COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE

MAGISTRATE NATASHA GALEA SCIBERRAS B.A., LL.D.

Case Number: 69/2015

Today, 7th September 2016

The Police
(Inspector Malcolm Bondin)

vs

Mumen Traore sive Mumin Trabule`
(ID 43874(A))

The Court,

After having seen the charges brought against the accused Mumen Traore sive Mumin Trabule`, age 35, son of Jibrid and Oussa, born in Ivory Coast on 1st January 1980, residing at 92, Ruby, Flat 5, Triq il-Lampuki, St. Paul's Bay, holder of Maltese Identity Card number 43874(A) and Police number 06X-039;

Accused with having on these islands on 7th March 2015:

a. Had in his possession the drugs (heroin) specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, when he was not in possession of an import or an export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance and when he was not licensed or otherwise authorised to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorised by the Internal Control of Dangerous Drugs Regulations (GN 292/1939) to be in

possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to him for his personal use, according to a medical prescription as provided in the said regulations, and this in breach of the 1939 Regulations of the Internal Control of Dangerous Drugs (GN 292/1939) as subsequently amended by the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for his personal use;

b. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the whole or any portion of the plant cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta;

c. And for rendering himself recidivist following judgement delivered by the Criminal Court of Appeal on 15th March 2012, which decision is final;

d. Committed an offence whilst being under a Probation Order by a judgement issued by the Court of Magistrates (Malta) presided by Magt. Dr. A. Bugeja LL.D. on 7th November 2014, which judgement has become absolute.

The Court was also requested to apply Section 533(1) of Chapter 9 of the Laws of Malta as regards the expenses incurred by court appointed experts.

Having heard the evidence and having seen the records of the case, including the order of the Attorney General in virtue of subsection two (2) of Section 22 of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), for this case to heard by this Court as a Court of Criminal Judicature;

Having heard the accused plead not guilty to the charges brought against him;

Having heard final oral submissions by the parties.

Considered that:

<u>Considerations on Guilt</u>

From the evidence tendered, it results that on 7th March 2015, the accused was arrested in Marsa, after suspected cannabis seeds were found in his possession and later, at the Police General Headquarters he was found in possession of cannabis grass. This is not being contested by the defence. Furthermore, the Prosecution alleges that prior to his arrest, the accused was noticed discarding a capsule

containing heroin. It is this latter allegation that is being contested by the defence. Indeed, the accused denies having discarded any such capsule or having been in possession of the same.

The first charge brought against the accused is that of possession of heroin in circumstances denoting that this was not intended for his personal use. The case of the Prosecution in this respect rests mainly on the deposition of PS 1086 Johann Micallef, who was the only police officer in this case stating to have seen the accused throwing away the said capsule. As stated above, the accused denies this allegation.

In terms of Section 638(2) of Chapter 9 of the Laws of Malta, "*... in all cases, the testimony of one witness if believed by those who have to judge of the fact 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*". Section 637 then states that in considering the credibility or otherwise of a witness, regard shall be had to the demeanour, conduct and character of the witness, to the probability, consistency and other features of his statement, to the corroboration that may be forthcoming from other testimony, and to all the circumstances of the case. It has then been held that conflicting evidence does not necessarily lead to the acquittal of the person accused, but the Court must determine whom to believe and which parts of his testimony to believe or otherwise, taking into account the criteria contained in the above mentioned Section 637 (*vide* judgement delivered by the Court of Criminal Appeal on 9th July 2003, **Il-Pulizija vs Joseph Thorne**).

After having heard and considered the testimony of both PS 1086 Johann Micallef and the accused and having also been in a position to observe their respective demeanour on the witness stand, the Court cannot but conclude that the accused had indeed been in possession of the capsule containing the heroin prior to his arrest. In his deposition, PS 1086 Johann Micallef is consistent and his version of events as they unfolded on the evening of 7th March 2015 is credible and perfectly plausible and leaves the Court in no doubt that he had actually seen the accused discarding the said capsule. Indeed, the witness states that although it was dark at 8.30 p.m. when he noted the accused's manoeuvre, yet it was not pitch dark and that he could see clearly, because there was light emanating from a lamp in the vicinity. Furthermore, although the accused was in the company of others (according to PS 1086, there were no more than four persons, whilst according to the accused, they were about ten), he states that they were not clustered together, which means that he would have had no difficulty in identifying the accused and distinguishing his movements. The Court also notes that in terms of his testimony,

PS 1086 alighted from the car directly in front of the accused and that he was only a metre and a half or two metres away from him, which would have therefore enabled him to notice the accused's actions clearly. The witness states in no uncertain terms that he spotted the accused and "*I just kept looking at him and that is why I can say that he threw the capsule*"[1] and that as soon as he exited the car, "*I was looking at him and basically we looked at each other and he threw the capsule. I saw the movement* (which he then explains as the movement of the accused's hand) *and the capsule flying towards my foot basically*"[2]. He also explains that the accused threw the capsule exactly near his (the witness's) shoe and that it touched his shoe lace, which also corroborates the witness's version regarding the short distance between himself and the accused. This account of events leaves the Court in no doubt as to what the witness had seen and that he had indeed noticed the accused discarding the capsule.

The Court also notes that given the circumstances in which the witness got into the car driven by his colleagues in order to approach the group of persons in the company of the accused and that he alighted from the car after a few moments, whilst focusing on the said group, it is perfectly plausible that the witness had not noticed or could not remember how many other persons were in the same car with him or if there was anyone riding in the passenger seat. This certainly does not render his version of events less credible or in any way dubious. Neither is his version weakened by the fact that he could not remember what the rest of the persons in the company of the accused were wearing or whether the bar in the vicinity was the 'Tiger Bar' or another bar with another name.

Furthermore, as already stated above, the Court had the opportunity to observe the demeanour of the accused on the witness stand and also notes a lack of consistency between his statement during his interrogation and his testimony before the Court. Thus, when faced with irrefutable evidence regarding the cannabis grass that was found on his person, the accused denies that such cannabis was so found and he states that he does not know what the substance was. On the other hand, in his testimony, he admits that he was in possession of cannabis and that he made use thereof. Likewise, when asked whether the mobile phone (which was in his possession) was his, in his statement, he replied "*I don't know*"[3], whereas in his testimony he confirmed that the said mobile phone was indeed his. The Court further notes that the accused was evasive and not credible on this matter during his testimony and whilst confirming that the phone 'Nokia' belonged to him, that it

[1] A fol. 40 of the records of the case.
[2] A fol. 41 of the records.
[3] A fol. 21A of the records.

was in his possession at the time of his arrest and also that he made use of such phone, yet when confronted with the fact that the messages on the phone were in English, he insisted several times that he could not read and write in English, without however offering any explanation regarding the fact that the messages on the said phone were all in the English language.

On the basis of the above considerations, the Court finds no reason to doubt that indeed the accused was in possession of the capsule containing the heroin, in terms of the version given by PS 1086. The Court further points out that it has made no inference from the fact that the accused refused to answer to most of the questions posed to him during his interrogation or that he did not deny (neither confirm) having heroin in his possession or disposing of it, as described by PS 1086, in terms of Section 355AU(2) of the Criminal Code. Although it results that the accused chose to exercise his right to consult with a lawyer and actually spoke to Dr. Joseph Mifsud prior to his interrogation, yet it results from the evidence adduced that this conversation lasted only for one minute and that Dr. Mifsud had merely told the accused not to speak to him. The Court indeed notes, as stated by Dr. Mifsud in his testimony, that not much could have been said between the accused and his lawyer in such a short period of time. Although the advice not to speak to a lawyer, as tendered by Dr. Mifsud to his client, constitutes in itself legal advice as the implications are clear - the refusal of an arrested person to seek legal advice excludes the drawing of any inferences in terms of Section 355AU(2) - yet it is the Court's view that such advice cannot be deemed to be real and effective assistance in relation to the case in issue and consequently, the accused is not being considered as having received legal advice in terms of the said section.

From the report drawn up by Scientist Godwin Sammut[4], it results that heroin was found in the extracts taken from the capsule and that the total weight of the brown substance in the said capsule is 17.77 grams. The purity of heroin is approximately 22%, which is described by the expert, in his testimony, as normal street purity.

As regards the offence of possession of drugs in circumstances denoting that these are not for the exclusive use of the possessor, the Court refers to the judgement delivered by the Court of Criminal Appeal on 12th May 2005, in the names **Il-Pulizija vs Marius Magri** where it was held that:

"*Illi dawn il-kazijiet mhux l-ewwel darba li jipprezentaw certa diffikolta` biex wiehed jiddetermina jekk id-droga li tkun instabet kienitx intiza ghall-uzu*

[4] A fol. 69 *et seq* of the records of the case.

personali jew biex tigi spjaccjata. Il-principju regolatur f'dawn il-kazijiet hu li l-Qorti trid tkun sodisfatta lil hinn minn kull dubbju dettat mir-raguni w a bazi tal-provi li jingabu mill-prosekuzzjoni li l-pussess tad-droga in kwistjoni ma kienx ghall-uzu esklussiv (jigifieri ghall-uzu biss) tal-pussessur. Prova, ossia cirkostanza wahda f'dan ir-rigward tista', skond ic-cirkostanzi tal-kaz tkun bizzejjed."

And as held by the Court of Criminal Appeal in its judgement of 2nd September 1999, in the names **Il-Pulizija vs Carmel Spiteri**, "*meta l-ammont ta' droga ikun pjuttost sostanzjali, din tista' tkun cirkostanza li wahedha tkun bizzejjed biex tissodisfa lill-qorti li dak il-pussess ma kienx ghall-uzu esklussiv tal-hati*".

However, as aslo stated by the Court of Criminal Appeal in its judgement of 23rd May 2002, in the names **Il-Pulizija vs Brian Caruana**, "*kull kaz hu differenti mill-iehor u jekk jirrizultawx ic-cirkostanzi li jwasslu lill-gudikant ghall-konvinzjoni li droga misjuba ma tkunx ghall-uzu esklussiv tal-akkuzat, fl-ahhar mill-ahhar hija wahda li jrid jaghmilha l-gudikant fuq il-fattispecji li jkollu quddiemu w ma jistax ikun hemm xi "hard and fast rule"x'inhuma dawn ic-cirkostanzi indikattivi. Kollox jiddependi mill-assjem tal-provi w mill-evalwazzjoni tal-fatti li jaghmel il-gudikant u jekk il-konkluzjoni li jkun wasal ghaliha il-gudikant tkun perfettament raggungibbli bl-uzu tal-logika w l-buon sens u bazata fuq il-fatti, ma jispettax lil din il-Qorti li tissostitwiha b'ohra anki jekk mhux necessarjament tkun l-unika konkluzzjoni possibbli*".

Also in **Il-Pulizija vs Mohammed Ben Hassan Trabelsi** of 17th February 1997, the Court of Criminal Appeal stated as follows:

" *... l-ewwel nett wiehed ghandu jara jekk l-ammont ta' droga huwiex ammont li normalment wiehed jassocja ma' uzu personali, u sa hawn il-piz tal-prova (u cioe` il-prova tal-ammont u tal-pussess) qieghed fuq il-prosekuzzjoni; jekk, pero`, dak l-ammont ikun tali li normalment wiehed ma jassocjahx mal-uzu esklussiv da parti tal-pussessur, ikun jispetta lill-imputat li jipprova, imqar fuq bazi ta' probabbilita`, li dak l-ammont kien ghall-uzu esklussiv tieghu, u dan b'applikazzjoni tal-Artikolu 26(1) tal-Kap. 101.*"

The Court considers that the amount of heroin involved certainly cannot be deemed as insignificant or one which is normally associated with personal use and indeed the amount is such, that in itself, it is already sufficient to lead the Court to the conclusion that the amount was not intended exclusively for the accused's personal use. Furthermore, not only did the accused fail to prove – at least on a

balance of probability – that the heroin was intended exclusively for his personal use, but indeed in his testimony he denies making use of any drug other than cannabis. In such circumstances, the Court cannot but conclude beyond any reasonable doubt that the heroin in question was not intended for the exclusive use of the accused and thus deems that the first charge brought against him has been proved to the degree required by law.

The Court considers that the above already constitutes sufficient evidence to the degree required by law to find guilt as to the first charge. However, the Court further notes that from the report drawn up by Dr. Steven Farrugia Sacco[5], it results that the mobile phone 'Nokia' which the accused confirms in his testimony to be his own, contains a sent message that reads as follows: "*Pls where are u now its me j.j I want to giv u 5gram*". The said message was sent on the day of the accused's arrest. It is evident to the Court that this message refers to drugs. The Court also notes that in his testimony, when asked who used the said phone and whether only he used the same, the accused answered in the affirmative "*Yes my mobile*"[6]. Yet, when confronted with the messages on the said phone, all in the English language, the accused insisted that he does not write or read in English, without however offering any explanation as to how or why the messages were all in the said language, having claimed that this was his phone and confirming that only he made use of it. Even when asked by the Court specifically as to who wrote those messages, once he was making such claim and once he stated that he did not read or write in English, the accused never offered any explanation and never alleged that others made use of the said phone, but simply replied again that he did not read or write in English. The Court further notes that the accused failed to indicate that this mobile phone was his during his interrogation and simply stated "*I do not know*" when he was asked on this matter and furthermore, as results from the testimony of PC 760 Christopher Saliba, immediately before being apprehended, the accused threw his mobile phone away. It is clear to the Court that the accused would have had no reason to do this, unless he was very much aware of the content of his phone.

By means of the second charge, the accused has also been charged with the offence of possessing cannabis plant. In this testimony, PC 467 Grame Baldacchino Lia states that when he carried out a search on the accused at the Police Headquarters, he found some green substance, which he suspected to be cannabis grass, in the back pocket of the jeans worn by the accused. According to the report drawn up

[5] Exhibited as Dok. SFS1, a fol. 146 of the records.
[6] A fol. 163 of the records.

by Scientist Godwin Sammut, *Tetrahydrocannabinol* was found in the extracts taken from the green grass, that the total weight of such grass is 0.18 grams and that the purity of THC was approximately 6%. Indeed, during his deposition, the accused confirms that he was in possession of cannabis or marijuana, as he refers to it and that he made use thereof.

Thus, the Court is satisfied that this charge has also been proved to the degree required by law.

In terms of the third charge, namely that the accused is a recidivist in terms of law, following a judgement delivered by the Court of Criminal Appeal, as presided by Mr. Justice Dr. Michael Mallia, on 15th March 2012, the Prosecution exhibited a true copy of a judgement delivered by the said Court on said date against Mumen Traore sive Mumin Trabule`.[7] In this respect, Inspector Raymond Aquilina, one of the Prosecuting Officers in that case, identified the accused in the present case as being the same person in respect of whom the said judgement was delivered. In terms of the said judgement, the Court of Criminal Appeal confirmed the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature wherein the accused was sentenced to eight years imprisonment. The offences forming the merits of this case were committed by the accused on 7th March 2015 and thus, it is clear that the accused is a recidivist in terms of Sections 49 and 50 of the Criminal Code.

In terms of the fourth charge, the accused is being charged with committing an offence whilst being under a Probation Order in terms of a judgement delivered on 7th November 2014, by the Court of Magistrates (Malta) as a Court of Criminal Judicature presided by Magistrate Dr. Aaron Bugeja. The Prosecution exhibited a true copy of a judgement, delivered by the said Court on the said date against Mumen Traore, whose identity card number is identical to that of the accused. The Court is therefore satisfied that the said judgement was delivered in respect of the accused. It results also from the said judgement that the accused was *inter alia* placed under a Probation Order for a period of three years, which means that the offences in the present case were indeed committed by the accused during the operative period of this Probation Order. Accordingly, the Court deems that the fourth charge has also been proved to the degree required by law.

Considerations on Punishment

[7] A fol. 59 *et seq* of the records.

For the purpose of the punishment to be inflicted, the Court took into consideration the criminal record of the accused at the time when the offences of which he is being found guilty were committed.
It also took into consideration the serious nature of the charges brought against the accused and that the amount of heroin in his possession was certainly not a trivial amount. For the purpose of the punishment to be inflicted, the Court applied Section 17(f) of Chapter 9 of the Laws of Malta in respect of the first two charges.

Furthermore, the Court took into consideration that the present offences were committed by the accused merely a few months after he was placed under a Probation Order, thereby being given the opportunity to obtain help and to rehabilitate himself but he chose instead to continue down the same path of delinquency. The Court will therefore deal with the accused in respect of the offences of which he was found guilty by means of the judgement delivered by this Court as differently presided on 7th November 2014. For this purpose, the Court took into account the early guilty plea filed by the accused in that case, that the third charge was dealt with in terms of Section 377 of the Criminal Code and that the second charge was adduced as an alternative charge to the first. The Court also applied the provisions of Section 17(b) of Chapter 9 of the Laws of Malta.

On the basis of the judgement delivered by the Court of Criminal Appeal on 4th October 2007 in the names **Ir-Repubblika ta' Malta vs Walter John Cassar**, the Court is condemning the accused to the payment of all expenses relating to court appointed experts in terms of Section 533 of Chapter 9 of the Laws of Malta since all such expenses were regularly incurred and could potentially have had a bearing on the guilt of the accused.

Conclusion

For these reasons, the Court after having seen Parts IV and IV, Sections 8(d), 22(1)(a), 22(2)(b)(i) and (ii) of Chapter 101 of the Laws of Malta, Regulation 9 of Subsidiary Legislation 101.02, Sections 17, 49 and 50 of Chapter 9 of the Laws of Malta and Section 23 of Chapter 446 of the Laws of Malta, finds the accused guilty of the charges brought against him and condemns him in respect of charges (a),(b) and (c) to **twenty one (21) months effective imprisonment** – from which term one must deduct the period of time, prior to this judgement, during which the person sentenced has been kept in preventive custody in connection with the offences of which he is being found guilty by means of this judgement – and **a fine (multa) of two thousand Euro (€2,000)**.

In respect of charge (d), the Court after having seen Sections 17, 49, 50, 261(c) and (f), 267, 270, 279(a), 280(1) and 334(a) of Chapter 9 of the Laws of Malta, is dealing with the accused in respect of the offences of which he was found guilty by means of the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 7th November 2014 and condemns him to **twelve (12) months effective imprisonment**.

In terms of Section 533 of Chapter 9 of the Laws of Malta, the Court condemns the person sentenced to pay the expenses relating to the appointment of court experts during these proceedings, namely the expenses incurred in connection with the report drawn up by expert Scientist Godwin Sammut, amounting to the sum of one hundred, forty seven Euro and fifty cents (€147.50), the expenses incurred in connection with the report drawn up by PS 659 Jeffrey Hughes amounting to one hundred and eighteen Euro and seventy one cents (€118.71) and the expenses incurred in relation to the reports drawn up by Dr. Steven Farrugia Sacco, amounting to eight hundred and eighty Euro and seven cents (€880.07). The total of said expenses amounts to one thousand, one hundred and forty six Euro and twenty eight cents (€1,146.28).

The Court orders that the substances exhibited as part of Document NS2 are destroyed, once this judgement becomes final, under the supervision of the Registrar, who shall draw up a *proces-verbal* documenting the destruction procedure. The said *process-verbal* shall be inserted in the records of these proceedings not later than fifteen days from the said destruction.

The Court orders that the sum of eighty five Euro (€85) exhibited as part of Document NS2 and the three mobile phones exhibited as Document MB3 are released in favour of Mumen Traore sive Mumin Trabule` and orders the forfeiture of the mobile phone Nokia forming part of Document NS2 in favour of the Government of Malta.

Natasha Galea Sciberras
Magistrate