Court of Criminal Appeal

Hon. Madame Justice Dr. Edwina Grima LL.D.

Appeal Nr: 222/2015

The Police

Inspector Raymond Aquilina

Inspector Herman Mula

Inspector Jesmond J. Borg

Vs

Omissis

Vladimir Omar Fernandez Delgado

Today the, 19th November, 2015,

The Court,

Having seen the charges brought against *omissis* and Vladimir Omar Fernandez Delgado, holder of Panamanian passport Number 1866486, before the Court of Magistrates (Malta) as a Court of Criminal Judicature, charged with having:

On the 9th May, 2013 and during the preceding 3 years from this date, on these Islands, with several acts committed, even if at different times and which constitute violation of the same provisions of the Law, and are committed in pursuance of the same design:

a. Carried out acts of Money Laundering by:

i. Converting or transferring property knowing or suspecting that such property is derived directly or indirectly from or the proceeds of criminal activity or from an act or acts of participation in criminal activity, for the purpose of or purposes of concealing or disguising the origin of the property or of assisting any person or persons involved or concerned in criminal activity;

ii. Concealing or disguising the true nature, source, location, disposition, movement, rights with respect of, in or over or ownership of property, knowing or suspecting that such property is derived directly or indirectly from criminal activity, or from an act or acts of participation in criminal activity;

iii. Acquiring property knowing or suspecting that the same was derived or originated directly or indirectly from criminal activity, or from an act or acts of participation in criminal activity;

iv. Retaining without reasonable excuse of property knowing or suspecting that the same was derived or originated directly or indirectly from criminal activity, or from an act or acts of participation in criminal activity;

v. Attempting any of the matters or activities defined in the above foregoing sub-paragraph (i, ii, iii, and iv) within the meaning of Article 41 of the Criminal Code;

vi. Acting as accomplice within the meaning of Article 42 of the Criminal Code in respect of any of the matters or activities defined in the above foregoing sub-paragraphs (i, ii, iii, iv, & v).

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 29th April, 2015, whereby the Court considered accused guilty as charged after having seen Articles 22(1C)(b) of Chapter 101; Articles 2(1) (b), 2(1), 2(a), 2(c), 2(A)(a)(ii), 3(3) of Chapter 373 of the Laws of Malta; and the Second Schedule thereof.

Considered, with regards to the correct penalty to be proffered, that it seems, as Defence Counsel has repeatedly stated in his note of submissions, mirrored this by the note entered by the Commissioner of Police, that the sum here in contention is that of circa eighteen thousand Euros (€18,000), this obviously being the monies transferred on Evans' behalf. In its final submissions Defence Counsel stressed that this amount, should the Court find guilt, be taken into consideration when the penalty is inflicted.

Further considered that in actual fact this Court has no other involvement of the accused proven but that limited to the transfers mentioned; his conviction sheet is also pristine.

Therefore condemns him to the term of effective imprisonment for a period of three (3) years and for the fine of twenty-thousand Euros (€20,000).

Seen Article 533 Chapter 9, and condemns him to the payment of the sum of one thousand nine hundred and ninety-two Euros and eighty-nine cents (€1,992.89) incurred as legal expenses.

Orders also the forfeiture of all monies found on the person of the accused.

Having seen the appeal application presented by Vladimir Omar Fernandez Delgado in the registry of this Court on the 8th May, 2015 whereby this Court was requested to revoke and annul the judgment delivered on the 29th April 2015 by the Courts of Magistrates (Malta) sitting as a Court of Criminal Judicature in the case The Police vs Omissis and Vladimir Omar Fernandez Delgado and acquits him of all the charges proffered against him and revokes and cancels the punishment and penalties (custodial and financial) imposed upon him and as well as revokes and cancels the order of the confiscation of the money found on him and in case that this Honourable Court decides to confirm his guilt he humbly asks this Honourable Court to impose a punishment which is more reasonable in the circumstances of the case.

Having seen the updated conduct sheet of the appellant, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of Vladimir Omar Fernandez Delgado:

Whereas the grievances of appellant in that he was found guilty of the crime of money laundering in the amount of around €18,000 are clear and manifest and consist as follows:

The Prevention of Money Laundering Act (Chap. 373 of the Laws of Malta), which since its promulgation in 1994 has undergone several changes, some of which were quite substantial, is a special law which has to be applied very carefully. The Court of Criminal Appeal in the case Ir-Repubblika ta' Malta vs John Vella decided on 29.11.99, and therefore at a time when this law was not as draconian as it is at present, had thus remarked on particular nature of this law: "Din hi ligi straordinarja li tintroduci kuncetti radikali fis-sistema tagħna w li tirrekjiedi applikazzjoni bl-akbar skruplu w attenzjoni biex ma tigix reza fi strument t'ingustizzja aktar riminixxenti taz-zmienijiet tal-Inkwizizzjoni minn dawk tal-era moderna tad-drittijiet tal-bniedem." Since this pronouncement this "extraordinary law" was amended and again rendering it even more draconian and thus requiring even more attention in its application lest it is rendered in an instrument of legal injustice which is the nemesis of justice according to law.

According to this 'special law' the material act (actus reus) of the crime of money laundering consists in the conversion or transfer or in the concealment or disguise of

the true nature, source, location, disposition, movement, rights with respect of, in or over, or ownership or in the acquisition, possession or use of property or in the retention without reasonable excuse, of property when such property derived or originated directly or indirectly from criminal activity or from an act/s of participation in criminal activity. Indeed, we do not need to look up the laws of other countries to come up with a definition of money laundering as the Court of First Instance seems to suggest in its judgement. Indeed if we look up for a definition found in the laws of other countries we may risk of not getting the definition right according to our law.

Furthermore, the material act (actus reus) or acts done by the guilty person must have been committed with the required specific mens rea, that is to say with at least one of two specific intentions as mentioned in the law, namely, (i) that of concealing or disguising the origin of the property; or (ii) that of assisting any person/s involved or concerned in criminal activity.

In view of the above mentioned dictum of the Honourable Court of Criminal Appeal pronounced when the law was less draconian than it is today, in view of the lack of specifications by the Prosecution of what exactly and precisely appellant should have been found guilty of, the least that one would have expected of the Court of First Instance in this case in finding appellant guilty is to have specified which of the different material acts (actus reus) which the law prohibits appellant was proved beyond reasonable doubt to have had committed; which of the special intentions (specific mens rea) appellant had been proved to have had when committing the actus reus; whether appellant was found guilty of having committed the crime as a principal or as an accomplice; and whether accused was found guilty of the crime in its completed form or in its attempted form. The lack of these specificities certainly does not make justice to the above mentioned dictum of the Honourable Court of Criminal Appeal.

The Prevention of Money Laundering Act, draconian as it is, did not however shift onto accused the burden of proving his innocence. In the case of a charge of money laundering the Prosecution still carries the burden of proving beyond reasonable doubt the guilt of accused. What is different from norm is that in certain instances the accused may be required to prove certain facts to the degree of on a balance of probabilities. But the burden of proving the guilt of accused remains with the Prosecution throughout the whole trial and does not at any moment shift onto accused to prove that he is innocent and this in line with established Maltese criminal law principles.

On a charge of money laundering also it is indispensable for the Prosecution to prove, through legally acceptable evidence, a nexus between the property which is the object of the charge and an underlying criminal activity and this for the reason that as the Criminal Court of Appeal had stated in the above quoted judgement Ir-Repubblika ta' Malta vs John Vella (decided on the 29.11.99), and in turn quoted in several subsequent judgements, amongst them Il-Pulizija vs John Borg, decided on the 6.10.03 by the Court of Criminal Appeal in its Inferior Jurisdiction, "Mhux kull akkwist, mhux kull konversjoni ta' trasferiment ta' propjeta', mhux kull]abi jew wiri ta' propjeta' ne`essarjament jammonta g]al-money laundering, ANKI JEKK l-AKKU|AT IKUN KRIMINAL INKALLIT". And further on, in the same judgment we find that, "allura g]andu jkun impellenti u ne`essarju li ji[i deskritt b'mod inekwivoku n-ness bejn l-attivita' kriminali u l-allegat money laundering".

Our law on money laundering specifies that a person may be convicted of a money laundering offence even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity and without it being necessary to establish precisely which underlying criminal activity. Whilst the need of specifying several conditions under article 2(a) of the Prevention of Money Laundering Act, namely, "in the absence of a judicial finding of guilt in respect of the underlying criminal activity"; "without being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity"; and, "and without being necessary to establish precisely which underlying criminal activity" is easily understood, it is not so clear why the legislator felt the need to specify that the existence of the underlying criminal activity may be established on the basis of circumstantial or other evidence and this for the simple reason that in any criminal trial conducted under our criminal law of procedure both circumstantial evidence as well as other evidence, provided that such other evidence is in accordance with the law, are capable of proving facts in issue and/or the guilt of an accused even to the degree of beyond reasonable doubt. Indeed, even circumstantial evidence on its own may be sufficient not only to prove facts but also to prove the guilt of an accused beyond reasonable doubt. However, in accordance with our jurisprudence, when the only evidence against accused is circumstantial, great care must be taken to avoid as much as possible the commission of the worst of injustices, that is to say finding guilt in an innocent person.

In so far as circumstantial evidence is concerned, it has been held that if this kind of evidence is genuine and relevant to the case it may prove or disprove facts in issue. It is also said that circumstances do not speak and therefore cannot lie. However,

when proved circumstantial facts are examined for the purpose of establishing whether you may draw an inference from them or a conclusion of guilt one must be very cautious since although circumstances do not lie they may deceive. Therefore before drawing any inference or conclusion from any such fact or facts as to the guilt of an accused one has to be sure that there are no other co-existing circumstances and/or testimony which would weaken or destroy such inference or conclusion.

In actual fact, it has been said that in order that indirect or circumstantial evidence may be made use of in considering whether one may draw an inference from it, the fact examined must be unambiguous or unequivocal meaning that it must be definite or unmistakable or clearly pointing to only one conclusion. Therefore, if the fact under consideration is ambiguous or equivocal or vague it is unreliable and obviously cannot be relied upon.

On the other hand, in the case of an accused, even if the indirect or circumstantial evidence only probably shows that he is not guilty or that there is a reasonable doubt as to his guilt, then it means that an inference must be drawn that he is not guilty and must be acquitted.

Indirect or circumstantial evidence must always be narrowly examined because although circumstances do not lie they may deceive.

It must also be said that it is common knowledge that in everyday life unscrupulous persons try to take advantage of other unsuspicious persons to achieve their end. If it were otherwise there would be no need for the crime of fraud. It is also common knowledge that in everyday life coincidences do happen and exist.

In so far as the level of proof which the Prosecution must reach in order to prove a nexus between alleged property deriving directly or indirectly from an underlying criminal activity and an underlying criminal activity is concerned, it has been stated that this level is that on a *prima facie* basis. In turn this level has been held by our Courts to mean something in between the level of proof on the level of possibility and the level of proof of on a balance of possibilities. It has also been stated that if the Prosecution succeeds to reach this level of proof with regards to the nexus between the property in question and an underlying criminal activity, then the law burdens the accused with proving the legal origins of the property concerned. However, since what is here required is proof of a fact and since the Prevention of Money Laundering Act did not change anything with regards to criminal law principles in so far as the level of proof a defendant must reach in proving a fact is concerned, the level that an accused must reach is to the degree of on a balance of probabilities. However, even in case that an accused does not succeed to prove the legal origins of the property on the level of on a balance of probabilities, it does not

mean that he is automatically guilty. The Prosecution still needs to prove beyond reasonable doubt his guilt since to prove guilt it has to prove beyond reasonable doubt that accused did not only commit the actus reus – that is at least one of the prohibited acts; but also that when accused committed the prohibited act or acts he had the required mens rea to commit the crime, meaning that he must have had the knowledge, or at least the suspicion, that the property in question originated directly or indirectly from an underlying criminal activity.

Whilst 'knowledge' may be easily understood, our Courts tried to explain what the legislator meant by 'suspicion', which is more difficult to explain than 'knowledge'. In the case, The Police vs Carlos Frias Mateo, the Court of Magistrates (Malta) sitting as a Court of Criminal Judicature, in its judgement of the 5.08.11, quoting from the English Criminal Court of Appeal judgment in the case Regina vs Hilda Gonmdwe Da Silva, stated that, "The word suspect means the defendant must think that there is a possibility, which is more than fanciful, that the relevant fact exists. A vague feeling of unease would not suffice". This definition was approved of by the Court of Criminal Appeal in its Inferior Jurisdiction in the same case in its judgment delivered on the 19.01.12. This definition carries much more weight than any definition which any dictionary may give. Again, if it is incumbent on an accused to prove that he had no knowledge or that he had no suspicion as defined in our jurisprudence of the illicit nature of the property, the accused would have to prove a fact and in which case it will be sufficient for him if he discharges this burden by proving, to the degree of on a balance of probabilities, such fact. This he may do in any manner which the law allows proof to be made such as for example by his own evidence under oath and/or from his own written or verbal statements and/or from evidence adduced even by the Prosecution itself.

In the light of the above mentioned doctrine, in the present case the Prosecution needed to prove beyond reasonable doubt that accused was guilty of the offence of money laundering, in the amount, according to the Prosecution itself, of the sum of €18,536.36 (vide the last two lines of para. (i) - 4. Considerations and Evaluations at page 17 of the Note of Submissions submitted by the Prosecution to the Court of First Instance) and as accepted by the Court of First Instance.

What evidence has been produced in this case with regards to the offence charged *vis-à-vis* accused?

In actual fact appellant had spoken to the Police about several transactions which he had made through Western Union on both of the occasions that he was in Malta (October 2012 and March till beginning of May 2013). Although in his statements accused could have told the Police that **all** the transactions he had made though

Western Union were of his own money he did not do so since this was not so and he actually chose to tell the truth to the Police and subsequently during his evidence before the Court of First Instance. Appellant had nothing to hide.

As has already been submitted, out of all the transactions made by accused, the Prosecution based its charges only on a part of all the transactions made. This was accepted by the Court of First Instance. This means that both the Prosecution and the Court of First Instance believed what appellant had told in so far as on whose behalf the transactions were made. What the Court of First Instance did not believe appellant in was that he did not have knowledge or suspicion that the money he transacted on behalf of John Joseph Evans derived from an underlying criminal activity.

In this case it was in the first place incumbent on the Prosecution to prove that the money which accused sent abroad on behalf of Evans originated directly or indirectly from an underlying criminal activity although not necessarily the precise criminal activity involved. In this regard the Prosecution alleged that the underlying criminal activity in this case was the dealing in dangerous drugs by Evans and this basically on the strength of the fact that in the penthouse where Evans (but not the accused) resided the Police found dangerous drugs. Whatever Evans himself may have told the Police and subsequently the Inquiring Magistrate under oath, cannot be used against or in favour of appellant as acknowledged by the Court of First Instance in the appealed judgment itself and this for the reasons therein mentioned.

Dato sed non concesso that the Prosecution had proved not only and simply on a *prima facie* basis that the money given by Evans to appellant to transfer abroad had originated from an underlying criminal activity, did the Prosecution however prove beyond reasonable doubt that accused had the 'knowledge' or at least the 'suspicion' as defined by our Courts that the money which came into his possession was the proceeds of a underlying criminal activity?

In considering this matter one may easily fall into the mistake of mixing up the required proof of this element by the Prosecution, which must be to the degree of moral certainty, with what has been stated by our Courts that once the Prosecution proves at least on a *prima facie* basis that the property derived from an underlying criminal activity then it is incumbent upon accused to prove, at least on a balance of probabilities, that the property is not tainted.

The direct or indirect origin of property from an underlying criminal activity is actually only one of the elements of the crime of money laundering since not each and every person who comes into possession of tainted property is automatically guilty of the crime of money laundering. Guilt must also be founded on the fact that

the person charged must have had the 'knowledge', or at least the 'suspicion' as defined by our Courts, that the money or property concerned derived directly or indirectly from an underlying criminal activity.

In this regard, appellant humbly submits that there is no proof whatsoever, whether through direct evidence or through indirect evidence, that accused knew or at least suspected that John Joseph Evans was involved in dangerous drugs dealings and that therefore the money given him derived from an underlying criminal activity. Indeed appellant had confirmed on oath that he did neither know nor suspected this. Even if one excludes what John Joseph Evans had told the Police in that appellant knew nothing about his illegal activity and that appellant did not know that the money he gave him was illegally obtained, the Prosecution did not bring a shred of evidence to contradict what appellant had stated both at Police HQ and under oath in Court. Furthermore, circumstantial evidence goes on to show, at least to the degree of on a balance of probabilities, that accused neither knew nor suspected anything wrong either about John Joseph Evans or about the money he had asked him to transfer abroad. In actual fact there could be other reasons for hiding money than the one that the money derived directly or indirectly from a criminal activity, as for example tax avoidance or evasion. The circumstantial evidence which confirms what appellant stated about his relationship with John Joseph Evans includes the fact that appellant had stayed in Malta for only a few days in October 2012; appellant always stayed in a different apartment from that in which John Joseph Evans resided; appellant believed that John Joseph Evans had money because he could afford to rent an apartment (where appellant resided whilst in Malta) and also a penthouse (where John Joseph Evans resided); he had never seen John Joseph Evans doing anything wrong on any of the occasions when he was in Malta; he knew that John Joseph Evans was an international disc-jockey and as such had the potential of earning good money; it was he who eventually led the Police to where John Joseph Evans actually lived; and it was he who told the Police that he had made transfers of money on behalf of John Joseph Evans even he did not know that the Police had found some documents related to these transactions at the residence of John Joseph Evans as appellant was not present during the search of the residence of John Joseph Evans. Furthermore, the Prosecution did not bring any shred of evidence to prove any wrong doing on the part of appellant.

Furthermore, in so far as these six transactions ranging each from about €3000 to €4000, except for one which was in the amount of approximately €2000, in the total of approximately €18,000, which appellant claimed that he transferred abroad to make a favour to John Joseph Evans, appellant could have claimed that also this money belonged to him having gotten it from his international legal activity in just

the same way as he did with the rest of the transactions made by him and about which he was believed. He did not do so because that was not the truth and in actual fact he decided, *a tempo vergine*, to tell the Police the whole truth about the transactions that he had made whilst in Malta.

The Prosecution did not prove beyond reasonable doubt that accused had the knowledge or at least the suspicion of the illicit origins of the money given to him by John Joseph Evans to send abroad.

In this case the Prosecution based its charges on circumstantial evidence. Likewise the Court of First Instance found appellant guilty on the basis of its interpretation of circumstantial evidence. At his juncture it is worthwhile recalling what our Courts have said with regards to circumstantial evidence. It is also worthwhile recalling the interpretation given by our Courts to the word 'suspicion' in the context of the law on money laundering. "The word suspect means the defendant must think that there is a possibility, which is more than fanciful, that the relevant fact exists. **A vague feeling of unease would not suffice**".

In accordance with what has transpired from the evidence in this case it is clear that appellant had known John Joseph Evans since childhood and although there were some years in which they were not in contact with each other appellant had no reason to doubt the good character of John Joseph Evans as he had known him since childhood. Even when accused was in Malta, when they met other persons these were persons of seemingly good character. In both of his visits to Malta, appellant did not stay in the same apartment in which John Joseph Evans was residing except for one night and therefore he had no way to know what may have been hidden in the penthouse where John Joseph Evans resided. In actual fact it transpired that all the dangerous drugs which the Police found in the penthouse where John Joseph Evans resided were hidden in such a way that he had to inform the Police where they could find them.

On the other hand, appellant proved that he himself is a person of good character. When appellant made the transfer transactions he used the address where he or John Joseph Evans resided and not a fake or false address, and this even if there was no proof to attest as to his residence. The passport he had used in the transactions was his own valid passport. Both the valid passport and the address/es used could lead to appellant.

Although in theory 'suspicion' may be less difficult to prove than 'knowledge', in order to prove suspicion as one of the elements of the crime of money laundering the Prosecution needs to prove beyond reasonable doubt that accused must have

thought that there is a possibility, which is more than fanciful, that the relevant fact exists. A vague feeling of unease does not suffice.

All the above mentioned facts, which are part and parcel of the circumstantial evidence in this case, go on to prove, at least to the degree of on a balance of probabilities, that appellant is not guilty of the charges brought against him.

Even if one may come to the conclusion that the Prosecution has succeeded to prove up to the level required by law that the money that accused transferred on behalf of John Joseph Evans derived directly or indirectly from an underlying criminal activity, appellant has succeeded to prove, at least to the degree of on a balance of probabilities that he did not have either the knowledge or the suspicion as interpreted by our Courts that in what he did he was breaching the law since he did not have either the knowledge or the suspicion that the money he transacted on behalf of John Joseph Evans originated directly or indirectly from an underlying criminal activity which according to the Prosecution is the dealing by John Joseph Evans in dangerous drugs.

In the absence of any declaration of accused pointing to guilt and in the absence of direct evidence showing that accused is guilty of the charges brought against him, it is clear that the Prosecution is basing its case in proving the different elements of the charges proffered against accused simply and squarely on circumstantial evidence.

Another aspect of this case is that the charges against appellant include the continuous offence. In this regard was incumbent on the Prosecution to prove beyond reasonable doubt the elements of this offence as well. In this regards the question which has to be answered is that if appellant is guilty of the crime of money laundering through which of the different acts mentioned by the law he committed the crime? Had the Prosecution proved beyond reasonable doubt that each and every single transaction made by appellant amounted to the crime of money laundering? If not, which of the different transactions (crimes) make up the continuous offence? Or is it that the crime of money laundering in this case is made up of the different transactions taken together as a whole with the different transactions amounting in their totality to one single crime? In this regards appellant respectfully submits that *in dubbio pro reo*.

Even in case that this Honourable Court deems that the Court of First Instance was correct in finding accused guilty as charged, the term of three years effective imprisonment and the fine of twenty thousand euro (€20,000) to which appellant was condemned, considering that effective imprisonment is not mandatory, and that in the case of imprisonment the law mentions a minimum of six months and in the case of the fine mentions a minimum of €2329.37, is a heavy one indeed. In this

regard appellant wishes to make reference to the case Republic of Malta vs Eduardo Navas Rios in which case the Court of Criminal Appeal considered that a term of three years and ten months imprisonment and a fine (multa) of ten thousand euro payable within one year after accused was found guilty in a trial by jury of the crime of money laundering in an amount which was more than double that in the present case were sufficient even if the maximum term of imprisonment applicable in that case was fourteen years and not nine years as in the present case.

Furthermore, the Court of First Instance condemned appellant to pay all the experts' expenses incurred in connection with this case even those incurred only in regards to the other co-accused John Joseph Evans, and regarding which appellant has nothing to do and therefore should not be made for expenses incurred on behalf of a co-accused charged also with other charges relating to dealing in drugs.

Considers,

In the prosecution of the crime of money laundering there must result and this beyond reasonable doubt the link between the predicate offence, meaning one of the crimes contemplated in the First and Second Schedule of the Prevention of Money Laundering Act, and the offence of money laundering. However article 2(2a) of Chapter 373 states:

"*A person may be convicted of a money laundering offence under this Act even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without it being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity and without it being necessary to establish precisely which underlying activity*"

This implies that although the underlying criminal activity is not proven, however if the prosecution manages to prove that the source of the laundered money is linked to the alleged criminal activity, then the offence is deemed to have been proven, without the need for evidence to be brought forward regarding a criminal conviction with regard to that underlying criminal activity.

The prevention of Money Laundering Act was enacted on the 23rd September 1994, with subsequent amendments coming into force by means of Act XXXI of 2007 and

Act VI of 2010. These amendments had a significant impact on the offence of money laundering to the extent that although prior to 2007, the suspect necessarily had to have full knowledge that the money in his possession was laundered, having as its source an underlying criminal activity, after 2007 it was enough for the prosecution to prove that the accused had the suspicion of the illegal source of that money, for a guilty verdict to be reached. With the amendments coming into force in 2010, not only was the prosecution relieved of the burden to prove that there had been a conviction with regard to the underlying criminal activity, but it was no longer necessary either to prove which particular criminal activity was at the source of the laundered money. These amendments, in the opinion of this Court, had far reaching effects, since the burden of proof needed to obtain a conviction for the offence of money laundering is now less tough on the prosecution, shifting the ball into the accused's court who is in a more difficult position to prove his innocence, necessarily having to give plausible justifications with regard to his degree of knowledge or suspicion about the underlying criminal activity linked to the offence with which he is being charged.

This is being said since the Prosecution need only prove a mere suspicion on the part of accused regarding the source of the money, the degree of suspicion, as opposed to the certainty brought about by proof of full knowledge, being merely subjective and personal. In the past the courts have extended the definition of knowledge beyond actual knowledge and included situations where the facts would be clear to an honest and reasonable person. It would also include turning a blind eye. Suspicion, on the contrary, is essentially a subjective issue and so is less than knowledge. The Court of Appeal in England had this to say on the matter: (*Regina vs Hilda Gondwe Da Silva)*:

"*The word suspect means that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice*."

The Court added that: "using words such as "inkling" or "fleeting thought" in directing a jury is liable to mislead". In particular they considered that a person who

temporarily held a suspicion but honestly dismissed it from their mind upon further consideration should not be liable to be convicted.

Unfortunately our law does not give a definition of what amounts to "suspicion" and consequently if the prosecution manages to prove such suspicion of the illegal source of the money, then their job is done. It is incumbent on the accused to bring forward evidence to rebut the alleged "suspicion", as being fanciful or a mere possibility. It is then up to the judge or jury to evaluate both sides of the coin in order to establish whether that suspicion is such as can lead to a conviction.

Section 8 of the UK Criminal Justice Act 1967 provides valid guide-lines in reaching a decision in this regard:

"*A court or jury, in determining whether a person has committed an offence,-*

a. shall not be bound in law ***to infer*** *that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but*

b. shall decide whether ***he did intend or foresee*** *that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.*"

One therefore asks what degree of proof is necessary for the prosecution to bring forward in such cases? This matter was dealt with in many judgments delivered by the European Court of Human Rights, since it was regarded to impinge on the accused's right to silence in criminal proceedings brought against him, even at the early stages of police interrogation before being actually charged and brought to trial. Should therefore the suspect be duly cautioned after having been informed of the offence subject of the investigation that his right to silence in this case could seriously prejudice his defence?

In fact article 3(3) of the Act, when referring to article 22(1C)(b) of Chapter 101 of the Laws of Malta states:

"In proceedings for an offence under paragraph (a), where the prosecution produces evidence that no reasonable explanation was given by the person charged or accused showing that such

money, property or proceeds was not money, property or proceeds described in the said paragraph ***the burden of showing the lawful origin of such money, property or proceeds shall lie with the person charged or accused.***"

In a judgment delivered by the First Hall of the Civil court in its constitutional jurisdiction in the case Mario u Pierre Camilleri vs Avukat Generali decided on the 15 November 2010 it was stated:

"**Il-Prosekuzzjoni ghandha l-obbligu li tipprova l-ezistenza ta' xi reat - "*any criminal offence*" *ai termini* tat-Tieni Skeda ta' l-Att kontra *Money Laundering*, u dan fuq bazi ta' "prova cirkostanzjali jew prova ohra". Fil-kaz in dizamina dan ir-reat hu precizament dak ta' traffikar ta' droga u kongura. Dan iwassal ghal li l-Prosekuzzjoni ma kellha ebda htiega li ggib sentenza ta' htija fil-konfront tar-rikorrenti in konnessjoni mat-traffikar tad-droga jew kongura ghal dan l-iskop.**

... Interessanti wkoll hu l-fatt li l-Kap 319 fit-Tieni Skeda annessa mieghu li tinkludi d-Dikjarazzjonijiet u r-Rizervi tal-Gvern Malti, illi meta accetta li jirratifika l-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem l-istess Gvern impona riserva fis-sens illi:

"*The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts.*"

L-istess kwalifika tinsab fil-paragrafu 5 ta' l-artikolu 39 tal-Kostituzzjoni li jghid hekk:

"(5) Kull min jigi akkuzat b'reat kriminali ghandu jigi meqjus li jkun innocenti sakemm jigi pruvat jew ikun wiegeb li huwa hati:

Izda ebda haga li hemm fi jew maghmula skond l-awtorità ta' xi ligi ma titqies li tkun inkonsistenti ma' jew bi ksur ta' dan is-subartikolu safejn dik il-ligi timponi fuq xi persuna akkuzata kif intqal qabel il-piz tal-prova ta' fatti partikolari."

L-artikolu 6.2 jezigi li l-Prosekuzzjoni ggorr l-oneru li tkun hi li finalment trid tikkonvinci lill-Qorti jekk sehhx reat u jekk il-persuna akkuzata kenitx hatja ta'

tali reat. Zgur li dan ma jwassalx ghall-fatt li l-imputat ikun qieghed jigi meqjus hati *ab initio*. Dejjem jibqa' l-obbligu tal-prosekuzzjoni li tipprova fatti konnessi mar-reat ta' *money laundering*. Il-Prosekuzzjoni trid dejjem tipprova ghas-sodisfazzjon tal-qorti aspetti ohra bhal ma huma kondotta refrattarja ta' l-imputat jew li kien konness f'cirku ta' traffikar tad-droga. Jinkombi dejjem fuq il-Prosekuzzjoni li tipprova li s-sitwazzjoni finanzjarja tar-rikorrenti ma kienetx kompatibbli ma' l-ammont ta' flejjes li kellhom fil-pussess taghhhom. Huwa biss wara li jsir l-ezami mill-gudikant dwar ir-ragjonevolezza o meno tal-provenjenza tal-flus li in segwitu tkun tista' topera din il-prezunzjoni. Hawnhekk ta' min jqis fattur ferm importanti. Hija Qorti li suppost dejjem ghandha l-indipendenza ta' l-agir taghha li trid tiddecidi. Mhux qed nitkellmu dwar xi hadd mill-Ezekuttiv. Ghalhekk huwa necessarju biex tinstab htija li jkun hemm iz-zewg fatturi. Ghandu jkun hemm agir suspettuz segwit bi tranzazzjonijiet ta' flus f'ammonti li setghu jitqiesu eccessivi. U dan irid jigi konstatat mill-Qorti.

Skond Jacobs [The European Convention on Human Rights] il-presunzjoni tal-innocenza u t-tqeghid tal-oneru tal-prova fuq il-prosekuzzjoni m'humiex l-istess haga. Ukoll gieli l-oneru tal-prova jaqa' fuq l-akkuzat:

"What the principle of presumption of innocence requires here is just that the Court should not be predisposed to find the accused guilty and second that it should at all times give the accused the benefit of the doubt 'in dubio pro reo'."

....Din il-Qorti kif presjeduta trid pero` taghmilha cara li l-qlib ta' l-oneru tal-prova hija l-eccezzjoni u mhux ir-regola. Dan hu limitat ghall-kazijiet biss fejn huwa logiku li sta ghall-imputat li jaghmel il-provi hu minhabba li l-prosekuzzjoni ma jista' qatt ikollha dawk il-provi."

The Court therefore concluded that it is incumbent on the accused to give a reasonable explanation as to the source of the money and concluded "tqis il-

presunzjoni hija *rebuttable and is not in itself unreasonable,* u … illi x-*shifting* tal-*burden of proof* huwa wiehed legali u jhalli l-*fair balance* rikjest ghall-iskopijiet ta' guri.[1]"

This legal exposition of the offence of money laundering has been carried out by the Court in view of the grievances put forward by appellant in his appeal application against the judgment of the First Court. The defence claims that from the acts of the case it clearly results that the formal element of the crime had not been proven since there is no evidence which indicates that when appellant transferred the money passed on to him by John Evans, he had the suspicion that this was the proceeds of a drug trafficking operation. Thus he contends that although the *actus reus* had been proven, being the money transfers carried out by appellant amounting to around €18000 passed on to him by John Joseph Evans and which he sent abroad on his behalf, he had no suspicion that Evans was involved in drug trafficking and that the money was allegedly derived from criminal activity. He contends that although the Prosecution believed him that the money sent by himself abroad amounting to €52000 was legitimate being money derived from his business, however he was then charged with the offence of money laundering on the basis that he was deemed not credible with regard to his affirmation that he had no knowledge or suspicion with regard to the money passed on to him by Evans. He further contends that the Prosecution has also failed to prove beyond reasonable doubt that the monies handed over to him by Evans were in actual fact tainted monies and this in view of the fact that the only evidence which confirms such an allegation is John Evans' testimony tendered before the enquiring magistrate, which evidence is however inadmissible in this case being evidence tendered by a co-accused. Therefore, although Evans was charged with the offence of drug trafficking having been found in possession of a substantial amount of drugs, and also having been established that various money transactions between Evans and other persons abroad was linked to this criminal orgnization, however there is doubt as to whether appellant knew about his friend's illegal movements linked to the trafficking of illegal substances,

[1] Vide also Andrew Ellul Sulivan vs Commissioner of Police et – 08/07/2004 First Court (Constitutional jurisdiction)

and whether the actual monies handed over by Evans to appellant to be sent abroad was in actual fact laundered money.

The First Court in its judgment concluded that there was sufficient circumstantial evidence to indicate that appellant did have a suspicion as required by law that the money was linked to an illegal activity and that he had not been able to give plausible reasons as regards to his ignorance of his friend's criminal activities putting forward a serious of queries with regard to what appellant had stated both to the police as well as during his testimony, although conceding that appellant had indeed put forward an explanation as to why he transferred with a certain frequency considerable money abroad. The Court found it strange that appellant had not questioned his friend regarding the said transfers, why he had not questioned his friend regarding the reason he was affecting the money transfers in his name, rather than doing so directly himself, why the receipt of the money transfers executed by appellant were found in Evans possession and why Evans even send money to appellant's brother. The Court also queried the fact that although appellant alleged that he had gone to Spain to collect monies due from his creditors, however no receipt book was found in his possession attesting to this fact although appellant declared that he had actually forwarded receipts for payments affected. The First Court was also perplexed by the fact that appellant had felt the need to borrow money from Evans when in Spain when he had admitted to collecting commissions due to him in his line of business, which money was passed on to him by another transfer from a Maltese girl locally. The first Court also questions the fact that upon appellant's arrest the police found in his possession a copy of the key to Evans' apartment, which was identical to a key which Evans also had in his possession, both lying to the police initially upon interrogation that the key belonged to an apartment belonging to Evans in the United States. The First Court does not believe appellants' explanation when he states that Evans had handed him over a copy of the key to his apartment, (where the drugs were eventually found) whilst they were in Egypt because they had initially planned to return on different dates, and this in spite of the fact that appellant states that he did not reside in the said apartment.

Finally the First Court declared that it was rather perplexing that Delgado did not provide an explanation as to the payment of the fee amounting each time to €118 due for the money transfers, thus losing a considerable amount of money each time a transfer was affected.

Having premised the above, the First Court consequently concludes that the explanation provided by appellant that he had no knowledge or suspicion that the money transfers affected by him on behalf of Evans was linked to an underlying criminal activity did not suffice at law to erase the evidence brought forward by the Prosecution that the money in question of around €18536.36 was linked to drug trafficking and that appellant necessarily knew or suspected the illegal activity taking place.

Considers,

It is not customary for this Court as court of appellate jurisdiction to substitute the discretion excercised by the First Court with regard to the evaluation carried out of the evidence tendered before it unless there results a gross miscarriage of justice. In examining the acts of this case, this Court states that although appellant did explain that it was in his line of business to affect huge money transfers abroad on a regular basis, however he did not present the necessary evidence to substantiate his claims as rightly pointed out by the First Court. No receipts were provided, no accounting records relating to his business and no other documentation attesting to the facts as purported by him, like business cards or sales samples of the products forming part of these negotiations. It is true, as appellant states, that the monies concerning his transfers abroad were not in the line of investigation, however, appellant tries to justify the assistance given to his friend when affecting the transfers subject of this case (being monies belonging to Evans), by stating that Evans had asked him to do so since appellant used to transfer a lot of money abroad and had never been questioned about it. He affirms that he did not know the recipients of the money transferred by him on behalf of Evans and did so on the latter's instructions, however he does not explain how the police found money transfer receipts sent by

him to his girlfriend and brother in Evans's possession, thus establishing his involvement in the case. Also from the documents exhibited by the Prosecution[2], it results that together with Evans, a certain Jennifer Angarita was to travel between the 1st and the 6th of May 2013 to Cairo, Egypt. This person was also booked into the same hotel together with Evans. However appellant makes no mention of such a person and states that he and Evans travelled on their own. This added to all the perplexing circumstances mentioned by the First Court in its judgment and not sufficiently justified by appellant, makes all the justifications put forward by appellant appear rather shady. Thus this Court, concurs with the conclusions reached by the First Court, that although it was incumbent on appellant to bring forward evidence to justify his actions, he has failed to provide sufficient proof to quell the doubts raised by the unconfutable evidence brought forward by the Prosecution regarding the drug trafficking operations carried out by Evans, and the money transfers affected by appellant on Evans' behalf. Having consequently been established that the monies involved in this case was laundered money, and having established appellant's involvement in the transfer of the said monies, the burden of proof having now shifted onto appellant, he fails to provide clear evidence to counter-balance the evidence tendered by the Prosecution, and this on a balance of probabilties that he had no suspicion and therefore knowledge of the underlying criminal activities involved in this operation, leaving unsumountable doubts with regard to the explanations provided by him as to his activities. The Court therefore finds that appellant's grievances directed towards the evaluation made by the First Court of the evidence found in the acts to be unfounded.

Appellant puts forward another grievance *in subsidium* with regards to the conviction made against him by the First Court as not indicating which of the acts mentioned in article 2(2) of the Money Laundering Act he was found guilty of committing. This grievance was also addressed by the First Court in its judgment

[2] Vide documents at folio 43

and rejected on the basis that the Attorney General by means of an order of the 29th September 2014 sent the case to be tried summarily by the Court of Magistrates as a Court of Criminal Judicature on the basis of article 2(2) of Chapter 373 of the Laws of Malta. This Court finds that this grievance is also unfounded since the offence of money laundering is contemplated in article 3 of Chapter 373, the acts constituting the offence being outlined in article 2, the duty of the Court on pain of nullity being to indicate the offence of which the person charged is being found guilty of rather then the individual act or acts executed by him leading up to the commission of the offence. Also although appellant contends that the charge brought against him included the continuous offence, however it does not result from the judgment being impugned that he was found guilty of the offence as qualified by section 18 of the Criminal Code.

Finally appellant deems that the punishment meted out by the first Court was too harsh considering that his involvement as proven was minimal and that the law contemplates an alternative punishment to that of imprisonment. The Court considers that this grievance is well founded. Article 2A(a)(ii) of chapter 373 states that:

"**on conviction by the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) to the punishment of imprisonment for a term of not less than twelve months but not exceeding nine years, or to a fine (multa) of not less than twenty thousand euro (€20,000) but not exceeding two hundred and fifty thousand euro (€250,000), or to both such fine and imprisonment"**

Since the law contemplates the punishment of effective imprisonment or a fine, the Court finds no valid reason for the imposition of both on accused, considering that his involvement, as proven, is minimal. Also it does not result that appellant has had previous convictions on drug related offences or offences relating to money laundering and his criminal conduct sheet is clean. Consequently an adjustment in the punishment inflicted will be made by this Court, taking into consideration all the

circumstances of this case. Also the legal costs will be apportioned between appellant and his co-accused, thus condemning appellant to half the legal costs incurred.

Consequently, this Court, whilst confirming the judgment of the First Court on its merits, varies the punishment meted out to appellant and the conviction with regards to legal costs to be paid by appellant, therefore upholds appellants' appeal only in this regards, and condemns him to a period of two years imprisonment. After having seen article 533 of Chapter 9 of the Laws of Malta varies the decision reached by the First Court and condemns him to a pay the amount of €996.45 as legal costs.

(ft) Edwina Grima

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar