24th January, 1989

Judges:

S.T.O. Prof. Hugh Harding B.A., LL.D., F.S.A., F.R.Hist.S. – President
Onor. Joseph A. Herrera Bl.Can.(Rome), LL.D.
Onor. Carmel A. Agius B.A., LL.D.

Republic of Malta

versus

Ravi Ramani

Dangerous Drugs Ordinance – Evidence of Accomplice – Corroboration – Amendment with Retrospective Effect – Concurrent Offences and Punishments – Conversion of Fine (Multa) into Imprisonment

The general rule is that the testimony of one witness, if believed by those who have to judge of the facts, is sufficient to constitute proof thereof. To this rule sections 639(3) of Cap. 9 provides an exception. But section 639(3) presupposes two very important requisites for its application namely, that the accomplice must be

the only witness against the accused, and that his evidence is not sufficiently corroborated by other circumstances.

In matters of procedure the general rule is that the law to be applied is always that in force at the time of the trial, notwithstanding that at the time of the commission of the offence the mode of proceeding may have been governed by a different law, and irrespective of whether such former law was more or less favourable to the accused.

When several offences, which taken together do not constitute an aggravated crime, are designed for the commission of another offence, whether aggravated or simple, the punishment for the graver offence shall be applied.

The maximum of three years established by section 17(g) of Cap. 9 in case of conversion of a fine (multa) is only applicable in the case of multiplicity of fines.

The Court:

By its judgement of the 12th April, 1988 the Criminal Court:

Having seen the verdict of the Jury finding the said Ravi Ramani guilty by seven votes to two votes, of the charge in Count One of the Bill of Indictment, namely of importing, aiming to be imported or taking any steps preparatory to importing a dangerous drug (heroin) into these Islands other than in pursuance of and in accordance with the provisions of the Dangerous Drugs Ordinance (Cap. 161) to wit without an import authorisation in the Form C set out in the Second Schedule to the said Ordinance permitting the importation into these islands of a dangerous drug Heroin specified and granted by the Chief Government Medical Officer; guilty, by seven votes to two votes of the charge in count Two of the Bill of Indictment, namely

of being in posession of a drug (heroin), when he was not in possession of an import authorisation or export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of Part VI of the Dangerous Drugs Ordinance (Cap. 161) nor licensed or otherwise authorised to manufacture or supply such drug nor otherwise licensed by the President or authorised by the Dangerous Drugs (Internal Control) Rules 1939 or by any authority granted by the President to be in possession of such drug and he did not prove that such drug was supplied to him for his use in accordance with a prescription issued under the said rules; guilty by seven votes to two votes of the charge in Count Three of the Bill of Indictment, namely of supplying or procuring a durg (heroin) to or for any person, including himself, when he was not licencsed by the Presidnet or authorised by the Dangerous Drugs (Internal Control) Rules 1939 or by any authority granted by the Presidnet to supply such drug and when he was not in possession of any import or export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of Part VI of the Dangerous Drugs Ordinance (Cahp. 161) and when he was not licensed or otherwise authorised to manufacture such drug or licensed to procure the same; guilty by nine votes to none of the charge in Count Four of the Bill of Indictment namely knowingly making a false declaration or statement or giving false information in a document intended for a public authority, in order to gain any advantage or benefit for himself or for others; and guilty by nine votes to none of the charge in Count Five of the Bill of Indictiment, namely of using or having in his possession a passport which he knew to be forged, altered or tampered with;

Declares the said Ravi Ramani guilty of the offences aforementioned;

Declares also that the offence of possessing a drug (heroin) without the required authorisations or licences aforenamed, of which the said Ramani has been found guilty, is merged in the offence of importing, causing to be imported or taking any steps preparatory to importing a dangerous drug (heroin) into these Islands other than in pursuance of and in accordance with the provisions of the Dangerous Drugs Ordinance (Chap. 161) of which Ramani has also been found guilty;

And after hearing the submissions of Counsel for the Defence and for the Prosecution on the punishment to be applied;

And after seeing sections 9, 10(1), 12, 14(1), (5), 22(1)(a)(2)(a) (before the coming into force of Act VIII of 1986) and 26 of Chapter 161 of the Laws of Malta 188 of the Criminal Code and 5 of Chapter 98 of the Laws of Malta, and rules 4 and 8 of the Dangerous Drugs (Internal Control) Rules 1939;

And after seeing also sections 17 and 31 of the Criminal Code and taking account of provision (b) of the Proclamation of 28th January 1987 given by Her Excellency the President of the Republic in favour of those persons who had committed offences prior to the date last mentioned;

Condemns the said Ravi Ramani to imprisonment of ten (10) years and to a fine (multa) of ten thousand liri (Lm10,000), so that the whole period during which Ramani has been kept in custody in connection with the present case, is to be deducted from the aforenamed term of imprisonment, and saving other provisions of the said Proclamation which may be applicable to Ramani;

And orders the forefeiture of the objects exhibited;

And furthermore, at the request of Ravi Ramani who declared that he has no means to pay the fine (multa) above given, after seeing sections (11(3), 14(1) third proviso and 17(g) of the Criminal Code, forthwith converts the said fine (multa) of ten thousand liri (Lm10,000) into imprisonment at the rate of one day for every five lira (Lm5), so that nevertheless, the duration of this punishment shall not exceed threee (3) years, and which term shall be undergone after the termination of the former term of imprisonment above inflicted;

And reserves to make an order with respect to the costs in connection with the employment of experts at a later stage, on an ad hoc application of the Registrar showing those costs in detail;

Accused has now entered an appeal against his conviction and sentence by means of an application filed on the 2nd May 1988;

This Appellate Court, after hearing the submissions of counsel of the appellant and of the Attorney General, considers as follows:

1) Appellant by means of his appeal is praying this Court to:

a) quash and revoke the conviction on the merits, and acquit him form all guilt and punishment according to law; and

b) subordinately, and entirely without predjudice to the

relief sought above, reform the sentence passed so that punishment shall not be less than nine (9) months nor exceeding six (6) years, together with a fine not exceeding ten thousand Maltese Liri (Lm10,000) to be converted into a period of detention not exceeding six (6) months;

2) Appellant's first ground of appeal is to the effect that the "ex post facts" amendments to the rules of evidence, such as the question of corroboration of the evidence of the accomplice, should not apply to the prejudice of the appellant and that the jury should have been directed in this sense. Instead according to appellant "the learned trial Judge did not address the jury on this important, indeed vital, topic";

3) Appellant's line of reasoning in regard to this ground of appeal is as follows:

a) "The principle of the Law of Evidence enunciated by section 639(3) previosly 635(3) of the Criminal Code (Cap. 9) is to the effect that the evidence of the accomplice which is not sufficiently corroborated by other circumstances ***shall not be*** *sufficient for the conviction of the accused, and thus constitutes an* ***absolute prohibition";***

b) "The amendment to the Dangerous Drugs Ordinance (Cap. 101) in derogation of the principle laid down in Section 639(3) of the Law of Evidence was enacted and accorded the Presidential Assent on the 31st March 1986, that is subsequent to the date of the commission of the offence";

c) "This "ex post facto" legislation alters substantially and unequivocally the position at law of the accused, who is

presumed to know the law at the time of the commission of the offence, and should therefore be tried according to those rules which applied at that time, and not subsequently";

d) "In terms of the Fundamental Human Rights provisions contained in The Constitution of Malta, section 39(8) enunciates the principle that no person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence";

e) "It is an established general principle of law that legislation, in whatever field, shall not have retrospective effect, unless expressly laid down in the enactment itself";

f) According to appellant as established by the American Courts in re Calder vs Bull (3 Dall. 3U.S.) "A law which alters the Rule of Evidence to permit a person to be convicted upon less or different evidence than was required when the offence was committed is invalid". Appellant also cited from the Brisith case "Liyanage and Others vs R." (1966) I A11 E.R. 650 decided by H.M. Privy Council;

4) Appellant's first ground of appeal in the firm opinion of this Court is untenable at law and deserves to be dismissed in particular for the following reasons:

a) The reference made by appellant to section 39(8) of the Constitution of Malta is completely out of context. That section lays down that "no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence...". It is an undisputed fact that the crimes appellant was charged with and

found guilty of were crimes when allegedly committed by him and it is also obvious that the relevant amendment to the Dangerous Drugs Ordinance complained of did not in any way modify this situation. Section 39(8) of the Constitution of Malta therefore is "toto caelo" irrelevant to the issue under examination;

b) The general rule in Our Criminal Code in matters of Law of Evidence and in terms of section 638(2) of the same code is that "the testimony of one witness if believed by those who have to judge of the facts shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses";

c) To this rule the ***Criminal Code*** *provides some exceptions amongst which is that laid down in S. 639(3). In terms of this subsection "when* ***the only wintesses*** *against the accused is an accomplice* ***whose evidence is not sufficiently corroborated by other circumstances,*** *the evidence of such single witness shall not be sufficient for the conviction of the accused";*

d) It is obvious that this provision of the law in consonance with its characteristic of being an exception to the rule presupposes two very important requisites for its application, namely 1) the accomplice must be the only witness against the accused, and (2) his evidence is not sufficiently corroborated by other circumstances. This is being highlighted at this stage by this Court because in the present case the accomplice Boccuto is by no means the only witness against the accused and further the assertion that Boccuto's evidence is uncorroborated by other circumstances is in the present case a highly gratuitous

assumption wholly unsupported by the facts of the case including appellant's own statement to the Police and the finding of his fingerprint on the briefcase;

e) By Act VIII of 1986 the said provision of the Criminal Code was made inapplicable for cases identical to that of appellant. In fact by Section 30 of the Dangerous Drugs Ordinance "Notwithstanding the provisions of subsection (3) of section 635 of the Criminal Code where a person has purchased or otherwise obtained or acquired a drug contrary to the provisions of this ordinance, the evidence of such person in proceedings against the person from whom he shall have purchased, obtained or acquired the drug, shall not require to be corroborated by other circumstances";

f) This addition to the Dangerous Drugs Ordinance came into force after the date on which appellant is alleged to have committed the crimes mentioned in the Bill of Indictment but by Section 7(1) of the said Act which introduced Section 30, "the provisions of section 30 of the principal law shall apply to any proceedings which on the day of the coming into force of this Act are pending before any Court". On March 21st, 1986 when both Section 30 of the Ordinance and Section 7(1) of the Act came into force, appellant's case was pending before the Criminal Court and therefore by Section 7(1) of the said Act, Section 30 of the Ordinance was applicable "ex lege" to his case. It follows also, therefore, that it was section 30 of the Ordinance and not Section 653(3) of the Criminal Code which was to be applied in his case as a matter of law in regard to the charges brought under the Ordinance;

g) Accordingly when the trial judge addressed the jurors

to the effect that in the case of the first three counts section 635(3), today section 639(3) could not be invoked by the defence and that they could accept the evidence of an accomplice even if uncorroborated, he was, as expected from him, explaining the correct position at law as it obtained at the time of the trial, and therefore this was the only way he could address the Jury correctly;

h) In addition to this as Prof. Sir A. Mamo states in his "Notes on Criminal Law", Vol. I 1135 "in matters of procedure, the general rule is that the law to be applied is always that in force at the time of the trial, notwithstanding that at the time of the commission of the offence, the mode of proceeding may have been governed by a different law and irrespective of whether such former law was more, or less, favourable to the accused". This is also in line with the general principle in matters of the retroactive applicability of the law as found in legal doctrine and as explained in the Digesto Italiano (1913 – 19 Ed) Vol. XX Parte Seconda pages 115 to 116 wherein the commentators state: "Similmente, appartenendo tutta le leggi probatorie penali alle leggi processuali, sono retroattive di loro nature, cioè applicabili non meno ai processi già incominciati ed ai reati commessi prima della loro attrazione che a quelli posteriori alla medesime". To this rule authors do admit some exceptions particularly if amendments to the existing law have the effect of defeating or annulling the accused's fundamental right to defend himself personally or through counsel;

These exceptions, however, are irrelevant and therefore inapplicable to the present case and consquently need not be examined any further;

i) Similarly the foreign case-law appellant made reference to in the pleading stage during his oral submissions do not purport to prove or support the submissions of appellant. In particular this Court refers to what Their Lordships of H.M. Privy Council said in the aforementioned Judgement in re Liyanage vs R., namely that "their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power". The test is it appears from this judgement and from the American Supreme Court Judgement cited by appellant is whether by a particular ex post facto legislation amending a previous law the legislature usurps the judicial power of the Courts thus acting ultra vires; in other words whether such acts in reality amount to legislative judgments thus constituting a grave and deliberate incursion into the judicial sphere. It is obvious that this caselaw can be of no relevance to the present case where the amendment in question was certainly not enacted ad hominem but made applicable to the generality of the citizens and designed as an improvement of the general law in the sense explained in the Liyanage case sup. cit.;

j) Appellant therefore is wrong in submitting that Section 639(3) of the Criminal Code constitutes an absolute prohibition, is wrong in submitting that the 1986 amendment to the Dangerous Drugs Ordinance ought not to have a retroactive effect, is wrong in quoting section 39(8) of the Constitution and finally is also wrong in relying on the foreign judgments referred to and in his submissions that the trial judge misdirected the Jury in his address. Consequently this Court finds his first ground of appeal as unfounded;

5) Appellant's second ground of appeal is in the sense that without prejudice to his first ground of appeal, the trial judge had an unequivocal duty to warn the jury of the danger of convicting on the basis fo the uncorroborated evidence of the accomplice, a duty which according to appellant the trial judge did not discharge;

6) This second ground of appeal is of its nature consequential to the first one and as such though submitted without prejudice to that ground of appeal cannot have any validity if the first ground of appeal is unfounded at law. This court has already explained that as regards the counts in the Bill of Indictment, which are based on the Dangerous Drugs Ordinance, the question of corroboration of the accomplice's evidence does not arise because the law itself has eliminated the need for such corroboration. Consequently any warning as the one appellant expected from the trial judge would have been not only unwarranted and uncalled for but also contradictory to the exprress will of the law. This second ground of appeal is therefore unfounded too;

7) Though not strictly speaking formulated as a separated ground of appeal, appellant seems to be submitting that irrespectively of any considerations on the question of corroboration, bearing in mind his evidence in the trial the conviction deserves to be quashed. This particular grievance calls in question the aspect of credibility of witnesses and the weighing of evidence in general which this Court will not interfere with if from the ensemble of the evidence the Jury was entitled to reach the verdict they actually arrived at. In this particular case appellant, when giving evidence during the trail by Jury, chose to give a version of facts completely different from the explanation

he had given in his statement to the Police, which the Jury obviously did not believe as they were entitled to do since there were other facts and circumstances which if believed ran counter to his evidence and tallied with his statement. In these circumstances, in accordance with the law and practice of this Court, the discretion exercised by the Jury in the evaluation of the evidence cannot be interfered with by this Court;

8) Appellant's last ground of appeal refers to the sentence passed against him by the Criminal Court. In this regard appellant has two complaints:

a) The Criminal Court, in meting out punishment, applied paragraph (h) of Section 17 of the Criminal Code and therefore dinflicted **one** *pecuniary fine on him;*

b) Consequently the said Court could not operated the conversion of the fine at the rate of Lm5 for every day and for a duration of three years in terms of paragraph (g) of Section 17 of the said Code because this paragraph deals only with the case of conversion of **more than one** *pecuniary punishment;*

c) Instated the said court was only entitled to convert the fine to a maximum of six months in terms of section 11(3) of the Criminal Code;

d) Moreover the first Court when passing sentence did not in fact reduce the punishment applicable to him by one degree in terms of the Proclamation of H.E. the President of the Republic of January 29th, 1987 and instead, though the judgment specifically referred to that Proclamation, awarded the maximum allowed by law;

e) In terms of the said Proclamation period of imprisonment to which he could have been condemned had to be between a minimum of nine (9) months and a maximum of six (6) years;

9) This court will deal first with this ground of appeal relating to the question of the period of imprisonment appellant could be sentenced to by the first Court;

10) In terms of S. 17(h) of the Criminal Code, when several offences which taken together do not constitute an aggravated crime, are designed for the commission of another offence, whether aggravated or simple, the punishment for the graver offence shall be applied;

11) It is obvious that this provision of the Law is only applicable in regard to the first three counts of the Bill of Indictment and cannot be extended to the fourth and fifth counts. Neither is it applicable cumulatively to the fourth and fifth counts in that between these two offences the nexus of means to an end is missing;

12) The first Court correctly considered the offence in the second count to be merged in that of the first count. It did not, however, consider these two offences as merged in that under count three. In the opinion of this Court, however both the possession and the importation of the heroin in this case, considering the substantial amount involved and appellant's own confession in his statement to the Police, were meant for trafficking. Consequently, in terms of the said paragraph (h) of section 17 of the Criminal Code the offences of possession and importation, being meant as a means to an end, following the

*merger of the offence under Count two in that of Count one, **for the purpose of punishment** these two offences should have also been declared by the First Court as being merged in the offence under the Third Count;*

13) In terms of section 17(b) of the Criminal Code "a person guilty of more than one crime liable to temporary punishments restrictive of personal liberty, shall be sentenced to the punishment for the graver crime with an increase varying from one third to one half of the aggregate duration of the other punishments, provided the period to be awarded shall not exceed twenty-five years;

14) For the offences under the first three counts which as already stated for the purpose of punishment are to be considered as merged; apart from the pecuniary punishment – the period of imprisonment to which appellant could have been sentenced varies between a maximum of twelve months and a maximum of ten years;

15) For the offence under the fourth count the law established a maximum of two years;

16) For the offence under the fifth count the minimum of six months and the maximum of two years imprisonment is envisaged by the law;

17) It follows that by the application of Section 17(b) of the Criminal Code the maximum term of imprisonment which was applicable to appellant was of twelve (12) years;

18) By the application of provision (b) of the Proclamation

of H.E. The President of the Republic of the 29th January 1987 the punishment applicable to appellant should be reduced by one degree. It follows, therefore, that in terms of section 31 of the Criminal Code, the maximum period of imprisonment which appellant could have been sentenced to was of nine (9) years;

19) In addition to this; since the verdict of the Jury in respect of the first three counts was of seven votes to two against appellant, and therefore not unanimous, this court is of the opinion that the said punishment of imprisonment ought not to be inflicted in its maximum;

20) The relevant part of the sentence of the first Court is therefore going to be modified accordingly;

21) Passing on to the grievance relating to the conversion of the fine (multa) into a period of imprisonment this Court having considered appellant's submissions, is of the opinion that the same grievance is founded at law and calls for a further variation of the sentence appealed against;

22) In fact, by section 17(g) of the Criminal Code, the maximum of three (3) years established as a maximum in the case of conversion is applicable only in the case of multiplicity of fines. In other words, in a case of conversion of more than one fine (multa) into a period of imprisonment, the conversion is to be applied in the case of each fine in terms and according to section 11 of the Code provided, however, that the total periods of imprisonment are not to exceed the maximum of three (3) years established by Section 17(g);

23) In the present case only one fine (multa) was inflicted

by the First Court and therefore section 17(g) of the Criminal Code is irrelevant to appellant's case in that the only section of the law applicable for the conversion is section 11 as aforesaid;

24) In terms of the proviso to section 11 of the Criminal code, if the fine (multa) is not higher than ten thousand maltese liri then, the period of imprisonment which the First Court could convert the fine into, could not exceed six months;

For these reasons this Court dismisses the appeal in as far as in it appellant prayed this Court to quash and revoke the conviction on the merits and acquit appellant from all guilt and punishment and consequently confirms the judgment of the Criminal Court as regards the conviction, declares that in terms of section 17(h) of the Criminal Code, for the purposes of punishment the offence under the first count and that under the second count of the Bill of Indictment are merged in the offence under the third count, upholds the appeal as regards the sentence in the sense of the aforesaid considerations and consequently (a) varies the Judgment of the first Court as regards the sentence to imprisonment by reducing the term inflicted by the first Court from ten years to eight years and six months, (b) varies the judgment of the first Court as regards the conversion of the fine of Lm10,000 into a period of imprisonment by reducing the period of imprisonment fixed by the first Court from three years to six (6) months, and finally confirms all the other remaining parts of the Judgment appealed against.