



COURT OF CRIMINAL APPEAL

**HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO**

Sitting of the 9th June, 2009

Criminal Appeal Number. 1/2009

The Police

v.

**David Abekunle¹ and
John Austen²**

The Court:

1. This is an appeal filed by David Abekunle and John Austen from a judgment delivered by the Court of Magistrates (Malta) on the 29th December 2008. The said Abekunle and Austen were arraigned in court on that same day charged with having, on the 28th December 2008 and in the months prior to that date, in Malta, (1) made or caused to be made a false return, false statement or false representation, and/or furnished the Principal Immigration Officer with false information in

¹ Son of David and Esther, born in Nigeria in Delta States, on the 1/01/1981, formerly residing at the Hal-Far Open Centre, and holder of police number 06K-003.

² Son of Austen and Janet, born in Liberia, Moriva, on the 15/08/1990.

violation of Article 32(1)(c) of the Immigration Act, Cap. 217, and (2) under the same circumstances, committed any other kind of forgery, or knowingly made use of any other forged document, in violation of Article 189 of the Criminal Code, Cap. 9.

2. Both Abekunle and Austen pleaded guilty to these charges and were sentenced to one year imprisonment each. They gave notice of appeal, and the application of appeal was filed on the 9th January 2009. Their grievance is in the sense that they consider that the punishment inflicted upon them was excessive. Their learned counsel, Dr Giannella Caruana Curran, who was appointed by this Court on the 29th May 2009 to assist them, made reference to relatively similar cases where the punishment of imprisonment was suspended in terms of Article 28A of the Criminal Code³.

3. From the evidence, including appellants' statements made to the Police, it transpires that appellant Abukunle has been in Malta since 2006, when he arrived here as an irregular immigrant by boat from Libya. After spending some time in detention according to immigration procedures he was transferred to the Hal Far Open Centre. His claim for asylum has been rejected by the Commissioner for Refugees. Appellant Austen, on the other hand, appears to have entered Malta surreptitiously some time around the 15th of September 2008 together with four other persons – at least this is what he told the police. The Immigration Police have no record of this arrival. Both Abukunle and Austen were apprehended at the airport on the 28th December 2008 (that is a day prior to their arraignment in court) when they attempted to leave Malta bound for Milan using forged Spanish identity cards (exhibited at fol. 6 and 7 of the record of the proceedings). Both claim that they “found” these documents in the street in Paceville. They were on their way to Italy using tickets purchased in the names shown on the forged documents, that is Blessing Enadeghe and

³ **Il-Pulizija v. Ahmed Mohamed Shih Ahmed**, 22/12/2008 – six months imprisonment suspended for three years; **The Police v. Imuru Bawa Ridwan and others**, 25/03/2009 – two years imprisonment suspended for four years; and **The Police v. Keshavarz Majid and others**, 30/03/2009 – six months imprisonment suspended for two years – all judgments of the Court of Magistrates (Malta).

Roland Erabou, both ostensibly residing in Madrid. The maximum punishment for the offence contemplated in Article 32(1)(c) of Cap. 217 is two years imprisonment, whereas the maximum punishment for the offence contemplated in Article 189 of the Criminal Code is of imprisonment for one year.

4. This Court must make it absolutely clear at the outset that it considers border security to be a very important and a very serious matter, and that any attempt to bypass, breach or otherwise circumvent such security by means which are illegal must consequently be regarded as a very serious offence. It is true that, as learned counsel for the appellants has ably shown, the Inferior Courts have, on a number of occasions, dealt with relatively similar cases with a suspended prison sentence. This Court, however, is of the view that such sentences cannot possibly serve as an effective deterrent against attempts to gain access to Malta and/or to the European Union illegally. This Court is of the view that, as a general rule, such cases should be met with a prison sentence with immediate effect, and that, always as a general rule, anything short of an immediate prison sentence amounts to taking a very myopic view of the whole issue of border security. The Inferior Courts should resist the temptation to deal lightly with such cases simply because the accused pleads guilty upon arraignment – as seems to have been the case in at least two of the three cases referred to by learned counsel for the appellants.

5. In the instant case, appellants were in Malta without proper documents and they attempted to compound their “irregular” position by using forged Spanish identity cards to obtain entry into Italy. In the circumstances the court of first instance was perfectly justified in imposing a prison sentence of one year with immediate effect.

6. For these reasons, this Court dismisses the appeal and confirms the judgment of the first court.

Informal Copy of Judgement

< Final Judgement >

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