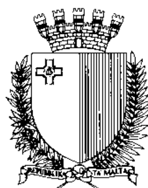

COURT OF CRIMINAL APPEAL

JUDGE

THE HON. DR. DAVID SCICLUNA LL.D.

Sitting of Wednesday 21st June 2017

Appeal no. 534 / 2013

The Police

v.

Richard Alistair Cranston

The Court:

1. Having seen the charges brought by the Executive Police against the abovementioned Richard Alistair Cranston, holder of UK Passport 540487406, before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 13th May 2009 and during the previous months, in these Islands:

(1) had in his possession the drug (cocaine) 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 authorization 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 authorized to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorized by the Internal Control of Dangerous Drugs Regulations (GN292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs was 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;

(2) had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof), the whole of any portion of the plant Cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for his personal use;

(3) had in his possession the resin obtained from the plant Cannabis or any preparations of which such resin formed the base in terms of Section 8(a) of Chapter 101 of the Laws of Malta;

(4) become a recidivist after being sentenced for an offence by a judgment which has become absolute, which sentence was issued by the Tribunale di Catania on the 19th December 2006;

2. Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 19th November 2013 whereby that Court found the said Richard Alistair Cranston guilty as charged and, after having seen articles 8 and 9 of Chapter 101 of the Laws of Malta, First Schedule to Chapter 101 of the Laws of Malta; artricles 22(1B) and 22(2)(b) of Chapter 101 of the Laws of Malta; GN 292/1939; Regulation 9 of S.L.101.2002, condemned him to a term of imprisonment of two (2) years; and to the payment of a fine (multa) of €6,000 (six thousand Euros). In terms of article 533 of Chapter 9 of the Laws of Malta the said Court condemned him to the payment of all experts' fees involved, namely the sum of €2,597.05; and furthermore ordered the destruction of all the drugs exhibited (exhibit number KB191.2009) and therefore communicated its judgment to the Registrar of Criminal Courts;

3. Having seen the appeal application presented by the said Richard Alistair Cranston on the 29th November 2013 whereby this Court was requested to vary the said judgement by confirming the finding of guilt in the first three charges but qualifying that, with regard to the first two charges, the first proviso of subsection (9) of section 22 of the Dangerous Drugs Ordinance is applicable and revoking the finding of guilt in the fourth charge and the punishment meted out and applying a lesser and more appropriate punishment;

4. Having seen the records of the case; having seen appellant's updated conviction sheet presented by the prosecution as requested by this Court; having heard submissions; having considered:

5. Appellant's grievances are the following:

> "The first grievance consists in the fact that the Court of Magistrates was, with regard to the first two charges, incorrect in its evaluation of the evidence porduced as well as in its interpretation of the first *proviso* of subsection (9) of section 22 of the Dangerous Drugs Ordinance.
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> "That the Court of Magistrates seems to have taken umbrage at defence's stance in shedding a bad light on witness Yvonne McKinnon. Suffice to say that the Court held that applicant and witnesses produced by him 'labelled this woman as an evil incarnate' and demonised her character to justify his actions. The Court also held that applicant conveniently forgot that he was previously condemned for drug-related offences in Italy. Defence is only putting the circumstances of the case in their proper perspective in order to explain the reason for the drugs on the above-mentioned yacht. In truth applicant did not label McKinnon as an evil woman. The perception of people who were around her at the time is unfortunately beyond his control and his producing these persons as witnesses should certainly not be used to shed a bad light on him.
>
> "That applicant was merely explaining the entity of his drug habit at the time of the offences. The amount of drugs found in this case was indicative of personal use, particularly when considering that such drugs were used by two persons. Applicant and defence witnesses never claimed that McKinnon created obstacles in his path to sainthood but simply explained that she was not a good influence in his life. With the evidence brought forward, defence explained the context and circumstances of applicant's life at the time of the offences.
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> "That the judgements of the Court of Criminal Appeal quoted by the Court of Magistrates – namely ***Il-Pulizija vs Russell Bugeja*** (05.05.2008) and ***Il-Pulizija vs Marco Galea*** (05.05.2008) – explain the interpretation that should be given to the first *proviso* of subsection (9) of section 22 of the Dangerous Drugs Ordinance. It goes without saying that these judgements were delivered in the light of the particular circumstances of the specific cases. The interpretation given was never intended to preclude the Court from examining the circumstances of each individual case and examining whether those circumstances fall within the parameters of the said *proviso*. The Court of Criminal Appeal merely laid down guidelines that are to be followed in each and every case. These guidelines were certainly not intended to render the *proviso* a dead letter.
>
> "That it was tacitly accepted by the Court of Magistrates that the drugs were intended for the use of applicant and Yvonne Mc Kinnon. The interpretation given by the Court of Criminal Appeal, albeit rigid at face value, does not in any way exclude the application of the said *proviso* in the present case. Applicant therefore humbly submits that the Court of Magistrates, irrespective of its actual application or not, should have declared the *proviso* to be applicable.

> "That the second grievance consists in the fact that the Court of Magistrates was wrong in finding applicant guilty of being a recidivist. To this effect the Court referred to a judgement by a Court in Catania which became definitive on the 16th December 2006. No evidence to the effect that this judgement was delivered against applicant was brought. Moreover applicant, in his testimony, only stated that he was tried in Sicily; he never stated that he was convicted. According to our case-law, the identity of the person found guilty must be ascertained by an identity number or passport number. In default, other evidence identifying the person convicted as the person subsequently charged must necessarily be produced. In the absence of such evidence, it is trite knowledge that the person charged must be acquitted of being a recidivist. In this case, notwithstanding the manifest lack of evidence to this effect, the Court of Magistrates still found applicant guilty of being a recidivist."

6. The first grievance requires a reappraisal of the evidence. Now, from the prosecution evidence it results that on the 13th May 2009 Drug Squad police carried out a search on appellant and his yacht which was berthed at Manoel Island. On appellant the police found a packet of cigarette rolling paper and a small block of a brown substance found to be a block of cannabis resin wieghing 4.98 gm. From the yacht the police seized a transparent plastic bag containing 7.84 gm of crushed and pressed leaves from the cannabis plant, a small packet made from brown tape containing a transparent plastic bag with 25.71 gm of crushed leaves also from the cannabis plant, a transparent plastic bag containing two blocks of a white substance found to be cocaine and weighing respectively 28.61 gm and 29.85 gm, and a small portable electronic balance which contained traces of THC and of cocaine.

7. Appellant was interrogated by the Police but without the benefit of legal assistance. Consequently, in view of the more recent Constitutional developments and a line of decisions taken by this Court[1], appellant's statement is being disregarded.

8. Appellant gave evidence twice before the first Court. While there does seem to be a discrepancy between the first time he gave evidence and the second, in that when he first gave evidence at no time did he mention his former girlfriend, when he gave evidence the second time he clearly explained how she too used to abuse of cocaine and cannabis grass. This Court has carefully examined all the evidence produced before the first Court, both the prosecution evidence and the evidence for the defence so as to get a proper feel of the case and it has no hesitation in stating that what appellant did when he gave evidence the second time was to give a fuller picture. After all, on both occasions he admitted to

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[1] See, viz., Constitutional Court: **Carmel Saliba vs l-Avukat Ġenerali**, 16th May 2016; Criminal Appeal (Superior): **The Republic of Malta v. Chukwudi Samuel** Onyeabor; Criminal Appeal (Inferior): Il**-Pulizija v. Mark Zahra**, 26th April 2017.

possession of the drugs for personal consumption, but bringing his former girlfriend into the picture when he gave evidence the second time. It is to be pointed out that the evidence shows that appellant and his girlfriend were in an intimate relationship and lived together.

9. Now, appellant has been charged with possession of cocaine and of cannabis grass not for his exclusive use and with possession of cannabis resin for personal use. As to the cannabis resin there is appellant's clear admission. As to the cocaine he claims that it was for his and his girlfriend's use. This Court does not in any way doubt what appellant has said in this regard. His evidence is borne out by the evidence of witnesses he produced. David Carter refers to an occasion when he and his family were on appellant's boat and after dinner appellant's girlfriend produced a bag of what he assumed was cocaine, tipped it on the table, made lines and she and appellant snorted it. On another occasion in the U.K. he picked up appellant and his girlfriend from the airport and as soon as they got into the car she produced a mirror, put again what he assumed was cocaine on it and she and appellant snorted it. Another two witnesses, Christopher Calleja and Jesmond Galea Enriquez, though never witnessing drug taking, spoke of the change that came over appellant after he had started his relationship with his girlfriend. At this stage it must be pointed out that from the evidence it appears that appellant started his relationshop with his girlfriend around 2004/2005. This means that the Italian case happened while he was in said relationship and not before. Further reference will be made to this case *infra*. Appellant states that he used to purchase the cocaine either with his money or his girlfriend's.

10. It has been submitted that appellant's should be considered as a case of "sharing". In this respect, reference is made to the relative provision of the Dangerous Drugs Ordinance which deals with the concept of "sharing". Subarticle (9) of article 22 of that law (Chapter 101 of the Laws of Malta) states:

> **"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".**

11. In the Criminal Appeals **Il-Pulizija v. Russell Bugeja** and **Il-Pulizija v. Marco Galea**, both decided on the 5th May 2008, said proviso was explained in the following manner:

> **"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 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 jittraffika 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[2], il-piena mandatorja ta' prigunerija b'effett immedjat."**

12. Appellant's (and his girlfriend's) activities do not appear to fall into this definition of "sharing". However, reference is being made to another two judgements delivered by this Court, both differently presided.

13. In **Il-Pulizija v. Ryan Galea** decided on the 25th November 1999, it was stated:

> **"Illi mill-provi prodotti jirrizulta li kemm l-appellant kif ukoll it-tfajla tieghu, darba minnhom, kienu ddecidew li jixtru d-droga Cannabis flimkien. Jirrizulta li l-flus sabiex tinxtara din id-droga hargithom it-tfajla, ossia l-gharusa, ta' l-appellant.**
>
> **"Illi meta huma marru bil-karozza misjuqa mill-appellant u waqfu sabiex jixtru din id-droga, dak li bieghhilhom id-droga mar hdejn is-sewwieq, u veru, fil-fatt, id-droga fizikament ghaddiet l-ewwel f'idejn l-appellant. Hu hallas bil-flus li kienet taghtu l-gharusa tieghu, u meta ha id-droga, hu ghaddielha parti minnha, stante li dik id-droga mixtrija minnhom flimkien kienet intiza ghat-tnejn li huma.**

[2] Ara it-tieni *proviso* tas-subartikolu (9) ta' l-Artikolu 22: "Izda wkoll il-hati jista' jikseb beneficcju ghal darba wahda biss mid-disposizzjonijiet tal-*proviso* li jigi minnufih qabel dan."

"Illi, fil-fehma ta' din il-Qorti, dawn il-fatti ma jwasslux sa l-estremi ta' traffikar tad-droga da parti ta' l-appellant. Mhux kaz ta' 'sharing' tad-droga fis-sens li hu biss gja kellu id-droga, kien xtraha jew ottjeniha hu biss, u ta minnha lill-terzi. Il-fatti rizultanti ma jinkwadrawx ruhhom fl-elementi kompleti rikjesti ghal traffikar ta' droga, izda semplicement ta' pussess illegali taghha."

14. In **Il-Pulizija v. Claire Farrugia** decided on the 17th March 2005, it was held:

"Illi mill-gurisprudenza johrog car li biex ikun hemm is-"*sharing"* li jammonta ghal traffikar irid ikun hemm il-fattispecji li wiehed ikollu **d-droga w jaqsamha ma xi hadd jew jippermetti lil haddiehor li juza minnha anki minghajr hlas jew korrispettiv (App. Krim.** "Il-Pulizija vs. Marvan Cachia**" [26.8.98],** "Il-Pulizija vs. Martin Pirotta" **[15.12.98] u** "Il-Pulizija vs. David Gatt" **[11.4.2002] u ohrajn). Imma d-droga l-ewwel trid tkun ghandu, mbaghad jaqsamha ma' jew jikkonsenja lil haddiehor. Issa fil-kaz in ezami id-droga ghalkemm fizikament inghatat f'idejn l-appellanti mit-traffikant, kienet qed tinxtara flimkien ma Magro u bi flus Magro stess, li ukoll gab is-siringi biex id-droga tkun tista' tigi somministrata lilu. Ghalhekk hawn kien hawn koakkwist minn Magro u l-appellanti."**

15. A parallel may be drawn in this case with the situation in these cases. Indeed in the present case appellant and his then girlfriend were, as stated, in an intimate relationship, they both abused drugs and drugs were acquired jointly for both their use. The fact that they had joint possession for their own use means that what we are faced with here is a case of simple possession.

16. As to the cannabis grass, appellant states that the cannabis grass was not his but his girlfriend's as he did not smoke it because he found it too strong and it effected his judgement. In saying so, of course, he was admitting to having smoked it as otherwise he would not have known its effect on him. Consequently here too one must consider this a case of simple joint possession.

17. The second grievance refers to the question of recidivism, i.e. whether in view of the offences with which appellant was charged, he should be considered a recidivist. Appellant submits that there is no evidence attesting that he was previously convicted of a criminal offence. In this respect reference is first to be made to article 49 of Chapter 9 of the Laws of Malta as it stood at the time the offences in question were committed:

"(1) A person is deemed to be a recidivist if, after being sentenced for any offence by a judgement which has become *res judicata*, he commits another offence:

> **Provided that the court may, in determining the punishment, take into account a judgment delivered by a foreign court which has become absolute.".**

18. At fol. 153 of the record of the proceedings is a certificate issued by Dr Donatella Frendo Dimech, then Head of the International Co-Operation in Criminal Matters Unit at the Office of the Attorney General whereby she certified receipt of a document from the Italian National desk at Eurojust (fol. 154 – 155). This document consists of a certificate known as "Certificato del Casellario Giudiziale" issued by the Italian Ministry of Justice being an extract from the *Procura della Repubblica presso il Tribunale di Salerno* regarding a judgement delivered by the Court in Catania on the 19th December 2006, confirmed on appeal on the 31st May 2007 and declared final on the 16th September 2008 against a Richard Alistair Cranston born in 30th May 1967 at Beaonsfield Great Britain. These particulars tally with those of appellant, save that the precise place of birth is, as indicated in his passport, Beaconsfield. From this "Certificato del Casellario Giudiziale" it results that the case referred to illegal possession of drugs for which the Catania Court awarded a punishment of imprisonment and the payment of a fine. Appellant himself, though not saying that he was "convicted", confirms that he was "tried" for cocaine in Sicily. Consequently this Court finds that such documentation constitutes sufficient evidence to the effect that appellant had already been convicted of a crime. Extradition proceedings (attached to the record) following the issuing of a European Arrest Warrant pursuant to said criminal proceedings further attest to this.

19. Reference is being made to article 50 of the Criminal Code which provides:

> **"Where a person sentenced for a crime shall, within ten years from the date of the expiration or remission of the punishment, if the term of such punishment be over five years, or within five years, in all other cases, commit another crime, he may be sentenced to a punishment higher by one degree than the punishment established for such other crime."**

20. In view of the punishment awarded by the Catania court, for article 50 to apply, a crime has to be committed within five years from the expiration of the punishment awarded. In the present case it does not result that when the offences in question were committed appellant had served his sentence. Therefore article 50 is not applicable.

21. As to the punishment awardable, one must take into consideration in the first instance that appellant is to be declared guilty of simple possession. Moreover, his updated conduct record is still clean. It is important to note that there is no evidence that he continued abusing of drugs. Indeed two urine tests

taken during the compilation of a social inquiry report turned out negative for any illicit drugs. He works regularly and is now married and, as results from the social inquiry report, appears to be leading a stable life.

22. For these reasons the Court disposes of the appeal by varying the appealed judgement in that (1) in respect of the first two charges it revokes the finding of guilt in respect of the qualification that "the drug was found under circumstances denoting that it was not intended for his personal use" and declares him not guilty in respect of such qualification and acquits him therefrom; (2) it revokes it in so far as it condemned him to a term of imprisonment of two (2) years and to the payment of a fine (multa) of €6,000 (six thousand Euros), and instead condemns him to a term of twelve months imprisonment which sentence shall, in terms of article 28A of Chapter 9 of the Laws of Malta, not take effect unless, during the period of four years from today, he commits another offence punishable with imprisonment. This Court explained to appellant his liability under article 28B if during the operational period he commits an offence punishable with imprisonment. The Court further condemns appellant to the payment of a fine of three thousand euros (€3,000). Furthermore it confirms the appealed judgement as to the remainder. The Court finally draws the attention of the Court's Registrar to the responsibility outlined in article 28A(8) of Chapter 9 of the Laws of Malta.