payable to the Customs Department.

It was therefore imperative that in determining the appropriate fine the First Court should have firstly determined the amount of duty payable on the goods in question. The duty in question includes both the import duty and any excise duty in this particular case as laid down in Article 2 of Chapter 37. The total import duty in this case was E2,405.89 and the total Excise Duty was E17,382.73c. with a cumulative total of E19,788.62c.

Three times this cumulative amount is E59,365.86c and one third thereof, namely E19,788.62, shall therefore be deemed as a civil debt owed to the Customs Department. This calculation of the relative fine (multa) and civil debt should therefore have been the basis of the first court's judgement. Hence the Attorney General's grievance on this score should be upheld.

With regards to the fine and civil debt owed to the Commissioner of Value Added Tax, the correct calculation should have read as follows :-

The Value added Tax due on the items in question was E4,325.60c. When this amount is then multiplied by three times according to article 80 (1) of the Value Added Tax Act, the amount of the fine (multa) payable will be E12,976.80c and the one third (1/3) of this amount due as a civil debt will obviously be E4,325.60c. As this fine is greater than the amount of E345 mentioned in article 80 (1), it is the fine to be awarded in this case. However in line with what is laid down in section 17 (f) of the Criminal Code, only one half of this latter fine can be awarded, in addition to the higher fine above mentioned for the other concurrent offence under the Customs Ordinance. Hence the fine should in this case of VAT evasion be E6488.40c.

This Court however disagrees with the calculation of the Attorney General in so far as it states that in this case the civil debt should be E4,325.60c. This amount should not be calculated on the full fine but only on the fine as reduced after the application of article 17 (f) of the Criminal Code, i.e. 1/3 of E6,488.40 , namely **E2,162.80c.**

With regard to the third ground of appeal namely that the fine awarded for breach of the Excise Duty Act was disproportionate, this Court has repeatedly pronounced itself that, as a court of review, it is normally reluctant to disturb and vary the discretion of the first court, when the punishment allows for such discretion, so long as it falls within the parameters of the law and unless it appears that it is 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 others). In principle, this Court feels that the same should apply when an appeal is filed by the prosecution because it deems the punishment inflicted by the first court to be too lenient.

In this case, according to Article 16 (1) (j) of the Excise Duty Act, there is no minimum fine laid down by law and only a maximum not exceeding E11,646.87c. Hence, when the First Court awarded a fine (multa) of E2,500, it was fully within its rights to do so, especially in view of the rather heavy fines which are to be awarded in respect of the breaches of the Customs Ordinance and the Value Added Tax Act and the forfeiture of the vessel and bunkering oil in this case.

The Attorney General is submitting that in this case the Excise Duty due was very high and the fine awarded was not proportionate to the excise duty and it did not reflect the seriousness and gravity of the case and he therefore requested this court to increase said fine from E2,500 to E5823.44c., being the one half of the maximum fine awardable i.e. E11,646.87c, upon the application of article 17 (f) of the Criminal Code above quoted.

This Court however finds no compelling reason for doing this and this ground of appeal is being turned down.

That therefore the total fine (multa) in this case should be :-

Fine under the Customs Ordinance.....	E59,365.86c
Fine under the Value Added Tax Act .....	E 6,488.40c
Fine under the Excise Duty Act .....	<u>E 2,500.00c.</u>
With a total comprehensive fine of .....	<u>E68,354.25c</u>

The parts of these fines recoverable as a civil debt by the Customs Department and the VAT Department respectively as aforesaid should be :-

Civil Debt due to the Customs Department  
.....E19,788.62c  
Civil Debt due to the Commissioner of Value  
Added Tax .E 2,162.80c

Now therefore, for the above reasons, this Court upholds the appeal of the Attorney General in part and varies the judgement of the first court by :-

Confirming it in so far as it found the defendant guilty of all the charges brought against him and sentenced him to one month's imprisonment, from which there shall be deducted the period that defendant had spent in preventive custody in relation to this case or any period in execution of the judgement of the First Court and in so far as it condemned defendant to pay a fine (multa) of two thousand five hundred Euros (E2,500) for the breaching of the Excise Duty Act;

Revoking it in so far as it concerns the further punishment and the first's court abstention from ordering the forfeiture of the vessel and the bunkering oil and instead orders the forfeiture of the vessel and the goods (gas oil) or, alternatively the forfeiture of the bank guarantee in the amount of E405,293 representing and substituting said vessel and the gas oil according to law and furthermore condemns the defendant to pay an aggregate fine of sixty five thousand eight hundred and fifty four Euros and twenty six Euro cents (E65,854.26c) in addition to the fine of E2,500 above mentioned, of which the amount of E19,788.62c shall be deemed to be a civil debt due to the Comptroller of Customs and the amount of E2,162.80c shall be deemed to be a civil debt due to the Commissioner of Value Added Tax.

If said fines, other than the parts thereof recoverable as civil debts, are not paid to the Registrar of Courts



Informal Copy of Judgement

forthwith, they shall be converted into a further term of imprisonment according to law.

**< Final Judgement >**

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