MALTA

COURT OF CRIMINAL APPEAL

HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI

THE HON. MR. JUSTICE
DAVID SCICLUNA

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 14 th February, 2013

Number 10/2012

The Republic of Malta

v.

Nelson Mufa

The Court:

1. Having seen the appeal filed by the said Nelson Mufa from the decision given by the Criminal Court on the 31st October 2012 whereby, following an application by the Attorney General filed on the 9th August 2012, it authorized changes in the Bill of Indictment without

ordering that the Bill of Indictment be served once again on appellant;

2. Having seen appellant's request that said decision taken *in camera* be quashed, and that, in the eventual confirmation of the decision taken by the Criminal Court to authorize the correction of the Bill of Indictment, that this Court orders that appellant be served with the corrected Bill of Indictment;

3. Having seen the Bill of Indictment whereby appellant was accused with having, with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug (heroin) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), or by promoting, constituting, organizing or financing such conspiracy;

4. Having seen the record of the proceedings, having heard submissions, having considered:

5. The original Bill of Indictment against appellant was filed by the Attorney General on the 12th April 2012 and duly notified to appellant. On the 9th August 2012 the Attorney General filed an application requesting that, by virtue of articles 597 and 598 of the Criminal Code, the following corrections be made to the Bill of Indictment: (1) that any reference made to the accused in the Bill of Indictment should read **Nelson Mufa** instead of Nelson Muffa; and (2) that the date mentioned in the last paragraph of the Bill of Indictment should read **3rd May 2010** instead of 3rd May 2011.

6. Following oral submissions heard on the 20th September 2012 and on the 8th October 2012, the Criminal Court put off the case to the 8th November 2012 for judgement.[1] However, by means of a decree given *in camera* on the 31st October 2012, the Criminal Court acceded to the Attorney General's request for the

[1] See note verbal dated 8th October 2012 at page 19 of the records of the Criminal Court.

correction of the Bill of Indictment as indicated and furthermore decreed: “The Court sees no reason why the Bill of Indictment should be served once again once the correct date is indicated in the sixth paragraph of the Bill of Indictment. Moreover, it is quite clear that this was a pure typing mistake.”

7. Appellant has three grievances: (1) that the Criminal Court was wrong in deciding the application *in camera* once it had decided that the decision was to be given in open court on a fixed date; (2) that although it is true that the law authorizes the Court to accept corrections in the Bill of Indictment, when the corrections are of a grave nature the Court should at least order that an amended copy of the Bill of Indictment be served on the accused; (3) that in this case the correction asked for was in the accusation itself, one of the essential elements to the validity of the Bill of Indictment. In the filed Bill of Indictment the date mentioned in the accusation did not tally with the alleged facts as emerging from the compilation of evidence. In these circumstances the appellant opted not to set up any preliminary pleas or indicate any witnesses in his defence since it could never result that he had committed the offence charged on the day and/or in the period mentioned in the accusation. Therefore, since the Bill of Indictment was not withdrawn and the Criminal Court accepted the correction in the date contained in the accusation, the least that the Criminal Court could have done, upholding the principles of fair trial, was to order that an amended Bill of Indictment be served on the appellant.

8. In his reply to the application of appeal, the Attorney General observed with regard to the first grievance that the Criminal Court’s decree dated 31st October 2012 was not a judgement pursuant to preliminary pleas raised in terms of articles 438 *et seq.* of the Criminal Code, but a decree pursuant to an application filed by him in terms of articles 597 and 598 of the Criminal Code. This application was served upon appellant for his views to be filed within two days. Appellant failed to reply. Notwithstanding this, the Criminal Court still afforded him

the opportunity to air his views during a sitting held on the 8th October 2012. Although on that date the case was put off to the 8th November 2012 "for judgement", the Court gave a decree *in camera* on the 31st October 2012 as it was procedurally entitled to do. The Attorney General submits that appellant suffered no prejudice thereby.

9. With regard to the second and third grievances, the Attorney General states that the authorized corrections were not, as appellant submits, "of a grave nature". The surname change from "Muffa" to "Mufa" is but of a cosmetic nature given that during all the proceedings he was indicated as "Mufa". As to the correction of the year in the accusation – from "2011" to "2010" – the Attorney General notes that the Bill of Indictment speaks of the year 2010 and that it is therefore quite evident that when in the final paragraph the year was indicated as "2011" this was a typing error, a *lapsus calami* (or *lapsus computeri*). Appellant was thus in no way misguided as to the offence or offences which the Bill of Indictment refers to and consequently appellant suffered no prejudice. The Attorney General thus submits that appellant's request to be notified afresh is but a delaying tactic.

10. During oral submissions, Doctor Philip Galea-Farrugia for the Attorney General further submitted that no right of appeal lay from the decree in question.

11. With regards to the latter submission, that is to say that no appeal lay from the decree delivered by the Criminal Court on the 31st October 2012, this Court refers to its decision of the 26th April 2012 in the case **Ir-Repubblika ta' Malta v. Mario Camilleri**. That case dealt with an appeal by the Attorney General from a decree delivered by the Criminal Court dismissing a request by the Attorney General for the revocation of a previous decree adjourning the case *sine die* pending a decision on a constitutional question raised by the said Mario Camilleri before the appropriate forum. In that case, this Court as now composed dismissed the appeal on the following grounds:

"13. Il-kompetenza ta' din il-Qorti hi arġinata bid-dispożizzjonijiet tal-artikoli 497 sa 515 tal-Kodiċi Kriminali u b'mod partikolari b'dak li jipprovdi l-artikolu 499 tal-istess Kodiċi. Dak l-artikolu jipprovdi li jista' jsir appell minn sentenza tal-Qorti Kriminali lil din il-Qorti fuq talba ta' l-Avukat Ġenerali jew ta' l-akkużat 'minn kull decizjoni mogħtija wara l-qari ta' l-att ta' l-akkuża' u dan 'fuq kull waħda mill-eċċezzjonijiet imsemmija fl-artikolu 449(1)(*a*), (*b*), (*c*), (*d*), u (*g*) u minn kull deċiżjoni fuq l-eċċezzjoni ta' inammissibbiltà ta' provi'. Tista' tappella wkoll lil din il-Qorti skont l-artikolu 500(1) 'Persuna misjuba ħatja fuq att ta' akkuża…'. Għalhekk il-kompetenza ta' din il-Qorti sabiex tisma' u tiddeċiedi appelli li jsirulha tippostula deċiżjoni li tkun ingħatat wara l-qari ta' att ta' akkuża fuq xi waħda mill-eċċezzjonijiet imsemmija fl-artikolu 449(1)(a)(b)(c)(d) u (g) tal-Kodiċi Kriminali jew deċiżjoni fuq l-eċċezzjoni ta' inammissibilita' ta' provi jew persuna misjuba ħatja fuq att ta' akkuza. L-appell odjern ma hux minn deċiżjoni li ingħatat fuq xi waħda mill-eċċezzjonijiet msemmija u anqas minn xi deċiżjoni fuq l-eċċezzjoni ta' inammissibilita' ta' provi u l-appellant ċertament anqas hu persuna misjuba ħatja. Għalhekk ma jirriżultax li din il-Qorti għandha kompetenza tiddeċiedi dan l-appell.

"14. Fil-kors tat-trattazzjoni orali quddiem din il-Qorti l-appellant permezz tal-konsulent legali tiegħu għamel riferenza għal dak li jipprovdi l-artikolu 415 tal-Kodiċi Kriminali sabiex jipprova jislet argument *a contrariu sensu* li appelli minn digrieti interlokutorji huma wkoll ammessi meta d-digriet interlokutorju in kwistjoni jkun iżomm il-kawża milli titmexxa 'l quddiem. Huwa ssottometta li d-deċiżjoni appellata li ddiferiet il-ġuri *sine die* effettivament kienet tali li żżomm il-ġuri milli jimxi 'l quddiem u għalhekk kienet appellabbli. Apparti l-kunsiderazzjoni jekk differiment ta' kawża *sine die* tinkwadrax bħala deċiżjoni li żżomm il-kawża milli timxi 'l quddiem dak li hu determinanti, iżda, huwa li l-artikolu ċitat mill-appellant jinsab fis-sub-titolu tal-Kodiċi Kriminali intestat 'Fuq l-Appelli mis-Sentenzi tal-Qorti tal-Maġistrati bħala Qorti ta' Ġudikatura

Kriminali'. Kjarament, għalhekk ma hux applikabbli għall-appell ta' llum li huwa appell minn deċiżjoni tal-Qorti Kriminali. Anqas jista' b'xi mod dak l-artikolu jiġi estiż b'analoġija għal appelli lil din il-Qorti minn deċiżjonijiet tal-Qorti Kriminali tenut kont tal-fatt li d-dispożizzjonijiet relevanti li jirregolaw il-kompetenza ta' din il-Qorti ma jipprovdux għal tali appell lil din il-Qorti minn deċiżjonijiet bħal dawk imsemmija fl-artikolu 415 tal-Kodiċi Kriminali u 'mhux lecitu li l-Qorti tikkonferixxi dritt ta' appell meta l-legislatur ma jkunx ta dan id-dritt'[2]."

12. Clearly, what was said in the case **Ir-Repubblika ta' Malta v. Mario Camilleri** applies *mutatis mutandis* to the present case. In other words, no right of appeal lay from the aforementioned decree of the 31st October 2012. Nonetheless, this Court believes that the following observations need to be made.

13. In terms of subarticle (2) of article 597 of the Criminal Code, the Attorney General may request the amendment of the Bill of Indictment. In terms of subarticle (1) of article 598 of the Criminal Code it shall be lawful, by leave of the Court, to correct any error in the name of or other particulars relating to the person accused. The corrections requested by the Attorney General by means of the application filed on the 9th August 2012 were made in line with these provsions. It would appear that appellant has primarily taken exception to the fact that the Criminal Court did not order that the Bill of Indictment be served anew and not to the fact that the corrections were in fact authorised.[3] Now, in terms of subarticle (3) of the said article 597, when an amendment of the Bill of Indictment has been ordered "upon the demand of the Attorney General, it shall be lawful for the accused to demand the adjournment of the trial **in order that he may prepare his**

[2] See Criminal Appeals **Repubblika ta' Malta v Raymond Brincat**, 10th November 1989; **Pulizija v Reuben D'Amato**, 19th January 2012.

[3] The proviso of subarticle (2) of article 598 of the Criminal Code even gives the Court the power to make, at any stage subsequent to the pleading of guilty or not guilty, the addition of the real name or the true particulars, should these become known. Moreover, the incorrect year mentioned in the last paragraph of the Bill of Indictment was evidently a *lapsus computeri*.

defence" (emphasis by this Court). The law does not require that the Bill of Indictment be served anew. During the sitting of the 8th November 2012 the defence did not request an adjournment but merely informed the Criminal Court that an appeal had been lodged and the case was adjourned *sine die*. In practical terms, therefore, appellant obtained a delay in the commencement of his trial during which he will have had ample time to prepare his defence. This Court thus fails to see any prejudice suffered by appellant. Consequently, and in view of the fact that, in any case, appellant had no right of appeal, the present appeal cannot be upheld.

14. For these reasons this Court declares the appeal null and void, abstains from taking further cognisance of it, and orders that the record be remitted to the Criminal Court for the case to proceed according to law.

< Final Judgement >

----------END----------