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

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

Case Number: 188/2016

Today, 5th December 2016

The Police
(Inspector Elton Taliana)

vs

Mustafa Tunkara
(ID 9001069(A))

The Court,

After having seen the charges brought against the accused Mustafa Tunkara, 28 years of age, son of Musa and Maria nee` Ciise, born in Gambia on the 1st April 1998, residing at Marsa Open Centre, Xatt il-Mollijiet, Marsa, holder of ID card number 9001069(A);

Charged with having on the night between 7th and 8th August 2016 in the Maltese Islands:

a. Produced, sold or otherwise dealt in the resin obtained from the plant cannabis, or any preparation of which such resin formed the base, in terms of Section 8(b) of Chapter 101 of the Laws of Malta;

b. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the resin obtained from the plant Cannabis, or any other preparation of which such resin formed the base, in terms of

Section 8(a) of Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for personal use;

c. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the resin obtained from the plant Cannabis, or any other preparation of which such resin formed the base, in terms of Section 8(a) of Chapter 101 of the Laws of Malta;

d. Committed these offences in, or within 100 metres of the perimeter of, a school, youth club or centre, or such other place where young people habitually meet in breach of Article 22(2) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

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 final oral submissions by the parties.

Considered that:

<u>Considerations on Guilt</u>

PS 887 Stefan Mercieca testified that on the night between the 7th and 8th August 2016, whilst he was patrolling the area in Dragonara Road, St. Julians, with his colleagues PC 1507, PC 319 and PC 1461, they noticed two persons, who fled upon seeing the said police officers, but were later apprehended by PC 319 and PC 1507. A third man was then noticed by the witness in the same area, where the other two persons had previously been noticed. He also tried to run away but was stopped and upon searching the area, on a bench, the witness and his colleague found a packet of cigarettes containing nine sachets with a white substance and a packet containing six green pills. Subsequently, the accused was noticed loitering in the vicinity and he was also stopped and arrested.[1] Although the witness stated that his colleagues later informed him that the accused had been with the two men

[1] A fol. 31 to 37 of the records of the case.

who had been apprehended, this was not confirmed by the police officers who gave him such information. Indeed, in this part of his deposition PS 887 seems to be referring to PC 319 and PC 1507, who did not testify in these proceedings.

PC 1461 Alfred Bray stated that whilst patrolling Dragonara Road, his colleagues and himself noticed two persons – a certain Mustafa and the accused. He stated that he saw Mustafa handing over a sachet to the accused and that upon noticing the police, two men ran away, whilst a third one remained there. He further stated that the accused was apprehended later on.

On the basis of these depositions, it is not clear to the Court whether the accused was also initially in the area where the police first noticed the three men referred to by PS 887 or whether he was one of the said three men. It seems to be so on the basis of PC 1461's testimony, but otherwise on the basis of the testimony provided by PS 887.

In any case, there is no doubt that the accused was apprehended and arrested by the police on the night in question. In his deposition, PC 448 Mark Bilocca stated that on 8th August 2016, at about 2.45 a.m., the accused was escorted to the lock up, where he conducted a strip search upon him at about 3.00 a.m., together with PC 828. During this search, they found two packets wrapped in silver paper and plastic. Both were hidden in the accused's underwear.[2] PC 828 Steve Camilleri stated that he was instructed to escort the accused to the lock up, where he assisted PC 448 during a strip search conducted on the accused. He confirmed that two packets wrapped in foil and plastic were found on the accused during the said search. He also stated that one of the said packets was opened in his presence by Drug Squad Officers and it was found to contain strips of a substance suspected to be cannabis.[3]

According to the report drawn up by expert Scientist Godwin Sammut, he was handed over a brown envelope containing an evidence bag with ID M00110395, which in turn contained a small brown envelope with pieces of plastic and two silver coloured papers containing brown substances. The said brown substances weighed 7.58 grams and 6.90 grams respectively. The expert concluded that Tetrahydrocannabinol was found in the extracts taken from the brown substances in the exhibit mentioned and that the weight of the said brown substance was 14.48 grams. The purity of THC was approximately 6%.[4]

[2] A fol. 20 to 22 of the records.
[3] A fol. 23 to 25 of the records.
[4] The report is exhibited a fol. 55 to 62 of the records.

The accused released a statement on 8th August 2016 at 11.35 a.m., after he was duly cautioned in terms of law and given the right to consult a lawyer, which right he exercised. In his statement, the accused confirmed that he was arrested from Paceville, St. Julians, near the beach, during the previous night. He also confirmed that two pieces of brown substance were found on his person and stated that he had paid €100 for the said substance, which he referred to as "*haxix*". He stated that he had bought the substance from St. Julians and that the police apprehended him, as soon as he had bought it from a person of Somali nationality. Upon being asked whether he could confirm that earlier on he had stated that he had bought the cannabis resin for himself and for his friends, he confirmed this and stated that he had collected €100 from five people so that they could smoke it together. He explained that at the time that he went to buy cannabis, his friends were in Sliema. He stated that on the night before, he met his friends in Sliema at a party and they asked him for some cannabis. Then he went to St. Julians on foot in order to buy the said substance from the Somalis over there. He confirmed that he smoked cannabis. He denied any involvement with the packet of cigarettes containing white substance and six pills that had been found by the police and stated that he knew nothing about it. He also confirmed that the substance found on his person was seized in evidence bag M00110395 and that he had also signed the same. He stated that he doesn't know the names of the persons or friends, for whom he had bought the substance.

Considered further that:

There is no doubt that cannabis resin was found on the person of the accused on the night to which the charges refer and indeed the accused never contested this fact. The defence, however, on the basis of the statement released by the accused, submitted that this is a case of trafficking by sharing and that the accused should therefore be found guilty merely within such parameters.

Apart from the statement of the accused, there is no other evidence that the accused produced or dealt in drugs on the night in question. Indeed nothing, apart from the drugs and two mobile phones, was found in the possession of the accused. Furthermore, there is no evidence suggesting that the accused was noticed approaching third parties to sell drugs on the said night. As to the submissions made by the defence, that the facts as indicated by the accused in his statement are tantamount to trafficking by sharing rather than trafficking *sic et sempliciter*, the Court refers to the judgements delivered by the Court of Criminal Appeal in the names **Il-Pulizija vs Marco Galea** and **Il-Pulizija vs Russell Bugeja**, both

decided on 5th May 2008, where the Court examined in detail the elements of trafficking by sharing as contemplated in the proviso of Section 22(9) of Chapter 101 of the Laws of Malta. The Court held as follows:

"*Is-subartikolu (9) in dizamina jipprovdi li ghar-reat, fost ohrajn, ta' bejgh jew traffikar ta' droga bi ksur tad- disposizzjonijiet ta' l-imsemmija Ordinanza ma jkunux applikabbli d-disposizzjonijiet ta' l-Artikoli 21 (inzul taht il-minimu) u 28A (sentenza ta' prigunerija sospiza) tal-Kodici Kriminali, kif ukoll lanqas ma jkunu applikabbli d-disposizzjonijiet tal-Att dwar il-Probation. Ir-rizultat ta' din il-projbizzjoni hi li fil-kaz ta' tali bejgh jew traffikar trid dejjem tigi applikata l-piena ta' prigunerija u ta' multa ghall-anqas fil-minimu taghhom – f'dan il-kaz, trattandosi ta' proceduri quddiem il-Qorti tal-Magistrati, il-minimu huwa ta' sitt xhur prigunerija u multa ta' Euro 465.87. L-ewwel proviso ghal dan is-subartikolu gie introdott ... bl-Att XVI ta' l-2006, u jipprovdi hekk:*

"Izda meta, dwar xi reat imsemmi f'dan is-subartikolu, wara li jitqiesu c-cirkostanzi kollha tal-kaz inkluz l-ammont u x-xorta tal-medicina in kwistjoni, ix-xorta ta' persuna involuta, l-ghadd u n-natura ta' kull kundanna li l-persuna kellha qabel, inkluzi kundanni li dwarhom tkun saret ordni taht l-Att dwar il-Probation, il-Qorti tkun tal-fehma li l-hati kien bi hsiebu jikkonsma l-medicina f'dak l-istess post flimkien ma' ohrajn, il-Qorti tista' tiddeciedi li ma tapplikax id-disposizzjonijiet ta' dan is-subartikolu…" *(sottolinear ta' din il-Qorti).*[5]

Huwa evidenti mid-dicitura tal-ligi li, apparti konsiderazzjonijiet ohra li l-qorti ghandha tizen sew qabel ma tapplika dan l-ewwel proviso (fosthom l-ammont u x-xorta ta' medicina involuta, ecc), trid tkun tirrikorri wkoll sitwazzjoni partikolari fejn id-droga tkun ser tigi, jew tkun giet, ikkunsmata (i) fl-istess post u (ii) minn min ikun qed jipprovdiha flimkien ma' ghall-anqas persuna ohra. Il-kliem "flimkien" u "fl-istess post" jissottolineaw l-element ta' komunanza – dak li aktar popolarment jissejjah "sharing" – jigifieri li dak li jkollu id-droga intiza ghalih jiddeciedi li jaqsamha ma' haddiehor f'dak l-istess waqt li jkun qed jikkunsmaha huwa stess. Kif inhu risaput, fil-ligi taghna min joffri d-droga, li jkollu ghall-uzu

[5] Section 22(9) provides that:
"*The provisions of articles 21 and 28A of the Criminal Code and the provisions of the Probation Act shall not be applicable in respect of any person convicted of an offence as is referred to in subarticle (2)(a)(i) or subarticle 2(b)(i):*
Provided that where, in respect of any offence mentioned in this subarticle, after considering all the circumstances of the case including the amount and nature of the drug involved, the character of the person concerned, the number and nature of any previous convictions, including convictions in respect of which an order was made under the Probation Act, the court is of the opinion that the offender intended to consume the drug on the spot with others, the court may decide not to apply the provisions of this subarticle ...".

tieghu, lil haddiehor – cioe` jaqsamha ma' haddiehor – ikun qieghed jipprovdi ("supply" fit-test ingliz) dik id-droga ghall-finijiet tad-definizzjoni ta' traffikar (Art. 22(1B)), u, per konsegwenza, ikun qed jitraffika dik id-droga. Dak li l-legislatur ried kien li meta jkollok kazijiet zghar u izolati ta' "sharing" – persuna jkollha d-droga ghaliha u taqsamha ma' haddiehor – tkun tista' (izda mhux bilfors – ghalhekk iridu jitqiesu c-cirkostanzi kollha tal-kaz) tigi evitata, ghall-anqas ghall-ewwel darba, il-piena mandatorja ta' prigunerija b'effett immedjat." (emphasis of that Court)

In the present case, in his statement, the accused stated that he paid €100 for the cannabis that was found in his possession and that he had collected €100 from five other persons, in order to buy the said cannabis, so that they (including the accused) could then smoke it together. On the night before, he had met his friends in Sliema and they had asked him for cannabis, so while they remained in Sliema, he went to St. Julians on foot to buy the said substance. He confirmed that he also smokes cannabis.

It is clear from the above, therefore, that the cannabis found in the possession of the accused was not intended merely for his personal use, but it was also intended for others, namely also for those who had provided him with the money to buy the said substance. Furthermore, although the intention was to consume the substance with his friends, yet one of the elements of 'sharing', as explained in the judgement above quoted, is absent. The accused acquired cannabis not merely for himself, but also for others, who also paid him for their share of the said substance. In other words, the accused purchased cannabis in order to procure it to his friends and also obtained money from them before so doing, although the intention was to consume the drug with them. It was not the case, therefore, that the accused intended to share the drug which he had for his personal use or that was intended for himself with others, or that he offered the drug intended for himself to others, because *a priori* he acquired cannabis for his friends (who had paid him for the drug that he bought), with the intention therefore of providing his friends with cannabis that he had specifically bought for them.

The Court therefore deems that the circumstances of this case do not amount to trafficking by sharing as contemplated by law and consequently the proviso to Section 22(9) of Chapter 101 of the Laws of Malta is not applicable. This was also the conclusion reached by the Court of Criminal Appeal in its judgement **Il-Pulizija vs Omissis**, decided on 19th November 2015, where the circumstances were very similar to those in the present case. Indeed, in that case, the accused had bought ecstasy pills for his friends, who had paid him for their share of the same,

with the intention of consuming the said pills during a party. After referring to the provisions of Section 120A(7) of Chapter 31 of the Laws of Malta, which is identical to Section 22(9) of Chapter 101 and considering that the said provisions are applicable also to the crime of possession of drugs in circumstances denoting that these were not for the possessor's personal use, the Court continued as follows:

"*Illi mid-dicitura tal-ligi allura johrog l-element formali tar-reat u cioe' l-hsieb pre-ordinat maghmul mill-hati illi jikkonsma dik id-droga li ikollu fil-pussess tieghu fl-istess post u fl-istess hin ma' ohrajn, liema intenzjoni tohrog iktar cara mill-qari tat-test ingliz fejn jinghad illi "the offender* <u>intended to consume</u> *the drug on the spot with others." Dan certament ma jinkludiex dik is-sitwazzjoni allura fejn l-hati ikun akkwista id-droga bl-intenzjoni li ighaddieha lil terzi.*

Issa l-appellanti ighid hekk fl-istqarrija tieghu rilaxxjata a tempo vergine u emmnuta mill-Ewwel Qorti u dan meta mistoqsi x'kien ser jaghmel bil-11-il pillola u nofs li instabu fuqu mill-pulizija:

"*Dawk jiena kont ghadni kif mort nixtrihom ghalija u ghal shabi ghal street party li kien hemm Bugibba.*"

Dan ifisser illi l-appellanti kien a priori akkwista id-droga bl-intenzjoni li ighaddieha lil shabu. Fil-fatt ikompli ighid illi kienu shabu stess li indikawlu il-persuna minn ghand min kellu imur jixtrihom, izda ma xtaqx isemmi min kienu dawn shabu. Ighid fil-fatt illi huwa hallas ghalihom bi flusu u bil-flus li kien gabar minn ghand dawn shabu. Dan ghalhekk huwa kaz car u klassiku ta' persuna li qed tindahal biex tmur tixtri d-droga (f'dan il-kaz pilloli ecstasy) sabiex tipprovdieha lil terzi u mhux bhal fil-kaz indikat mil-legislatur ta' dik il-persuna li akkwistat d-droga li imbaghad taqsamha ma' terzi fl-istess post u fl-istess hin li kienet qed tikkonsmaha hi, bhal per ezempju dik il-persuna li ikollha xi joint u tiddeciedi taqsmu ma' haddiehor. Minn dak li ighid l-appellanti stess huwa gie inkarigat sabiex jakkwista id-droga ghal haddiehor, tant illi gie mghoddi il-flus minn ghand shabu sabiex huwa jakkwista il-pilloli ghalihom. Allura hawn temergi il-figura tal-mandant, li qed jigi mibghut minn haddiehor biex jakkwistalu id-droga. Illi huwa minnu illi dawk il-pilloli, hekk akkwistati u mghoddija lil shabu kienu ser jigu ikkunsmati fil-party li attendew ghalih, izda ma jistax jinghad illi dan jinkwadra ruhu fit-tifsira, anke dik komuni, moghtija lil kelma "sharing" li necessarjament timplika il-pussess ta' oggett f'idejn persuna li ma izzommhiex biss ghalih, izda jaqsamha ma' haddiehor. U allura minn hawnhekk tohrog l-interpretazzjoni moghtija mill-qrati taghna tal-kuncett tal-komunanza. Jekk persuna jakkwista

oggett ghan-nom ta' terz, ma jistax jinghad li qieghed jaqsam dak li ghandu hu fil-pussess tieghu ma' dak it-terz. Illi huwa proprju dan li gie imfisser fid-decizjonijiet Il-Pulizija v. Russell Bugeja u Il-Pulizija v. Marco Galea, decizi it-tnejn fil-5 ta' Mejju 2008 u li ghalihom taghmel referenza l-Ewwel Qorti fi-decizjoni impunjata.

Illi huwa minnu illi il-qrati taghna jigu rinfaccjati spiss b'sitwazzjonijiet simili bhal dik li instab fiha l-appellanti, fejn grupp hbieb jinkarigaw lil wiehed minnhom sabiex jaghmel l-akkwist ghan-nom taghhom lkoll, u li tali persuna tispicca ikollha tiffaccja akkuzi dwar traffikar jew pussess aggravat. Izda ma jidhirx illi l-legislatur kellu f'mohhu dawn ic-cirkostanzi, li ghalkemm jimmeritaw l-attenzjoni tieghu, madanakollu ma jinkwadrawx rwiehom fid-dispost tal-ligi li jikkontempla 'l hekk imsejjah t-trafficking by sharing. Illi li kieku din il-Qorti kellha tabbraccja it-tezi prospettata mill-appellanti tkun qed tiftah il-bibien ghal abbuz serju fejn persuna intercettata b'ammont ta' droga jew sustanza illecita f'xi avveniment socjali tohrog bl-iskuza illi dawn hija akkwistathom bl-intenzjoni li taqsamhom ma' shabha, minghajr ma jingiebu provi ulterjuri sabiex tigi sostanzjata dina l-affermazzjoni." (emphasis of the Court of Appeal).

The Court therefore deems that charge (b), namely that the accused had in his possession cannabis resin in circumstances denoting that this was not intended for his personal use, has been proved beyond any reasonable doubt and that the circumstances of such possession do not amount to sharing, as contemplated in the proviso to Section 22(9) of Chapter 101.

As regards charge (a), namely that the accused produced, sold or otherwise dealt in cannabis resin, in terms of Section 22(1B) of the Dangerous Drugs Ordinance, even an offer to supply drugs amounts to dealing in drugs and since it is irrelevant whether any such substance is actually supplied following such offer, the offer in itself being sufficient to constitute the completed offence of dealing in drugs, it is of no consequence in this case that the accused was actually found in possession of cannabis before he had supplied it to others. As stated in the judgement delivered by this Court, differently presided, on 12th October 2001, in the names **Il-Pulizija vs Ronald Psaila**, which was subsequently confirmed by the Court of Appeal in its judgement delivered on 8th January 2002 (Appeal No: 187/2001):

"*Minn din id-disposizzjoni tal-ligi johrog car li r-reat ta' Traffikar jikkonfigura anki jekk persuna **toffri** li taghmel wahda mill-azzjonijiet indikata f'dan l-Artikolu. Fit-test ingliz, il-kelma "joffri" hija trodotta bil-kelma "offer". Issa stante li ma hemmx fl-Ordinanza definizzjoni ta' din il-kelma, allura ghall-finijiet ta'*

interpretazzjoni, din ghandha tittiehed fis-sinifikat ordinarju taghha, u cioe` li, spontaneament jew fuq rikjesta, direttament jew indirettament,* ***persuna turi****, bil-fatt jew bil-kliem, id-disponibilita` taghha li taghmel wahda mill-azzjonijiet indikati.

*In propositu huma interessanti l-osservazzjonijiet maghmula fil-Blackstone Criminal Practice 2001 – (11th Ed. B20.29) fuq l-interpretazzjoni tal-frasi "***Offering to Supply***" kontenuta fil-Misuse of Drugs Act 1971 s. 4. "****An offer may be made by words or conduct … Whether the accused intends to carry the offer into effect is irrelevant; the offence is complete upon the making of an offer to supply***" *(vide kazistika indikata – pg. 776).*"

It is clear that in this case the accused offered to supply cannabis to others, so much so that after having been requested to supply them with the said drug, he proceeded to collect money from them and set off to buy cannabis. The fact that the accused was apprehended before actually supplying them with the same is irrelevant for the purposes of the said offence, since his offer to supply others with cannabis is in itself sufficient to constitute the said offence.

The Court therefore considers charge (a) as also having been proved to the degree required by law. It is also clear that charge (c) has been proved to the said degree. Finally, as regards charge (d), namely that of having committed these offences in or within 100 metres of the perimeter of a school, youth club or centre or such other place, where young persons habitually meet, in terms of the proviso to Section 22(2)(b) of Chapter 101 of the Laws of Malta, it results from the evidence adduced that the accused was apprehended in Dragonara Road, St. Julians and there is no doubt therefore that the offence in charge (b) occurred in a place where young people habitually meet. Therefore this aggravating circumstance has also been sufficiently proved to the degree required by law.

Considerations on Punishment

For the purpose of the punishment to be inflicted, the Court took into account the clean criminal record of the accused and that he cooperated with the police during its investigation.

Furthermore, the Court is also taking into consideration that the accused was found in possession of 14.48 grams of cannabis, in the circumstances above described.

The Court is applying the provisions of Section 17(h) of Chapter 9 of the Laws of Malta with respect to the offences in charges (a) and (b) and is considering the offence in charge (c) as being comprised in the offence contemplated in charge (b). The Court is also applying the increase in punishment by one degree as contemplated in the proviso to Section 22(2)(b) of Chapter 101, since the accused is also being found guilty of the aggravating circumstances in charge (d).

Conclusion

For these reasons, the Court after having seen Sections 8(a), 8(b), 22(1)(a), 22(2)(b)(i) and (ii) and the second proviso to Section 22(2)(b) of Chapter 101 of the Laws of Malta, Section 17(h) of Chapter 9 and Regulations 4 and 9 of Subsidiary Legislation 101.02, finds the accused guilty of the charges brought against him and condemns him to **eleven (11) months effective imprisonment** – from which term one must deduct the period of time during which the person sentenced has been detained under preventive arrest in connection with the offences of which he is being found guilty today – and **a fine (multa) of eight hundred Euro (€800)**.

Furthermore, in terms of Section 533 of Chapter 9 of the Laws of Malta, the Court condemns the person sentenced to the payment of the costs incurred in connection with the employment of experts in these proceedings, namely the expenses relating to the appointment of expert Scientist Godwin Sammut, amounting to the sum of two hundred, twenty four Euro and twenty cents (€224.20).

The Court orders the release of the two mobile phones exhibited as Document ET1 in favour of the person sentenced. Furthermore, it orders the destruction of Document ET once this judgement becomes final and definitive, under the supervision of the Registrar, who shall draw up a process 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.

Natasha Galea Sciberras
Magistrate