MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE -- ACTING PRESIDENT
DAVID SCICLUNA

THE HON. MR. JUSTICE
ABIGAIL LOFARO

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 9 th May, 2013

Number 17/2008

The Republic of Malta

v.

Eduardo Navas Rios

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 7th November 2008 wherein the said Eduardo Navas Rios was charged with having, (1) on the 5th March 2007, and in the preceding months, by several acts even though committed at different times but

constituting a violation of the same provisions of law and committed in pursuance of the same design, rendered himself guilty of carrying out acts of money laundering by: (i) converting or transferring property knowing 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 that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity; (iii) acquiring property 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; (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 subparagraphs (i), (ii), (iii), (iv) and (v); (2) rendered himself guilty of aggravated theft by person, place, time and amount of the thing stolen; (3) kept in any premises or had in his possession, under his control any firearm or ammunition without a licence;

2. Having seen the judgement delivered on the 9th March 2012 whereby the Criminal Court, after having seen the verdict whereby (a) the jury by six votes in favour and three votes against found the accused Eduardo Navas Rios not guilty of the first count of the bill of indictment but guilty of the offence under the first count of the bill of indictment without the offence being continuous; (b) the jury by seven votes in favour and two votes against found the accused Eduardo Navas Rios not guilty of the second count of the bill of indictment but guilty of aggravated theft

by person, place and amount of the thing stolen; (c) the jury by eight votes in favour and one vote against found the accused Eduardo Navas Rios not guilty of the Third Count of the Bill of Indictment, declared the said Eduardo Navas Rios guilty of only the first two counts of the Bill of Indictment, namely of having:

(1) on the 5th March 2007, and in the preceding months, rendered himself guilty of carrying out acts of money laundering by:

(i) converting or transferring property knowing 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 that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;

(iii) acquiring property 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;

(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 this according to the First Count of the Bill of Indictment;

(2) during the investigations concerning the circumstances indicated in the First Count of this Bill of Indictment rendered himself guilty of aggravated theft by person, place, and amount of the thing stolen.

(3) The Criminal Court acquitted the accused of the Third Count;

3. Having seen that by the said judgement the first Court, after having seen articles 2, 3(1), 3(3) and 3(5) of Chapter 373 of the Laws of Malta, sections 5(1), 51(2) of Chapter 480 of the Laws of Malta, and articles 261(c)(d)(e) (f), 267, 268(b), 269(g), 270, 279(b), 280(b), 17(b), 18, 23, 23B, 31 and 533 of the Criminal Code, sentenced the said Eduardo Navas Rios to a term of imprisonment of (4) years and (6) six months and to pay a fine (multa) of ten thousand Euros (€10,000). Should the fine not be paid within one year, it shall be converted into a term of imprisonment of one year. Furthermore, the Criminal Court ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which the accused was found guilty and other moveable and immovable property belonging to the said Eduardo Navas Rios, and finally ordered the confiscation of all the objects exhibited in Court.

4. Having seen that the first Court reached its decision after having considered the following:

“The Court notes that the Prosecution and the defence made the following submissions:

“The Prosecution submitted that it is not after the pound of flesh because the accused has a clean conduct sheet and has never had any further trouble with the law. Moreover, he fully co-operated with the police. The law, at the time of the offence of money laundering did not stipulate any minimum. It also submitted that, in connection with the money

laundering charge the panel of the jury had not found the accused guilty of a continuous offence but of a continuing one. However, as to the aggravation of amount in the second count, the Prosecution had indicated article 279(b) of the Criminal Code in the paragraph of the accusation.

"The Defence submitted that the actual sum involved was between Lm20,000 and Lm24,000 and also laid stress on the fact that at the time when the money laundering offence was committed there was no minimum of punishment indicated in the law. Furthermore as the money involved in the offence of money laundering, was the money which was derived from the theft, then article 17(h) should apply. The Defence also stressed that the accused has never had any further trouble with the police and that the verdict of the jury was the minimum one required by law. It also added that the aggravation of amount referred to by the Prosecution in the Bill of Indictment referred to the minimum. Finally the defence referred to the case of 'Ir-Repubblika ta' Malta versus Carmen Butler *omissis*' decided by the Court of Criminal Appeal (Superior) on the 26th February, 2009 where the amount involved was almost identical.

"The Court

"(a) in accordance with the Constitution of Malta and Chapter 9 of the Laws of Malta, is applying the law as it stood at the time of the offence;

"(b) has considered the submission made by the defence about the application of section 17(h) of Chapter 9. The Court has decided that in this case the theft cannot be considered 'as a mean to an end', that is, as a means to commit the offence of money laundering. Two classic cases which are used to illustrate the application of article 17(h) are these: breaking down the door of a house in order to steal anything from it or to rape a person; damaging a car door in order to steal a radio or any money found

inside. In the present case the situation is entirely different. The fact that the theft is an underlying criminal activity does not turn the criminal activity into a means to an end even if the same sum of money stolen is eventually transferred or in any other way laundered in accordance with 2(1) of Chapter 373. Hence it is rejecting the submission made by defence.

"(c) has considered the submission made by the defence with regards to the aggravation of amount. The Court decides that the reference to the aggravation of 'amount' by the Prosecution in the paragraph: 'By committing the abovementioned acts the accused Rios Eduardo Navas rendered himself guilty of aggravated theft by person, place, time and amount of the thing stolen' is enough. One does not expect any further elucidation of what is meant by 'amount' once even the law itself is laconic about this aggravation. An indication of the relevant article is made in the final paragraph where the Attorney General makes the accusation and hence the Court is rejecting this submission.

"(d) has considered the case referred to by the defendant and noted the following differences: the jury had asked the Court to consider being lenient with the defendant; that Court had also taken into account that the defendant had found herself in very difficult family circumstances; and that the case dealt with only one charge. So while one feature may be almost identical, there are other circumstances which are not.

"The Court has also considered the following:

(i) The defendant fully co-operated with the police;
(ii) That the verdict was in its minimum;
(iii) That the Prosecution is not after its pound of flesh;
(iv) The defendant has a clean conduct sheet;
(v) That the jury panel has considered the first count as a continuing one (in Maltese 'permanenti') rather

than a continuous one and hence article 18 does not apply;
(vi) That the law at the time of the offence did not stipulate a minimum."

5. Having seen the application of appeal of the said Eduardo Navas Rios filed on the 30th March 2012 wherein he requested that this Court vary and modify the jury's verdict and the appealed judgement by (1) confirming both the jury's verdict and the judgement insofar as the First Count of the Bill of Indictment is concerned in that appellant was not found guilty of a continuous offence; (2) confirming both the jury's verdict and the judgement insofar as the Second Count of the Bill of Indictment is concerned in that appellant was not found guilty of theft aggravated by time; (3) confirming both the jury's verdict and the judgement insofar as the Third Count of the Bill of Indictment is concerned in that appellant was acquitted of the charge therein contained; (4) revoking both the jury's verdict and the judgement of the Criminal Court in regards to the declaration of guilt of appellant as stated in the jury's verdict and judgement under the First Count and under the Second Count of the Bill of Indictment, and consequently ordering that a "Not Guilty" verdict be registered in regards to both of these two Counts of the Bill of Indictment, thereby acquitting appellant of all charges of which he was found guilty and thus exonerating him of any guilt and punishment; (5) subordinately, in the eventuality that this Court decides not to accept this appeal in whole or in part, cancelling the punishment inflicted upon appellant by the Criminal Court and substituting for it a more appropriate punishment which is in accordance with the law and which would more reflect the circumstances of this case; having seen all the records of the case and the documents exhibited; having heard the submissions made by counsel for appellant and counsel for the respondent Attorney General; considers:-

6. Appellant's grievances are as follows: (1) that during the trial before the Criminal Court there was an irregularity during the proceedings which could have had a bearing

on the verdict and during the summing-up there was also a wrong interpretation and/or wrong application of the law which could have had a bearing on the jury's verdict; (2) that the jury returned an incorrect majority verdict of guilt with regards to the First and Second Counts of the Bill of Indictment because appellant was wrongly convicted on the facts of the case; (3) that, without prejudice and subordinately to the abovementioned two principal grounds of appeal, the prison term, the fine (*multa*) and the confiscation of all property of appellant inflicted upon appellant were not wholly based on law and in any case are excessive in the circumstances of the case. This Court will be dealing with each grievance *seriatim*.

7. As regards the first grievance, appellant says that while the trial judge well instructed the jury that in considering the evidence they must not take into consideration the written statement made by appellant to the Police since this was obtained in breach of his constitutional rights, the trial judge failed to tell the jury that this also applied to anything which appellant may have told the Police during investigations. In this respect, appellant referred to the judgement delivered by the First Hall of the Civil Court (Constitutional Jurisdiction) in the names **Ir-Repubblika ta' Malta vs Alfred Camilleri** on the 16th January 2012. Appellant further states that since the statement released by appellant was in breach of his constitutional rights, a copy should not have been handed over to the jury who, as laymen, are not expected to understand the thorny legal implications. According to appellant, this amounts to an irregularity during the proceedings since this fact could have had a bearing on the proceedings.

8. Appellant further submits: "Without entering deeply into the question as to whether the statement released by applicant to the Police and/or as to what applicant may have verbally told the Police was illegally obtained in breach of section 658 of the Criminal Code (with particular reference to the case of a confession extorted or obtained by any promise or suggestion of favour), it is clear, obvious and evident that the written statement and/or anything stated in evidence by the Police Inspector as to

what applicant may have told him, had a bearing on the jury's verdict in finding applicant guilty on both Counts I and II of the Bill of Indictment, even if according to law it would be enough for appellant if this Honourable Court arrives at a conclusion that it could have had a bearing on the verdict." Appellant finally states: "In actual fact, especially in so far as the crime of aggravated theft is concerned, if the written statement made to the Police and/or anything that applicant may have told the Police **were** to be excluded, there is no other evidence whatsoever on which applicant could have been found guilty of the charges preferred against him."

9. With regard to the fact that appellant's statement was distributed to the jury, suffice it to say here that according to the record of the sitting of the 5th March 2012, following the request by the prosecution that a copy of appellant's statement be distributed to the jurors, defence counsel did not object that it be so distributed. Nor was any objection registered to its being read out during Superintendent Paul Vassallo's testimony. Indeed, it was defence counsel himself who stated that it should be given to the jurors. During Superintendent Vassallo's testimony, after the prosecuting officer had asked him to give a brief indication in his own words of what appellant had told him, defence counsel stated: *"Your Honour, the statement I think it's going to be exhibited and so this is the best proof. If he is speaking from memory yes, but if he is referring to a document which we will have a minute then we should give it to the jurors."*[1] Consequently appellant cannot now, contradictorily, complain that the statement was so distributed.

10. Appellant also complains that the trial judge failed to tell the jury that they should ignore anything which appellant may have told the Police during investigations. From the judgement appellant refers to, the Attorney General lodged an appeal and judgement was delivered by the Constitutional Court on the 12th November 2012 whereby, although the appealed judgement was

[1] Page 23 of the transcription of evidence.

confirmed, other considerations were made. The Constitutional Court in fact stated, *inter alia*:

"Din il-Qorti ttenni illi l-jedd li jaghtu l-Kostituzzjoni u l- Konvenzjoni huwa dak ghal smigh xieraq: ma hemm ebda jedd li kull min hu suspettat, jew kull minn huwa akkuzat b'reat kriminali, jigi liberat minn dik l-akkuza, jew li akkuzat jinghata l-mezzi biex, hati jew mhux, jinheles mill-akkuza, jew li, minhabba xi irregolarità, tkun xi tkun, min fuq il-fatti ghandu jinstab hati ghandu jithalla jahrab il-konsegwenzi ta' ghemilu. Il-jedd ghal smigh xieraq jinghata kemm biex, wara process fi zmien ragjonevoli u bil-garanziji xierqa, min ma huwiex hati ma jehilx bi htija, u biex jinghata l-mezzi kollha mehtiega ghalhekk, u kemm biex min huwa tassew hati ma jahrabx il-konsegwenzi tal-htija tieghu. Il-jedd ghal smigh xieraq ma jinghatax biex min hu tassew hati jasal biex, b'xi mod jew b'iehor, ma jwegibx tal-htija tieghu. Jekk il-jedd ghal smigh xieraq, kif interpretat u applikat, iwassal ghal hekk, mela hemm xi haga hazina hafna fis-sistema tal-harsien tad-drittijiet.

"Ghalhekk li trid taghmel din il-Qorti la huwa li tara jekk l-appellat huwiex hati jew le tal-akkuzi li ngiebu kontrieh u lanqas li tara biss jekk l-appellat kellux l-ghajnuna ta' avukat waqt l-interrogazzjoni u tieqaf hemm: li ghandha taghmel din il-Qorti hu illi tara jekk dak in-nuqqas wassalx ghall-ksur tal-jedd ghal smigh xieraq u jekk inholoqx il-perikolu illi l-appellat jinstab hati meta ma kellux jinstab hati. Jekk ma hemmx dak il-perikolu, mela ma hemmx ksur.

"….

"It-thassib ta' din il-Qorti jinsorgi mill-fatt illi qabel bdiet it-tfittxija, accertat il-fatt illi l-appellat kien suspettat bit-twettieq ta' reat, ma nghatax it-twissija li kellu jedd jibqa' sieket sakemm ma jinkriminax ruhu. Din il-Qorti tirrespingi l-argument tal-*compelling reasons* li ressaq l-Avukat Generali illi fil-mira tal-investigaturi ma kienx l-appellat izda t-tragitt tal-

pakkett. Fil-fatt fil-mira tal-pulizija kien kemm it-tragitt tal-pakkett kif ukoll l-involviment tal-appellat u ta' Mario Abdilla ma' dak il-pakkett. Ma jistax jitwarrab il-fatt accertat illi qabel il-pulizija zammet liz-zewg suspettati fic-Cirkewwa, huma kienu diga` qeghdin jinzammu taht osservazzjonijiet. Rawhom jigbru l-pakkett minghand l-agenti Thomas Smith, rawhom jitilqu bih mill-Belt lejn ic-Cirkewwa, kienu arrestati c-Cirkewwa u ttiehdu l-Belt minn hemm. Ghal din il-Qorti huwa rilevanti l-fatt illi qabel kien akkumpanjat id-dar tar-residenza ta' ommu, u qabel l-Ispettur Ciappara ghamillu d-domandi, l-appellat ma kienx mgharraf bil-jedd tieghu li jibqa' sieket u ma jwegibx. Fic-cirkostanzi, ma jistax jinghad li l-appellat kien moghti ghazla li jibqa' sieket. Fil-kaz tal-lum ma hemm l-ebda allegazzjoni illi l-appellat kien mhedded jew imqarraq b'weghdiet ta' xi vantagg. Hemm pero` l-kwistjoni, li din il-Qorti tqis gravi, illi l-appellat ma nghatax il-libertà fl-ghazla jekk iwegibx jew le u b'hekk kien privat minn garanzija kontra kull pregudizzju jew riskju ta' awto-inkriminazzjoni. Fil-ligi taghna kif kienet fiz-zmien relevanti ghal kaz tal-lum, u cioe` qabel ma dahhlu fis-sehh l-Art. 355AT u 355AU tal-Kodici Kriminali, il-jedd li tibqa' sieket u ma twegibx ghal mistoqsijiet li jsirulek kien assolut u bla kundizzjonijiet. Ghalkemm fiz-zmien tal-kaz tal-lum, l-appellat ma setax jaghzel li jkellem avukat qabel ma jwiegeb, ma kienx liberu li jaghzel illi ma jwegibx id-domandi li saru mill-pulizija qabel u waqt it-tfittxija mill-pulizija tas-7 ta' Settembru 2006 ghaliex ma nghatax it-twissija. Din il-Qorti hija ghalhekk tal-fehma illi kien hemm ksur tal-jedd tal-appellat ghal smigh xieraq."

11. Now, apart from the fact that the circumstances of that case were different from the present case, it is to be observed that according to the criminal law, any verbal declarations made by the person charged or by the accused are admissible in evidence. Article 658 of the Criminal Code provides: "Any confession made by the person charged or accused, whether in writing or orally, may be received in evidence against the person who

made it, provided it appears that such confession was made voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour." In the present case there is nothing to suggest that what appellant told the Police was not done voluntarily, and no evidence that what he said was "extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour". Indeed, even if this Court were to base its appreciation of evidence with reference to the Camilleri case, if one were to exclude the reference made by Superintendent Vassallo to appellant's written statement, his evidence cannot be just written off in its entirety. This Court will, however, be making its appreciation of the evidence to the exclusion of appellant's statement as the trial judge directed the jurors to do. Further considerations will be made *infra*.

12. As to appellant's second grievance, appellant maintains that "the jury, also probably due to the manner in which it had been improperly directed by the trial judge as submitted under the first grievance mentioned in this application, did not reach their verdict in a legitimate and reasonable manner and therefore the conviction on both the first and second counts of the Bill of Indictment is not one which is safe and sound to be upheld…." In his application of appeal, appellant deals separately with the First and Second Counts. In so far as the First Count is concerned, he makes the following submissions:

"During the trial the Public Prosecutor asked the jury not to consider sub-paragraphs (v) and (vi) regarding the different options mentioned by law as to how the crime of money laundering may be committed since it contended that in this case the crime was fully consummated, and therefore not attempted, by accused, and that accused had acted alone as a principal and therefore not as an accomplice.

"During the trial the Public Prosecutor told the jury that she deemed that the money laundering charge was in respect of the amount of between Lm20,000 and

Lm22,000, that is to say the same amount mentioned in the Second Count of the Bill of Indictment.

“During the trial the Public Prosecutor told the jury that sub-section (3) of section 3 of the Prevention of Money Laundering Act did not apply to this case.

“In view of these declarations, during his rejoinder, defence counsel did not make any further remarks on these three matters.

“The Trial Judge had correctly explained to the jury that in the case of sub-paragraphs (iii) and (iv), which define two of the methods through which the crime of money laundering may be committed, the person committing the crime of money laundering must be a different one from the person committing the crime deemed to be the underlying criminal activity.

“According to sub-section (2) of section 2 of the Money Laundering Act, as it stood at the time that the alleged crime had taken place, although the Prosecution is not bound to prove a judicial finding or a conviction with regards to the underlying criminal activity it still needs to prove beyond reasonable doubt the precise underlying criminal activity from which the proceeds object of money laundering derived.

“In the case of this First Count of the Bill of Indictment, since the Prosecution had emphasised that the amount referred to in the Bill of Indictment is in regards to the amount of between Lm20,000 and Lm22,000 mentioned in the Second Count of the Bill of Indictment, applicant is restricting his appeal to only this amount.

“In this case, two scenarios must be considered.

“The first of these two scenarios is that of the money allegedly taken by appellant from the apartment of his cousin George Neville Navas prior to it being taken or removed whilst the second scenario is that of the money

after allegedly having been taken or removed by appellant.

“Under the first scenario, the Prosecution although not bound to prove any judicial finding of guilt or a conviction with regards to the property deriving directly or indirectly from the underlying criminal activity is still bound to prove beyond reasonable doubt, on the basis of circumstantial or other evidence, that the money allegedly found in the sports bag in the apartment was the direct or indirect proceeds of a precise criminal activity.

“Did the Prosecution succeed in doing this in order that the jury could eventually reasonably arrive at a conclusion of guilt in so far as this element of the crime is concerned?

“In order to try to prove this element of the crime, in the Bill of Indictment, the Prosecution had made reference to another cousin of appellant, namely Ricardo Domingo Navas, who during the period of the police investigations was charged with a drugs offence following an alleged meeting with a drug courier. Subsequently, Ricardo Domingo Navas was unanimously acquitted in a trial by jury of the charge regarding which he had been arrested.

“This means that the allegation of the Prosecution that the money allegedly taken by applicant was the direct or indirect proceeds of drugs activity in which Ricardo Domingo Navas was involved does not stand.

“Did the Prosecution prove beyond reasonable doubt any other precise underlying criminal activity? No such direct or indirect proof results from the evidence. For all that there is in the evidence this money could, for example, have been won at the Casino.

“Even if there were proof beyond reasonable doubt that the money concerned was the direct or indirect result of a precise underlying criminal activity, the Prosecution had also to prove beyond reasonable doubt another element, that is to say that at the time of the acquisition or at the commencement of the retention of the money appellant

knew that this money was the direct or indirect result of a precisely proved underlying criminal activity. As the law stood at that time of the alleged commission of the offence proof of a suspicion was not enough. In this case proof beyond reasonable doubt of knowledge on the part of appellant is essential.

“Knowledge is the higher level of certainty in the hierarchy of mental states and is higher than both belief and suspicion. In fact knowledge is to be distinguished from belief and suspicion. Having knowledge means that, on the basis of evidence, you actually know something to be true.

“Belief is a state of the mind when, on the basis of evidence, though your brain tells you what is obvious, you still decide to shut your eyes.

“Suspicion, which may be either a strong one or simply a fanciful one, is a state of the mind where proof is lacking.

“The law here requires knowledge. By this word the law requires that appellant must have been, on the basis of facts known to him, proved beyond reasonable doubt that he knew for sure that the alleged money in the bag was the direct or indirect result of criminal activity. Suspicion is not enough whilst belief must be on the same level of knowledge so as to amount to knowledge.

“If the Prosecution could not even prove that this money came from a precise underlying criminal activity how could it have proved beyond reasonable doubt that accused had knowledge based on known facts to him that the money was the direct or indirect result of a precise criminal activity?

“Under the second scenario, if appellant had stolen the money as has been alleged in the Second Count of the Bill of Indictment, then it cannot be said that he didn’t know that the money was not the result of an underlying criminal activity after it was acquired. However, apart from the written statement to the Police and/or evidence as to

what he may have told the Police, which in any case does not amount to acceptable evidence according to law, there is no evidence whatsoever that the amount of between Lm20,000 and Lm22,000 was stolen by appellant.

“At this juncture it must be submitted that it is true that it is legally conceivable that a person who commits a crime as a result of which he acquires property, he may eventually also become guilty of the crime of money laundering if he converts or transfers such property. However, in order that in this case the crime of money laundering subsists, the third element of the crime of money laundering, that is to say the conversion or transferring such property for the purpose of or purposes of concealing or disguising the origin of the property, must also be proved beyond reasonable doubt.

“Did the Prosecution prove beyond reasonable doubt in this case that when the money was transferred to the account of Simone Sciberras and/or to applicant’s account in Panama, such transfer was made for the purpose of concealing or disguising the origin of this money?

“There is surely no direct evidence against applicant. Is there proof beyond reasonable doubt through proved circumstantial evidence from which the jury could have reasonably inferred this element of the crime?

“In actual fact it had transpired that this money was deposited in a bank and sent through a bank, which is a public institution authorised by law and subject to checks and controls by the bank itself and by public authorities. Is a deposit in and/or a transfer through a bank a univocal act that points only to the purpose of concealing or disguising the proceeds of criminal activity?

“It has been constantly held that in order that circumstantial evidence may serve as a basis to convict it must first and foremost be narrowly examined and then in order to give weight to a circumstance or to a number of circumstances as proving guilt this or these must be

unambiguous or unequivocal meaning that these must be definite or unmistakable or clearly pointing to only one conclusion. If circumstantial evidence may have more than one meaning then that circumstance or circumstances cannot be given any weight or consideration at all because although circumstances do not lie they may deceive.

"The decision of the perpetrator of a crime to make use of the fruit of his crime to his own benefit does not amount at law to this element of the crime of money laundering. Otherwise any crime committed and from which its perpetrator takes an advantage would automatically amount also to the crime of money laundering since nobody would commit a crime to make a gain, for example in the case of money, to simply keep it in his drawer and/or counting it on every day until he dies.

"In this regard, applicant humbly submits that in the preponderance of the evidence the jury could not have based its decision to find guilt on the basis of proof beyond reasonable doubt and therefore applicant humbly submits that the verdict on the First Count of the Bill of Indictment is not only unreasonable but also unsafe and unsatisfactory."

13. It is to be pointed out first of all that, as the law stood when the acts of money laundering as attributed to appellant took place, the person charged or accused had to "know" that the property concerned derived from a criminal activity. "Suspicion" was not sufficient. Suspicion that the property derived from a criminal activity was introduced subsequently by means of Act XXXI of 2007[2] and Act VII of 2010[3].

14. Secondly, although appellant says that during the trial the Public Prosecutor told the jury that sub-article (3) of

[2] By means of article 43 which amended subparagraphs (i), (ii) and (iii) of the definition of money laundering in article 2 of the principal Act.

[3] By means of article 59(a) which amended subparagraph (iv) of the definition of money laundering in article 2 of the principal Act.

article 3 of the Prevention of Money Laundering Act did not apply to this case, this Court, having read the transcription of the prosecutor's reply, disagrees with appellant's submission. It is true that at a point in her reply the prosecutor said that the jurors "don't even need to go into whether or not a justifiable excuse was given in this case – the police didn't doubt that the accused gave them a justifiable excuse in this case which is why action was taken, apart from the fact that other evidence was also brought to establish the veracity of the reasonable excuses given by the accused himself."[4] But what the law has in mind in sub-article 3 of article 3 of the Prevention of Money Laundering Act is the shifting of the burden of proof onto the accused in showing the lawful origin of the property. Indeed the prosecutor returns to the matter later on in her reply[5] pointing out that although the Money Laundering Act makes a cross- reference to the Dangerous Drugs Ordinance, it does not mean that there is said shifting of burden of proof only in respect of drugs but also in respect of other crimes. The prosecutor went on to tell the jurors that "the judge will elaborate further on this"[6] In fact the trial judge did so elaborate and in this respect reference is made to the transcribed summing-up at pages 217 and 218.

15. Coming now to the facts in issue, it may be stated at the outset that there is no contestation about the fact that appellant had given his girlfriend Simone Sciberras a sum of money which she eventually transferred to Panama. What has to be determined is the provenance of such money. And the first question to be asked is: where did appellant obtain the money from? Here, this Court makes reference to what it said in paragraph 11 *supra*. Moreover, paragraph (a) of sub-article 2 of article 2 of the Prevention of Money Laundering Act (as it read at the time of the case in question) has to be read in conjunction with sub-article 3 of article 3 of said Act. Paragraph (a) of sub-article (2) of article 2 provided as follows:

[4] Page 132 of the transcription.
[5] Page 155 *ibidem*.
[6] Page 155 *ibidem*.

"A person may be convicted of a money laundering offence under this Act even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without it being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity."

Sub-article (3) of article 3 provides:

"In proceedings for an offence of money laundering under this Act the provisions of article 22(1C)(b) of the Dangerous Drugs Ordinance shall *mutatis mutandis* apply."

Article 22(1C)(b) of the Dangerous Drugs Ordinance provides:

"In proceedings for an offence under paragraph (a), where the prosecution produces evidence that no reasonable explanation was given by the person charged or accused showing that such money, property or proceeds was not money, property or proceeds described in the said paragraph, the burden of showing the lawful origin of such money, property or proceeds shall lie with the person charged or accused."

16. From the evidence it results that appellant was not yet a suspect when the Police went with appellant's girlfriend Simone Sciberras to carry out a search in their residence. When appellant was met at their residence and was informed why Simone Sciberras was under arrest, appellant, as stated by Superintendent Paul Sciberras, "just blurted out to me that the money that has been sent by Simone had been given to her by him". After speaking to appellant on his own in one of the apartment's bedrooms, Superintendent Vassallo, informed him that he was under arrest and that he was to be taken to Police Headquarters so that they could speak in greater detail about the matter. Before leaving the flat, appellant seems

to have volunteered the information that “he had a cousin here in Malta who knew some bad people and he was doing bad things”. After having been duly cautioned, it would appear that appellant informed Superintendent Vassallo that he had taken the money from his cousin’s flat. If appellant had taken the money from his cousin’s flat, there is no evidence pointing to where his cousin had obtained that money from. There may be, at best, a suspicion. But such is not sufficient in terms of the law as it stood at the time. Hence, as regards what appellant refers to as the first scenario, appellant is right in stating that the prosecution did not prove that the money in question ended up in appellant’s cousin’s flat from an underlying criminal activity.

17. As to the second scenario, it must be pointed out that appellant did not give any reasonable explanation as to a lawful origin of the money he handed over to Simone Sciberras. Consequently the money had an unlawful origin. That he had taken it from his cousin’s flat is certainly a reasonable explanation as to the money’s unlawful origin. That the money he transferred to Simone Sciberras did not have a lawful origin is also evidenced by the fact that he had not been in Malta long enough to accumulate the sum of between Lm20,000 and Lm22,000 on the wages he was earning. It would appear that appellant had come to Malta in 2005. In cross-examination Simone Sciberras confirmed: that she struck up a relationship with appellant towards the end of 2005 and that he was earning about Lm60 a week working at The Edge; that at the end of January 2006 he went to Panama for a few days and when he returned he continued working at The Edge till about March 2006; that he later earned Lm200 a week [presumably] when he worked at Fuego till the end of June 2006; that in July he returned to Panama and came back to Malta towards the end of October 2006. Simone Sciberras also said that if she is not mistaken appellant handed her the money in June 2006. So even if appellant had worked for the whole of 2005 and the first three months of 2006 earning Lm60 a week, and then for three months at Lm200 a week, his total income could not have been more than Lm6500

without deducting any expenses.[7] Now, from the evidence tendered by the representatives of a number of agencies which carried out transactions done by appellant in transferring funds overseas to various individuals during the period 5th December 2005 to the 7th July 2006 and from the relative documentation it results that the total of Lm3,903.75 (inclusive of charges) was expended by appellant. It also results that on the 21st March 2006 he expended Lm499.96 in the purchase of United States dollars. All this further strengthens the Court's conclusion as to the unlawfulness of the provenance of the money appellant transferred to Simone Sciberras, given that he failed to give any explanation of a lawful origin.

18. In the First Count of the Bill of Indictment, appellant was charged with a variety of options as provided for in the definition of "money laundering" contained in article 2 of the Money Laundering Act. He was found guilty under the First Count of the Bill of Indictment without the offence being continuous and was declared guilty under all six options. In reality appellant could have been found guilty of the first option. Appellant transferred the money, which he knew derived from an unlawful activity which he himself had carried out, to Simone Sciberras for the purpose of having that money transferred by her to Panama, in the main to his account, for the purpose of concealing or disguising said money by, as Simone Sciberras said in evidence "arranging the house of his mum and doing some things there"[8]. It is true that appellant did not have an account of his own locally as he apparently was unable to open one, according to Simone Sciberras because he did not have a work permit. However, depositing the money in Simone Sciberras' account also involved a degree of concealment as it resulted in *confusio* with her own monies. Moreover, the transfers to Panama were clearly effected on his instructions. Consequently, the jurors could have legally and reasonably found appellant guilty of the offence of money laundering as indicated in the First Count of the

[7] 2005: 52 weeks @ Lm60 = 3120; 2006: 13 weeks @ Lm60 = Lm780 plus 13 weeks @ Lm200 = Lm2,600.
[8] Page 70 of the trasnscription of evidence.

Bill of Indictment, even if simply in respect of the first option indicated.

19. The Second Count of the Bill of Indictment will now be considered. Here appellant observes:

"In so far as the Second Count of the Bill of Indictment is concerned, apart from what is stated in the statement of applicant to the Police and/or what appellant may have verbally told the Police, which is legally unacceptable as part of the evidence for the reasons already mentioned, there is absolutely no proof that appellant had committed the crime of theft and any of its aggravations. Indeed, not basing oneself on appellant's written statement and/or on what appellant may have verbally told the Police may probably have been too much to pretend of a lay jury. This is why the handing down of an illegally obtained written statement of an accused amounts to an irregularity during the proceedings which could have had a bearing on the jury's verdict.

"Furthermore, in accordance with the narrative part of this Count of the Bill of Indictment, the Prosecution had bound itself with a specific period when alleged aggravated theft had taken place, namely the period of the 2nd May 2006 and the previous weeks.

"It transpired from the evidence that applicant had given the amount of between Lm20,000 and Lm22,000 to Simone Sciberras in June 2006.

"Even if it were to be held that on the preponderance of the evidence there is proof beyond reasonable doubt which had entitled the jury to come to a reasonable conclusion that appellant had committed the crime of theft after the 2nd May 2006, he could not have been found guilty of the crime of theft, aggravated or otherwise, because the crime of aggravated theft with which appellant had been accused was, according to the Attorney General, committed prior to the 3rd May 2006. Whilst there is no proof whatsoever that the alleged theft was committed on the 2nd May 2006 or in the previous

weeks, there is proof beyond reasonable doubt or at least on a basis of a balance of probabilities that the amount of between Lm20,000 and Lm22,000 was handed to Simone Sciberras in June 2006.

"Therefore it follows that also in the case of the Second Count of the Bill of Indictment the jury did not base its verdict on legally acceptable evidence but only on what it may have deduced from the written statement and/or from what appellant may have verbally told the Police and/or simply on speculation. In such a case the jury could not have reasonably reached a guilty verdict, with regards the theft and of any of its aggravations, and therefore the verdict of guilt on this Count is also unsafe and unsatisfactory."

20. Here appellant was charged with the aggravated theft of the sum of between Lm20,000 and Lm22,000 from his cousin which purportedly took place "some time during the weeks prior to the 3rd May 2006". From the evidence tendered by Superintendent Paul Vassallo – excluding as aforesaid appellant's statement – there is no indication as to when this theft took place. Simone Sciberras says that if not mistaken the money was handed to her in June 2006 but could not remember the day. Consequently the jurors could not have concluded beyond reasonable doubt that the theft had taken place in the timeframe mentioned in the Bill of Indictment. Accordingly appellant will be acquitted from this Second Count.

21. Appellant's third grievance is in respect of the punishment meted out. He raises a number of points:

(1) In sentencing appellant, the Criminal Court also based its punishment on articles 5(1) and 51(2) of Chapter 480 of the Laws of Malta which refer to the Third Count of the Bill of Indictment from which appellant was acquitted. Now, it is true that in its judgement the Criminal Court referred also to these two articles. This, however, does not necessarily mean that it did take such articles into consideration in determining the *quantum* of punishment, particularly when one considers the maximum punishment

possible in respect of the First Count of the Bill of Indictment. Appellant was quite clearly acquitted from the Third Count of the Bill of Indictment and therefore it was unnecessary to refer to these two articles in the judgement. But they were, after all, articles which were referred to during the trial. For these reasons this Court does not believe that the reference to them in the judgement could in any way have influenced the final determination of punishment.

(2) Appellant says that after the jury's verdict, the Criminal Court rejected two submissions made by defence counsel: (i) that article 17(h) was applicable, and (ii) that under the Second Count of the Bill of Indictment the aggravation of amount should be considered as referring to under Lm1,000 (€2,329.37). In view of the fact that appellant is to be acquitted from the Second Count of the Bill of Indictment this Court will not take further cognizance of these submissions.

(3) Appellant says that although appellant was acquitted of the charge of a continuous offence, the Criminal Court made reference to article 18 of the Criminal Code in its judgement. What was said in respect of the first point must also be said to apply here.

(4) Appellant submits that the confiscation of his property without any shred of evidence having been brought during the trial as to whether he has any property at all and/or whether such property, including that which appellant may have legitimately acquired both prior to his arrest and arraignment and after, especially considering that the amount of between Lm20,000 and Lm22,000 was transferred to Panama, as stated in the Bill of Indictment, is not just and does not make legal sense. This Court points out that appellant has failed to notice that the confiscation of property is a direct consequence of a finding of guilt in respect of money laundering and as provided for in subarticle (5) of article 3 of the Money Laundering Act. Hence appellant's submission is rejected.

(5) Appellant finally submits that, considering all the circumstances of the case, the punishment inflicted is excessive. This Court is of the opinion that, having considered the circumstances of the case, the maximum punishment to which appellant could have been sentenced, and the considerations made by the First Court, the only reduction in the punishment meted out by the Criminal Court is to be in respect of the fact that he is to be acquitted from the Second Count of the Bill of Indictment.

22. For these reasons the Court varies the appealed judgement, revokes the verdict and declaration of guilt in respect of the Second Count of the Bill of Indictment and instead substitutes the verdict in respect of said Second Count by declaring appellant not guilty of the Second Count of the Bill of Indictment and accordingly acquits him therefrom, revokes the judgement inasmuch as it condemned appellant to a term of imprisonment of four years and six months and instead condemns him to a term of imprisonment of three years and ten months, and confirms the judgement as to the rest, saving that the term for the payment of the fine shall commence from today.

< Final Judgement >

----------END----------