MALTA

# QORTI TA' L-APPELL KRIMINALI

**ONOR. IMHALLEF**
**JOSEPH GALEA DEBONO**

Seduta tas-17 ta' Novembru, 2003

Appell Kriminali Numru. 90/2003

**The Police**

**(Inspector Martin Sammut)**
**Vs**
**Edward Joseph O'Connor**

**The Court,**

Having seen the charges proferred against the accused in the Court of Magistrates (Malta) as a Court of Criminal Judicature whereby he was charged with having on these Islands, on the 26th August, 2000 and a few days before, in Bugibba, Qawra, Sliema, St. Julians and other several places in Malta, with several acts committed in different times, which constitute violations of the same provisions of the law, and committed in pursuance of the same design,

1) Without the permission of the Minister, not being an authorized dealer, in Malta, and being a resident, outside Malta, bought or borrowed any gold or foreign currency from or sold or lent, any gold or foreign currency to, any person other than an authorized dealer, and this in breach of article 4 (1) of Chapter 233 of the Laws of Malta;
2) Without the permission of the Minister, not being an authorized dealer, in Malta did several acts which involved, were in association with or were preparatory to buying or borrowing any gold or foreign currency from, or sold or lent any gold or foreign currency to, any person outside Malta, and this in breach of article 4(2) of Chapter 233 of the Laws of Malta;
3) Not being an authorized dealer, who was in possession of or had control over any gold or foreign currency in Malta, and as a resident, who was in possession of or had control over any gold or foreign currency outside Malta, did not offer the gold or foreign currency or caused it to be offered for sale to an authorized dealer, and this in breach of article 5 of Chapter 233 of the Laws of Malta;
4) Without the permission of the Minister, imported into or exported out of Malta any notes or coins which are or have at any time been legal tender in Malta and this in breach of article 11(1) of Chapter 233 of the Laws of Malta;
5) Without the permission of the Minister, exported out of Malta any gold or foreign currency and this in breach of article 11(2) of Chapter 233 of the Laws of Malta;
6) And furthermore accused in the name of the Comptroller of Customs, for having on 26th August 2000, at Malta International Airport, whilst on point of departure from Malta on Flight Number BA 6937 to London UK, being found in possession of and/or under his control an amount of monies and one article of yellow metal as listed in Seizure notice 35/00 which amount of monies was not covered by the necessary permits/documents for exportation and this in breach of Section 60(f) (g) and section 62 (I) of the Customs Ordinance, Chapter 37 of the Laws of Malta.

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature dated 2nd May, 2003, in which after having seen sections 4, 5, 11 of Chapter 233, sections 18, 31, 20, 17 of Chapter 9, found accused not guilty of the second and sixth charges and guilty of the other charges and condemned him to one (1) year's imprisonment suspended for 2 years.

Having seen appellant Edward Joseph O'Connor's application of appeal dated 14th May, 2003, wherein he requested that this Court to vary and reform the judgement of the Criminal Court of Magistrates (Malta) as a Court of Criminal Judicature of the 2nd May, 2003, in that whilst confirming the said judgement in that part where it found the accused not guilty of the second and the sixth charges brought against him and where it refrained from ordering the forfeiture of the monies exhibited, it reverses, revokes and cancels that part of the said judgement where the accused was declared guilty of the first, third, fourth and fifth charges brought against him and sentenced to one year's imprisonment suspended for two years and consequently acquit him of all charges and consequential punishment inflicted upon him.

Having seen the appellant Attorney General's application of appeal dated 19th May, 2003, wherein he requested that this Court reforms the above mentioned judgement in that it confirms the guilt on the first, third, fourth and fifth charges and revokes it as regards the acquittal of the second and the last charges relating to the Customs Ordinanace, finds guilt on all counts and inflicts the appropriate punishment in terms of Law including the forfeiture of the exhibits including the foreign currencies.

Having seen that appellant Edward Joseph O'Connor's grounds for appeal are :-

1. that with regard the first charge the Court of first instance made a wrong application of the law as while Section 4 (1) of Chapter 233 contains a prohibition to the effect that except with the permission of the Minister , no person other than an authorised dealer shall in Malta and

no resident , other than an authorised dealer , shall outside Malta buy or borrow, sell or lend any gold or foreign currency to any person other than an authorised dealer, it transpires that the loan was made to John O' Connor and not to the accused by Steven Peel and whereas the first Court was correct in stating that for that reason there resulted no transgression of the first prohibition contained in Section 4 (1), it decided that there was a breach of said Section 4 (1) in that accused admitted to having in Malta sold foreign currency in exchanges made "in bucket shops". In doing this the first Court presumed that such outlets are not authorised dealers when no evidence of this results from the act of the proceedings and when the prosecution must prove all elements of the crime including that the transaction was carried out in an outlet which was not duly licensed as an authorised dealer.

2. that with regard to the third charge , in view of the fact that Legal Notice 419 of 2002, which amended G.N. 9 of 1973 and whereby Section 5 was rendered inapplicable if the amount of monies held did not exceed LM20,000 (Section 4[c] of L. N. 9 , 1973), if one is to argue that appellant is a resident, then no criminal liability results since today the threshold has been increased to an amount which does not exceed the amount found in the possession of appellant.

3. that with regard to the fourth charge , L.N. 419 of 2002 removed completely the prohibition contained in Section 11 (1) of Chapter 233 in respect of notes and coins. Section 5 of L.N. 9 of 1973, as amended by L.N. 419/2002 , which came into force on the 1st. January, 2003, states that the restrictions contained in Section 11(1) do not apply in respect of the exportation and importation by any traveller of any coins and notes which are or have been legal tender in Malta . The term "traveller" includes a person who is at the airport about to board a plane.

4. that with regard to the fifth charge , appellant contends that Section 5(2) (i) or (ii) of L.N. 9, of 1973 are applicable in this case, contrary to what was held erroneously by the first Court. In view of the amendments quoted above, the fact that there is no evidence that the transactions were carried out at an unauthorised dealer, then one cannot

legally argue that the monies were not lawfully acquired or held by the accused and, if for the sake of argument , the monies were not “lawfully acquired “, one cannot argue that at the moment of the search they were not “lawfully held” according to case law.

Having seen that the Attorney General’s grounds for appeal were the following :-

5. that when the First Court acquitted Edward O’ Connor of the second charge stating that section 4(2) of Chapter 233 of the Laws of Malta was not applicable since it related to foreign transactions it made a wrong interpretation of the law since the changing of the money was done in Malta with the intent of having it transferred abroad to another person . The concept of preparatory action was ignored by the First Court and hence section 4(2) was applicable to the case.
6. that with regard to the charge under Chapter 37 of the Laws of Malta , the First Court stated that there is no section 61(1) but the reference, in fact, was to section 62(I) as can be seen from the charge and the letter to prosecute (fol. 11) and the Attorney General’s reference (fol. 71) . That this mistake should not lead to the acquittal of the accused. Similarly Section 60(g) was wrongly interpreted as to require the production of the package by the accused. His failure to proceed according to law cannot exonerate him from his responsibility and hence the search by the Customs Officers. He was in duty bound to declare the currency and not wait for the search by Customs. As regards the charge relating to Section 60(f) the notion of ship includes that of aircraft as emerges from Legal Notice 42 of 1994, paragraph 11 which indicates clearly that the Customs Ordinance is applicable also to aircraft. Hence the interpretation of the First Court was incomplete.
7. that the Court stated that it could not order the forfeiture of the money in terms of section 23 of the Criminal Code . However it could have done so in terms of Section 42 of Chapter 233 and Section 60 of Chapter 37 of the Laws of Malta. Hence the forfeiture was applicable.

Having seen the records of the case;

Having heard oral submissions by Prosecution and Defence Counsel in the course of the sitting of July 3, 2003;

Having seen the Notes of written submissions filed by the Attorney General and appellant O'Connor on the 21st and 30th. October, 2003 respectively, after the time limit for filing same was extended by the Court following a joint application filed on 18th. September, 2003;

Having considered that :-

The first charge proffered against the appellant and respondent O'Connor in this case, hereinafter referred to as O'Connor,is that of having without the permission of the Minister , not being an authorised dealer , in Malta , and being a resident , outside Malta , bought or borrowed any gold or foreign currency from , or sold or lent , any gold or foreign currency to, any person other than an authorised dealer , and this in breach of article 4 (1) of Chapter 233 of the Laws of Malta .This charge was duly included in the Note of the Attorney General indicating the sections of the law under which an offence could result. The First Court found O'Connor guilty of this charge and O'Connor appealed from this finding.

Now Section 4 (1) of Chapter 233 states that :-

"Except with the permission of the Minister, no person, other than an authorised dealer, shall, in Malta, and no resident, other than an authorised dealer, shall, outside Malta, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer."

The First Court correctly held that is was proven that O'Connor had no such permission under the Exchange Control Act (Vide evidence of Edmond Calleja, at fol. 19). The First Court gave O'Connor the benefit of the doubt when it said that, if his version was to be believed , then it

did not result that he had borrowed money outside Malta as the money had been borrowed by his brother John O' Connor, though that this does not take into account that O'Connor "ex admissis" states that he had in turn "borrowed" the said money from his brother who was abroad (fol.85), which is tantamount to the same thing to this Court's mind. Hence to begin with the First Court was not correct when it held that borrowing from his brother abroad did not make accused guilty of this charge and this was obviously a wrong interpretation and application of the law.

Appellant's ground of appeal with regard to this charge is that the Prosecution did not prove – as it is bound by law to do – that appellant O'Connor did not acquire the foreign currency from an authorised dealer. Now whereas this Court agrees that for purposes of section 4 (1) the Prosecution has to prove that the other person with whom the transaction was conducted was not an authorised dealer (Criminal Appeal "The Police vs. Andre' Carbonaro" [24.10.2002]), the Prosecution can prove this in a number of ways , first and foremost through the accused 's own admission either in his statement to the Police or in his evidence in Court . Such an admission has been held to be the "queen of all evidence" ("il-prova regina"). In this particular case, accused admits in his statement that after converting the money he allegedly brought over from abroad into Maltese currency, he converted part of it back either into Sterling or U.S. Dollars in what he calls "BUCKET SHOPS" . And on being asked ,

"Why didn't you go to a licensed Foreign Exchange Bureau? , he replied :-
""Because the commission was too much." (fol. 32)

This is a manifest and clear admission on accused 's part that in Malta he acquired foreign currency from outlets which were not licensed authorised dealers and that he knew that he was actually doing so. Accordingly the First Court was more than justified in finding O'Connor guilty of this first charge. The First Court did not "presume" that

these “bucket shops” were not authorised dealers, but it drew the only logical conclusion and implication from accused ’s own reply to the question above reproduced. As such O’Connor’s first ground of appeal with regard to the first charge of which he was found guilty by the First Court is manifestly unfounded.

The second charge of which O’Connor was acquitted but an appeal was lodged therefrom by the Attorney General was that of having, without the permission of the Minister, not being an authorised dealer, in Malta, did several acts which involved, were in association with or were preparatory to buying or borrowing any gold or foreign currency from, or sold or lent any gold or foreign currency to , any person outside Malta , and this in breach of section 4 (2) of said Chapter 233.This sub-section of Section 4 was also included in the Attorney General’s Note .

Subsection (2) of Section 4 states that :-

“Except with the permission of the Minister , no person other than an authorised dealer , shall , in Malta, do any act which involves, is in association with or is preparatory to buying or borrowing of any gold or foreign currency from , or selling or lending any gold or foreign currency to any person outside Malta.”

The First Court very succinctly held that this subsection was not applicable to the case in question in view of the fact that even if O’Connor purported to borrow any foreign currency, such was done outside Malta. Besides any foreign currency sold was done in Malta.

In his appeal the Attorney General submitted that this a wrong application of the law because the changing of money was done in Malta with the intent of having it transferred abroad to another person and although it was true that if O’Connor had borrowed the money abroad, that transaction was not finalised in Malta, the paying back process and change of currency was done in Malta

in preparation of the transaction abroad. This concept of preparatory action was ignored by the First Court.

Now whereas it is clear that O'Connor was not involved in the selling or lending of foreign currency to any person outside Malta, as per the second hypothesis of the subsection in question, if his version of the facts is to be believed, it also resulted that when he was in Malta he had requested his brother's help in borrowing money from him. It resulted that his brother was abroad and "outside Malta" and that in effect this borrowing from a person "outside Malta" had in effect taken place. Although in his statement to the Police, O' Connor initially would not divulge from whom he had borrowed or acquired the money he had brought with him from England, in his evidence before the First Court (Fol. 86), he stated :-

"The week or so before when I borrowed the money from England from my brother I brought the money to Malta. I was going to buy a mini bus …So I asked my brother if he can, because I know he has friends who have money, if he could somehow get me the money and he agreed. So I went to England …and my brother gave me the money. "

It is obvious from the above sequence of events that O'Connor was still in Malta when he requested his brother who was outside Malta at the time to borrow or raise the money for him. Hence even here it is manifestly clear that O'Connor was guilty of doing an act which involved , was in association with and was preparatory to his borrowing foreign currency from his brother who was outside Malta. The Attorney General is correct in pointing out that the First Court ignored the preparatory element which is a key ingredient of this offence and that therefore this was an incorrect application of the law. Accordingly this ground of appeal of the Attorney General is being upheld by this Court.

The third charge was that O'Connor, not being an authorised dealer, who was in possession of or control over any gold or foreign currency in Malta, and as a resident, who was in possession of or control over any

gold or foreign currency outside Malta, did not offer the gold or foreign currency or caused it to be offered for sale to an authorised dealer and this in breach of Section 5 of Chapter 233. This Section was also cited by the Attorney General in his Note and the First Court found O'Connor guilty of same after holding that in its view O'Connor was a resident for purposes of this Section. However O'Connor appealed from this part of the judgement and is maintaining that, if he is to be considered as a resident, then in view of the change in the law by virtue of L.N.419 of 2002 where the threshold of the amount to make this section applicable was raised to LM20,000, no criminal liability exists today. This line of defence was not raised before the First Court as the only line of defence taken on this count, having regard to the written pleadings (fols. 208 and 209), was that O'Connor was not a resident and consequently by virtue of Regulation 4 of L.N. 9 of 1973, the provisions of Article 5 of the Act did not apply to him. Consequently the First Court did not pronounce itself on this matter but, as it held that O' Connor was in fact resident in Malta, dismissed that plea.

Detailed submissions in writing were made on this point, which was raised for the first time before this Court, by both parties. Whereas O'Connor refers to general principles of Criminal Law, text writers, case law and Section 27 of Chapter 9 , the Attorney General relies on the provisions of the Interpretation Act .

Section 5 (1) of Chapter 233 states that:-

"Every person, not being an authorised dealer, who has possession of or control over any gold or foreign currency in Malta, and every resident who has possession of or control over any gold or foreign currency outside Malta, shall, subject to the provisions of this section, offer the gold or foreign currency or cause it to be offered for sale to an authorised dealer, unless the Minister consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Minister."

However, Regulation 4 of The Exchange Control Order enacted by Legal Notice 9 of 1973, **as it stood at the time of the commission of the alleged offence updated by Legal Notice 226 of 1999, which came into force on the 1st. January 2000, stated :-**

"The provisions of article 5 of the Act shall not apply where the foreign currency is in the possession or under the control of –
(a) any person who is not a resident ; or
(b) any person in Malta who holds a valid resident permit in terms of the Immigration Act ; or
(c) any resident if the aggregate value of the foreign currency , including any sums held in a foreign currency (demand deposit) account with a credit institution in Malta , does not exceed **two thousand five hundred liri**."

Legal Notice 278 of 2000, which came into force on the 1st January, 2001 and hence after the commission of the alleged offence in August, 2000, raised the latter exemption to LM10,000. Subsequently, by virtue of Article 2 of L.N. 419 of 2002, which came into force on the 1st. January, 2003, the limit was again raised to LM20,000.

As stated above, in the course of his submissions before the First Court (fol. 208) O'Connor only submitted that he was not to be considered as a resident, however, the First Court , correctly in this Court's view , held that O'Connor , who was married to a Maltese, had lived regularly in Malta for some seven years, possessed a Maltese Identity Card and was even entitled to vote in Local Council Elections, intended to buy a mini bus to work in Malta and also intended to eventually bring his daughter over to live here , was to be considered as a resident for purposes of the Exchange Control Act . In fact the term "resident", according to Section 2 (1) of Chapter 233, means:-

"any natural person , regardless of nationality , whose place of residence is in Malta ."

Hence the fact that O'Connor still had a British Passport did not detract from his being a "resident", as he

undoubtedly was in this case. Residence must not be confused with “domicile” which is a more notional concept strongly influenced by the persons’ long-term intentions.

In his application of appeal O’Connor limits his objection to the judgement of the First Court on this score to the fact that since the time of the alleged commission of the offence in August, 2000, the law was changed as aforestated and that, if one were to argue that accused was a resident, then no criminal liability results today.

There was an apparent misapprehension shared both by the defence and the prosecution that as the law stood at the time of the commission of the alleged offence the maximum amount which any resident could hold in foreign currency in Malta without the need of any express consent on the part of the Minister to hold them, was LM10,000, when in actual fact as seen above that limit was in fact **LM2500**. It is obvious that the amount found on O’ Connor exceeded this amount. On the other hand, the Prosecution does not contest that the said monies however do not exceed the present threshold of Lm20,000.

In the course of the oral submissions reference was made to a number of judgements by both parties, but this Court could not fall upon any authoritative pronouncement of our Courts with regard to this specific point in the judgements quoted, because the issues decided therein were not the same. In fact the cases quoted either refer to cases where the new law created a procedurally more unfavourable position for the accused: (“Republic of Malta vs. Ravi Ramani”; Court of Criminal Appeal [24.1.1989]; “Il-Pulizija vs. Lawrence Cuschieri”, Constitutional Court [8.1.1992] or where the substantive law was changed to the prejudice of accused: “Joseph Picco vs. Avukat Generali” (Civil Court, First Hall, (Constitutional) [17.6.1991] and Constitutional Court [10.12.1991.], or where the punishment could be interpreted as being graver than that applicable at the time of the commission of the alleged offence (Republika ta’ Malta vs. Fabian Galea et.” (Criminal Court) [17.2.2003]. It is only in one of

the above judgements that the Court made some sort of pronouncement "obiter dicta" that relates to the point at issue.

Hence in the Cuschieri case above mentioned it was stated "obiter" that any person charged with a criminal offence is to answer to the guilt attributed to him according to the laws applicable and in force at the time of the commission of the alleged offence, whether those laws are of a substantive nature or of a procedural or adjectival nature, unless those laws have been changed in such a way as to benefit the accused due to a change in the legislative policy of the state.

O'Connor quoted from the relevant part of Prof. Sir Anthony Mamo's "NOTES ON CRIMINAL LAW" (p. 32) where it is stated that:-

"In fact, an apparent exception to the rule that a penal law cannot have a retrospective effect occurs when a new law enacted after the commission of the offence is less severe or more advantageous to the offender then the law in force at the time the offence was committed.

"The hypothesis is twofold:

8. the law against which the offence was committed is subsequently repealed so the act is no longer criminal;
9. the law against which the offence was committed is subsequently amended or changed so that, though the act is still criminal, the punishment or conditions of liability and prosecution are varied ."

and Prof. Mamo goes on to state :-

"The 'communis opinio' among continental writers is that where the law in force at the time of the commission of the offence and the subsequent law are different, the offender should be dealt with according to the law which is more favourable to him . This means that if the law in force at the time of the trial is less favourable to the accused than the law in force at the time of the commission of the

offence, it is the latter law that should be applied retrospectively to his prejudice (Sic!). If, on the contrary, the new law is more favourable to the accused than the law which was in force at the time the offence was committed, then it is the new law that should be applied, for, if the old law were to be applied, it would have, as to the excess of punishment or other aggravation, an effect beyond its limit of valid operation."

Prof. Mamo also refers specifically to Section 27 of the Criminal Code which lays down that:-

"if the punishment prescribed by the law in force at the time of the trial is different from that prescribed by the law in force at the time of the commission of the offence , the less severe of the two punishments (old Italian Text : "pena di qualita' meno grave" ) shall be applied."

With regard to this provision of the Law, Prof. Mamo also refers to a judgement of H.M. Criminal Court in its Appellate Jurisdiction in the case "The Police vs. Agostino Bugeja" (Vol. XXIV, p. iv. p.941) where it was held that, although the said section contemplates only the case in which the punishment provided by the law in force at the time of the trial is different from that provided by the law at the time of the commission of the offence, and no express provision exists concerning the case in which, at the time of the trial, the act complained of has ceased to be an offence, nevertheless arguing "a fortiori" from this section, it is clear that the accused should go free from all punishment in the latter case. Otherwise the law would be contradicting itself by giving retroactive effect only to a law which establishes a lighter punishment and at the same time negating this retroactive effect to a subsequent law, which, rather than diminishes, actually eliminates the punishment.

However O'Connor did not quote all that Prof. Mamo had to say on this issue. In fact, in all fairness, Prof. Mamo goes on to say (ibid p. 34-35) :-

"….the principles above set forth concerning the application of the more favourable law **may be set aside** by an express provision in the repealing or amending law . This is, In Malta, commonly done, especially in respect of enactments which operate for a short period at a time and are at short intervals amended or repealed and re-enacted. In such cases the necessity is obvious of saving unprejudiced any liability or proceedings incurred or instituted under the law so amended or repealed."

Although Prof. Mamo published his Notes on Criminal Law in the late 1940's, i.e. before the enactment of the Interpretation Act, (Chap. 249) which came into force decades later in 1975, he felt that his treatise should be more complete by referring to the position under English Law and he went on to say that :-

"In England, the general rule is, now, that the repeal of a statute has no effect on pending proceedings. Prior to 1889, by the unqualified repeal of the Statute on which an indictment was framed, the proceedings fell to the ground and no judgement could be pronounced. A prisoner indicted for an offence against an Act which was repealed after the offence was committed, but before the prisoner was tried, could not be sentenced under the repealed Act. But as to Statutes passed since 1889, the Interpretation Act, 1889 (52 & 53 Vict. C. 63 S. 38, Ss.2) provides that where an Act *"repeals any other enactment, then, unless the contrary intention appears, the repeal shall not ….(d) effect any penalty , forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or (e) affect any investigatio , legal proceeding or remedy in respect of any such …..penalty, forfeiture or punishment as aforesaid" and that "any such investigation, legal proceeding or remedy may be instituted , continued or enforced and any such penalty , forfeiture or punishment may be imposed as if the repealing Act had not been passed."*

Now an almost identical provision to this just quoted was introduced by the Maltese Interpretation Act, 1975,(Chapter 249 of the Laws of Malta) which the

Attorney General is invoking to rebut O'Connor's argument on this score. In particular he refers to Section 12 (1) (d) which is almost identical in wording to the English Interpretation Act and which states that where an Act passed after the commencement of the Interpretation Act of 1975 *," repeals any other law, then unless the contrary intention appears, the repeal shall not "affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed or any liability thereto."*

Moreover, subsection (e) which also echoes the corresponding English provision, goes on to state that it shall likewise not "*affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued and enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. "*

Now "Act" , according to Section 2 (1) includes *…"any order , rule, regulation, bye-law, notice or other instrument having the force of law in Malta*" and according to Section 3 (1) *"amend" includes " repeal, add to and vary" and "repeal" used in relation to a law includes , rescind, revoke, cancel, and replace. "*

As the change in the law under review was brought about by Legal Notice amending a previous Legal Notice and hence by virtue of subsidiary legislation, one has to refer also to Section 9 of Chapter 249 which deals with subsidiary legislation. This section states that : -

*"Any law made after the commencement of this Act by virtue of a power conferred by an Act passed either before or after the commencement of this Act, may, unless the contrary intention appears in the Act conferring that power, be made to operate retrospectively to any date which is not earlier than the commencement of such Act, or where different provisions of such Act come into*

*operation on different dates, the commencement of the provision under which the subsidiary law is made.*
"Provided that no person shall be made or become liable to any punishment in respect of anything done or omitted to be done before the commencement of the subsidiary law."

Sub-section (2) of Section 12 then states that :-

"When an Act , whether passed before or after the commencement of this Act , amends any other Act passed either before or after the commencement of this Act , or any provision of such other Act, the Act or provision so amended, as well as anything done thereunder or by virtue thereof, shall unless the contrary intention appears , continue to have full effect and so continue to have effect as amended , and subject to the changes made by the amending Act."

And subsection (3) :-

"for the purposes of subarticle (2) "amended" means and includes any amendment, modification , change, alteration , addition or deletion , in whatsoever form or manner it is made and howsoever expressed , and includes also a provision whereby an Act or a provision thereof is substituted or replaced or repealed and substituted , or repealed and a different provision made in place thereof."

Appellant O' Connor submits that L.N. 419 of 2002 did not repeal the previous regulation conferring the exemption but only amended it or modified it by making it wider and hence once this was not a case of a repeal of the law Section 12 (1) of Chapter 249 was not applicable. He bases this argument on the definition of the word "repeal" above quoted which does not include "amend" , whereas the definition of the latter word includes also "repeal" .

Be that semantic distinction as it may, this Court is of the opinion that the solution to this problem lies in Section 9 above quoted , which says that subsidiary legislation **"MAY BE MADE TO OPERATE RETROSPECTIVELY"**

**("tista tkun retroattiva**" in the Maltese text ) unless the contrary intention appears in the Act conferring that power. Now in this Court's view , the use of the words : **"MAY BE MADE " and "TISTA' TKUN**" clearly imply that such a law is not necessarily retroactive automatically but may be made to be so . The only limitation to such a faculty is that no person shall be made liable to a punishment for an act which when it was done was not so punishable. Obviously for such subsidiary legislation to be retroactive therefore it would have to be expressly stated in the new law and that this cannot be assumed to happen automatically in all cases of subsidiary legislation supplanting a former law. Now whereas in Chapter 233 there appears no declared contrary intention to enable subsidiary legislation to be made retroactive and hence this is legally possible under the Interpretation Act, for any amendment of any order or regulation issued under Chapter 233 to be retroactive, it would have to be expressly stated that this is to be the case . A close examination of Legal Notice 419 of 2002 (and for all that matters of L.N. 278 of 2000 which preceeded it) reveals no such declaration to make the wider exemption being invoked by O' Connor retroactive however. Indeed, Article 1 (2) of both Legal Notices respectively expressly states :-

**"THIS ORDER SHALL COME INTO EFFECT ON THE 1ST JANUARY , 2003".**

**and**

**"THIS ORDER SHALL COME INTO EFFECT ON THE lst. JANUARY , 2001"**

and no mention of any retroactive effect is made therein . Hence one cannot assume that the intention of the legislator was to make the wider exemption retroactive. Therefore once no contrary intention appears from L.N. 419 itself to make the change retroactive, it does not affect the liability , punishment and forfeiture incurred or to be incurred for any breach of the law as it stood prior to such change according to section 12 (1) (d) and (e).

It is published Government policy to gradually do away with exchange control restrictions and that this is being done in a structured way, at yearly or longer intervals, by

relaxing certain restrictions and limitations and by widening exemptions. This is Government's declared purpose. Now if with every relaxation of restrictions or widening of exemptions, the previous restrictions were automatically to be revoked retrospectively, then Government's declared programme would be automatically defeated before it started because transgressors would have an in built guarantee that even if proceedings against them were commenced for breaches of the law at a given time, proceedings would have to stop or end in acquittals with the coming in force of any future relaxation. This is clearly not the legislator's intention, because if it were the case, it might as well do away with all exchange control restrictions in one fell swoop and not in a structured way programmed over a number of years.

Where the legislator wanted to introduce an amendment to give retrospective immunity from liability and prosecution for past infringements of the Act, it did so categorically and unequivocally in the newly amended Section 39, introduced by Act II of 2002.

Accordingly appellant O' Connor's ground of appeal on his conviction of the third charge is being rejected and the decision of the First Court finding him guilty thereof is being upheld.

Appellant O'Connor also lodged an appeal from his conviction of the fourth charge which states that he imported or exported any notes or coins which are or have been legal tender in Malta in breach of article 11 (1) of Chapter 233. In his written submissions filed on 12th. December, 2001 before the First Court, (Fol. 209) O' Connor pleaded that he could not be found guilty of this charge as the "importation" of the foreign currency took place on 10th. August, 2001(Sic! Recte 2000) and that as he was charged with having committed the offences in question on the 26th. August, 2000 "and a few days before" , therefore the importation fell outside the parameters of the original charge and consequently accused could not be found guilty of this offence . The

First Court only dealt with this line of defence and dismissed it as it held that O'Connor had admitted to this importation and that this importation did happen a few days before . Before this Court in the appeal stage, O'Connor's defence has not raised that issue again but instead raised a new issue based on the changes brought about by Legal Notice 419 of 2002 .

Section 11(1) states :-

Except with the permission of the Minister , no person shall import into or export out of Malta any notes or coins which are or have been at any time legal tender in Malta."

Even here there was a misapprehension on the part of the defence that the Legal Notice that was applicable at the time of the commission of the alleged offence was L.N. 278 of 2000. But this Order as above stated ,only came into force on the 1st. January, 2001 and hence after the commission of the alleged offence in August, 2000.

Hence Article 5 (2) of Legal Notice 9 of 1973 as it stood at the time of the commission of the alleged offence as amended by L.N. 102 of 1978 stated :-

*"There shall be exempted from the provisions of article 11 (1) of the Act –*

*(a) the exportation from Malta by any traveller of any notes and coins which are or have at any time been legal tender in Malta , up to an amount exceeding* ***twenty five liri*** *;*
*(b) the importation into Malta by any traveller of any notes and coins which are or have been legal tender in Malta , up to an amount not exceeding the value of* ***fifty liri*** *."*

L. N . 278 of 2000 which however only came into force on the 1srt. January, 2001 raised this amount to LM1000. Subsequently L.N. 419 of 2002, which came into force on 1st. January, 2003, did away with any limitation altogether by the deletion of the phrase : "up to an amount not exceeding one thousand liri"

Clearly this subsection speaks ONLY of the importation or exportation of notes or coins which are or have been legal tender at any time in Malta . No evidence whatsoever was brought forward by the Prosecution to prove that O'Connor , albeit "a few days before" the 26th. August , 2000, imported any notes or coins that were or have been legal tender in Malta . Although it may be argued that at some time long ago in Malta's history , the English Pound was legal tender in Malta , clearly this provision of the law refers to Maltese Currency as such and not to the Pound Sterling , which O' Connor admits to have imported into Malta a few days before he was apprehended .

However when O'Connor was apprehended at the airport on the point of travelling to England on the 26th. August , 2000 , he was found in possession of notes or coins which were or had been legal tender in Malta in excess of the then obtaining limit of LM25. In fact it resulted that he was carrying the sum of LM52. Consequently this charge has been proven at law and O' Connor was correctly found guilty thereof by the First Court.

O'Connor also appealed from his conviction on the fifth charge i.e. of having without the permission of the Minister exported out of Malta any gold or foreign currency in breach of section 11 (2) of Chapter 233. Before the First Court O' Connor had argued in his written defence (fol. 209-210) that as a non-resident traveller he could not be prohibited from taking out of Malta any gold or foreign currency which he could show that he had originally brought into Malta . According to the defence ,the evidence clearly showed that O' Connor was going to export the money he had originally brought (after converting it back to Sterling and U.S. Dollars) in order to repay his debt . It was also submitted that even if the First Court were to hold that the proviso was inapplicable, by virtue of Regulation 5 (2) of L.N. 9 of 1973 the exportation from Malta of any foreign currency he has lawfully held or acquired, in the case of a resident, or which he can show that he had originally brought into Malta, in the case of a

non-resident was exempted from the provisions of Article 11 (2).

The First Court had dismissed both these pleas on the first Count because it had already held that he was a resident and, on the second score, because the foreign currency exported by the resident must have been lawfully held or acquired and that that Court had already decided that said monies were not lawfully held.

In the appeal stage O'Connor's first ground of appeal is. that the provisions of Section 5 (2) (i) or (ii) of L.N. 9 of 1973 were applicable to his case despite the fact that the First Court erroneously held them to be inapplicable.

Now Section 11 (2) states :-

"Except with the permission of the Minister, no person shall export out of Malta any gold or foreign currency .
"provided that nothing in this section shall prohibit a non-resident traveller from taking out of Malta any gold or foreign currency which he can show to have originally brought into Malta."

Article 4 now Article 5 of Legal Notice 9 of 1973 , which was in force at the time of the commission of the alleged crime , stated that :-

"There shall be exempted from the provisions of article 11 (2) of the Act the exportation from Malta, by any person, of any foreign currency which –
*(i) in the case of a resident , he has lawfully held or acquired; and*
*(ii) in the case of a non-resident , he can show that the had originally brought into Malta."*

With regard to the first ground of appeal, it has already been held that the First Court had correctly held that O' Connor was a resident and therefore the First Court was being consistent with itself when it held that the proviso of Section 11 (2) of the Act and Article 5 (2) (ii) of the Exchange Control Order of 1973 as amended up to the

date when the offence was allegedly committed were not applicable to O' Connor's case , as he was held to be a resident . Hence this Court cannot fault the first Court's reasoning in this regard.

The second ground of appeal with regard to this charge is that one could not hold that the monies were not lawfully acquired and that, even if one were to concede that the funds were not "lawfully acquired", one cannot argue that at the time of the search the monies were not "lawfully held". In support of this argument O' Connor quotes the judgements of this Court in the case **"The Police vs. Winston Zahra ."** [20.7.1988] and "**The Police vs. Joseph Vassallo "** [20.5.1993]. This Court however would like to refer to its recent judgement in the case : "**Il-Pulizija vs. Paul Borg**" [6.10.2003] where the facts of the case were very similar if not identical to the case under review and where this submission was considered .

In the **Paul Borg case**, in fact it was held that although this Court was in full agreement with the principles laid down in the **Zahra** and **Vassallo** cases in that appellant should have offered the foreign currency in his possession for sale to an authorised dealer within a reasonable time and that what constitutes a reasonable time was to be decided by the Court from case to case and that a term of three months could be held to be a reasonable time , it did not result that that was a genuine case of a person who had somewhat delayed, albeit by a few months, the offer of the foreign currency to an authorised dealer . On the contrary, it resulted that the foreign currency in question was about to be exported from Malta and appellant had in effect already cleared passport control and entered a part of the airport where it is common knowledge that there are no bank or other exchange facilities for exchanging foreign currency into Maltese currency and that this clearly showed that appellant in that case had absolutely no intention whatsoever of offering the foreign currency in his possession to an authorised dealer in Malta. This Court had held in that case that appellant Borg could not reasonably invoke in his favour that a reasonable time for handing over the foreign currency had not yet elapsed but

that the evidence showed that he had no intention whatsoever of doing so and that , had he not been stopped by the authorities at the airport , the foreign currency in question would have been spirited out of Malta. What was stated in the Borg case in this respect applies squarely and fully also to this case. Hence this ground of appeal based on the two cases quoted by appellant O'Connor is unfounded in this case.

Furthermore once that the first Court correctly held that the foreign currency had not been lawfully acquired and that acquisition was in breach of Section 4 (1) and (2) and once that it had also correctly held that they were not lawfully held , as their possession was in breach of Section 5 , then O' Connor could never benefit from the exemption under Regulation 5 (2) (i) above quoted.

Consequently O' Connor's appeal against his conviction of the fifth charge also fails and is being rejected.

Finally this Court is called upon to decide upon the Attorney General's appeal regarding O' Connor's acquittal of the sixth charge of having at Malta International Airport on the 26th. August, 2000, whilst on the point of departure from Malta on Flight number BA6937 to London, United Kingdom, been found in possession of and/or under his control an amount of monies and one article of yellow metal as listed in Seizure Notice 35/00 which amount of monies was not covered by the necessary permits/documents for exportation and this in breach of Sections 60 (f) (g) and Section 62 (I) of the Customs Ordinance. (Chap.37). O'Connor's only submission in writing on this charge (Fol. 210) was that, whilst acknowledging that had there been any breach of Chapter 233, this would be tantamount to a breach of Chapter 37 , since he was contending that he could not be found guilty of any violation of Chapter 233, he was refraining from making any submissions on the sections contained in Chapter 37 and cited by the Attorney General. On the basis of this submission – or indeed lack of one, this Court would have expected the First Court , which had already found O' Connor in breach of all the charges

proffered against him under Chapter 233, to almost automatically find guilt also under the sixth charge. This was not however to be the case.

In fact the First Court, found O' Connor not guilty of said charge and acquitted him thereof. The first Court first premised that Section 62 (1) does not exist in Chapter 37. However, the Attorney General submits in his application of appeal , that the reference in fact , was to section 62(I) as can be seen from the charge and the letter to prosecute (Fol. 11) and the Attorney General's reference (Fol. 71). In actual fact the First Court was right in pointing out the error as the relevant subsection of Section 62 is (i) not capital (I) . This subsection deals with the case of whosoever, knowingly, is in any way concerned in any fraudulent evasion or attempt at evasion of any duties of customs or the laws and restrictions of customs ..or otherwise contrary to the Ordinance . The Attorney General contends that this error should not lead to O' Connor's acquittal of this charge. This Court likewise feels that the reference to section 62 (I) in the charge, the letter to prosecute and his Note is clearly a reference to subsection (i) and could not be interpreted otherwise by the Court as there is in fact no subsection ( I ) with which it could possibly be confused . Whereas this Court enjoins all parties - be it the Prosecution or the Defence - to ensure that when quoting sections of the law, they are to be precise , it cannot endorse the first Court's reasoning for an acquittal simply because a subsection was indicated with a capital "I" rather than a small "i" in this case.

The first Court held that section 60 speaks of the forfeiture of goods found in the conditions described in sub-paragraph (f) and (g) . Whereas this Court agrees with the First Court that the facts of the case do not fall within the scope of subsection (g) as in this case no object the exportation of which was prohibited were found in a package which had been presented to customs officials as containing objects not subject to such a prohibition, it cannot agree with the First Court when it held that the facts of the case did not fall under the scope of paragraph

(f) as a plane did not fall within the definition given to the word “vessel” in section 2 of Chapter 37. The First Court is right to state that Section 2 does not include an aircraft under the definition of vessel. However ,the Attorney General rebuts that the notion of ship includes that of aircraft as emerges from Legal Notice 42 of 1994 and in particular from paragraph 11 which indicates that the Customs Ordinance is applicable also to aircraft and hence the interpretation of the First Court , with respect was incomplete.

Paragraph 11 (1) of the Customs (Control at Airport) Regulations, 1994 , in fact lays down that :-

“The provisions of the Customs Ordinance and of regulations made thereunder …..in so far as they are applicable, shall apply to aircraft and to goods , mails and persons carried in or landed from them as they apply to ships and to goods, mails, and persons carried in or landed from ships.”

*This Court feels that although the Attorney General was not bound to indicate this paragraph of L.N. 42 in his Note at fol. 71, as, strictly speaking, it was not one of the sections of the law under which guilt was to be found and this paragraph was a mere tool of interpretation of another law, it might not have been amiss if he had also done so to assist the First Court . Be that as it may, the First Court apparently overlooked this provision and this led it to the wrong interpretation and application of the law which in turn led to O’Connor’s acquittal of this charge. Hence once it results, as it should result, that O’ Connor was in breach of section 60 (f) by putting the monies the exportation of which was prohibited under Chapter 233 in any place in Malta to be put on board for the purpose of being exported albeit on an aircraft and thereby he was knowingly concerned in the fraudulent evasion of the laws and restrictions of customs in a manner contrary to the Ordinance - which he undoubtedly did by taking them into the departures lounge after clearing security which was just one step away of boarding the plane for London - then it follows that O’ Connor’s action was also prohibited*

*under the Customs Ordinance in terms of Section 16 of Chapter 233 and consequently that the money in question was therefore also liable to forfeiture .*

*Now whereas – as rightly stated by the First Court - the forfeiture of the infringing articles is discretionary under section 42 of Chapter 233 , it is however mandatory under Chapter 37 and as such the monies exhibited are subject to forfeiture in terms of Section 60 of Chapter 37. This Court however holds that the "yellow metal article" seized from O'Connor which obviously was not "gold bullion" should not be subject to said forfeiture .*

*In view of this conclusion , the Court does not need to enter into the merits of the motivation and reasoning of the First Court for not applying the forfeiture of the monies under section 23 of the Criminal Code , as their forfeiture is in any case being ordered by this Court in virtue of Section 60 of Chapter 37.*

*As this Court does not feel that the additional conviction on the second and sixth charges by itself warrants a harsher punishment than that applied by the First Court, this Court does not feel that it should increase or vary the punishment inflicted by the First Court, except for the forfeiture of the monies seized from O'Connor which is mandatory under Chapter 37 .*

*Now therefore this Court disposes of both appeals as follows. First it dismisses appellant O' Connor's appeal as unfounded and secondly it upholds the Attorney General's appeal by modifying and reforming the judgement of the First Court, by revoking it in so far as it found the respondent O' Connor not guilty of the second and sixth charges proffered against him and in so far as it decided not to order the forfeiture of the monies seized from respondent O' Connor and instead declares respondent O' Connor guilty also of these two charges and hereby orders the forfeiture of all the monies seized from him as per the seizure note dated 26th. August, 2000 , with the exclusion of the "yellow metal article" therein mentioned, and confirms the other parts of the judgement in so far as*

*it found O' Connor guilty of all the other charges and sentenced him to one year's imprisonment suspended for two years in terms of Section 28A of Chapter 9 of the Laws of Malta. .*

**< Sentenza Finali >**

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