MALTA

CRIMINAL COURT

THE HON. MR. JUSTICE
MICHAEL MALLIA

Sitting of the 24 th October, 2012

Number 16/2009

THE REPUBLIC OF MALTA

Versus

Morgan Ehi Egbomon

The Court,

Having seen the bill of indictment no. 16/2009 against the accused Morgan Ehi Egbomon wherein he was charged with:

1) After the Attorney General premised in the First Count of the Bill of Indictment that on the night between the sixth (6th) and seventh (7th) June of the year two thousand and seven (2007) the Police (Economic Crimes Unit) was informed by the Malta Customs Officers at the Malta International Airport that during inspections that were being carried out at the departures lounge, they discovered that MORGAN EHI EGBOMON (henceforth

referred to as “EGBOMON”) who was about to board Air Malta flight number KM784 to Istanbul in Turkey was carrying a huge amount of money in different currencies, which money was not declared to the competent authorities in terms of Law. Furthermore EGBOMON was carrying a number of objects that were deemed to be suspicious to the Investigating Authorities.

The total amounts of money that were found in the possession of EGBOMON were as follows :

a. thirty eight thousand two hundred and sixty Euro (€38,260)
b. four thousand five hundred Hungarian Forint (HU4,500)
c. twenty thousand French Francs (FrF20,000)
d. one hundred and forty five thousand and three United States Dollars (US$145,003).

Furthermore, EGBOMON was also carrying on his person:
a. four mobile phones - two Nokia, one Samsung, and one Motorla;
b. fourteen SIM cards;
c. two passports – a Nigerian Passport and a Hungarian Passport;
d. one Spanish Card; one Hungarian Card; a Dutch Driving licence.

The Police tried to establish, among other things, whether EGBOMON was in a position to give a reasonable explanation showing that the money, property or proceeds that he was carrying were derived from Lawful origins and sources. The reason behind this is that if the person questioned gives **no** reasonable explanation showing that such money, property or proceeds **were not** money, property or proceeds derived from a criminal activity, then **the burden of proof showing the lawful origin** of such money, property or proceeds **lies with the person being questioned**.

The Police questioned EGBOMON about the reasons for his visit to Malta and also about the origin of and the scope behind his carrying such a huge amount of currency out of this country.

During this questioning EGBOMON explained that he was a trader in Hungary, where he sold clothes.

EGBOMON came to Malta three times during the year 2007 :
(a) on the 8th February 2007 he was in Malta and boarded Air Malta flight KM784 to Istanbul;
(b) on the 4th May 2007 he was in Malta and then flew on board Air Malta flight KM742 to Athens;
(c) and finally on the 7th of June 2007 he was in Malta and was due to board on flight KM784 to Istanbul – however he was apprehended before leaving the Islands.

EGBOMON stated that in this last visit to Malta he arrived in Malta from Hungary, though he transited in England. His flight left from Heathrow airport.

During his stay in Malta, EGBOMON resided at the Hotel Bernard in St. Julians between the 2nd and the 6th June 2007 and declared with the Hotel administration that his name was Peter Morgan and that he was from the United Kingdom. EGBOMON was billed accordingly, in the above name supplied by him (Peter Morgan) and paid two hundred and nineteen Euro seven cents (€219.07).

EGBOMON acknowledged with the Customs and Police authorities that he was carrying the huge amount of money that was seized from his person. EGBOMON said also that this money was obtained **in cash** from his uncle, a certain Joseph Enorouwa, around one month before he came to Malta. EGBOMON stated that the said Joseph Enorouwa lived in Nigeria and travelled to Europe very often, however Joseph Enorouwa had never been in Malta. According to EGBOMON, Joseph Enorouwa told him that he wanted to buy an aparthotel in Malta together with an Italian person by the name of Giuseppe. However no other further concrete details relating to the persons or

transactions to be carried out were supplied. The pieces of information tendered by EGBOMON were as follows : -

He stated also that he did not know where this aparthotel was. EGBOMON said that he phoned his uncle in order for his uncle to give him the details of the hotel and to tell his Italian friend to contact EGBOMON upon the Italian's arrival in Malta. However, according to EGBOMON, this Italian gentleman did not turn up and did not phone EGBOMON. Finally EGBOMON decided to leave the Islands as he could not stay in Malta waiting.

EGBOMON admitted that he did not declare this huge amount of cash upon his arrival and this despite the fact that there were clear signs at the Malta International Airport informing passengers about this procedure to declare monies; he said that he failed to declare the same nonetheless because he did not take notice of the signs. EGBOMON stated that he did not even declare this money in England or Hungary from where he said he was travelling.

Upon being specifically questioned about whether he commissioned the services of a notary public or an estate agent in Malta in anticipation of this alleged real estate deal, EGBOMON said that it was the Italian gentleman that was to hire the services of a notary public or an estate agent in Malta and not his uncle as the Italian person had a Maltese person backing him.

EGBOMON provided no evidence of any lawful employment or business in this country or any other lawful source of money or other income in this country or any other lawful source of money or other income arising abroad which was duly and lawfully declared to the competent authorities and remitted to Malta. EGBOMON failed also to give any other concrete particulars or documentation showing the lawful origin of the money and property in question.

Therefore EGBOMON **gave no reasonable explanation** showing that such money, property or proceeds **were not**

money, property or proceeds derived from a criminal activity given that as a consequence of his failure to give such explanation, the burden of proof to show the lawful origin of such money, property or proceeds **lay with him**.

Consequently in view of the abovementioned facts the accused MORGAN EHI EGBOMON (during the period between the 8th February 2007 and the 7th June 2007) rendered himself guilty of carrying out acts of money laundering by:

i) converting or transferring 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) concealing or disguising the true nature, source, location, disposition, movement, rights with respect of, in or over, or ownership of property, knowing or suspecting that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;
iii) acquiring, possessing or using 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) retaining property without reasonable excuse knowing 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) attempting any of the matters or activities defined in the above foregoing paragraphs (i), (ii), (iii) and (iv) within the meaning of Article 41 of the Criminal Code;
vi) acting 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 sub-paragraphs (i), (ii), (iii), (iv) and (v).

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the circumstances of

fact abovementioned and as a consequence of the same, accused MORGAN EHI EGBOMON of, (during the period between the 8th February 2007 and the 7th June 2007) rendering himself guilty of carrying out acts of money laundering by:

i) converting or transferring 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) concealing or disguising the true nature, source, location, disposition, movement, rights with respect of, in or over, or ownership of property, knowing or suspecting that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;
iii) acquiring, possessing or using 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) retaining property without reasonable excuse knowing 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) attempting any of the matters or activities defined in the above foregoing paragraphs (i), (ii), (iii) and (iv) within the meaning of Article 41 of the Criminal Code;
vi) acting 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 sub-paragraphs (i), (ii), (iii), (iv) and (v);
AND
Demanded that MORGAN EHI EGBOMON be proceeded against according to law, and that he be sentenced to the punishment of fourteen years imprisonment or to a fine (*multa*) not exceeding two million and three hundred and twenty-nine thousand and three hundred and seventy-three Euro and forty cents (€2,329,373.40) or to both such fine and imprisonment, and to 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, as is stipulated and laid down in articles 2, 3, 3(1), 3(2A)(a)(i), 3(3), 3(5)(a), 4A, 5, 6 of Chapter 373 of the Laws of Malta, article 22(1C)(b) of Chapter 101 of the Laws of Malta and articles 17, 20, 22, 23, 23A, 23B, 31, 41, 42, 533 of Chapter 9 of the Laws of Malta, or to any other punishment applicable according to law to the declaration of guilty of the accused.

2) After the Attorney General premised in the Second Count of the Bill of Indictment that on the night between the sixth (6th) and seventh (7th) June two thousand and seven (2007) the Police Force (Economic Crimes Unit) was informed by the Malta Customs Officers at the Malta International Airport that during inspections that were being carried out at the departures lounge, they discovered that MORGAN EHI EGBOMON (henceforth referred to as "EGBOMON") was about to board Air Malta flight number KM784 to Istanbul in Turkey and who was carrying a huge amount of money in different currencies, which money was not declared to the competent authorities in terms of Law.

The total amounts of money that were found in the possession of EGBOMON were as follows :

a. thirty eight thousand two hundred and sixty Euro (€38,260)

b. four thousand five hundred Hungarian Forint (HU4,500)

c. twenty thousand French Francs (FrF20,000)

d. one hundred and forty five thousand and three United States Dollars (US$145,003).

The Police started their investigation, and during questioning EGBOMON explained that he was a trader in Hungary, where he sold clothes. He came to Malta three times during the year 2007. During his interrogation EGBOMON stated that in this last visit to Malta he arrived in Malta from Hungary, though he transited in England. His flight left from Heathrow airport.

EGBOMON acknowledged with the Customs and Police authorities that he was carrying the abovementioned huge amount of money that was seized from his person. Following further questioning, EGBOMON stated that he did not declare this huge amount of cash upon his arrival; despite that there were clear signs at the Malta International Airport informing passengers about this procedure to declare monies, he failed to declare the same nonetheless even when he was about to travel out of Malta because he did not take notice of the signs; he did not even declare this money in England or Hungary from where he said he was travelling.

Consequently, in view of the abovementioned facts, the accused MORGAN EHI EGBOMON (during the period between the 1st June 2007 and the 7th June 2007) rendered himself guilty of the offence of being a person entering or leaving Malta and who was carrying more than five thousand Malta Liri (Lm5000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86)) and who failed to declare to the Comptroller of Customs on the appropriate form that he was carrying more than five thousand Malta Liri (Lm5000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86)).

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the circumstances of fact abovementioned and as a consequence of the same, accused MORGAN EHI EGBOMON of (during the period between the 1st June 2007 and the 7th June 2007) rendering himself guilty of the offence of being a person entering or leaving Malta and who was carrying more than five thousand Malta Liri (Lm5000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86)) and who failed to declare to the Comptroller of Customs on the appropriate form that he was carrying more than five thousand Malta Liri (Lm5000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86))
AND

Demanded that MORGAN EHI EGBOMON be proceeded against according to law, and that he be sentenced to the punishment of a fine (*multa*) equivalent to twenty-five *per centum* of the value represented, in Maltese currency on the date of entry or leaving Malta, by the cash carried, but in any case not exceeding a fine (*multa*) of twenty thousand Maltese Liri (equivalent to Euro forty six thousand five hundred eighty seven forty six cents (€46587.46)) and the court shall, besides this punishment to order the forfeiture in favour of the Government of the undeclared cash in excess of five thousand Malta Liri (Lm5,000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86), or of the whole amount when the cash is indivisible and this as is stipulated and laid down in articles 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Chapter 233 of the Laws of Malta, and of regulations 2, 3 and 4 of Legal Notice 463 of 2004 named "Reporting of Cash Movements Regulations, 2004" issued under the said Chapter 233 of the Laws of Malta and articles 17, 20, 22, 23, 23A, 23B, 31, and 533 of Chapter 9 of the Laws of Malta, or to any other punishment applicable according to law to the declaration of guilty of the accused.

Having seen the note of pleas filed by the accused on the twentieth (20th) of April two thousand and nine (2009) :

Regarding the First Count

a. That the Bill of Indictment does not in any way indicate the antecedent offence, or source, which could give rise to money laundering, and consequently there is no antecedent actus reus on which to base the charge of money laundering; and the count is consequently null and void.

b. The charge as proferred violates the principles of a fair trial. The Attorney General is basing the charge of money laundering on the lack of a reasonable explanation coming from the accused, showing that such monies, properties or proceeds were not money, property or proceeds derived from a criminal activity. This presumption at Law violates the fundamental human

rights of the accused, who has already proceeded before the Civil Court, First Hall to have it declared that article 3(3) of Chapter 373 of the Laws of Malta and Articles 22(1C)(b) of Chapter 101 of the Laws of Malta, are in violation of Article 6 of the European Convention on Human Rights.

Regarding the Second Count

a. The accused is raising the plea of *nullum crimen sine lege.* As transpires from the facts stated in the second count the alleged offence was committed between the 6th and 7th June, 2007. The Attorney General is charging on the basis of the regulations existing at the time that is to say Legal Notice 463/2004, named "Reporting of Cash Movements Regulations, 2004". By Legal Notice 149/2007, (as is clear from Section 6 thereof) Regulations 463/2004 were repealed. In Legal Notice 149/2007 there is no provision or a transitory clause or a saving clause for the continued prosecution of an offence committed before the coming into force of the new Regulations. The coming into force of the new regulations (and the repeal of the earlier regulations) was on the 15th June 2007.
As may be seen from Chapter 238 the Act of Parliament was only giving powers to the Minister to make Regulations which were done both in 2004 by Legal Notice 463/2004, and a repealing Legal Notice 149/2007. consequently the Law applicable under the second count has been repealed and therefore the principle applies of *nullum crimen sine lege.* This situations is not remedied for the prosecution by the Interpretation Act, which only saves Acts of Parliament and not subsidiary Legislation, which are clearly different.

Having seen the note verbale of the twentieth (20th) of January two thousand and ten (2010) (fol 61) where with reference to paragraph "B", the accused stated that "... does not raise any issue which falls to be decided by this Court."

Having seen the reply of the Attorney General of the sixteenth (16th) of January two thousand and ten (2010) (fol 63);

Having seen the counter reply of the Defence of the twelfth (12th) of April two thousand and ten (2010) (fol 72);

Having seen the additional note of pleas filed by the Defence on the fourteenth (14th) of June two thousand and twelve (2012) whereby it was requested that the applicable law should be that in force on the seventh (7th) of June two thousand and seven (2007) and not as subsequently amended, with particular reference "knowing or suspecting that ..." which element of suspicion was not in force at the commission of this crime on the seventh (7th) of June two thousand and twelve (2012);

Considers:

That as regards the first count, the accused is claiming that this is null and void because it does not in any way indicate the antecedent offence or source which could give rise to money laundering.

The accused is arguing that the Attorney General must at least prove *prima facie* that the money is coming from an illicit activity. If there is a shifting of the burden of proof, this must be accompanied by an illicit activity which illicit activity should show in the bill of indictment. In this case no previous offence was established, therefore there is no antecedent criminal act. The situation is very similar to the crime of receiving stolen property where there must be proof that the goods have a criminal origin. Therefore, in matters of money laundering, the Prosecution must prove the illicit origin of the money. The suspicion of a crime is not enough. It has yet to be established what is the predict offence.

Considers:

It has to be stated from the outset that the narrative part of the bill of indictment is not evidence of its own contents. It is just an explanation given by the Attorney General to show why he deems it necessary to charge the accused with the crime of money laundering. The narrative still has to be proven in a Court of law and the Attorney General is not bound with the details of the narrative but only with the general theme of the narrative. He is, however, fully bound by the concluding paragraph of the charge from which there can be no deviation.

This means, therefore, that if according to the accused, the bill of indictment does not in any way indicate the antecedent offence, or source, this does not mean that evidence of this offence can not be brought during the trial. According to the guidelines given by the Court of Appeal in the case "Police versus Carlos Frias Matteo" of the nineteenth (19th) of January two thousand and twelve (2012), it was stated that:

"Ghalhekk, dan il-livell ta' prova *prima facie* japplika kemm ghall-persuna li tkun akkuzata b'money laundering taht il-Kap. 101 kif ukoll taht il-Kap. 373. Issa, peress illi l-artikolu 2(2)(a) tal-istess Att jezimi mir-responsabiltà lill-Prosekuzzjoni milli tipprova xi htija precedenti in konnessjoni ma' xi attività kriminali, kulma ghandha tipprova l-Prosekuzzjoni huwa illi l-flus illi nstabu fil-pussess tal-persuna ma kinux konformi mal-istil ta' ħajja tal-persuna, liema prova tkun tista' tiġi stabbilita anki minn provi indizjarji. Dan ifisser illi l-Prosekuzzjoni m'ghandhiex tipprova lill-Qorti l-origini tal-flus, lanqas jekk il-flus kinux illegali. Kulma trid tipprova huwa fuq grad ta' *prima facie* illi ma hemm l-ebda spjegazzjoni logika u plawsibbli dwar l-origini ta' dawk il-flus. Darba ssir din il-prova fil-grad imsemmi, ikun imiss lill-akkuzat sabiex juri illi l-origini tal-flus ma kinux illegali."

This Court finds that the bill of indictment does provide a correct description of what happened and includes also the predicate offence. Here, the Attorney General did not fail to indicate what the *actus reus* was all about even though he does not have to prove any specific offence.

This Court, therefore, finds that the narrative part of the first charge of the bill of indictment contains sufficient information for the accused to prepare for his defence, is drafted according to law and sees no reason why it should be declared null and void.

For these reasons, therefore, the Court dismisses the first plea of the accused.

Regarding the second plea, the Court makes reference to the note verbale of the twenty-ninth (29th) of January two thousand and ten (2010) (fol 61) and therefore abstains from taking any further cognizance of this plea.

As regards the second charge, the accused is raising the plea of *nullum crimen sine lege.* The alleged offence was committed between the sixth (6th) and seventh (7th) of June two thousand and seven (2007) and the Attorney General is charging on the basis of the regulations existing at the time, that is to say Legal Notice 463/2004 named “Reporting of Cash Movements Regulations, 2004”. By Legal Notice 149/2007, Regulations 463/2004 were repealed. In Legal Notice 149/2007, there is no provision or transitory clause or a saving clause for the continued prosecution of an offence committed before the coming into force of the new regulations.

Accused is claiming that Legal Notice 149/07 shifted the *ratio legis* to only a question of reporting movements of capital in certain situations. This is different from exchange control. When accused was held at the airport, the officers, then, confiscated the money on the basis of the exchange control act which was declared illegal, and repealed by Regulations 463/2004. What’s more the situation is not remedied for the Prosecution by the Interpretation Act which only saves Acts of Parliament and not subsidiary legislation, which are clearly different.

Considers:

It is true that the law under which accused was charged – Legal Notice 149/07 – has since been repealed. And it is also true that the Legal Notice abovementioned does not contain any transitory provisions. So, in this case the Court believes that the Interpretation Act comes into force and does not agree with the argument of the accused that this Act refers only to Acts of Parliament and not subsidiary legislation. Article 2 of the Interpretation Act defines an Act. This definition is very wide and refers to an Act of Parliament and any other Act passed by the Legislature of Malta and includes any Code, Ordinance, Proclamation, Order, Rule, Regulation, Bye-Law, Notice, or other instrument having the force of law in Malta ... . Article 12 of the Interpretation Act states that where any Act passed after the commencement of this Act repeals any other law, then, unless the contrary intention appears ... shall not affect the previous operation of a law so repealed ... as if the repealing Act had not been passed."

This law is very clear and not subject to any interpretation, which means that the accused may be charged and tried according to the law which was in force at the time of the commission of the offence, and this is the law under which accused is being charged.

This Court does not see anything illegal on this count and therefore dismisses the plea raised regarding the second charge.

Considers:

The accused, however, raised additional pleas by means of his note of the fourteenth (14th) of June two thousand and twelve (2012) requesting that the applicable law should be that in force at the commission of the offence on the seventh (7th) of June two thousand and seven (2007) and not as subsequently amended, with particular reference to the adding of the phrase "knowing or suspecting that ...".

Considers:

Even though this plea was filed *fuori termine*, since the time period for the filing of pleas had elapsed, the Court considers this plea to be of fundamental importance affecting directly the rights of the accused which could be irreversibly prejudiced if this plea were not held. So, in such exceptional circumstances the Court is willing to take cognizance of the plea raised by the accused.

Considers:

The amendment to the principal law was made by Act 31/2007 which came into force
on the thirty-first (31st) of December two thousand and seven (2007) which specifically amended section 43, making it easier for the Prosecution to prosecute these cases by burdening the accused with the knowledge or suspicion that the money has illicit origin. Obviously knowledge and suspicion are two different things completely – knowledge being the harder to prove – although this should not create stumbling blocks for the Prosecution. The word “knowledge” has been used in many statutes and therefore its interpretation in this context is unlikely to give rise to difficulties since it is quite straightforward. Hence, it will include actual knowledge, shutting one’s mind to the obvious, as well as knowledge of circumstances that would indicate the facts to an honest and reasonable person. It is an objective criterion that must be used and not a subjective one. Be that as it may, the Court upholds the submission made by the accused through the note of pleas of the fourteenth (14th) of June two thousand and twelve (2012) and orders that the words “or suspecting that” be removed wherever they occur in the bill of indictment.

Having seen that there are no further pleas to consider – and subject to an appeal from this judgement – the Court puts off this case *sine die* to await its turn to be heard by trial by jury.

< Final Judgement >

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