



MALTA

COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE
MAGISTRATE DR.
CONSUELO-PILAR SCERRI HERRERA

Sitting of the 19 th May, 2014

Number 1/2014

The Police

(Inspector Maurice Curmi)

vs

ACKARI FATHI SALEH

The Court,

Having seen that the accused **ACKARI FATHI SALEH**, of fifty seven (57) years, son of Saleh and Salha, born in Tripoli, on the 05 January 1957, residing at Intercontinental Hotel, St. Julians and holder of Libyan passport number 573615, was arraigned before her being accused for having on the 30th April 2014 at the Malta International Airport, as he was about to leave Malta on a direct Alitalia flight to Rome, failed to declare that he was carrying in excess of ten thousand euro (€10,000) to the Controller of Customs.

The Court was also kindly requested, in pronouncing judgement or in any subsequent order, to sentence the person convicted, 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.

This Court was humbly requested that apart from the punishment which may sentence the person convicted of such offence, order the forfeiture in favour of the Government of the undeclared amount in excess of €10,000.

Having seen all the documents exhibited in the acts of these proceedings by the Prosecution in particular the fiat of the Attorney General in terms of Chapter 233 of the Laws of Malta dated 1st Mat 2014 , the passport of the accused, a true copy of the passport of the accused and a declaration of customs marked as document CSH 4.

Having heard the accused declare that he understands the English language well and that he understood the charges brought forward against him by the prosecution.

Having heard **Inspector Maurice Curmi** testify on the 1st May, 2014 and explain that on the 30th April at about 1.30 in the afternoon, William Grech in his capacity as manager with Customs reported to him that a Libyan national by the name of Ackari Fathi Saleh holding a Libyan passport number 573615 was about to leave Malta on flight number AZ 0887 to Rome and failed to declare the amount in excess of ten thousand euro (€10,000) that he was carrying on his person in cash. William Grech added that the subject in question had arrived in Malta about two days before and had declared with Customs that he was carrying the sum in excess of twenty five thousand euro (€25,000). When he first arrived in Malta he declared this amount, however when he was leaving to Rome, the customs officials checked to see whether the accused in question had declared again the same amount he was carrying in cash upon arrival and they discovered that he had not declared such money again and so they approached him, while he was already queuing to board the flight to Rome. They soon realised that he was carrying twenty three thousand euro cash (€ 23,000) that he failed to declare and so they obviously seized the money and called in the Police. They handed him back the ten thousand euro (€10,000) and the thirteen thousand euro (€13,000) were handed to the Police for further investigation.

The witness stated that he then accompanied the accused to the Police Headquarters, and after he was given the due caution, the accused opted to consult with his lawyer Dr Gianluca Caruana Curran. The accused was questioned at length and he released a statement. The accused stated that he had declared the money once he arrived in Malta and that he was on his way to Rome to buy some marble for the house that he was building in Tripoli, Libya and nobody told him that he had to declare the same money again as he was leaving Malta. He assumed that since he had already told them that he was going to Italy to buy the marble he did not have to fill the declaration again.

The accused also stated that he came directly to Malta first because it was easier for him to obtain the Schengen Visa from the Maltese embassy in Tripoli and also because at the moment his brother was in Malta and he wanted to see him because he had not seen him for a while. He also showed him some invoices that he had issued in his name from the Italian marble supplier and thus he thought that this was a confirmation that he was in fact going to Italy to buy this marble.

The witness then exhibited the written statement that the accused had released after being given due caution which the accused opted to sign. This document was marked as document CSH. He also exhibited the sum of thirteen thousand euro, in hundred euro notes, in two envelopes and these were marked document CSH1 and CSH2 respectively. He exhibited the passport of the accused which was marked as document CSH3. He exhibited the receipt issued by the Customs Malta which was marked by

the Court as document CSH4, which declaration declares that effectively they took the sum of thirteen thousand euro (€13,000) from the accused and that they handed over to him the ten thousand euro (€10,000) he was entitled to keep.

Customs Officer Lawrence Cutajar testified on 6th May 2014 and declared that he works as an enforcement officer in the Customs Department. He remembered that on the 30th April 2014 together with another inspector colleague of his, Mario Borg, were asked by their manager at the airport, a certain William Grech to go to the departure hall to indicate to them who Ackari Fathi Saleh actually was, in particular to inform him whether the same Ackari Fathi Saleh had declared any income money on that day. Together they proceeded to the office and waited for Mr Ackari Fathi Saleh to appear.

Then, the witness together with Inspector Mario Borg proceeded towards Gate 4 to wait for the accused. He remembered that there were a number of people queuing to board the plane and he identified the accused as Ackari Fathi Saleh and asked him if he had anything to declare to Customs and immediately the accused said that he had twenty three thousand euro (€23,000) in cash. In fact the accused passed over the form to him , to show him that he had already declared this same amount of money when he arrived in Malta.

The witness saw the Custom's form exhibited in the acts of these proceedings, which is marked as Document CSH 4 and said that this was

not the form in question. He confirmed that Document CSH4 is the withhold form. It is a form which is signed by the witness himself and indicates that he held the sum of thirteen thousand euro (€13,000) which he had taken from the accused. Asked if the witness was involved in the filling of the form whereby the accused declared that he had the sum of money, he said no he was not involved in that, at this stage, however he knew about it because William Grech had informed him.

In cross-examination, the witness was asked if he recognised the signature of his manager, William Grech, to which he replied no. The courts showed him a document which is marked as document CSH5 and confirmed that this document is the document which the accused showed him when he had spoken to him when he was queuing at Gate 4. The witness knew that the accused was going to be leaving on the flight in question on the 30th April 2014 and also William Grech knew because William Grech had instructed him to go and see if he can see the accused at that terminal on that day. Asked if the accused had informed the Customs that he was leaving on the 30th April 2014, he said that he does not know. He confirmed that the accused was leaving Malta for Italy. It is correct what the defence is alleging that when he spoke to the accused he told him that he had the sum of twenty five thousand euro (€25,000) on his person when he had arrived from Libya and which money he had declared to the Customs. When he spoke to the accused, he asked him if he had anything to declare including cash and what he declared was that he had the amount of money which he had declared upon his entry to Malta. The accused also told him that he had brought this money to Malta because he intended to purchase marble from Italy. This is also indicated on the form

itself, CSH5. He also told the witness that he had informed the customs official that this money was intended for Italy. He had also informed them on entry about this reason.

Asked if William Grech had told him what he was meant to be looking for on the accused, he said yes, naturally it was for the cash in question. Asked by the defence how did William Grech know that the accused had money, he said that he must have known from the declaration form signed by him, Doc. CSH5. He also said that the customs officials knew which flight the accused was leaving on. He knows this, because he thinks the accused had told them about it. Asked if he knows who had signed the form CSH4, he answered that he does not know. Asked if there is anybody by the name of Ella Attard who works at Customs, he said, yes there is.

The witness declared that the accused was certainly very cooperative with them and at no point in time did he try to hide the money on his person (underlined by this same court).

Mario Borg testified on 6th May, 2014 and declared that he works as an enforcement officer in the Customs Department. On the 30th April 2014 his manager William Grech had sent him to the departures lounge to check if there was any one in excess of currency. He was sent to the departure lounge at Gate 4 to look for Mr Ackari Fathi Saleh. William Grech told him to check whether this person had excess currency over the sum of ten thousand euro (€10,000). The witness was with Lawrence Cutajar. They saw the accused who is also present here in court. Then they asked him, how

much money he had on his person and the accused confirmed to them that he had twenty three thousand euro (€23,000). They already had a declaration signed by the accused with regards to the money he had declared upon arrival. The witness said that he does not have a copy of this declaration on him. The declaration was signed by the manager and later by the officer in charge at the arrivals. This was Mr Lino Attard Biancardi. The witness explained that this is a procedure that all passengers need to take - they have to fill in a declaration of the currency at arrivals as well as another at the departures. He does not know if Ackari Fathi Saleh was informed by Mr Lino Attard Biancardi that he had to make this declaration about the money again on his departure. It is true that the accused had declared the money on entry, he was coming from Libya and he had declared that he had this money which he was taking to Italy in order to pay some marble.

William Grech gave evidence on the 9th May 2014 and declared that he occupies the post of head of Customs Department at the Airport. He stated he remembers that during the week of the 30th April 2014, they were carrying out a cash control exercise controlling the money which was leaving Malta and this was done for the whole week. He remembers that on that particular day, two of his colleagues were assisting him throughout this operation. Actually this was being held by them, while he was at his office. Mario Borg was the inspector in charge together with the enforcement officer Lawrence Cutajar. They reported to the witness that they had found the person who had more money than he was allowed to have in his possession. So the witness went to their departure office to verify. The witness was in fact handed over a list of passengers from their CIS which is our Intelligence Section, and they also had another list which they were compiling through the arrivals.

The witness confirmed that the name of the person whom the officers had to speak to and who was indicated to them by the witness himself is Ackari, whom the witness recognised in court as the accused. The witness said he had instructed Mr Borg and Mr Cutajar to speak to Mr Ackari because upon his arrival Mr Ackari had declared that in fact he was in possession of an amount of money. He confirmed that he had told his officers that when a person on arrival declares that he is getting a certain amount of money into the country for export, they are to take as much information about him as possible, even if such person was leaving Malta and going into another EU country. The witness was shown the cash declaration form exhibited in these proceedings, which document is marked CSH5 and he said that this is the form that the person fills in upon entry.

The law is clear that a person who comes into Malta with a certain amount of money has to declare this money upon arrival and upon departure and even if he is in transit. The instructions he gave were that once a person fills in this cash declaration form, they have to verify to see if the money which is stated in this cash declaration form is actually exported from the country. Here the witness confirmed that when Mr Ackari came to Malta he had declared that he had €25,000 in his possession and six hundred US dollars. However, when he was leaving the country he had €23,000. The reason why Mr Akari brought this money to Malta as results from the cash declaration form signed by his good-self was that he was going to use this money to buy marble in Italy, and he also indicated to the customs the flight he was going to take to leave Malta. The witness stated he does not know that in actual fact the accused had shown this proforma invoice to the customs officers with regards to the marble which he was intending to purchase. The witness confirmed that on

the 28th April 2014, he had received an e-mail from Mr Peter Grima who was in charge of the shift at the Customs Office on that day whereby he was indicated the flight which Mr Ackari was going to take on the 30th April 2014. The witness exhibited the e-mail which was marked Document WG and also a copy of the instructions he gave to the customs officers which was marked as Document WG1. The witness covered the names of the other people who appear on this email. Naturally they knew what Gate the flight would be at, as that is part of his job. The witness declared that consequently he sent Mr Cutajar and Mr Borg to Gate No 4.

Lino Attard Biancardi gave evidence on the 9th May 2014 whereby he declared that he occupies the post of a customs officer and being shown a document which is exhibited in these proceedings and marked as Document CSH5, he confirmed that this was the document which he filled up. However, he was not recognising the accused. Asked by the court if he remembers this case specifically, the witness replied no as he fills up these forms on a regular basis. He remembers however that there was a passenger that had told me that he was going to buy marble from Italy. However, he does not recall that he showed him any proforma invoice with regards to the marble he intended to buy. The witness does not even remember if actually the accused told him which flight he was going to catch. However, usually when a person tells him which flight he was going to catch or what day he is going to leave, he writes a note on the bottom of the form, and he was not seeing this on the form in question.

Asked by the Court if he knows about an email which was sent to him by William Grech, with regards to the instructions they must follow when a

person is arriving to Malta and declares that he has a certain sum of money in his pocket, the witness replied yes he does know about this. He does not even remember if he asked the question in this case, whether the passenger was going to leave Malta, where he is going to and when. What the witness knows is that according to the instructions given to him by Mr Grech, is that he has to write down the flight and the date of his departure if the passenger knows it. The witness also presumes that in this case the person stopped did not give him this information otherwise he would have written them down as usual. Asked by the Court what he does with the original form of the document marked CSH5, the witness said that he puts it in a box file and then this is picked up by another customs's official. If anybody else spoke to the accused on the day in question, he does not know. Usually he is alone with the passenger.

The accused **Ackari Fathi Saleh** gave evidence on the 9th May and declared that he in fact works as a businessman. He came to Malta to see his brother who lives here in Malta and to get a Visa to enter in the EU. As soon as he arrived in Malta, he asked for the declaration office, so that he could declare his money. He was accompanied to the cash declaration office and was there for half an hour and spoke to Mr Attard Biancardi and told him that he wanted to declare his money. Attard Biancardi asked him to show him his money which he did and the accused told him that he was going to Rome after two days, with the intention to buy marble. He asked the accused to show him his ticket and pro-forma invoice, which he did.

The accused passed on to the court the pro-forma invoice which is relative to the purchase of this marble. The accused exhibited two documents which

were marked as Document AF and AF1 with regards to the deposit the accused had made for this marble and then AF2 with regards to the balance which was still due by his good-self. These two documents were being exhibited animo ritirandi. The accused also exhibited a copy of the ticket that he had for his return, which was marked as Document AF3. He intended to go to Rome within two days, and he also told him that he was declaring it because he wanted to take it with him to Rome. The accused then went back to the airport two days later on the ^{30th} April. He approached the Alitalia Desk, gave them his luggage and ticket, and they gave him the boarding pass, which he exhibited and marked as Document AF4. The accused said he passed through the security and they checked him and he went to the departure area. He stayed there for about an hour and forty-five minutes and went into the duty free area and then subsequently when they called Alitalia flight on the microphone, he went and stood in the line at Gate 4, ready to leave.

The customs officers came on to him and asked him if he was Mr Ackari Fathi Saleh to which he replied yes. Then they wanted to see his passport and he gave it to them, asked him to accompany them, and the accused asked them for what reason. The accused stated he followed them to the office and was asked if he had money and he said yes and he showed them the money which he had in his possession and also the decalation CSH5. They told him that this was no longer valid. The accused said he entered Malta being a member of the European Union and he was going to remain in the country belonging to the same European Union and nobody informed him that he had to fill in another form, when there was no sign for him to declare the same money on leaving the country. On this form he had indicated that there was a box indicating if he was leaving the EU which is not filled, naturally because he

was remaining in the EU. Nobody told him that he should declare this money if he was going to Italy. The accused understood that he was still in the Shengen area. He was purchasing the marble from Albazel Construction Company and confirmed that the total value of the proforma invoice of the marble that he was purchasing amounted to €34,068. In actual fact, the accused had also made a deposit of €9,904.24 as per document AF2. The accused also confirmed that the balance left was €24,163.76 however, when he was going to Italy he intended to reduce this balance.

The Court heard the parties make their final oral submissions in the sitting of the 9th May 2014.

Court Considerations.

The Court feels that before it goes on to discuss the merits of this particular case, it should first of all discuss the notions of what constitutes Criminal Liability, for not all who commit a wrong is said to be liable or responsible for it. The general conditions of criminal responsibility are indicated with sufficient accuracy in the legal maxim "*actus non facit reum nisi mens sit rea*". This proves to show that an act cannot be guilty in itself, it must be accompanied by a guilty mind. In other words there are two conditions which have to be fulfilled before criminal responsibility can rightly be found, and we may distinguish these two conditions as a material condition (*actus reus*) and a formal condition (*mens rea*).

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The material condition is the doing of an act by an individual which violates the rights of others. The formal condition is the *mens rea*, the guilty mind with which the act was committed. It is thus of vital importance that a look at the mental attitude of the doer is given before the law can justly punish. Because there are instances when the mind is innocent and the act is heinous and thus objectively wrongful. The material badness of an act depends on the actual nature circumstances and consequences of it, whilst its formal badness depends solely on the state of mind and the will of the doer.

The *mens rea* includes two mental attitudes of the doer towards the deed. A person is criminally responsible for those wrongful acts which he does wilfully, here there is the wrongful intention (*dolus*) and negligently culpable negligence (*culpa*).

Only when either of these two attitudes happen that the *actus* is accompanied by the *mens rea*, and thus the material and formal condition co exist. If there is no intention or culpable negligence, the doer would be exempted from criminal responsibility.

Intention, in general, is the purpose or design with which an act is done. It is the full knowledge of the act coupled with the desire of it, such full knowledge and desire being the cause of the act. An act is intentional if it exists in idea, before it exists in fact. **Holmes** says in his book **Common Law** - page 53 that :

"intention resolves itself into two major issues - that of foresight and that of wish, desire."

Therefore an act is intentional when every part of it corresponds to the precedent idea of it which was present in the doer's mind and of which it is the outcare of realisation.

Generally this intention is the combined operation of the intellect and will. But in criminal law it is clear that the word 'intent' is used in a wider sense and in fact **Carrara** defines criminal intent *dolus* as the more or less perfect intention of doing an act which is known to be contrary to law. It is not necessary that the wrong doer knows that he was breaking the law, because of the principle *ignorantia iuris neminam excusat* but that the doer knew that he was doing a wrong, in other words that his act was injurious to a right of others protected by criminal law. As **Kenny** says in page 39 of his book ***Criminal Law*** -

"in all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in intending to do what you know to be illegal."

This element requires:

1. the power of violation, i.e. that the offender must be able to help doing what he does;

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2. knowledge - that what the offender is doing is wrong;
3. foresight of such circumstance.

In fact, **Antolisei** in his book - ***Manuale di diritto penale*** - 1975 edition (fol 271) says that for a doer to be found guilty of a crime it is essential the existence of *dolo*.

a. la rappresentazione o cioe' la visione anticipata dell fallo che costituisce il reato (momento conoscitivo o intellettuale);

b. la risoluzione seguita da uno sforzo del volere diretto alla realizzazione del fatto rappresentato (momento volitivo).

The facts of the case as shall be outlined shortly are not contested by the parties however in spite this, the prosecution still thought it proper to arraign the accused in court and charge him with the above indicated charges.

1. The accused arrived in Malta on the 28th April 2014 after having boarded a plane from Libya
2. Once he arrived in Malta, he entered into the Customs Office and declared the cash he had on his person being the sum of twenty five thousand euro (€25,000) and six hundred US dollars (USD600) as can be evidenced from the form CSH5 entitled 'Cash declaration form'.
3. It also transpires according to document CSH 4, another customs document, that the accused was handed over the sum of ten thousand

euro (€10,000) [the sum allowed to be retained] and the rest was kept by the police and subsequently the sum of thirteen thousand euro (€13,000) was deposited in the acts of these proceedings by Inspector Maurice Curmi.

4. It results that the accused had also informed the customs official with the reason why he had so much money on his person and later on in Court exhibited the pro forma invoices relative to such purchase of marble from Italy.
5. It also appears that the accused had informed the customs official of his date of departure and that he was leaving for Italy and this was confirmed by the Manager William Grech who said he had known about the departure of the accused and that is why he had specifically sent Mario Borg and Lawrence Cutajar to gate number 4 on the date of departure.
6. It results too that when the accused was stopped, he immediately told the customs officials that he had an amount of money on him as he himself had stated earlier on upon arrival.

Thus, the Court has now to see whether these facts as above indicated amount to the crime under examination as envisaged in Article 3 of Legal Notice 149/2007 entitled **External Transactions Act (Cap. 233)** which controls Cash Regulations. This law was introduced in our legal system in the year 2007. The relevant section at law provides the following:

3. (1) *“Any person entering or leaving Malta, or transiting through Malta and carrying a sum equivalent to Lm4,293 or more in cash shall be obliged to declare such sum to the Comptroller.*

(2) The obligation to declare any such sum as in subregulation (1) hereof shall not be fulfilled unless such person has completed the applicable form, appearing in the Schedule to these regulations, and has handed in such form to the Comptroller when entering or leaving Malta, or transiting through Malta.

(3) Where any cash has not been declared as provided in sub-regulation (1), the Comptroller shall seize the undeclared amount in excess of Lm4,293, or the whole amount when the cash is indivisible”.

Thus the law imposes an obligation on a person entering Malta or leaving Malta or transiting through Malta and who is carrying a sum of Money equivalent to Lm 4,293 (thus the sum of €10,000) to declare such money to the Comptroller of Customs. It also provides that such person has to fill in the form that appears in the schedule to these same regulations as indicated in the Legal Notice 149/2007 and once again such person has to then hand in this form to the comptroller either upon entering Malta or leaving Malta or transiting through Malta.

Now it appears from the facts of this case that the accused did exactly this what was expected of him according to this section of the Law. He came into the European Union, more precisely to Malta being one of the members of the European Union and so part of the Shengen from a non EU state being Libya. The accused upon arrival said that he wanted to declare some money which he had in his possession, which money he intended to take out of Malta two days later to purchase marble in Italy. He was given a form by Mr Lino Attard Biancardi to fill in and sign. It is to be noted immediately that the form he was given is **not** the form that is attached to the regulations and thus

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is not the form which according to Section 3 supra was meant to be given to the accused.

From an examination of the form given to the accused (Dok CSH 5) it appears that the form confirmed that the accused was entering the EU. According to his evidence given in court and as can be evidenced from the statement he had released to the police *a tempo vergine* of the investigation, the accused was never told that he had to declare the money once again upon departure. This is also confirmed by Lino Attard Biancardi who said that he did not explain to the accused that he had a duty to re-declare this money upon departure.

So on the day in question the accused proceeded to the gate number 4 to catch the plane to Italy and thus remain in the European Union and consequently he felt that he did not have to fill in another form. It was only a few moments later that he was stopped by the customs officials who once again asked him if he had any money to declare and at that point he stated that he had already declared his money upon arrival in the EU and made reference to the copy of the form he had filled which was in his possession Dok CSH 5.

From the above, it results that the accused at no point in time was going to leave the EU with the money he had declared. It does not result from any law that the accused had a double obligation to declare this income upon arrival and upon departure since such accused was remaining in the EU. It does not make any sense, unlike what the prosecution believes, that the accused has such a double obligation. The form itself although not the

correct one provides a declaration for entry into the EU and thus since the accused was going to remain in the EU, he was covered with such declaration. Such thesis of the prosecution would have held ground if the accused was returning back to Tripoli or any other country outside the EU.

It appears to the satisfaction of the Court that the accused was consistent in his version of events as from the early stages of this investigation from the moment he released his statement. He never had any intention to avoid declaring such money so much so that it was he himself who informed the official of his income upon arrival and of his date of departure, so if he had anything to hide, he would not have been so sincere in his approach.

The Court concludes by making reference to the judgment delivered by the Criminal Court of Appeal in the names **'Il-Pulizija vs Austin Joseph Psaila et'**, delivered on the 7th April 1992 where in it was held that:

"Ghalhekk din il-Qorti, bhal kull Qorti ohra, hija fid-dmir li ssib htija tal-imputat jekk il-provi tal-Prosekuzzjoni huma totalment sodisfacenti u li m'ghandux ikollhom l-ebda dubju dwar il-kolpevolezza tal-imputat. L-icken dubju kkawzat f'dawn l-provi jew bil-provi prodotti mid-difiza, ghandu per forza jmur favur l-imputat li ghandu mmedjatament jigi dikjarat liberat. Din hija l-prassi legali f'dan il-pajjiz."

The Court thus after having seen the relevant sections at law in particular Sections 532A, 532B and 533 of Chapter 9 of the Laws of Malta and Section 4 of the Legal Notice 149/2007, decides to find the accused ACKARI FATHI

SALEH not guilty of the charges brought forward against him and acquits him accordingly of all charges.

The Court further declares that it is abstaining from the request of the prosecution to order the confiscation of the money deposited in Court and thus orders the immediate release of such money in the hands of the accused.

The Court further declares that it is abstaining from the request of the prosecution to condemn the accused to pay the expenses of any expert appointed in these proceedings since it does not appear that there was such appointment.

< Final Judgement >

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