MALTA

COURT OF CRIMINAL APPEAL

HON. MR. JUSTICE
DAVID SCICLUNA

Sitting of the 7 th November, 2006

Criminal Appeal Number. 283/2006

The Police

v.

Benjamin Saygbe
Yaya Traore
… omissis …

The Court:

Having seen the charges proferred by the Executive Police against Benjamin Saygbe, Yaya Traore and Yacou Doukoure, to wit the charges of:

A. Having, jointly and/or severally, on these Islands, on the 14th September 2005 and in the preceding months, in various parts of Malta and outside Malta, by means of several acts committed by them, even if at different times,

which acts constitute violations of the same provisions of the law:

1. For having, promoted, constituted, organised or financed an organisation of two or more persons with a view to commit criminal offences liable to the punishment of imprisonment for a term of four years or more;

2. For having, made part or belonged to an organisation referred to in Subarticle (1) of Article 83A of Chapter 9 of the Laws of Malta;

3. For having, in Malta conspired with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act;

B. Furthermore, having jointly and/or severally, on these Islands, on the 14th September 2005 and in the preceding months, in Malta, by means of several acts committed by them, even if at different times, which acts constitute violations of the same provisions of the law:

1. For having, by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made a gain of more than LM10,000.00 to the detriment of Anton Camilleri and other persons;

2. With having, verbally threatened Anton Camilleri with the commission of a crime, which threats contained an order, or an imposed condition.

The Court was requested to apply *mutatis mutandis* the provisions of Article 5 of the Money Laundering Act, Chapter 373 of the Laws of Malta, as per Section 23A(2) of Chapter 9 of the Laws of Malta.

The Court was also requested that in case of a finding of guilt of the accused, apart from inflicting the punishment prescribed at law, to order the forfeiture of all the objects exhibited in these proceedings.

The Court was also requested that, in pronouncing judgement or in any subsequent order, it sentences the person/s convicted, jointly or severally, to the pament, wholly or in part, to the Registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, within such period and in such amount as shall be determined in the judgement or order, as per Section 53 of Chapter 9 of the Laws of Malta;

Having seen the judgement of the Court of Magistrates (Malta) of the 16th August, 2006, whereby that court found the accused not guilty of charges A1 and A2 brought against them and acquitted them of the same, guilty of charge A3, not guilty of charge B1 and duly acquitted them thereof, whilst charge B2 is being absorbed in charge A3, and after having seen Articles 18, 48A, 308 and 310(1)(a) of Chapter 9 of the Laws of Malta condemned them to a period of imprisonment of two years. The first Court ordered that the period that accused spent in preventive custody be deducted from this period of imprisonment and furthermore ordered that all objects exhibited by the Prosecution be confiscated in terms of Law, but refrained from adhering to the Prosecution's requests, in terms of Article 5 of Chapter 373 of the Laws of Malta, since no property or assets resulted from the searches effected by Dr. Cutajar;

Having seen the applications of appeal of the said Benjamin Saygbe and Yaya Traore, filed by them on the 25th August 2006 and the 22nd August 2006 respectively, whereby they requested that this Court reforms the judgement from which the appeals were entered, by confirming it in all those parts wherein they were acquitted, and revoking it for the remainder, and consequently declaring them not guilty of any charge and acquitting them;

Having seen the records of the case;

Having heard submissions by counsel for the defence and for the prosecution;

Considered:

Although appellants have filed separate applications of appeal, their grievances are identical and refer to questions of law and of fact. Appellants say: (1) that the first Court did not separate the proof as to each and every one of the persons charged and therefore unintentionally breached article 661 of the Criminal Code; (2) the circumstantial evidence referred to was not unequivocal; (3) the first Court did not decide on the basis of the articles of law as submitted by the Attorney General in his note of the 6th March 2006; (4) the facts do not support the theory drawn up by the first Court as to what happened.

Appellants' first grievance is, to say the least, frivolous. It is true that the first Court made a sixteen-point list of what it referred to as "the salient facts or circumstances of the case". But it also stated that it considered "the evidence proferred by the accused themselves in their statements, each in relation only to his own case (in view of the dictates of Article 661 of Chapter 9 of the Laws of Malta) and under oath before this Court". Therefore this grievance is dismissed.

The second grievance relates to the circumstantial evidence brought forward in this case and has to be dealt with when this Court passes on to evaluate the facts of the case.

According to appellants' third grievance, the first Court evidently followed the original charges proferred by the Police, notwithstanding the Attorney General's committal for trial before the Court of Magistrates as a Court of Criminal Judicature through his note of the 6th March 2006 wherein he quoted the articles of law under which there

might result offences. Appellants state that it is evident that the first Court acquitted them from what is contained in paragraphs (a), (b), (c) and (d) of said note; that the Attorney General did not lay any charge under article 249 of the Criminal Code (which the first Court considered as being "absorbed" in another crime) and that there should therefore be no pronouncement of guilt in respect of the crime under said article; and that the Attorney General charged appellants with continuous completed offences under paragraphs (e), (f) and (g) so that the first Court could not have reached a finding of guilt as it did, that is to say conspiracy to commit the crime referred to in article 308 of the Criminal Code.

Appellants are correct in stating that once the Attorney General has decided to send a person for trial by the Court of Magistrates as a Court of Criminal Judicature in terms of article 370(3) of the Criminal Code, then that Court is bound to decide according to the articles cited by the Attorney General in respect of which he believes that an offence (or offences) may result. However, where a person is charged with being a principal in an offence, the Court may instead find him guilty of being an accomplice, or of having attempted to commit such offence or even of having conspired to commit such offence.

Subsection (2) of article 467 of the Criminal Code, as amended by Act III of the year 2002, now states as follows:

"(2) Where there is no proof that the accused, or any one of the accused, was the principal or one of the principals in the offence charged in the indictment, but there is proof that he was an accomplice or of being guilty of conspiracy to commit that offence, it shall be lawful for the jury to find him guilty of complicity in, or of conspiracy to commit, such offence; conversely, where a person is accused, in the indictment, of being an accomplice in an offence it shall be lawful for the jury to find him guilty of conspiracy to commit that offence or of being the principal, or one of the principals, in that offence and

if he is accused of conspiracy to commit an offence he may be found guilty of being an accomplice in that offence or of being a principal, or one of the principals, in that offence, completed or attempted, if there is proof to that effect…."

In the case **Il-Pulizija v. Carmelo Agius** decided by this Court on the 24th May 2002, it was stated:

"Kif din il-Qorti rriteniet diversi drabi, persuna li tigi akkuzata quddiem il-Qorti tal-Magistrati bhala awtur ta' delitt, tista' tinstab minn dik il-Qorti hatja sija ta' komplici f'dak id-delitt kif ukoll hatja biss ta' tentattiv ta' dak id-delitt (*Il-Pulizija v. Godfrey Seisun et*, App. Krim. 2/5/1994; *Il-Pulizija v. Michael Carter*, App. Krim. 7/12/2001). Din hija l-linja li dejjem hadu l-Qrati ta' Gustizzja Kriminal taghna; u kienet tkun sitwazzjoni pjuttost stramba, jekk mhux addirittura assurda, li kieku filwaqt li fil-procedura solenni tal-guri persuna li tkun akkuzata bhala l-awtur ta' reat tista' tinstab hatja bhala komplici f'dak ir-reat jew hatja ta' tentattiv ta' dak ir-reat (Art. 467(2)(4), Kap. 9), fil-procedura essenzjalment 'sommarja' quddiem il-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali tali possibilita` ma kinitx tezisti."

And in the case **Il-Pulizija v. Emanuel Camilleri et** decided by this Court on the 23rd November 2001, it was stated:

"… huwa wkoll principju elementari li meta persuna tkun akkuzata b'reat bhala awtur ta' dak ir-reat, qorti ta' gustizzja kriminali tista' ssib lil dik il-persuna hatja mhux bhala awtur izda bhala komplici f'dak ir-reat, jew inkella flok hatja tar-reat ikkunsmat hatja biss ta' tentattiv ta' dak ir-reat. Ir-regoli msemmija fis-subartikoli (2) u (4) tal-Artikolu 467 tal-Kodici Kriminali gew dejjem ritenuti li japplikaw ghall-Qrati ta' Gustizzja Kriminali kollha. Ghalhekk ma kienx hemm ghalfejn li l-Avukat Generali, fin-nota ta' rinviju ghall-gudizzju, jindika l-artikolu tat-tentattiv."

Following the amendment of article 467, and on the basis of what has been said in these judgements, although a person may be charged with being the principal of a crime, such person may now not only be instead found guilty of being an accomplice or of having attempted to commit a crime, but also of having conspired to commit such crime. Therefore, in this case, although the Attorney General in his note of the 6th March 2006 did not qualify articles 18, 308 and 310(1)(a) in paragraph (e) thereof with article 48A, in virtue of what has been said above the first Court was legally correct when it qualified said articles with article 48A.

As to the crime under article 249, which the first Court deemed to be absorbed in the crime of conspiracy to defraud, appellants are right in stating that the Attorney General did not make any reference to this article but rather to articles 293 and 294 and therefore they are right in stating that there could not be a finding of guilt in respect of the crime to which article 249 refers.

This Court will now pass on to consider appellants' grievance regarding the facts of the case. They state that the first Court pinpointed a number of facts which in its opinion constituted evidence and drew up a new theory of what happened and which was different from the theory of the police and different from the decision of the Attorney General to indict. They say that the Court's opinion was that Kaba Konate was the man who defrauded Camilleri, but the same Kaba Konate left as his substitute in the first place Traore who then called in the other accused and these in turn conspired together and started to make threatening calls to Camilleri with a view to defraud him of 200,000 euros and at that point Camilleri resorted to the Police for help. The appellants say that this theory is not even supported by the alleged victim, Camilleri, who insisted that he was threatened – a crime covered by article 249 of the Criminal Code with which the accused were not charged by the Attorney General. Appellants believe that on the same facts and on the same circumstantial evidence it is more logical to conclude that the threats were coming from Kaba Konate and illogical to

think that someone who knows that a person has been duped by a particular stratagem employs the same trick to defraud that same person who is now wiser through bitter experience.

Appellants submit that the first Court's theory fails on legal grounds too. As Camilleri was threatened, the matter was no longer a conspiracy but an attempted offence. Camilleri did not recognise any of them in the dock. For fraud to exist there must be some form of communication and not a threat.

Appellants insist that the evidence against them fails to amount to the crime attributed to them by the first Court. They ask: Could they have come for a holiday in Malta? Is it unusual that people from the same ethnic groups share rooms in a flat? The flat was being lived in by quite a group already. Is it an unequivocal circumstance that Traore went to stay with Saygbe at the Corinthia? Is it unequivocal that Traore may have touched something left in the room by Kaba Konate? Does a fingerprint amount to a conspiracy? Is there any evidence that Saygbe ever talked to Camilleri? Did Traore ever contact Camilleri? Traore could not have as he does not speak any English and Camilleri is positive that he was spoken to in English. Although one of the accused says that when finding the black papers left as excess of what was needed by Kaba Konate in his room, he formed the intention of making the black money scam (apart from the fact that his statement could not prejudice his co-accused), did he even remotely allege that he involved his friends in the matter? Not even this inadmissible piece of evidence exists. But when he spoke to the Police, they allege that he told them that his friends were informed of his scheme. Appellants point out that at page 9 of its judgement the first Court states in bold letters this part of the verbal declaration of Yacou Doukoure and comment that it is not wonder that the Court used this declaration to reach the view that there was a conspiracy under article 48A. But was this legal evidence, ask appellants, keeping in mind article 661 of the Criminal Code? The Court also lists at page 43 part of

the statement of Doucoure implicating the other two accused.

Appellant Saygbe says that he explained why he started chewing a piece of paper and that although one may not believe him, this does not constitute evidence of a “conspiracy”. Not believing does not amount to believing the opposite. The first Court emphasised that appellant Traore used the mobile phone of Kaba Konate. According to appellant Traore, this is no unequivocal evidence. Both appellants further submit that there was a perfectly legitimate explanation that three friends contact each other by telephone – because they are friends. The fact that appellant Traore used the telephone formerly belonging to Kaba Konate is no evidence of guilty knowledge. One cannot, appellants insist, presume illegal content of a telephone conversation unless that content is known. Appellant Traore says that he did not take hold of the black paper and carry it away from the flat in Bugibba – this is stated by independent evidence – and the fact that he was seen wrapping a bottle of alcohol does not constitute an offence.

Conspiracy, state appellants, cannot be presumed and has to be proven against each and every one who is found guilty of it, and this on legally admissible evidence. Finally, they submit, even if one were to say that the first Court was correct in finding guilt under article 48A combined with Article 308, the aggravating circumstance of value was presumed by the first Court rather than proved.

All these submissions require an evaluation of the evidence produced before the first Court. This Court is a Court of review and, in carrying out this function, it has examined the records of the proceedings, including the transcriptions of evidence and the documents exhibited, to determine whether on the basis of the evidence produced, the first Court could have legitimately and reasonably reached its conclusion of guilt in respect of the crime of conspiracy to defraud. This Court will not disturb such

conclusion unless it results that it was manifestly incorrect.

In **Blackstone's Criminal Practice 2001** we read (at para. D22.15 page 1622):

"The case of *Cooper* [1969] 1 QB 267 continues to provide guidance on how the word 'unsafe' should be interpreted in determining a criminal appeal. In that case, Lord Widgery CJ explained that if the overall feel of a case left the court with a 'lurking doubt' as to whether an injustice may have been done, then a conviction will be quashed, notwithstanding that the trial was error-free. Lord Widgery said (at p. 271 C-G):

'[This is] a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 [which somewhat widened the court's powers to quash a conviction] it was almost unheard of for this court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it

is a reaction which can be produced by the general feel of the case as the court experiences it'."

And in its judgement of the 1st December 1994 in the names **Ir-Repubblika ta' Malta vs Ivan Gatt** the Court of Criminal Appeal in its Superior Jurisdiction said:

"Fi kliem iehor, l-ezercizzju ta' din il-Qorti fil-kaz prezenti u f'kull kaz iehor fejn l-appell ikun bazat fuq apprezzament tal-provi, huwa li tezamina l-provi dedotti f'dan il-kaz, tara jekk, anki jekk kien hemm versjonijiet kontradittorji - kif normalment ikun hemm - xi wahda minnhom setghetx liberament u serenament tigi emmnuta minghajr ma jigi vjolat il-principju li d-dubju ghandu jmur favur l-akkuzat, u jekk tali versjoni setghet tigi emmnuta w evidentement giet emmnuta, il-funzjoni, anzi d-dover ta' din il-Qorti huwa li tirrispetta dik id-diskrezzjoni u dak l-apprezzament."

Now, as has already been determined, the first Court could have legally reached its conclusion that appellants were guilty of conspiracy to defraud, and it remains to be ascertained whether it could also have reasonably reached such a conclusion on the basis of the facts before it. Clearly, said Court reached its conclusion after having examined all the evidence before it and after having had the opportunity to consider "the demeanour, conduct and character" of all the witnesses, "the probability, consistency, and other features" of their statements, "to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case" (article 637 of Chapter 9).

From the evidence reviewed, there is no doubt that a certain Anton Camilleri was the victim of a "black money scam" put into operation by a certain Kaba Konate, and although the said Camilleri identified one of the co-accused (namely Yacou Doukoure) as having accompanied Konate when receiving money from Camilleri – and this in August 2005 – there is evidence to suggest that Doukoure arrived in Malta on the 3rd

September 2005. Appellants Saygbe and Traore were however already in Malta. Appellant Traore was taken to the Bugibba flat by Konate. Konate left and appellant Traore continued occupying the same room in the Bugibba flat that Konate had been occupying. After him, appellant Saygbe turned up and then the co-accused Doukoure. Alex Pedro, the tenant, objected to so many people in the flat and Saygbe and Traore moved to the Corinthia Hotel while Yacou Doukoure apparently took up residence at the English Residence in Pieta`. All co-accused however continued to frequent the Bugibba flat.

At this point, reference necessarily has to be made to the actions of Yacou Doukoure and to his statement to the Police. Yacou Doukoure was seen by George Brown (one of the tenants of the Bugibba flat) wrapping up black paper with tape and, since he suspected that it might be something illegal, he took photographs of Doukoure which were exhibited in these proceedings. Doukoure, in his statement to the Police, explains precisely what the black paper was and how it was intended to con someone into believing that the black paper was in fact money that had been blackened and, in order to wash it, one had to buy a very expensive liquid. Now, although Doukoure, in his statement, says with reference to appellants Saygbe and Traore, that “they called me in order to do this work the black carbon”, said statement can in no way prejudice appellants as article 661 of the Criminal Code categorically provides that a confession **“shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person”**. The question therefore is whether there is sufficient evidence to prove that appellants were involved with Doukoure in a conspiracy to carry out the black money scam.

Appellants suggest that it is not logical to think that someone who knows that a person has been duped by a certain stratagem would employ the same trick to defraud him. This Court does not think it so illogical to try and dupe someone who was already so gullible as to part with Lm13,000. On the other hand, appellants say that if Anton

Camilleri was threatened, this goes beyond the stage of a conspiracy. For the purpose of these proceedings, however, it is not even necessary to determine whether or not Camilleri was threatened by any one of the appellants, particularly since the Attorney General did not include article 249 of the Criminal Code in his note of the 6th March 2006. What is relevant is to determine whether any mode of action was planned or agreed upon between the co-accused in these proceedings, a determination that can be made even on the basis of circumstantial evidence. Appellants refer to their friendship as being the legitimate explanation of their contacting each other and meeting in Malta. This Court certainly cannot condemn friends for meeting in Malta for a holiday, but if their meeting is not for holidaying, that is another matter.

When Anton Camilleri, on receiving further threats and demands for money, informed the Police about what had happened, he handed over a luggage which was found to contain black papers the size of bank notes, and a wrapped bottle.

Reference has already been made to the fact that when Doukoure was wrapping up black paper, George Brown took photographs of him. This same witness stated that after he had taken said photographs, Doukoure "was angry and he wanted to fight me". He called his friends and appellants Saygbe and Traore appeared at the flat. George Brown continues: "They met me in the flat and they were angry they wanted to fight me, one of them said that they wanted to fight me … I told them I didn't take any photo … one of them said that they intended to come and fight me, if it was I did take the photos … and one of them quickly went into the room and … took the bag away … a greenish luggage." He identified the person who took the luggage as Benjamin Saygbe. George Brown also gave evidence on how one night he found appellant Traore and Doukoure wrapping a bottle and how he thought that it was something illegal that they might be doing.

On the 12th September 2005 the Police raided the Bugibba flat and in the room that had been used by

Doukoure (it resulted that Doukoure had moved to the English Residence in Pieta`) they found a wrapped bottle and black papers (similar to what Anton Camilleri had handed to the Police). Among various items seized was a roll of masking tape on which a fingerprint was found that resulted to be the left middle finger impression of appellant Traore. Also found were a number of documents issued by Novak International.

On the 13th September 2005 appellants and Doukoure were arrested and on the 14th September a search was carried out in room 319 at the Corinthia Hotel where appellants were staying.

P.S. 90 Jeffrey Gerada stated that before the search he asked if they had anything illegal and appellant Saygbe replied in the negative. Appellant Saygbe then opened a briefcase, first tried to take a phial with white liquid in it which he said was his vitamin, and then took a paper, crumpled it up and put it in his mouth, chewed and tried to swallow it but was stopped by witness. Appellant Saygbe said that he tried to swallow it because he thought it was a paper on which he had written details of how he is bisexual and he did not want the others to know about it. This paper in fact contained step by step instructions of washing black money purportedly issued by the United States Department of the Treasury. This Court cannot but note that what appellant Saygbe said to the Police regarding what he thought the paper contained was nothing more than a tall story. Also found was a bottle of iodine tincture. They also found a document headed Novak International (Dok. G10 at page 162) and a registration card in the name of Yaya Traore.

P.C. 1337 basically confirmed what P.S. 90 said. However he also stated that after they had compelled appellant Saygbe to remove the paper from his mouth, he noticed appellant Traore looking to the left where there was a French magazine. P.C. 1337 said that Traore looked suspicious, that he said that the magazine was not theirs, but that when he opened it he found a paper entitled U.S. Embassy Top Secret (identified as the same Dok. G10 at

page 162) which appellants denied knowing about and some hotel receipt which appellants said was theirs. Coincidentally, inside the luggage seized from their room, the Police found several other documents headed Novak International and others purportedly being official United States documents. These are documents which both appellants conveniently denied were theirs and yet they were found in their possession.

From what has been outlined above, it is clear to this Court that appellants together with Doukoure were conspiring to defraud money by putting into operation the black money scam. The reaction by appellants when Doukoure phoned to say that he had been photographed wrapping the black papers, appellant Traore's fingerprint on the masking tape, Saygbe's attempt to swallow a paper that related to the scam, the documents found at the Bugibba flat and in the Corinthia hotel room, and the similarity between the contents of the luggage that had been given to Anton Camilleri and those seized by the Police to which reference has been made, all point to one direction – an agreement on their part to defraud a person of his earnings and certainly, considering the quantity of black papers involved, to the tune of over one thousand liri – which is why the aggravation of value according to article 310(1)(a) of Chapter 9 applies.

For these reasons:

The Court reforms the judgement appealed against by revoking it insofar as it declared that the crime contemplated under article 249 of the Criminal Code was being absorbed in the crime of conspiracy to defraud and instead finds them not guilty of the crime contemplated under article 249 of the Criminal Code and acquits them from said charge, furthermore declares and confirms their acquittal from the remaining charges brought against them by the Attorney General and confirms the rest of the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 16th August 2006 and particularly insofar as it found them guilty of conspiracy to commit the crime referred to in article 308 of

the Criminal Code and insofar as it condemned them to a period of two years imprisonment from which period there has to be deducted the period spent in preventive custody.

< Final Judgement >

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