MALTA

COURT OF CRIMINAL APPEAL

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

THE HON. MADAM JUSTICE
ABIGAIL LOFARO

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 12 th December, 2013

Number 25/2012

Bill of Indictment No. 25/2012

The Republic of Malta

v.

Izuchukwu Nwakaeze

The Court:

1. This is an appeal from a judgement delivered by the Criminal Court on the 21st January 2013 regarding preliminary pleas raised by the accused Izuchukwu Nwakaeze. The accused appealed by means of an application filed on the 24th January 2013.

2. Izuchukwu Nwakaeze was accused, by means of a Bill of Indictment filed by the Attorney General on the 3rd October 2012, of having (1) on the twenty second [*recte:* twenty third] (23rd) day of October of the year two thousand and nine (2009) and during the previous days and weeks, with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug (cocaine) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or by promoting, constituting, organizing or financing such conspiracy; (2) on the twenty third (23rd) October of the year two thousand and nine (2009) and in the previous days, in Malta, and with criminal intent, rendered himself guilty of being in possession of a dangerous drug (cannabis) as specified in the First Schedule of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta; (3) on the twenty third (23rd) October of the year two thousand and nine (2009), in Malta, rendered himself guilty of having reviled, or threatened, or caused a bodily harm to a person lawfully charged with a public duty, while in the act of discharging his duty or because of his having discharged such duty, or with intent intimidated or unduly influenced him in the discharge of such duty as specified under Article 95 of the Criminal Code, Chapter 9 of the Laws of Malta; (4) on the twenty third (23rd) October of the year two thousand and nine (2009), in Malta, rendered himself guilty of having assaulted or resisted by violence or active force not amounting to public violence, a person lawfully charged with a public duty when in the execution of the law or of a lawful order issued by a competent authority as specified under Article 96 of the Criminal Code, Chapter 9 of the Laws of Malta; (5) on the twenty third (23rd) October of the year two thousand and nine (2009), in Malta, rendered himself guilty of having caused slight injuries on the person of PS 1174 Adrian Sciberras

who was a public officer or was lawfully charged with a public duty or is or was an officer or employee of a body corporate established by law and the offence was committed because of that person having exercised his functions as specified under Article 221(1) and Article 222(1)(c) of the Criminal Code, Chapter 9 of the Laws of Malta; (6) on the twenty third (23rd) October of the year two thousand and nine (2009), in Malta, rendered himself guilty of having disobeyed the lawful orders of an authority or of a person entrusted with a public service, or hindered or obstructed such person in the exercise of his duties, or otherwise unduly interfered with the exercise of such duties, either by preventing other persons from doing what they are lawfully enjoined or allowed to do, or frustrating or undoing what has been lawfully done by other persons, or in any other manner whatsoever as specified under Article 338(ee) of the Criminal Code, Chapter 9 of the Laws of Malta.

3. In his application of appeal, appellant requested that this Court revoke the appealed judgement and accept his preliminary pleas.

4. Izuchukwu Nwakaeze's pleas, as results from his note of pleas filed on the 24th October 2012, are the following:

"i. The nullity of the Third, Fourth and Fifth Counts of the Bill of Indictment due to the fact that all these three different Counts are based on the same alleged facts and moreover the Third and Fifth Counts of the Bill of Indictment effectively contain the same accusation.

"ii. The nullity of the Third and Fifth Counts of the Bill of Indictment since the consequences are not based on what emerged from the evidence collected by the Court of Magistrates (Malta) as a Court of Criminal Inquiry in this case. In actual fact in his evidence reported at pages 137 to 139 of the records of the inquiry, PS 1174 Adrian Sciberras stated that the injury suffered in his hand was not intentional.

"iii. The nullity of the statement of accused exhibited at pages 8 to 10 of the records of the inquiry and the impropriety of adducing in evidence the same statement and whatsoever accused may have verbally told the police during the investigation stage since the adducing in evidence of this statement and/or whatsoever he may have said during the investigation stage was made and/or said by him without having previously been offered any form of legal assistance and consequently the adducing in evidence of the statement of accused and/or whatsoever he may have told the police would impinge on his right to a fair trial which right is enshrined and protected in article 39 of the Constitution of Malta and in articles 6(1) and 6(3)(c) of the European Convention for the Protection Human Rights and Fundamental Freedoms."

5. In its judgement regarding these pleas, the Criminal Court said:

"The defence submits that the facts of these three counts are identical while the third and the fifth counts contain the same accusation.

"The Court notes that the facts refer to what happened on the 23rd October 2009 while the defendant was being arrested. The defendant resisted the arrest and as a result the Police had to use reasonable force to control him while PS 1174 Adrian Sciberras suffered scratches on his right shoulder.

"The facts as narrated in the third count are repeated in the fourth count and in the fifth count but in each of the three counts the Attorney General made a different accusation. In the Third Count the Attorney General charges the accused with a breach of article 95 of the Criminal Code, in the Fourth Count the Attorney General charges him with a breach of article 96 of the Criminal Code and in the fifth count with a breach of articles 221(1) and 222(1)(c) of the Criminal Code.

"Considers

"Now, according to the Criminal Law Notes of Professor Mamo, Part 1, page 151, it is possible that 'one and the same fact constitutes an offence under two
or more provisions of the law or, in other words, where the same 'fact' violates two or more provisions of the law so as to give rise to various grounds of incrimination.....'

"It is entirely at the discretion of the Attorney General to issue different charges having a common basis of facts if these, in his view, lead to different breaches of the law. No article falling under any of the sections 588 – 602 regarding the Bill of Indictment prohibits the Attorney General from drawing up a Bill of Indictment in this way.

"After the verdict of the jury, it is entirely up to the judge to decide on the penalty, bearing in mind section 17 of the Criminal Code.

"As far as the third and the fifth counts are concerned, the Articles cited are not identical even though the Attorney General refers 'to the bodily harm inflicted on a person lawfully charged with a public duty.' In the third count the AG refers to the more serious crime under article 95 whereas in the fifth count the Attorney General refers to slight bodily harm. The jury may return verdicts of guilty or not guilty under both articles or a guilty verdict under one article and a not guilty verdict under the other one. The judge will address the jury on the elements of the crimes contemplated on all the counts and then it is up to the jury panel to deliver their verdicts.

"There is absolutely no nullity in having different counts in the Bill of Indictment which have the same facts as a basis.

"Hence the Court is rejecting the first plea submitted by the defence.

"<u>The Second Plea – Nullity since the consequences are not based on what emerged from the evidence.</u>

"The defence submits that on pages 137 to 139 of the records of the inquiry, PS 1174 Adrian Sciberras stated that the injury he suffered in his hands was not intentional. The Court examined the pages identified by the defence and is reproducing the following excerpts from pages 138 and 139 of the records:

"Lawyer: When you say he hurt your fingers, how did it happen?

"Witness: I handcuffed him and when I tried to hit his hands together and handcuff the other, he pulled his hand away and I had the handcuff in my hand and my hand got caught in the handcuffs.

"Lawyer: This happened behind his back.

"Witness: Yes, of course.

"Lawyer: So he did not know what was happening really at that stage when he pulled his hand.

"Witness: We told him we were police officers. He already had one handcuff in his hand, so I think he knew.

"Lawyer: But I am referring to the accident of your fingers. It happened behind his back when he pulled his hand.

"Witness: Of course.

"Lawyer: Would you say that it was an intentional injury to hurt you in your hand?

"Witness: It was not intentional. He resisted the arrest.'"

"The defence is submitting that once the alleged victim himself says that the accused had no intention to injure him, then the third and fifth counts are null.

"Considers:

"The Court of Criminal Appeal (Superior) and the Criminal Court have always held that at this stage the accusatory part in the Bill of Indictment should be reflected in the narrative part. It is then up to the jury panel to decide whether during the proceedings there was sufficient evidence to support the charge in the Bill of Indictment. Once the narrative part in the Bill of Indictment and the accusation tally, then the requirements laid down in section 589(c)(d) of the Criminal Code are satisfied.

"Hence the Court is rejecting the second plea.

"<u>The Third Plea – the statement and any conversation between the police and the accused.</u>

"The defence submitted that the statement made by the accused and 'whatsoever' he may have told the police would impinge on his right to a fair trial.

"Has considered

"<u>The Facts as they appear in the Statement</u>

"The statement of the accused (pages 51 and 52) was made on the 23rd October 2009. He was duly cautioned. In the statement, the accused admits that he had smoked cannabis the day before the statement. He also said the Upo was a relative from Nigeria. He did not know whether Upo was a drug dealer. On the day he was arraigned the accused was on his way to the workplace. He denied attacking the Police when he was arrested near the Topaz hotel and added that he was unaware that the persons involved were police officers. In the last part of the statement, the accused explained how he came to be in

possession of €2910 and confirmed that Upo had called him several times during the last twenty four hours. He denied that Upo had informed him that a particular lady was going to have drugs in her bag. He also denied that he was carrying a backpack to put the drugs in it.

"This summary of the statement does not reveal any incriminating statement barring an admission to smoking cannabis. Otherwise the accused denied the 'contents' of the main charges.

"<u>The Law</u>

"Furthermore, sections 658 to 661 of the Criminal Code have never been amended since they became part of Chapter 9. So the validity of a statement taken in accordance with the law still stands. The last judgment of the Constitutional Court on this point – 'Stephen Muscat versus the Attorney General' – delivered on the 8th October 2012 overturned a decision of the First Hall of the Civil Court which had decided that the statement should be left out altogether. The Constitutional Court held that one has to examine the admissibility of a statement made by an accused on a case by case basis.

"<u>The decision about the Statement</u>

"So, as far as the statement made on the 23rd October is concerned, this Court is rejecting the third plea of the defence.

"<u>Whatever the accused told the Police</u>

"The defence did not indicate any paragraphs or any pages where the accused may have said something to the Police which may incriminate him.

"<u>The Facts</u>

"The Court examined what several police officers stated on the witness stand including the prosecuting inspector (Mr Johan Fenech) (pages 48, 65 and 141), PC 733 Joyce Galea (page 121), PS 1174 Adrian Sciberras (page 68) and PC 1319 Matthew Xuereb. None of these witnesses for the Prosecution referred to any words spoken by the accused which could in any way be considered as incriminating.

"<u>The Decision about 'whatsoever the accused told the Police'</u>

"Hence the Court is also rejecting this second part of the third plea.

"<u>The Court's Conclusion about the Third Plea as a Whole.</u>

"The Court is rejecting both parts of the third plea of the accused."

6. Appellant felt aggrieved by the Criminal Court's decision in respect of all three pleas. His grievances are being dealt with *seriatim*.

7. Appellant's first grievance refers to his first plea where he maintains that the Third, Fourth and Fifth Counts of the Bill of Indictment relate to the same alleged occurrence of facts and, furthermore, that the accusations under the Third and Fifth Counts are practically the same, the only difference being that whilst the accusation under the Third Count amounts to a crime, that under the Fifth Count amounts to a contravention. Appellant states:

"Whilst the Attorney General is free to choose the crime or contravention with which to charge an accused person, the same person may not be charged with different crimes or contraventions for the same alleged fact or facts since otherwise for the same fact/s an accused person who is found guilty by a lay jury of all the charges preferred against him, will have, for the same fact, to be punished

more than once even if the provisions of article 17(b) of the Criminal Code are applied."

8. This Court cannot but disagree with appellant. The Criminal Court rightly quoted Sir Anthony Mamo who, in Part I of his Lectures in Criminal Law[1], says with regard to formal or ideal *concursus delictorum*:

"The first and typical form of this *concursus* arises where one and the same 'fact' constitutes an offence under two or more provisions of the law, or, in other words, where the same 'fact' violated two or more provisions of law so as to give rise to various grounds of incrimination.

He then goes on to say:

"Our law makes no explicit mention of this form of ideal *concursus*: but our Courts have constantly accepted and applied the doctrine. In re: 'Camilleri v. Cilia et (2.XII.1939) the Criminal Court of Appeal said: 'It is a well established principle of our jurisprudence that where the same fact, resulting from one and the same criminal determination, occasions several violations of law, there are not several distinct offences, but there is only one offence, the smaller violations being merged into the graver violation.'

"The practical effect of this doctrine is that the accused cannot be punished for the several violations but can only be subjected to the punishment provided for the more serious violation."

9. It will thus have to be seen during the trial by jury whether appellant is guilty (or not) of one fact (which may consist of one act or several acts or a series of acts inspired by one single criminal purpose) or of a number of facts with different criminal determinations. In the former case, appellant will not be punished – as he fears – "more than once".

[1] Page 151.

10. It must also be noted that, contrary to what appellant submits, the offences contemplated in the Third Count and the Fifth Count are both crimes which may, however, attract the punishments for contraventions.

11. Appellant's first grievance is thus dismissed.

12. With reference to his second grievance, appellant says:

"In so far as the second plea is concerned, whilst applicant agrees with the Criminal Court that as had been constantly held the accusatory part of the Bill of Indictment should be reflected in the narrative part, applicant humbly submits that the narrative part should and must be based on the inquiry since otherwise the Attorney General will be free to charge an accused person with a crime on facts which do not result from the inquiry. In such a case what would be the use of having an inquiry in the first place? In actual fact, the Third and Fifth Counts of the Bill of Indictment are null because the crimes therein charged, *mens rea* being an essential ingredient of the criminal offence, cannot hold since the evidence adduced at the inquiry excludes the commission of the crimes charged."

13. This Court here refers to a similar plea made in the case **Ir-Repubblika ta' Malta v. Giovanna Pace et** decided by this Court (differently composed) on the 13th June 2013. In its judgement this Court stated as follows:

"8. L-ewwel aggravju jirrigwarda l-eċċezzjoni B. Hija tilmenta li minkejja li ma teżisti l-ebda prova kumpilata (u l-persuni kollha ndikati bħala xhieda fil-każ odjern kollha ddeponew fl-Istruttorja) li b'xi mod issaħħaħ it-teżi tal-prosekuzzjoni in sostenn tat-Tieni Kap. u tar-Raba' Kap. miġjuba kontra tagħha, il-Qorti Kriminali saħqet li tali deċiżjoni għandha tittieħed mill-ġurati stante li dan huwa punt ta' fatt. L-appellanti ssaqsi jekk dan huwiex ġust. Issaqsi x'inhu l-iskop tal-Qorti Kriminali matul l-eċċezzjonijiet.

"9. Permezz ta' dan l-aggravju, u allura l-eċċezzjoni B, l-appellanti qed tippretendi illi l-Qorti Kriminali kellha tagħmel, u issa li din il-Qorti għandha tagħmel, apprezzament tal-provi biex tiddetermina jekk jirriżultawx it-Tieni u r-Raba' Kapi ta' l-Att ta' Akkuża. Din la hi l-funzjoni ta' din il-Qorti u lanqas il-funzjoni tal-Qorti Kriminali fl-istadju ta' l-eċċezzjonijiet. Kwistjonijiet ta' apprezzament ta' provi jridu jiġu ndirizzati mill-ġurati. L-artikolu 436(2) tal-Kodiċi Kriminali jipprovdi: **'Imiss lill-ġuri li jiddeċidi fuq dak kollu li għandu x'jaqsam dwar jekk l-akkużat hux ħati jew le, u fuq il-kwistjonijiet kollaterali msemmijin taħt it-Titolu VII tat-Taqsima II tat-Tieni Ktieb ta' dan il-Kodiċi; u jmiss lill-qorti li tiddeċidi fuq l-applikazzjoni tal-liġi għall-fatt kif jiġi iddikjarat mill-ġuri, kemm ukoll fuq kull punt ieħor ta' liġi jew tal-fatt dwar il-proċediment.'** Għalhekk l-ewwel aggravju qiegħed jiġi miċħud."

14. This Court reaffirms what was said in that case which applies *mutatis mutandis* to the present one. Accordingly appellant's second grievance is also dismissed.

15. With regard to his third grievance, appellant submits:

"In so far as the third plea is concerned, although the Honourable Constitutional Court in the case **Stephen Muscat v. The Attorney General** had overturned previous jurisprudence with regards to a statement made by a suspected person previously to having been afforded the opportunity to consult a lawyer, it did not do so absolutely and had actually held that the statement of an accused person in such circumstance had to be examined on a case by case basis.

"In this case, the Second Count of the bill of Indictment charges applicant with possession of the dangerous drug cannabis. Therefore 'an admission' of having smoked cannabis is relevant to this Count of the Bill of Indictment.

"It does not emerge from the evidence adduced during the inquiry that applicant was 'a regular client of the police'. In

so far as the evidence goes this was the first time that applicant was investigated by the police with regards to the possible commission of an offence/s.

"Therefore in this particular case, at least the part of the statement as well as any evidence tendered or to be tendered by the police officers who had investigated the case in so far as the smoking of cannabis by accused is concerned should be excluded."

16. In so far as the taking of a statement without access to a lawyer and verbal declarations made to the Police also without such access are concerned, suffice it to refer to this Court's decisions in the cases **Ir-Repubblika ta' Malta v. Antonio Abdilla et** decided on the 9th May 2013 and **Ir-Repubblika ta' Malta v. Giovanna Pace et** decided on the 13th June 2013. This Court reaffirms the position as enunciated in those cases.

17. In so far as verbal declarations are concerned, no such declarations appear to result from the evidence tendered during the compilation of evidence.

18. Consequently appellant's third grievance is also dismissed.

19. For these reasons the Court dismisses the appeal entered by Izuchukwu Nwakaeze from the judgement of the Criminal Court of the 21st January 2013 and orders that the record be forthwith sent back to that Court for the case to proceed according to law.

< Final Judgement >

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