



Court of Magistrates (Malta) As a Court of Criminal Judicature

THE POLICE (INSPECTOR KEITH VELLA) V. GIUSEPPE COCUZZA (ID. CA56681EI)

(FAILURE TO DISCLOSE SUM IN EXCESS OF EUR 10,000 UPON ENTERING, LEAVING OR TRANSITING THROUGH MALTA – S.L. 233.07 CASH CONTROL REGULATIONS, REG. 3)

MAGISTRATE: DR. VICTOR G. AXIAK

26 November 2020

THE COURT,

having considered the charge brought against Giuseppe Cocuzza, an Italian national of 58 years, son of Mario and Rosa nee' Indelicato, born in Sicily on 19 July 1962, resident at Contrada Fontanazza, SNC, Motta Sant' Ananstasia (CT – Catania), Sicily and holder of Italian identity card number CA56681EI ("the accused" or "the Defence"),

having seen the Attorney General's consent for criminal proceedings to be commenced against the accused for an offence under the Cash Control Regulations (Reg. 3(6) of S.L. 233.07), dated 10 September 2020,

having considered the evidence submitted during the sitting held on 26 November 2020 including all the documents exhibited by the Prosecution,

having considered the oral submissions made on behalf of

- the Prosecution, by Inspector Keith Vella
- the Defence, by Dr. Lennox Vella,

gives the following

Judgement

1. The Police summoned the accused for the sitting held on 26 November 2020 and accused him of having on the 13/08/2020 at around 14:45 hrs at Malta International Airport:
 1. failed to declare to the Tax Commissioner that he was carrying the sum of ten thousand euro (€10,000) or more in cash whilst entering Malta with a flight from Bucharest, in breach of Regulation 3 of the Cash Control Regulations (S.L. 233.07) of the External Transactions Act (Chapter 233 of the Laws of Malta).
2. The Court was requested that in case of the conviction of the accused, apart from inflicting the penalties as established by law, the Court also orders the convicted party to pay the costs in relation to the appointment of experts as provided in Article 533 of Chapter 9 of the Laws of Malta.
3. **Inspector Keith Vella** testified that on 13 August 2020, at about 15:15hrs, he had been informed by Customs Officer, Mr Daniel Delia, that earlier on that day, at about 14:45hrs, he, together with his colleagues, namely Officer Kirsten Borg and dog handler Silvio Agius, whilst carrying out currency controls on passengers arriving from Bucharest, an individual who had not declared that he was carrying equal or more than €10,000 in cash was stopped. This individual was the accused whom he also recognized in the court room. Inspector Vella explained that the accused arrived in Malta with a Wizz Air flight with reference W63259 from Bucharest. After the passenger passed through the Blue Channel, he was stopped by the Customs Officers mentioned earlier and was escorted to the MIA Arrivals Office for a search to be carried out on his belongings in relation to the Cash Control Regulations. Whilst the search was being conducted, in the back pack of the accused, a bank draft issued by the Central Bank of Malta numbered CBMEURD202060002 amounting to €75,600 was subsequently found and seized by the Customs Officers. Since the bank draft was indivisible, nothing was returned to the accused and an "Items Withheld by Customs Officials Pending Investigation" form was issued for the bank draft mentioned. PC 822 Bryan Agius and PC 1245 Brandon Demanuele were instructed to head to the airport, arrest the accused and convey him to his office to be investigated. The bank draft was placed in a safety deposit envelope with reference 03825235, sealed and signed by the police, the passenger, and Customs Officers Daniel Delia and Kirsten Borg.

Later on, on 13 August 2020, the suspect had to be released on police bail as he complained of pains for which he was referred to Mater Dei Hospital on the orders doctors from the Floriana Health Centre. During his interrogation held on Saturday, 15 August 2020, the accused who was also assisted by his lawyers stated amongst other things that he knew that he had to declare cash equal to or more than €10,000 but he did not do so as for him a bank draft did not amount to cash that had to be declared.

4. Regulations 3(1) and (2) of the Cash Control Regulations provide that:

'3. (1) Any person entering, leaving, or transiting through Malta and carrying a sum of a value of ten thousand euro (€10,000) or more in cash shall be obliged to declare such sum to the Commissioner.

(2) The obligation to declare every sum as mentioned in subregulation (1) shall not be fulfilled unless such person has completed the applicable form appearing in the Schedule, and has handed in such form to the Commissioner when entering, leaving, or transiting through Malta.'

5. "Cash" is defined under the Cash Control Regulations as:

'(a) currency;

(b) bearer-negotiable instruments;

(c) commodities used as highly-liquid stores of value; and

(d) prepaid cards'

6. The current version of the Cash Control Regulations was enacted pursuant to Legal Notice 285 of 2020 and entered into force on 7 July 2020, that is, a month or so prior to the event under consideration. It therefore the law that applies to this case.
7. Legal Notice 285 of 2020 was enacted partly to align local legislation with Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union. The said Regulation enters into force in the European Union on 3 June 2021, on which date the other EC

Regulation dealing with Cash Control, that is, Regulation (EC) No 1889/2005, will be repealed.

8. Regulation (EU) 2018/1672's definition of "cash" is identical to the same definition under the Cash Control Regulations. However, the Regulation goes on to define "bearer-negotiable instruments" as follows:

'1(d) 'bearer-negotiable instruments' means instruments other than currency which entitle their holders to claim a financial amount upon presentation of the instruments without having to prove their identity or entitlement to that amount.

Those instruments are:

- (i) traveller's cheques; and
- (ii) cheques, promissory notes or money orders that are either in bearer form, signed but with the payee's name omitted, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery'

9. The Cash Control Regulations **do not** define "bearer-negotiable instruments".
10. The previous version of the Cash Control Regulations defined "cash" as 'any legal tender currency notes and coins and includes **monetary instruments**'. The term "monetary instruments" was (and still is) in turn defined under the External Transactions Act (Chapter 233 of the Laws of Malta) as including 'cheques, drafts or travellers cheques, any anonymous or bearer certificates of a financial or monetary nature which are convertible into cash, irrespective of the issuer, and in particular, negotiable and other securities and instruments, whether denominated in euro or foreign currency'. The problem with this definition was that it was not in line with Regulation (EC) No 1889/2005 that defined "cash" as currency as well as 'bearer-negotiable instruments including **monetary instruments in bearer form such as travellers cheques, negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery and incomplete instruments (including cheques, promissory notes and money orders) signed, but with the payee's name omitted**. Therefore, a bank draft issued specifically to a named individual (and not to the order of someone) that cannot be endorsed to third parties did NOT fall under

the definition of “bearer-negotiable instruments” under Regulation (EC) No. 1889/2005. It did however fall under the definition of “cash” and “monetary instruments” under the previous version of the Cash Control Regulations and the current version of the External Transactions Act. This led to a situation whereby local legislation enacted to align local legislation with the EU Anti-Money Laundering Regulation went beyond the scope of the said Regulation, without any legal justification whatsoever and purely due to haphazard drafting by the legislator (this is also confirmed by the wording used on the back of the Cash Declaration Form which makes reference to the definition of “bearer-negotiable instruments” under Regulation (EC) No. 1889/2005) – see paragraph 18 of this judgement for more details on this point).

11. As already said, whilst the current version of the Cash Control Regulations, that came into force on 7 July 2020 partly to align local legislation with Regulation (EU) 2018/1672, includes “bearer-negotiable instruments” under the definition of “cash”, it does not however define “bearer-negotiable instruments”. Since Regulation (EU) 2018/1672 is not yet in force (it will enter into force on 3 June 2021), the Court is precluded from applying any of its provisions to the present case. The definition of “bearer-negotiable instruments” that applies is the one found under Regulation (EC) No. 1889/2005. The latter Regulation is still in force throughout the Member States and being a European Union Regulation is also directly effective in any Member State legislation, including in Malta.

12. The term “bearer-negotiable instruments” is defined under Article 2.2(a) of Regulation (EC) No. 1889/2005 as including:

‘monetary instruments in bearer form such as travellers cheques, negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery and incomplete instruments (including cheques, promissory notes and money orders) signed, but with the payee's name omitted’.

13. The bank draft under consideration dated 24 July 2020¹ is neither in bearer form, nor is it endorsed without restriction, made out to a fictitious payee, or otherwise in

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such form that title thereto passes upon delivery. On the contrary it is issued specifically to the accused by the Central Bank of Malta and it can only be cashed by the accused (i.e. cannot be endorsed to third parties) at a bank upon identifying himself as "Giuseppe Cocuzza".

14. The objective of Regulation (EC) No. 1889/2005 (and the subsequent repealing Regulation) is to complement Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering. This Directive had introduced a Community mechanism to prevent money laundering by monitoring transactions through credit and financial institutions and certain types of professions.
15. Despite the variety of methods employed, money laundering is generally accomplished in three stages, which may comprise numerous transactions by the launderers that could alert a financial institution to criminal activity. These stages are placement, layering and integration:-
 - (i) Placement: refers to the placing of "dirty money" or unlawful cash proceeds into the financial system without arousing suspicion for example via deposits and purchases of monetary instruments such as cheques, or bank drafts.
 - (ii) Layering: refers to the movement of the money, often in a series of complex transactions crossing multiple jurisdictions designed to disguise the audit trail and provide the appearance of legitimacy. **These transactions may include purchasing investment instruments, insurance contracts, wire transfers, money orders, travellers' cheques and letters of credit.**
 - (iii) Integration: refers to the attempt to legitimize wealth derived from criminal activity. The illicit funds re-enter the legitimate economy by way of investments in real estate, luxury assets and business ventures, until the laundered funds are eventually disbursed back to the criminal.²
16. In the recitals to the Regulation (EU) 2018/1672 which though not yet in force are still valid as a point of reference:

² Supervision Guideline no. 13 issued under the authority of the Anti-money laundering and Countering the Financing of Terrorism (AML/CFT) Act 2009 (Bank of Guyana, June 28, 2013)

“given their characteristics, certain bearer-negotiable instruments ... are likely to be used in place of currency as an anonymous means of transferring value across the external borders in a manner that is not traceable using the classic system of supervision by the public authorities. This Regulation should, therefore, lay down the essential components of the definition of ‘cash’, while at the same time enabling the Commission to amend the non-essential components of this Regulation in response to the attempts by criminals and their associates to circumvent a measure which controls only one type of highly-liquid store of value by bringing another type across the external borders. If evidence of such behaviour on a considerable scale is detected, it is essential that measures be taken swiftly to remedy the situation ...

Bearer-negotiable instruments enable the physical holder to claim a payment of a financial amount without being registered or mentioned by name. They can be easily used to transfer considerable amounts of value and present salient similarities with currency in terms of liquidity, anonymity and risks for abuse.”

17. Therefore, it is clear that the use of cash or bearer negotiable instruments is monitored under the EU Anti-Money Laundering Regulations (i.e. the currently applicable Regulation (EC) No. 1889/2005 and the regulation that will shortly supersede it, Regulation (EU) 2018/1672) precisely because they may be used to break or disguise an audit trail thus providing the appearance of legitimacy where there is none. **This does not apply to the case in question since the bank draft issued by the Central Bank of Malta to the accused, being addressed specifically to him without the possibility of any endorsement, can never be used to break or disguise the audit trail.**

18. The Court also notes that the “Cash Declaration Form” that must be filled in and submitted to the authorities by travellers entering, leaving or transiting through Malta in compliance with the Regulations, makes direct reference to Regulation (EC) No. 1889/2005 and instructs travelers to declare *“bearer-negotiable instruments including monetary instruments in bearer form such as traveler cheques, negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, signed but with the payee’s name omitted, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery and incomplete instruments (including cheques, promissory notes and money orders) signed, but with the payee’s name omitted”*. Therefore the bank draft in question is pointedly and correctly omitted from the definition of “bearer-negotiable

instruments” on the Cash Declaration Form that is issued under the provisions of a legal notice that then fails to define the said term in accordance with the EU Anti-Money Laundering Regulation.

19. It is therefore clear that when the accused entered into Malta with the bank draft in question he was under no legal obligation whatsoever to declare it to the Commissioner.

Decision

20. For these reasons, the Court acquits the accused from the charge brought against him.

V.G. Axiak
Magistrate

Y. M. Pace
Dep. Registrar