



QORTI TA' L-APPELL KRIMINALI

**ONOR. IMHALLEF
DAVID SCICLUNA**

Seduta tas-27 ta' Jannar, 2010

Appell Kriminali Numru. 6/2008

The Police

v.

Jean Jacques Fuentes

The Court,

Having seen the charges brought against the appellant Jean Jacques Fuentes before the Court of Magistrates (Malta) as a Court of Criminal Jurisdiction for having:

- (1) In these Islands, in May 2004, exported military equipment from Malta to the Republic of the Ivory Coast without authorisation by the Director responsible for trade;
- (2) On behalf of the Comptroller of Customs, also, in these Islands, in the same period and under the same circumstances, with the intent to evade any prohibition

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and/or restriction of customs, or under other laws, was in any way knowingly concerned in the exportation of a combat aircraft, the exportation of which is subject to restrictions or to observance of any conditions;

(3) Also, in these Islands, in the same period and under the same circumstances, in order to gain any advantage or benefit for himself or others, in a document intended for a public authority, knowingly made a false declaration of statement, or gave false information.

The Court was further requested that the said Jean Jacques Fuentes be ordered to pay the costs incurred in connection with the employment in the proceedings of any expert in terms of article 533, Chapter 9 of the Laws of Malta;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 10th January 2008 whereby the said Jean Jacques Fuentes was declared not guilty of the charges brought against him and acquitted therefrom;

Having seen the application of appeal filed by the Attorney General on the 21st January 2008 wherein he requested this Court to reform the appealed judgement in the sense that it confirms that part whereby the accused was acquitted from the second and third charges brought against him whilst revoking the part whereby the accused was acquitted from the first charge brought against him and subsequently proceed to find the said Jean Jacques Fuentes guilty of the first charge and inflict punishment according to law;

Having seen the records of the proceedings;

Having heard the submissions made by counsel for the parties;

Having considered:

This appeal by the Attorney-General is in respect of the first charge brought against respondent Jean Jacques Fuentes. Appellant contends that respondent should not have been acquitted from said charge. He refers to Subsidiary Legislation 365.13 entitled Military Equipment (Export Control) Regulations and to the definition of “military equipment” in section [*recte*: regulation] 2, namely:

“‘military equipment’ means any used or unused items, including software and technology, which are listed in the First Schedule”.

Appellant then refers to part ML10 of the First Schedule of these regulations (Legal Notice 269 of 2001) and in particular to subsection (b) thereof, as well as regulations 3 and 4 of the same Legal Notice. From appellant’s submissions it is clear that he is making reference to said Legal Notice not only as it was amended by Legal Notice 376 of 2003 but also as it was amended by Legal Notice 168 of 2006 when the charge in question refers to May 2004. This Court therefore viewed Legal Notice 269 of 2001 as amended by Legal Notice 376 of 2003 and found that the law as it then was, read as follows, insofar as relevant:

Regulation 2

“‘military equipment’ means any used or unused items, including software and technology,

“‘the Manual’ means the manual entitled ‘List of Military Equipment’ which is published in the Gazette and which may be subsequently amended as necessary from time to time by the Director by notice in the Gazette”¹

Regulation 3(1)

¹ This Manual was published in the Government Gazette on the 6th November 2001. In virtue of Legal Notice 168 of 2006, said Manual now forms the First Schedule of Subsidiary Legislation 365.13.

“An authorization by the Director shall be required for the export of the items listed in the Manual.”

Regulation 4(1)

“Subject to the provisions of these regulations no person shall make any export of items specified in the Manual, to any destination except under and in accordance with an authorization as specified in regulation 3.”

The relevant parts of “the Manual” read as follows:

“ML10 ‘Aircraft’, ‘lighter-than-air vehicles’, unmanned airborne vehicles, aeroengines and ‘aircraft’ equipment, related equipment and components, specially designed or modified for military use, as follows:

a. Combat ‘aircraft’ and specially-designed components therefor;

b. Other ‘aircraft’ and ‘lighter-than-air vehicles’ specially designed or modified for military use, including military reconnaissance, assault, military training, transporting and airdropping troops or military equipment, logistics support, and specially designed components therefor.”

The facts of the case are clearly outlined in the judgement appealed from and do not require repetition. Respondent contends that he did not export anything but it was the company NCA International Ltd which co-ordinated the export of the “aircraft parts”, that these parts belonged to a civilian aircraft and were not parts of a military plane and that the aircraft parts exported from Malta, were they to be assembled together, would not be sufficient to build an aircraft which could fly as parts from it were used on another similar aircraft that was flown out of Malta.

As to respondent’s contention that he was not responsible for the export of the aircraft, in his first statement to the

Police and which he confirms in both his other statements, he states: "I had arranged for disassembling G-BXFP in Malta through NCA and Medavia's technicians and also arranged for the shipment of the aircraft via Tristar Agency." It also results that it was he who effected all payments. Therefore respondent cannot disclaim responsibility for the export of the aircraft in question.

As to respondent's contention that what he exported was a civil aircraft, this Court observes that the aircraft exported was a BAC 167 Strikemaster. This aircraft has been described as follows: "The BAC 167 Strikemaster was a British jet-powered training and light attack aircraft. It was a development of the Hunting Jet Provost trainer, itself a jet engine version of the Percival Provost, which originally flew in 1950 with a radial piston engine.... The BAC 167 Strikemaster is essentially an armed version of the Jet Provost T Mk 5; the Strikemaster was modified with an up-rated engine, wing hardpoints, a strengthened airframe, new communication and navigation gear, up-rated ejection seats, a revised fuel system, and shortened landing gear. First flown in 1967, the aircraft was marketed as a light attack or counter-insurgency aircraft."²

It is therefore quite clear that, notwithstanding the fact that the aircraft in question may have now been registered as a civil aircraft, and notwithstanding the fact that the aircraft exported did not contain any armaments, the BAC 167 Strikemaster, having been produced as a training and light-attack aircraft, remains objectively an aircraft meant for combat purposes or for military training purposes. Indeed, in his statements to the Police respondent himself categorically stated that he sold the aircraft to the Ivory Coast "for initial military training purposes". He furthermore stated that it was never armed and could not technically be rearmed and confirmed that the aircraft in question is an effective military training aircraft because the instructor and the cadet can sit next to each other.

² http://en.wikipedia.org/wiki/BAC_Strikemaster.

Regarding the missing parts, contrary to submissions made, in his evidence before the first Court respondent stated that no parts from the aircraft in question were used on the first aircraft flown out of Malta. However, he did say that there were two items missing from the second aircraft – the timer relay marks and a transformer – and that according to him without them the aircraft could not fly. On reaching the Ivory Coast, however, the aircraft in question was in fact reassembled using some parts from the first aircraft. Respondent says that he flew some test flights, waited for cadets to turn up for training, but they never did. He then carried out two maintenance flights to avoid the aircraft staying idle for long and then the embargo entered into force, essentially meaning that this aircraft was grounded.

Having therefore ascertained the nature of the aircraft exported, and that it consequently falls within the provisions of paragraph ML10 of the Manual mentioned above, the manner in which it was exported is irrelevant, i.e. whether it was flown out, or transported whole or, as in this case, transported in dismantled form. Accordingly, before exporting, respondent should have obtained the necessary authorization from the Director of Trade as provided in the regulations mentioned above.

As to punishment, regulation 10(2) of Legal Notice 269/2001 provides that the punishment applicable is of imprisonment not exceeding five years or a fine (multa) not exceeding €116,468.67. Respondent has already served a period of time under preventive arrest. Consequently, and in the circumstances outlined above, it is this Court's belief that a pecuniary punishment would be adequate punishment.

For these reasons:

The Court grants the Attorney General's appeal, reforms the judgement appealed from. And therefore confirms that part whereby the said Jean Jacques Fuentes was acquitted from the second and third charges and revokes that part whereby he was acquitted from the first charge

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and instead declares him guilty of said first charge and, after having seen regulations 2, 3(1), 4(1) and 10(2) of Legal Notice 269 of 2001 and paragraph ML10 of “the Manual” entitled “List of Military Equipment”, condemns the said Jean Jacques Fuentes to the payment of a fine of €11,646.87.

< Sentenza Finali >

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