COURT OF CRIMINAL APPEAL

His Honour Chief Justice Silvio Camilleri – President
Hon. Mr. Justice David Scicluna
Hon. Mr. Justice Joseph Zammit McKeon

Sitting of Thursday, 26th January 2017

Bill of Indictment No. 12/2014

The Republic of Malta

v.

Mubarak Bawa

The Court:

1. Having seen the charges brought against the accused Mubarak Bawa, holder of identification document number 44045A, whereby he was accused with having, in the Maltese Islands and/or outside the Maltese Islands on the 13th of February, 2013 and in the preceeding six (6) months prior to this date:

(1) conspired with another one or more persons on these Islands or outside Malta for the purpose of selling or dealing on these Islands the dangerous drug (heroin/cocaine) in breach of the Dangerous Drugs Ordinance Chap. 101 of the Laws of Malta or promoted, constituted, organised or financed such conspiracy for the importation of the dangerous drug (heroin/cocaine) in breach of the Dangerous Drugs Ordinance Chap. 101 of the Laws of Malta;

(2) supplied or distributed or offered to supply or distribute the drug (heroin), specified in the first schedule of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, to person/s or for the use of other person/s, without being licensed by the President of Malta, without being fully authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939), or by the authority given by the President of Malta, to supply this drug, and without being in possession of an import and export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of paragraph 6 of the Ordinance and when he was not duly licensed or otherwise authorised to manufacutre or supply the mentioned drug, when he was not duly licensed to distribute the mentioned drug, in pursuance of the provisions of the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta;

(3) had in his possession the drug (heroin) specified in the First Schedule of the Dangerous Drugs 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 otherwised licensed by the President of Malta or authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession fo 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 (G.N. 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 for his personal use;

(4) had in his possession a passport issued to another person and this in violation of Article 3 of Chapter 61 of the Laws of Malta;

(5) forged, altered or tampered with any passport or used or had in his possession any passport which he knew to have been forged, altered or tampered with in violation of article 5 of Chapter 61 Laws of Malta;

(6) committed any other kind of forgery, or knowingly made use of any other forged document, and this in violation of Article 183, 184 and 189 of Chapter 9 of the Laws of Malta;

(7) driven a motor vehicle model Rover 214 bearing registration number GAO 926 without a circulation licence renewed for the current year in violation of regulation 13 of SL 368.02 Laws of Malta.

The Court was requested to attach in the hands of third parties in general all monies and other movable properties due or pertaining or belonging to the accused, and further to prohibit the accused from transferring, pledging, hypothecating or otherwise disposing of any movable or immovable property in terms of article 22(3A) of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, of article 5(1)(a)(b) of the Prevention of Money Laundering Act Chap 373 Laws of Malta as well as to issue orders as provided in articles 5(1) and 5(2) of the same Act and of article 23A of the Criminal Code Chapter 9 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 to the expenses incurred by the Court appointed Experts;

2. Having seen the guilty plea registered by the accused Mubarak Bawa before the Court of Magistrates (Malta) as a Court of Criminal Inquiry on the 14th February 2013 during his examination in terms of articles 390(1) and 392 of the Criminal Code;

3. Having seen the minutes of the proceedings of the 2nd September 2014 as drafted by the Court of Magistrates, whereby the accused Mubarak Bawa reaffirmed the guilty plea filed by him on the 14th February 2013, and this even after that Court gave him time to think about his guilty plea and the Court explained to him the consequences of this guilty plea;

4. Having seen the Attorney General's note presented in the registry of the Criminal Court on the 29th September 2014, whereby the Attorney General declared that in terms of the proviso of article 392B(2) of Chapter IX of the Laws of Malta, the charges proffered against the said Mubarak Bawa before the Court of Magistrates (Malta) as a Court of Criminal Inquiry, to which the accused registered the aforementioned guilty plea, should be considered as a Bill of Indictment for all the purposes and effects of law;

5. Having seen the judgement delivered by the Criminal Court on the 13th July 2016 whereby that Court, in view of the guilty plea filed by Mubarak Bawa before the Court of Magistrates (Malta) on the 14th February 2013, which plea was duly confirmed on the 2nd September 2014, declared the said Mubarak Bawa guilty of having, in the Maltese Islands and/or outside the Maltese Islands on the 13th of February 2013 and in the preceding six (6) months prior to this date:

(1) conspired with another one or more persons on these Islands or outside Malta for the purpose of selling or dealing on these Islands the dangerous drug (heroin/cocaine) in breach of the Dangerous Drugs Ordinance Chap. 101 of the Laws of Malta or promoted, constituted, organised or financed such conspiracy for the importation of the dangerous drug (heroin/cocaine) in breach of the Dangerous Drugs Ordinance Chap. 101 of the Laws of Malta;

(2) supplied or distributed or offered to supply or distribute the drug (heroin), specified in the first schedule of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, to person/s or for the use of other person/s, without being licensed by the President of Malta, without being fully authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939), or by the authority given by the President of Malta, to supply this drug, and without being in possession of an import and export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of paragraph 6 of the Ordinance and when he was not duly licensed or otherwise authorised to manufacutre or supply the mentioned drug, when he was not duly licensed to distribute the mentioned drug, in pursuance of the provisions of the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta;

(3) had in his possession the drug (heroin) specified in the First Schedule of the Dangerous Drugs 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 otherwised licensed by the President of Malta or authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession fo 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 (G.N. 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 for his personal use;

(4) had in his possession a passport issued to another person and this in violation of Article 3 of Chapter 61 of the Laws of Malta;

(5) forged, altered or tampered with any passport or used or had in his possession any passport which he knew to have been forged, altered or tampered with in violation of article 5 of Chapter 61 Laws of Malta;

(6) committed any other kind of forgery, or knowingly made use of any other forged document, and this in violation of Article 183, 184 and 189 of Chapter 9 of the Laws of Malta;

(7) driven a motor vehicle model Rover 214 bearing registration number GAO 926 without a circulation licence renewed for the current year in violation of regulation 13 of SL 368.02 Laws of Malta.

6. Having seen that by the said judgement the first Court, after having seen articles 9, 10(1), 12, 14, 15(A), 20, 22(1)(a)(f)(1A)(1B), 22(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d), 26 and 29 of Chapter 101 of the Laws of Malta and regulations 4 and 9 of Subsidiary Legislation 101.2, articles 183, 184, 189 and articles 17(b)(h), 23, 31 and 533 of the Criminal Code, Articles 3 and 5 of Chapter 61 of the Laws of Malta and Regulation 13 of Subsidiary Legislation 368.02, condemned the said Mubarak Bawa to a term of imprisonment of seven and a half years and the imposition of a fine of twenty three thousand euros (€23,000), which fine (multa) shall be converted into a further term of imprisonment of one year according to Law, in default of payment. Furthermore condemned him to pay the sum of four thousand, fifty-eight euros and fifty-two cents (€4058.52), being the sum total of the expenses incurred in the appointment of court experts in this case in terms of Section 533 of Chapter 9 of the Laws of Malta, and ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which he has been found guilty and other movable and immovable property belonging to the said Mubarak Bawa. Finally, said Court ordered the destruction of all the objects exhibited in Court, consisting of the dangerous drugs or objects related to the abuse of drugs, which destruction shall be carried out by the Assistant Registrar of the Criminal Court, under the direct supervision of the Deputy Registrar of that Court who shall be bound to report in writing to said Court when such destruction has been completed, unless the Attorney General files a note within fifteen days declaring that said drugs are required in evidence against third parties. And this after having further considered the following:

> "Although the punishment with regards to the crimes the accused has admitted to having committed, is of life imprisonment, however article 492(1) of the Criminal Code provides that if at any stage of the proceedings, before the constitution of the jury, the accused admits to the charges brought against him and for the fact admitted by the accused there is established the punishment of imprisonment for life, the court may, instead of the said punishment, impose the punishment of imprisonment for a term from eighteen to thirty years. Also according to the proviso to article 22(2)(a)(i)(aa) of Chapter 101 of the Laws of Malta, where the court is of the opinion that, when it takes into account the age of the offender, the previous conduct of the offender, the quantity of the drug and the nature and quantity of the equipment or materials, if any, involved in the offence and all

other circumstances of the offence, the punishment of imprisonment for life would not be appropriate then the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (multa) of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixtyeight euro and sixty-seven cents (€116,468.67).

"That in considering the punishment to be inflicted, therefore, in this case, the Court will take into consideration first and foremost the guilty plea filed by accused at the outset of the proceedings, the Court having been incapable at law to proceed to sentencing due to procedural stumbling blocks which were removed by recent amendments to the law of procedure.

"The Court, however, cannot ignore the fact that the accused had formed the intention to traffic drugs in Malta and this for personal profit. He therefore conspired with third parties in order to import and traffic not only the drug heroin but also cocaine. Thus his participation was not a minimal one having also agreed to assist in a second importation of drugs being this second time cocaine. Also accused was found in possession of 71 capsules of which 371.66 grammes were heroin having a level of purity of 22% and 330.72 grammes consisted of paracetamol and caffeine 7 which are considered to be cutting agents to be mixed with heroin. The retail price of the heroin according to court-appointed expert Godwin Sammut was of €27131.18.

"Furthermore accused is being found gulity of forging and making use of a forged passport and driving a vehicle without a circulation license.

"The accused, however, collaborated fully with the police in the investigations carried out in connection with this drug-trafficking chain and consequently a mitigation in the punishment to be inflicted will be affected, after taking note of the declaration made by the Prosecution that the accused is to benefit from the application of Section 29 of Chapter 101 of the Laws of Malta by one degree.

"Having considered local and foreign case law regarding a reduction in the punishment when the accused registers an early guilty plea, thereby avoiding useless work and expenses for the administration of justice (Vide "Ir-Repubblika ta' Malta vs. Nicholas Azzopardi", Criminal Court, [24.2.1997] ; "IlPulizija vs. Emmanuel Testa", Court of Criminal Appeal, [7.7.2002] and BLACKSTONE'S CRIMINAL PRACTICE, (Blackstone Press Limited – 2001 edit.); As was held by the Court of Criminal Appeal in its judgement in the case "Ir-Repubblika ta' Malta vs. Mario Camilleri" [5.7.2002], an early guilty plea does not always necessarily and as of right entitle the offender to a reduction in the punishment.

"The general rules which should guide the Courts in cases of early guilty pleas were outlined by the Court of Criminal Appeal in its preliminary judgement in the case : "Ir-Repubblika ta' Malta vs. Nicholas Azzopardi", [24.2.1997]; and by the Court of Criminal Appeal in its judgement "Il-Pulizija vs. Emmanuel Testa", [17.7.2002]. In the latter judgement that Court had quoted from Informal Copy of

Judgement Page 14 of 17 Courts of Justice BLACKSTONE'S CRIMINAL PRACTICE , (Blackstone Press Limited – 2001 edit. ecc.) :-

"*'Although this principle [that the length of a prison sentence is normally reduced in the light of a plea of guilty] is very well established, the extent of the appropriate "discount" has never been fixed. In Buffery ([1992] 14 Cr. App. R. (S) 511) Lord Taylor CJ indicated that "something in the order of one-third would very often be an appropriate discount", but much depends on the facts of the case and the timeliness of the plea. In determining the extent of the discount the court may have regard to the strength of the case against the offender. An offender who voluntarily surrenders himself to the police and admits a crime which could not otherwise be proved may be entitled to more than the usual discount. (Hoult (1990) 12 Cr. App. R. (S) 180; Claydon (1993) 15 Cr. App. R. (S) 526) and so may an offender who, as well as pleading guilty himself, has given evidence against a co-accused (Wood [1997] 1 Cr. App. R. (S) 347) and/or given significant help to the authorities (Guy [1992] 2 Cr. App. R. (S) 24). Where an offender has been caught red-handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris [1998] 10 Cr. App. R. (S) 216; Landy [1995] 16 Cr. App. R. (S) 908). Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage (Hollington [1985] 85 Cr. App. R. 281; Okee [1998] 2 Cr. App. R. (S) 199.) Similarly, some or all of the discount may be lost where the offender pleads guilty but adduces a version of the facts at odds with that put forward by the prosecution, requiring the court to conduct an inquiry into the facts (Williams [1990] 12 Cr. App. R. (S) 415.) The leading case in this area is Costen [1989] 11 Cr. App. R. (S) 182, where the Court of Appeal confirmed that the discount may be lost in any of the following circumstances: (i) where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, be passed; (ii) cases of 'tactical plea', where the offender delayed his plea until the final moment in a case where he could not hope to put up much of a defence, and (iii) where the offender has been caught red-handed and a plea of guilty was practically certain.... "*'

7. Having seen the application of appeal of the said Mubarak Bawa filed on the 19th December 2012 wherein he requested that this Court varies the appealed judgment by confirming the finding of guilt of the appellant and by quashing the punishment awarded by the Criminal Court and instead pass a less severe and much more warranted sentence according to law on him; having heard the submissions made by counsel for appellant and counsel for the respondent Attorney General; considers:-

8. Appellant's grievance is in respect of the punishment inflicted as he deems it not proportional to the entirety of the circumstances pertinent to the case. Appellant submits:

"That appellant is aware that the punishment imposed by the Criminal Court is within the limits prescribed by the law. Still however it is being submitted that if it is shown that there were a number of mitigating factors which the Criminal

Court did not take into consideration when it calibrated the punishment and that the same Court took into account were considerations that legally should not [have] been taken into consideration, then it is humbly submitted that the Court of Appeal should review such punishment. This is what has happened in this case. Therefore, appellant is going to list those mitigating factors which the Criminal Court took into account. Then list the considerations made by the Court, and finally appellant will make his submissions on the reasoning of the Court and give reasons why the punishment should be reviewed and mitigated by the Court of Appeal.

"Mitigating factors considered by the Criminal Court

"That the Criminal Court considered the following mitigating factors in favour of the appellant when it calibrated the extent of the punishment:

1) That appellant reaffirmed the guilty plea filed by him on the 14th February, 2013 in his examination in terms of article 3900) and 392 of the Criminal Code;

2) His updated conduct sheet (which was clean);

3) Article 492(1) of the Criminal Code which provides that if at any stage of the proceedings, before the constitution of the jury, the accused admits to the charges brought against him, the punishment of imprisonment for life is reduced to a term of imprisonment from eighteen to thirty years;

4) That according to the *proviso* to Article 22(2)(a)(i)(aa) of Chapter 101 of the Laws of Malta, where the court is of the opinion that, when it takes into account the age of the offender, the previous conduct of the offender, the quantity of the drug and the nature and quantity of the equipment or materials, if any, involved in the offence and all other circumstances of the offence, the punishment of imprisonment for life would not be appropriate then the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (multa) of not less than two thousand and three hundred and twenty-nine Euro and thirty-seven cents (€2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixty-eight Euro and sixty-seven cents (116,468.67);

5) That even though there was the guilty plea of the accused, the Court was incapable at law to proceed to sentence due to procedural stumbling blocks which were removed by recent amendments to the law of procedure;

6) The appellant collaborated fully with the police in the investigations carried out in connection with this drug-trafficking chain and consequently a mitigation in the punishment to be inflicted was affected, after taking note of the declaration made by the Prosecution that the accused is to benefit from the application of Article 29 of Chapter 101 of the Laws of Maita, by one degree;

7) Local and foreign case law regarding a reduction in the punishment when the accused registers an early guilty plea, thereby avoiding useless work and expenses for the administration of justice;

"On the other hand the Criminal Court stated that it was of the opinion that it could not ignore that:

1) The accused had formed the intention to traffic drugs in Malta and this for personal profit;

2) That the accused conspired with third parties to import and traffic not only the drug heroin but also cocaine;

3) That his participation was not a minimal one because he agreed to assist in a second importation of drugs, this time of cocaine;

4) That appellant was found in possession of 71 capsules of which 371.66 grams were heroin having a level of purity of 22% and 330.72 grams consisted of paracetamol and caffeine which were considered to be cutting agents to be mixed with heroin;

5) That the retail price of the heroin according to the court-appointed expert Godwin Sammut was of €27,131.18;

6) That besides the offences related to drugs, appellant was guilty also of forging and making use of a forged passport and driving a vehicle without a circulation license;

"That with all due respect appellant submits the following with regard to the punishment mitigating factors which were taken into account by the Criminal Court:

1) That even though the Criminal Court stated that it saw the appellant's updated conviction sheet, it did not stress or emphasise that appellant's criminal conduct was clean. The Court seems also to have ignored that even though the appellant was not a Maltese national living in Malta, still he lived in Malta the previous six years to the incident in an exemplary fashion;

2) That the Criminal Court sentence is absolutely missing from any mathematical calculation with regard the punishment. In fact, appellant cannot understand and cannot be aware of the minimum term of imprisonment which the Court used as departure to calibrate his punishment. This is being stated not only because as stated above, mathematical calculation is absent from the sentence, but also because even though the Court has mentioned that it has considered Article 492(1) of the Criminal Code, it failed to depart from such a minimum threshold. This is evident because the Criminal Court quoted Article 22(2)(a)(i)(aa) of Chapter 101 which provided a higher minimum threshold and it did not say that in this particular case, the lesser minimum applied;

3) It is also evident that although the Court opined that the minimum punishment in this case was eighteen months according to Article 492(1) of the Criminal Code, or four (4) years according to the *proviso* to Article 22(2)(a)(i)(aa) of Chapter 101, it failed to apply the reduction of one or two degrees according to

Article 29. The Court, therefore, determined the punishment from a threshold which was one or two degrees higher than that which was legally permissible;

4) That appellant does not even know why the Court has applied Article 29 by one degree and not by two degrees. It is being humbly submitted that the reduction in the punishment should have been applied by two degrees. The accused has fully collaborated with the police and according to Insp Johann Farrugia's testimony it is evident that the information supplied by the appellant was crucial to have a person arrested and arraigned in court. However, the Criminal Court seems to have missed such point and only applied Article 29 by one degree due to thedeclaration made by the police. It is appellant's opinion that the Criminal Court was contradictory in its reasoning. Once the Criminal Court was convinced that appellant fully collaborated with the police, it should have reduced the punishment by two degrees instead of one.

5) That the Criminal Court declared that it has considered local and foreign case law regarding a reduction in the punishment because the accused registered an early guilty plea, thereby avoiding useless work and expenses for the administration of justice. This was evident from the several quotations which the Criminal Court put in its sentence. Still, however appellant does not know to what extent he had benefited from his early guilty plea! The Court did not declare to what extent it was reducing the punishment. Thus appellant does not know whether the Court has reduced his punishment by 1/3 or less, it is being humbly submitted that appellant should have benefited from a one-third reduction of punishment due to the fact that he has admitted at earliest stage of the proceedings and admitted to crimes which the prosecution could not have proven without appellant's cooperation and statement.

"In relation to what the Court has considered as 'aggravating' circumstances, the appellant would like to make the following observations:

1) That with all due respect to the Criminal Court's reasoning, such Court was wrong in considering that appellant decided to deal in drugs for personal profit. All that appellant wanted was to help his son and grandmother due to their medical condition. That was the reason why he decided to venture into such criminal activity. Consequently, whilst appellant is not trying to excuse his behaviour, it is being humbly submitted that in this case the dealing in drugs was not to gain money for personal profit;

2) That, as opposed to what the Criminal Court has declared, in actual fact, appellant's participation was minimal. He was not the author of the importation of such drugs. He did not plan the importation of the drugs. He was not the mastermind at the back of this case. He was only a mule executing orders. What the Criminal Court in fact failed to consider was that appellant was not able to sell not even a gram of the drugs which were imported in Malta,

3) That appellant does not agree with the Criminal Court's consideration that when calibrating the punishment, it had to consider that he was in possession of paracetamol and caffeine and that these were used as cutting agents to be mixed with heroin. It is not a criminal offence to be in possession of paracetamol and

caffeine and thus the Criminal Court should have not considered such fact to calibrate the punishment. It was not even proved that paracetamol and caffeine were used as cutting agents to be mixed with heroin. The Court of Magistrates as a Court of Criminal Inquiry upheld the defence submission that Godwm Sammut's task was to determine whether appellant was in possession of drugs and not to give an opinion on whether or not paracetamol and caffeine could be used as cutting agents to be mixed with heroin. Once the paracetamol and caffeine were not mixed with the heroin, their weight had to be discarded by the Court and not taken into consideration;

4) That even when one compares the punishment which the appellant was awarded with other analogous cases, it becomes even more evident that the punishment given by the Criminal Court was in the circumstances exaggerated. To mention the least one can make reference to:

i) R vs Henrique Nunes Correia. (dated 18th February 2011) in which case the accused was charged with conspiracy, importation and possession of 948 grams the purity of which was 35%. Such accused was sentenced to eight (8) years imprisonment and fined twenty three thousand Euro (€23,000);

ii) R vs Enervina Lara Zepeda, (dated 19th October 2011) in which case, after the accused pleaded guilty to the charges of conspiracy, importation, trafficking and possession of 497 grams of cocaine the purity of vhich was 45%, the accused was sentenced to seven years imprisonment;

iii) In R vs Rachyd Clemen Vitae Antrim Curiel (dated 24th November 2010), the accused was sentenced to eight (8) years imprisonment after he admitted that he conspired, imported and was in possession of 42l grams of cocaine which cocaine had 46% purity;

iv) In R vs Lucie Azuka, (dated 5th March, 2015, Justice Dr Michael Mallia condemned the accused to a term of eight (8) years imprisonment and imposed a fine of twenty thousand Euro (€20,000) after finding him guilty of illegal trafficking of 73 capsules of cocaine in the amount of 901.75 grams, with a purity level of 45% which had a street valueof €57,513.62;

v) In R vs Christopher Umeh, (11th February, 2015) Mr. Justice Michael Mallia found the accused guilty, inter alia, of possession with intent of 75 capsules of cocaine which weighed 754.9 grams with a purity of approximately 35% with a street value of $57,341.24. The court awarded a term of eight years imprisonment and imposed a €23,000 fine;

"It is worth mentioning also that in all the above mentioned cases, Article 29 did not even apply.

"That the Criminal Court did not adequately consider the purity of the heroin. In this particular case, having a twenty-two percent purity drug should have been considered as very low when compared

to the above mentioned cases and others. Thus such low purity had to be considered as a mitigating factor, something which the Court seemed to have completely ignored.

"That the appellant cannot understand also why he should pay for the expert expenses. As already stated above the appellant has admitted to the charges as brought against him at the very outset of the procedure. He admitted at the stage of his examination and has reiterated his admission plea every time he was requested to do so in the *iter* of the proceedings. Thus there was no need for the appointment of court experts and experts were only appointed because at the time of their appointment, the law did not provide for the possibility to avoid the compilation of evidence. Appellant therefore should not be penalised for the proven inadequacy of the law of procedure.

"That the disproportional nature of the punishment also emerges out of the fact that the appellant was fined a substantial fine, which fine is likely to be converted into one year's additional imprisonment."

9. This Court has had occasion to remark several times that appeals against punishment following the entering of a guilty plea will only be considered favourably in exceptional cases. It is not the function of this Court as a Court of appellate jurisdiction to disturb the discretion of the first Court as regards the quantum of punishment unless such discretion has been exercised outside the limits laid down by the law or in special circumstances where a revision of the punishment meted out is manifestly warranted.[1]

10. Now, appellant states that he felt aggrieved by a number of factors. In the first place, he complains that while the Criminal Court stated that it saw the appellant's updated conviction sheet, it did not stress or emphasise that appellant's criminal conduct was clean. While it is true that the first Court could have, in its considerations, specifically referred to the fact that appellant's conduct record was clean, it does not mean that it ignored said record. Indeed, in the preambular part of the judgement, it quite clearly stated that it had seen "the updated conduct sheet of Mubarak Bawa", which record speaks for itself.

11. Appellant then complains that mathematical calculations are missing from the judgement. However, as was stated in this Court's judgement of the 25th August 2005 in the names **The Republic of Malta v. Kandemir Meryem Nilgum and Kucuk Melek**:

"... the Criminal Court is not obliged to give <u>detailed</u> reasons explaining either the nature or the *quantum* of the punishment being meted out, or to spell out any mathematical calculations that it may have made in arriving at that *quantum*. Although the determination of the nature and the *quantum* of the punishment is,

[1] **The Republic v. Ahmed Ben Taher**, 6th October 2003.

of its nature, the determination of a question of law – see Sections 436(2) and 662(2) of the Criminal Code – all that is required is that the Court state the facts of which the accused has been found guilty (or, as in the present case, the facts to which he/she has pleaded guilty), quote the relevant provision or provisions of the law creating the offence (which provisions generally also determine the punishment applicable), and state the punishment or other form of disposal of the case. Unless expressly required by law to spell out in detail something else – as for instance is required by Section 21 of the Criminal Code or by the first proviso to subsection (2) of Section 7 of the Probation Act, Cap. 446 – the above would suffice for all intents and purposes of law. The principle *nulla poena sine lege* does not mean or imply that a Court of Criminal Justice has to go into any particular detail as to the nature and *quantum* of the punishment meted out, or, where the Court has a wide margin of discretion with various degrees and latitudes of punishment, that it has to spell out in mathematical or other form, the logical process leading to the *quantum* of punishment. This is also the position in English Law. As stated in **Blackstone's Criminal Practice 2004** [2]:

"**'Save where the statutory provisions mentioned below apply, there is no obligation on the judge to explain the reasons for his sentence. However, the Court of Appeal has encouraged the giving of reasons, and has indicated that that should certainly be done if the sentence might seem unduly severe in the absence of explanation…It has been held that failure by the sentencing court to give reasons when required to do so does not invalidate the sentence…although the failure may no doubt be taken into account by the appellate court should the offender appeal. Where the sentencer does give reasons and what he says indicates an error of principle in the way he approached his task, the Court of Appeal sometimes reduces the sentence even though the penalty was not in itself excessive. Similarly a failure by the judge to state expressly that he is taking into account any guilty plea, although contrary to [statutory provision], does not oblige the Court of Appeal to interfere with what is otherwise an appropriate sentence…'**

"This Court is in full agreement with the principles stated above. Indeed, it is highly recommendable that, when the law provides for a wide margin of discretion in the application of the punishment, reasons, possibly even detailed reasons, be given explaining how and why the court came to a particular conclusion. This is particularly so in drugs cases coming before the Criminal Court where, as in the present case, the punishment of life imprisonment could also have been meted out."

In the instant case, the first Court gave detailed reasons for its decision but did not outline any mathematical calculations. As indicated in the above quoted judgement, there was certainly no obligation on the first Court to spell out any mathematical calculations.

12. Appellant also complains that the first Court failed to depart from the minimum threshold indicated in article 492(1) of the Criminal Code, which

[2] OUP (2003) at p 1546, para. D18.34.

threshold appellant indicates to be eighteen months. A cursory glance at the said article 492(1) will show that the minimum threshold is not eighteen "months" but eighteen "years".

13. Now, in the instant case it is patently obvious that the Criminal Court was of the opinion that life imprisonment was not the appropriate punishment, even though it did not state so *expressis verbis* in the judgement. This means that the starting point, as far as the custodial punishment was concerned, was of a minimum of four years imprisonment and a maximum of thirty years.

14. With regard to the application of article 29 of Chapter 101 of the Laws of Malta, appellant seems to contradict himself, first saying that the first Court failed to apply the reduction of one or two degrees according to article 29, and then that he does not know why the Court applied article 29 by one degree and not by two degrees. From the judgement it would appear that the first Court did take into consideration a reduction of one degree when it stated: "The accused, however, collaborated fully with the police in the investigations carried out in connection with this drug-trafficking chain and consequently a mitigation in the punishment to be inflicted will be affected, after taking note of the declaration made by the Prosecution that the accused is to benefit from the application of Section 29 of Chapter 101 of the Laws of Malta by one degree." This means that the parameters were further reduced to a minimum of three years and a maximum of twenty years. Appellant, however, submits that the reduction should have been of two degrees.

15. Reference is here made to what article 29 of Chapter 101 stipulates[3] and to the judgement delivered by this Court in the names **The Republic of Malta v. Tony Johnson** on the 23rd October 2014:

> "**27.** The meaning of this article is clear. A reduction in punishment takes place when the person found guilty in terms of Chapter 101 **"has helped the Police <u>to</u> <u>apprehend</u> the person or persons who <u>supplied</u> him with the drug"** (emphasis by the Court). This meaning cannot be extended to include a situation where such person helps the Police apprehend the person for whom the drugs were destined or the person who may have acted as an intermediary – although such assistance may be taken into consideration by the Court in determining the appropriate punishment."

[3] "Where in respect of a person found guilty of an offence against this Ordinance, the prosecution declares in the records of the proceedings that such person has helped the Police to apprehend the person or persons who supplied him with the drug, or the person found guilty as aforesaid proves to the satisfaction of the court that he has so helped the Police, the punishment shall be diminished, as regards imprisonment by one or two degrees, and as regards any pecuniary penalty by one-third or one-half."

16. This Court examined the record of the case. While it is true that appellant collaborated with the Police, and Inspector Dennis Theuma (one of the prosecuting officers) declared before the Court of Magistrates on the 25th February 2014[4] that the accused should benefit from article 29, this Court could find no evidence that the person whom appellant helped the Police to apprehend was the person who supplied him with the drug. Consequently, while the first Court correctly considered appellant's assistance to the Police, article 29 of Chapter 101 is not applicable.

17. Appellant also complains that he does not know to what extent he benefitted from his early guilty plea. Now, that the first Court did take into consideration appellant's early guilty plea there is no doubt as it stated categorically: "That in considering the punishment to be inflicted, therefore, in this case, the Court will take into consideration first and foremost the guilty plea filed by accused at the outset of the proceedings". If, arguably, the first Court applied a one-third reduction in terms of the cases it referred to in its judgement, the parameters of the punishment of imprisonment would thereby be reduced to a minimum of two years and a maximum of thirteen years and four months. This means that the punishment awarded by the first Court still lies within the legal paremeters. This Court cannot, however, but also point out that from the evidence produced by the prosecution it results that appellant was caught "red-handed" with the drugs in his possession.

18. With regard to appellant's other observations, this Court makes the following considerations:

(i) From what appellant said in his statement to the Police, it would appear that he decided to embark on this criminal activity to be able to finance his son's and his grandmother's medical problems. Even so, he would just the same be profiting as he would thereby not have to forward funds from his personal income.

(ii) While not being the mastermind, he was playing an important role in trying to dispose of the drugs and, as correctly pointed out by the first Court, had "also agreed to assist in a second importation of drugs being this second time cocaine".

(iii) The fact that appellant had in his possession an amount of paracetamol and caffeine cannot be ignored. It is true that these are not illicit substances, but it is well known that these substances are used as cutting agents which thereby increase the volume of drug available for sale and, consequently, the resultant

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profits. Having said that, the retail price quoted by the first Court is in respect of the 371.66 grams of heroin only.

(iv) Appellant refers to what he calls "analogous cases" to argue that the punishment awarded in the instant case is exagerated. This Court has often said that comparisons are odious and each case has to be decided on its own particular merits. In fact in the first four cases mentioned by appellant, the accused were couriers whereas in the fifth case the accused was charged with "aggravated" possession. Moreover, in four of the cases (those marked ii) to v)) the punishment awarded was one following the procedure of sentence-bargaining in terms of article 453A(1) of the Criminal Code.

19. Appellant also raises the issue of the low purity of the heroin (22%) found, which he considers as a mitigating factor. In this respect, this Court refers to what was said in its judgement in the names **Ir-Repubblika ta' Malta v. Sugeidy Margarita Novas Castillo** delivered on the 30th October 2014 where the question of low purity of heroin was raised:

> "**10.** Hawn din il-Qorti tirreferi għas-sentenza fl-ismijiet **Ir-Repubblika ta' Malta v. Alberto Alessandro Bafumi** mogħtija minn din il-Qorti kif komposta fit-23 ta' Jannar 2014. Il-każ kien jirrigwarda l-assoċjazzjoni, traffikar u pussess ta' kważi kilo kokaina b'purita` ta' 18.76%. L-appellant f'dak il-każ kien argumenta illi kellu jiġi kkunsidrat tnaqqis fil-piena in vista tal-purita` baxxa tal-kokaina. Fis-sentenza tagħha din il-Qorti kienet kkonkludiet hekk:
>
> "**'Fil-każ in eżami l-ammont involut kien ta' kważi kilo ta' purita` ta' 18.76% (u li skond ix-xiehda ta' l-appellant tħallset għaliha s-somma ta' Lm21,340). Huwa minnu li dan kien perċentwal *on the low side*, iżda ma kien ikun hemm xejn x'iżomm lill-akkwirenti milli jagħmlu *cutting* ta' l-ammont minnhom akkwistat. Difatti fl-esperjenza tagħha din il-Qorti għadha ma rriskontratx każijiet fejn traffikanti lokali analiżżaw il-purita` tad-droga qabel ma "kkattjawha" jew qabel ma qasmuha f'dożi. Imbagħad il-bejgħ ta' dożi lil min juża mhuwiex solitament ibbażat fuq il-kriterju tal-purita` iżda dak tal-piż. Għalhekk fil-każ in eżami ma hemmx lok illi tingħata aktar konsiderazzjoni għall-kriterju tal-purita`.'**
>
> "**11.** Filwaqt illi fil-każ ċitat id-droga nvoluta kienet kokaina, hawn si tratta tad-droga eroina li, pero`, hi wkoll ta' purita` relattivament baxxa (ċirka 19.7%). Il-piż f'dan il-każ huwa wkoll kważi kilo, u speċifikament 995.4 grammi. Skond ir-rapport ta' l-espert forensiku l-Ispiżjar Mario Mifsud, il-prezz bl-imnut ta' l-eroina misjuba – a bażi tar-rapport '2007 National Report to the EMCDDA by the Reitox National Focal Point', kien ta' cirka €45,788. Dak li ntqal fil-bran appena ċitat dwar il-*cutting* japplika wkoll għall-każ odjern."

20. What was said above clearly applies to this case, *multo magis* where appellant had cutting agents (the paracetamol and caffeine) in his possession

and even admitted that he had been told to mix the heroin with said cutting agents.

21. In conclusion, therefore, the punishment awarded is well within the legal parameters, the custodial sentence being even within the parameters of punishment falling within the Court of Magistrates' jurisdiction. Moreover, as was held in **Ir-Repubblika ta' Malta v. Basam Mohamed Gaballa Ben Khial**, decided by this Court differently composed on the 19th February 2004: **"fejn si tratta ta' traffikar tad-droga (inkluża importazzjoni) l-element tad-deterrent ġenerali fil-piena hija konsiderazzjoni ewlenija li kull Qorti ta' Ġustizzja Kriminali għandha żżomm f'moħħa fil-għoti tal-piena, basta, s'intendi, li jkun hemm element ta' proporzjonalita` bejn il-fattispeċi partikolari tal-każ u l-piena erogata (ara f'dan is-sens is-sentenza ta' din il-Qorti tas-16 ta' Ottubru, 2003 fl-ismijiet *Ir-Repubblika ta' Malta v. Thafer Idris Gaballah Salem*)."** In fact in **Ir-Repubblika ta' Malta v. Thafer Idris Gaballah Salem**, it was said: **"Ma hemmx dubbju li l-element ta' deterrent, speċjalment fil-każ ta' reati premeditati (a differenza ta' dawk li jiġu kommessi "on the spur of the moment") hi konsiderazzjoni leġittima li Qorti tista', u ħafna drabi għandha, iżżomm quddiem għajnejha fil-għoti tal-piena…. S'intendi, hemm dejjem l-element tal-proporzjonalita`: qorti ma tistax, bl-iskuża tad-"deterrent", tagħti piena li ma tkunx ġustifikata fuq il-fatti li jirriżultaw mill-provi."**

22. Apart from this, appellant seems to forget that he also admitted and was found guilty of charges under the Criminal Code and under Chapter 61 of the Laws of Malta. Considering the punishment awardable for those offences and the applicability of article 17(b) of the Criminal Code, there is no doubt that the punishment awarded by the Criminal Court, both that of imprisonment and the fine (multa), was proportionate to the circumstances. Consequently finds that there is no reason to disturb the first Court's decision as to the q*uantum* awarded.

23. As regards the Court experts' costs, reference is made to article 533(1) of the Criminal Code which provides:

> **"In the case of proceedings instituted by the Police *ex officio*, the court shall, in pronouncing judgment or in any subsequent order, sentence the person convicted or the persons convicted, jointly or severally, to the payment, wholly or in part, to the registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, including such experts as would have been appointed in the examination of the process verbal of the inquiry, within such period and in such amount as shall be determined in the judgment or order."**

Said article is clear. The appointment of experts by the Inquiring Magistrate was undoubtedly "necessary" (article 548 of the Criminal Code) for the preservation of all evidence and for the investigation of the documents retrieved. Likewise as to the experts appointed by the Court of Magistrates as a Court of Criminal Inquiry. The fact that article 392B of the Criminal Code was only introduced *pendente lite* is thus irrelevant. Consequently appellant's complaint regarding the Court experts' costs cannot be accepted.

24. For these reasons this Court dismisses the appeal and confirms the appealed judgement in its entirety, save that the fifteen day period within which the Attorney General is to declare whether the dangerous drugs or objects related to the abuse of drugs are required in evidence against third parties shall commence from today