



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
MICHAEL MALLIA**

Sitting of the 25 th October, 2012

Criminal Appeal Number. 411/2012

**The Police
(Insp. Ian J. Abdilla)**

Vs

Dimitrios Drosos

The Court,

Having seen the charges brought against the defendant Dimitrios Drosos before the Court of Magistrates (Malta) as a Court of Criminal Judicature that in his capacity as Company Director and Legal Representative of Gold Victory Ltd (Registration Number C 40908) with having;

On the 15th May 2009 and the preceding months on these islands, by means of several acts, even if at different times, that constituted violations of the same provision of the law, and committed in pursuance of the same design;

1) misapplied, converted to his own benefit or to the benefit of any other person, the sum of over €2,329.27 which has been entrusted or delivered to him by several persons, under a title which implies an obligation to return such sum or to make use thereof for a specific purpose, which sum of money was entrusted or delivered to him by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit;

2) on the same dates, location and circumstances 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 or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event made gain of more than the sum of over €2,329.27 to the prejudice of several people;

3) on the same dates, location and circumstance as the Key Official appointed by the company Gold Victory Ltd licensed by the Lottery and Gaming Authority of Malta, by continuous and repeated acts of commission or omission or any other behaviour in contravention of the Remote Gaming Regulations (Legal Notice 176 of 2004) therefore constituting an offence against the Lotteries and Other Games Act;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 30th August, 2012, by which, the Court, after having seen the articles 18, 23A, 293, 294, 308, 309 and 310 of Chapter 9 of the Laws of Malta, and regulations 15, 35, 37, 38 and 40 of Legal Notice 176 of 2004 (Chapter 438 of the Laws of Malta) after having seen the accused admit the charges brought against him, which admission was confirmed by him after having been given due time to reconsider in accordance with the law, found the said accused guilty as charged and condemned him to a term of fourteen (14) months imprisonment.

The Court furthermore ordered that the sum of seventy thousand Euro deposited in Court as a condition of bail granted to the accused be forfeited in accordance with Article 579 of the Laws of Malta.

The Court explained in clear words the terms of the judgement to the accused.

Having seen the application of appeal filed by appellant Attorney General on the 17th September, 2012, wherein he requested this Court to reform the judgements in the sense that it confirms that part whereby the accused person was found guilty of all charges brought against him, confirming also the confiscation of seventy thousand Euro deposited in Court as a condition of bail granted to the accused, whilst revoking the punishment imposed on the appealed Drosos in that it goes below the minimum stipulated by law and in turn to apply a punishment in accordance with all provisions of the law. Moreover the forfeiture of the property of the accused persons should be ordered by this Court following the application of Article 23A of the Criminal Code with regards to the accused, and in accordance with article 23B of Chapter 9 of the Laws of Malta.

Having seen the records of the case.

Having heard Counsels' submissions during the hearing of the

Now therefore duly considers.

That the grounds of appeal of appellant, the Attorney General, consist in the following :-

That without prejudice to the nature of this appeal and for all intents and purposes the appellant submits that this appeal is limited to the quantum of punishment and to the fact that the First Court failed to apply the confiscation or forfeiture of assets/property of the accused persons although the freezing order was effectively imposed on the accused in terms of Court minute dated 16th May 2009. Although the defence objected to this on the basis of the argument that the accused is not charged with

Money Laundering, the First Court ordered the application of article 23A of the Criminal Code as is duly stipulated and which hence renders article 5 of Chapter 373 of the Laws of Malta applicable to offences of a voluntary nature under the Criminal Code exceeding more than one year imprisonment, as is the case here. It is clear that no mention is made to this effect or to the eventual confiscation or forfeiture of assets/property of the accused in the judgement given.

That primarily, with regards to the quantum of punishment as imposed the Court when convicting the appealed for fourteen months imprisonment went below the minimum punishment as stipulated in accordance with law for the charges brought against him. It transpires that the first two offences mentioned in the charges which were duly admitted to by the accused are aggravated further owing to the quantum of money allegedly misappropriated and defrauded, so much so that the provision of article 310(1)(a) is applicable with regards thereto. Hence the minimum punishment awarded in such a situation is that of thirteen (13) months for both the first and second charge.

Moreover the third charge brought is punishable by legal notice 176 of 2004 by a fine (multa) or by a term of imprisonment not exceeding two years.

That in view of the fact that the Court should have applied article 17(b) of the Criminal Code when computing punishment (which article is not referred to in the judgement pronounced and appealed), the minimum punishment which could be awarded was that of no less than 18 months. This is also reflected by the fact that the Court referred to and apparently applied also the provision of article 18 of the Criminal Code which can increase the punishment proffered by one or even two degrees. Moreover although the Court expressed its intention to “award” an effective punishment term close to the minimum stipulated, it failed to apply or indicate the application of article 21 of the Criminal Code which would enable the Court to go below the minimum stipulated by

law in the event of extraordinary circumstances which would have to be clearly indicated in the judgement given. Neither did the Court clearly indicate or imply that the first two charges were being absorbed for the purpose of punishment which however would be highly unlikely, considering the circumstances of the case and the elements of either offence which differ from one another in various respects. Hence, the punishment awarded must be increased even if the absolute minimum is retained.

That secondly and without prejudice to the above plea, the First Court upon pronouncing judgement, also failed to order to confiscation/forfeiture of the assets or property of the accused persons as it was duty bound to do in accordance with Article 23A and 23B of the Criminal Code which read as follows :

23A. (1) In this article, unless the context otherwise requires :

“relevant offence” means any offence not being one of an involuntary nature other than a crime under the Ordinances or under the Act, liable to the punishment of imprisonment or of detention for a term of more than one year;

“the Act” means the prevention of Money Laundering Act;

“the Ordinances” means the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance.

(2) Where a person is charged with a relevant offence the provisions of article 5 of the Act shall apply mutatis mutandis and the same provisions shall apply to any order made by the Court by virtue of this article as if it were an order made by the Court under the said article 5 of the Act.

23B. (1) 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.

(1A) Any property, whether in Malta or outside Malta, of or in the possession or under the control of a body corporate as may become liable under the provisions of article 121D shall, unless proved to the contrary, be deemed to be derived from the relevant offence and be liable to confiscation or forfeiture by the Court.

(1B) The provisions of article 7 of the Act shall mutatis mutandis apply so however that any reference in that article to “article 3(3)” shall be construed as a reference to subarticle (1A) of this article and any reference in the said article 7 to “an offence under article 3” shall be construed as a reference to a relevant offence.

That therefore it is clearly indicative that once the Court orders the freezing of the property in question in accordance with Article 23A, which order is given upon the arraignment of the accused persons as was in fact clearly stipulated in the charges brought against the appealed as well as in accordance with Court minute dated the 16th May 2009, upon conviction the Court is obliged to impose the forfeiture of the said property in favour of the government. Subsequently if the accused or any person having an interest wants to contest the validity or otherwise of such forfeiture, action can be brought before the First Hall Civil Court within three months from final judgement whereby the forfeiture of property which did not emanate from the criminal activity in question can be contested accordingly. This is established according to Article 7 of Chapter 373 of the Laws of Malta which is applicable also with regards the charges brought against the accused persons as per paragraph (1B) of Article 23B as above quoted.

That in this case, although the Court ordered the freezing of property of the accused person at the commencement of the proceedings, which order stood firm even though proceedings recommenced afresh, it failed to order the forfeiture of the property in question as it was duty bound so to do according to the articles indicated above when pronouncing judgement. In fact the provision concerning the freezing order, namely 23A which was effectively imposed upon the request of the prosecution actually seizes to have effect once the sentence is pronounced in that upon conviction the forfeiture thereof and the procedure abovementioned take over. In fact article 5(2) of Chapter 373 applicable to the Criminal Code by virtue of article 23A of same reads as follows :

(2) Such order shall –

(a) become operative and binding on all third parties immediately it is made, and the Registrar of the Court shall cause a notice thereof to be published without delay in the Gazette, and shall also cause a copy thereof to be registered in the Public Registry in respect of immovable property and

(b) remain in force until the final determination of the proceedings, and in the case of a conviction until the sentence has been executed.

Considers:

That accused is a director of *Gold Victory Limited*, an Internet betting company registered in Malta. On the fourteenth (14th) of May two thousand and nine (2009) the Police received a report from the Lotteries and Gaming Authority regarding complaints received by various foreign clients who were having difficulty retrieving money deposited into the players' accounts of a company belonging to the accused Dimitrios Drosos. It transpired that the money was being moved from one bank account to another, belonging also to the company in question, rather than remaining in one fixed account, which sums were being used to incur payments of a different nature.

When the accused was investigated by the police he confirmed that some clients complained that they did not

receive their payments and that he discussed the matter with the Lotteries and Gaming Authority in order to come to an arrangement to make the necessary payments within ten (10) days. However, he had difficulties to adhere to such an arrangement and hence he was unable to make the repayments.

On the basis of this information the police charged the accused with fraud and misappropriation and also breaching the regulations of Chapter 438 of the Laws of Malta.

Accused pleaded not guilty. Subsequently the Magistrates' Court received a five-day referral from the Attorney General requesting the recommencement of proceedings in order to have these proceedings regularized. During the sitting held on the thirtieth (30th) of August two thousand and twelve (2012) the accused responded that he admitted to the charges brought against him, whereby the Magistrates' Court converted itself into a Court of Criminal Judicature and decided the matter, whereby the accused was found guilty and condemned to serve fourteen (14) months imprisonment. Furthermore, the first Court ordered the confiscation of seventy thousand Euros (€70,000) deposited in Court as a condition of bail granted to the accused to be forfeited in accordance with article 579 of the Laws of Malta.

The Attorney General felt aggrieved by this judgement on two counts. First, that the punishment awarded fell below the minimum requested by law, and secondly that the first Court failed to order the confiscation/forfeiture of the assets or property of the accused as it was duty-bound to do in accordance with article 23A and 23B of the Criminal Code.

Regarding the first count, on the morning of the hearing of this appeal, the Attorney General was informed that the Prosecution had informed the Magistrate that the first two charges should be considered as one offence. On the basis of this information the lawyer representing the Attorney General then withdrew his objection regarding

the quantum of the punishment awarded because in such a case the punishment would be within the perimeters allowed by law.

Regarding the second count, it resulted that the Prosecution had originally asked for the freezing of the assets as per article 23A of Chapter 9 (see fol 6). The first Court had agreed to such a request. However, on pronouncing judgement it failed to order the confiscation of the assets as it was obliged to do according to article 23B of Chapter 9, which article states, "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 121(d)."

It is clear from the reading of this article that upon conviction the Court is obliged to impose the forfeiture of the said property in favour of the Government. The Court failed to do so and therefore the appeal of the Attorney General on this count should be upheld.

The Defence upon seeing that the Attorney General was not insisting on an increase in the punishment, did not object to having the second count of the Attorney General's plea upheld by this Court.

Consequently, for the reasons abovementioned, the Court upholds in part the appeal of the Attorney General, reforms the judgement of the first Court in the sense that it confirms that part whereby the accused was found guilty of all the charges brought against him, confirming the fourteen (14) months imprisonment and the confiscation of seventy thousand Euros (€70,000) deposited in Court as a condition of bail granted to the accused, orders the confiscation of the property of the accused following the

Informal Copy of Judgement

application of article 23A of the Criminal Code with regards to the accused and also with regards to article 23B of the said Criminal Code.

< Final Judgement >

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