



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 24 th November, 2010

Criminal Appeal Number. 371/2010

The Police

v.

**... omissis ...
... omissis ...
Edgars Kervis
Eriks Zakis
... omissis ...**

The Court,

Having seen the charges brought against Edgars Kervis and Eriks Zakis before the Court of Magistrates (Malta) as a Court of Criminal Inquiry with having:

A. On these Islands, on the 1st August 2010 and in the preceding days and weeks, in various parts of Malta and outside Malta, by means of several acts committed by the

accused, even if at different times, which acts constitute violations of the same provisions of the law:

(1) promoted, constituted, organized or financed an organization 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 (which offences include fraud and other crimes); and

(2) made part of or belonged to an organisation referred to in subsection (1) of article 83A of Chapter 9 of the Laws of Malta;

B. Furthermore, on these Islands, on the 1st August 2010 and in the preceding days and weeks, in Malta, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law:

(3) by means of any 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 a gain of more than two hundred and thirty two euros and ninety four cents (€232.94) but less than two thousand, three hundred and twenty nine euros and thirty seven cents (€2,329.37) to the detriment of HSBC Bank Malta plc. and Bank of Valletta Limited; and

(4) by means of any 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 a gain of more than two thousand, three hundred and twenty nine euros and thirty seven cents (€2,329.37) to the detriment of Air Malta Company Limited;

C. Furthermore, on these Islands, on the 1st August 2010 and in the preceding days and weeks, in Malta, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law;

(5) knowingly made use of any of the false acts, writings, instruments or documents mentioned in article 184 of Chapter 9 of the Laws of Malta; and

(6) committed any other kind of forgery, or knowingly made use of any other forged document.

The Court was asked to apply *mutatis mutandis* the provisions of article 5 of the Money Laundering Act, Chapter 373 of the Laws of Malta, as per article 23A(2) of Chapter 9 of the Laws of Malta.

The Court was also requested that in case of a finding of guilt, apart from inflicting the punishment prescribed by law, it orders the forfeiture of all the objects exhibited in these proceedings.

The Court was also requested that, in pronouncing judgement or in any subsequent order, it orders the person/s convicted, jointly or severally, to the payment, wholly or in part, to the Registrar, of the costs incurred in connection with the appointment of experts, within such period and in such amount as shall be determined in the judgement or order, as per article 533 of Chapter 9 of the Laws of Malta;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 3rd August 2010 whereby that Court, having seen articles 18, 83A(1)(2)(4), 308, 309, 310, 184 and 189 of Chapter 9 of the Law of Malta, declared the said Edgars Kervis and Eriks Zakis guilty of the charges brought against them and condemned them to three (3) years imprisonment;

Having seen the appeal application filed on the 13th August 2010 by Edgars Kervis and Eriks Zakis wherein they requested that this Court annul and reverse the said judgement or, alternatively, vary the same by awarding a lesser punishment;

Having seen the record of the proceedings;

Having heard oral submissions by the parties;

Having considered:

Appellants have two grievances which will be dealt with *seriatim*.

According to their first grievance, the judgement delivered by the first Court is null because it found guilt “way beyond” appellants’ guilty plea. They explain that prior to their guilty plea, the prosecuting officer declared that the first two charges were alternative charges and that applicants had only committed the latter and less serious charge; and likewise that even the fifth and sixth charges were alternative charges. Notwithstanding such declaration, the first Court made no reference to such declaration and went on to find appellants guilty of all charges. According to appellants, this renders the judgement null.

Now, article 382 of the Criminal Code states: **“The court, in delivering judgement against the accused, shall state the facts of which he has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence.”**

From a reading of the judgement it is clear that the first Court abided by all these conditions, that is to say (1) it stated the facts of which appellants were found guilty – namely all charges brought against them; (2) it awarded punishment; and (3) it quoted the articles of law creating the offences in respect of which appellants were found guilty. Where this Court has annulled judgements is where any of these were lacking. See, viz., **II-Pulizija v.**

Emanuel Mercieca decided on the 7th February 2006 where the Court of Magistrates did not declare whether it was finding guilt or otherwise in respect of one of the charges. And in **Il-Pulizija v. Raymond Mula** decided on the 13th February 2006, where the Court of Magistrates did not quote all the articles of law creating the offences in respect of which the accused was declared guilty. Consequently, since in this case the first Court observed article 382 of the Criminal Code, appellants' first grievance is dismissed. The fact that certain charges were to be considered as alternative charges and, notwithstanding this, the first Court also found appellants guilty of such charges, is a matter to be considered in determining which charges the first Court should have found appellants guilty of and therefore what the appropriate punishment should have been.

Appellants' second grievance refers to the punishment meted out and which they consider to be excessive. They say that the fact that an effective prison sentence has been given addresses the seriousness of the offences committed. However, they submit, first time offenders are not usually granted an effective prison sentence. Moreover, the first Court failed to take into consideration paragraphs (b) and (h) of article 17 of the Criminal Code and the principle of formal concurrence of offences. Furthermore, appellants cooperated unconditionally with the Police, they pleaded guilty at the first possible moment, the amount involved was a small one, they are of a young age and much lesser punishments have been awarded by other Courts in similar yet more serious cases.

This Court has to point out at the outset that there has been no contestation on the part of the prosecution that certain charges brought against appellants were in fact alternative charges. Rather this was confirmed by both counsel for the defence and counsel for the prosecution during the sitting held on the 27th October 2010. In its judgement the first Court clearly found appellants guilty of all the charges brought against them and in fact quoted the articles of law relevant to each and every charge.

Therefore, on this point alone, there has to be a reduction in punishment to reflect a finding of guilt in respect of four and not six charges.

This Court has reviewed the evidence available so as to determine in respect of which alternative charges appellants should have been found guilty. From the statements made by appellants to the Police it results that appellants formed part of an organisation aimed at making use of false credit cards and that they were in Malta specifically for the purpose of making use of such false credit cards. Consequently, in view of the fact that the first and second charges are alternative charges, they should have been found guilty of the second charge only (breach of article 83A(2) of Chapter 9). Furthermore, as the documents they had in their possession were bank credit cards, and the fifth and sixth charges are alternative charges, they should have been found guilty of the fifth charge (breach of article 184 of Chapter 9 with reference to article 183).

Appellants also pointed out that the first Court did not apply paragraphs (b) and (h) of article 17 of Chapter 9. Here too appellants are right insofar as paragraph (h) is concerned. This paragraph provides that **“when several offences, which taken together do not constitute an aggravated crime, are designed for the commission of another offence, whether aggravated or simple, the punishment for the graver offence shall be applied.”** The offences contemplated in the second and fifth charges were designed to commit the offences contemplated in the third and fourth charges. Moreover, the prosecution charged appellants with having committed a continuous offence even in respect of the third and fourth charges which relate to breaches of article 308¹ of the Criminal Code. Consequently, the punishment that is to be applied by this Court is that contemplated in article 310(1)(a), i.e. the higher punishment applicable for the offence contemplated in article 308 and which may be

¹ Obtaining money or property by false pretences.

increased by one or two degrees in terms of said article 18.

While considering the seriousness of the offences, this court must also keep in mind that appellants admitted to the charges at the earliest possible opportunity, that is to say on the same day they were charged before the Magistrates' Court and, in the instant case are entitled to what has been termed a "discount"². Moreover, although admitting to the charges as formulated, they did not personally benefit from the full amounts mentioned in the charges. Furthermore both appellants are young first time offenders with clean conduct records. Nonetheless, in view of the nature of the offences committed by them, an effective prison term is deemed essential.

For these reasons:

This Court varies the judgement delivered by the first Court insofar as appellants Edgars Kervis and Eriks Zakis are concerned, revokes it insofar as it condemned them to a period of three years imprisonment and condemns them to a period of thirteen months imprisonment, while confirming the rest of the appealed judgement.

< Final Judgement >

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² See Blackstone's Criminal Practice, 2001, para. E1.18, p.1789 as quoted in Criminal Appeal **Ir-Repubblika ta' Malta v. Brian Godfrey Bartolo** decided on the 14th November 2002.