



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 22 nd June, 2011

Criminal Appeal Number. 379/2010

The Police

v.

**Edgars Kullis
Edgars Zobnevs
Vadimas Gruzdzevicius**

The Court,

Having seen the charges preferred against Edgars Kullis, Edgars Zobnevs and Vadimas Gruzdzevicius charged with having:

A. On these Islands, on the 20th July 2010 and in the preceding days and weeks, in various parts of Malta and outside Malta, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law;

(1) promoted, constituted, organized 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 (which offences include fraud and other crimes);

(2) formed part of or belonged to an organisation referred to in subarticle (1) of Article 83A of Chapter 9 of the Laws of Malta;

B. on these Islands, on the 20th July 2010 and in the preceding days and weeks, in Malta, by means of several acts committed by the accused, even if at different times, which acts constitute violations of the same provisions of the law;

(3) 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 two thousand, three hundred and twenty nine euros and thirty seven cents (€2,329.37) to the detriment of HSBC Bank Malta plc. and Bank of Valletta Limited;

(4) 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 two thousand, three hundred and twenty nine euros and thirty seven cents (€2,329.37) to the detriment of Air Malta Company Limited;

(5) knowingly made use of any of the false acts, writings, instruments or documents mentioned in Article 184 of Chapter 9 of the Laws of Malta;

(6) committed any other kind of forgery, or knowingly made use of any other forged document.

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, it orders the forfeiture of all the objects exhibited in these proceedings.

The Court was further requested that, in pronouncing judgment or in any subsequent order, it sentences the person/s convicted, jointly or severally, to the payment, 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 judgment or order, as per Section 533 of Chapter 9 of the Laws of Malta;

Having seen the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 21st July 2010 whereby, following the accused's guilty plea, it declared them guilty of the charges brought against them and, after having seen articles 18, 83A(1)(2)(5), 308, 309, 310(1), 184, 189, 17 and 31 of Chapter 9 of the Laws of Malta, it sentenced them to 18 months imprisonment and furthermore, having seen article 23A of Chapter 9 ordered the freezing of the accused's property in terms of article 5 of Chapter 373;

Having seen the application of appeal by the Attorney General presented on the 1st September 2010 whereby he requested this Court to reform the judgement in the sense that it confirms that part whereby the accused persons were found guilty of all charges brought against them, confirming also the quantum of punishment concerning the term of imprisonment with regards to each one of the accused persons whilst revoking the final part of the

judgement in that the forfeiture of the property of the accused persons should be ordered following the application of Article 23A of the Criminal Code and this with regards to all three accused, in accordance with Article 23B of Chapter 9 of the Laws of Malta;

Having seen the record of the proceedings;

Having heard the submissions by the defence and the Attorney General;

Considers:

This appeal is limited to the fact that the first Court on pronouncing judgement failed to order the confiscation of assets or property of the accused in terms of article 23B of the Criminal Code, and this notwithstanding that it ordered the freezing of such property in terms of article 23A of the Criminal Code and article 5 of Chapter 373.

Now, article 23B(1) provides:

“Without prejudice to the provisions of article 23 the court shall, in addition to any punishment to which the person convicted of a relevant offence may be sentenced and in addition to any penalty to which a body corporate may become liable under the provisions of article 121D, order the forfeiture in favour of the Government of the proceeds of the offence or of such property the value of which corresponds to the value of such proceeds whether such proceeds have been received by the person found guilty or by the body corporate referred to in the said article 121D.”

What the first Court ordered was the freezing of respondents' property in terms of article 23A(2) of Chapter 9 of the Laws of Malta with reference to article 5 of Chapter 373 of the Laws of Malta and not the forfeiture of proceeds in terms of article 23B(1) of Chapter 9. According to the note presented by the Commissioner of Police on the 3rd June 2011, the *quantum* of proceeds in

this case amounts to €1,750.21 (miscellaneous) + €1,246 (Air Malta) = €2,996. This amount has not been disputed by respondents. The Attorney General has requested the forfeiture of respondents' property in terms of article 23B. Now, such forfeiture is evidently possible in terms of article 23B(1) where the proceeds of the offence exist. If they no longer exist, then article 23B(2) comes into play. This provides:

“Where the proceeds of the offence have been dissipated or for any other reason whatsoever it is not possible to identify and forfeit those proceeds or to order the forfeiture of such property the value of which corresponds to the value of those proceeds the court shall sentence the person convicted or the body corporate, or the person convicted and the body corporate *in solidum*, as the case may be, to the payment of a fine (*multa*) which is the equivalent of the amount of the proceeds of the offence. The said fine may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure.”

As in this case no proceeds exist, then each and every one of respondents are bound to pay a fine equivalent to one-third of the sum of €2,996, i.e. €998.67.

For these reasons:

The Court disposes of the appeal by revoking the judgment delivered by the first Court inasmuch as it ordered the freezing of respondents' property in terms of article 23A of Chapter 9 of the Laws of Malta and instead, in terms of article 23B of Chapter 9 of the Laws of Malta, condemns each and every one of respondents to the payment of a fine of €998.67, while confirming the rest of the judgment.

< Final Judgement >

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