Court of Criminal Appeal

Hon. Mrs. Justice Dr. Edwina Grima LL.D.

Appeal Nr: 331/2016

The Police

[Inspector Malcolm Bondin]

Vs

Mumen Traore sive Mumin Trabule'

Today the, 28th September, 2017,

The Court,

Having seen the charges brought against Mumen Traore sive Mumin Trabule'holder holder of Maltese Identity card number 43874 A and Police number 60X-039 before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

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

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

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

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

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

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

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

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 7th September, 2016 whereby the Court after having seen Parts IV and IV, Sections 8 (d), 22 (1) (a), 22 (2) (b) (i) and (ii) of Chapter 101 of the Laws of Malta, Regulation 9 of Subsidiary Legislation 101.02, Sections 17, 49 and 50 of Chapter 9 of the Laws of Malta and Section 23 of Chapter 446 of the Laws of Malta, found the accused guilty of the charges brought against him and has been condemned him in respect of charges (a), (b) and (c) to **twenty one (21) months effective imprisonment** – from which term one must deduct the period of time, prior to this judgement, during which the person sentenced has been kept in preventive custody in connection with the offences of which he was found guilty by means of this judgement – and **a fine (multa) of two thousand Euro (€ 2,000)**. In respect of charge (d), the Court after having seen Sections 17, 49, 50, 261(c) and (f), 267, 270, 279(a), 280(1) and 334(a) of Chapter 9 of the Laws of Malta, is dealing with the accused in respect of the offences of which he was found guilty by means of the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 7th November 2014 and condemns him to **twelve (12) months effective imprisonment**.

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

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

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

Having seen the appeal application presented by the appellant Mumen Traore sive Mumin Trabule' in the registry of this Court on the 12th September, 2016 whereby prays this Honourable Court to reform the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 7th September 2015 in the case in the above mentioned names and this by;

Firstly revoking and cancelling that part of the judgment under which appellant was found guilty of the first charge proffered against him and consequently acquits him of that charge;

Secondly by revoking and cancelling the penalty of twenty-one months effective imprisonment and the fine of two thousand euro (€ 2000) inflicted upon appellant;

Thirdly by revoking and cancelling the order of the Court of First Instance condemning appellant to pay all the experts' lees;
Fourthly by confirming appellant' s guilt in so far as the second charge proffered against him is concerned and consequently confirms his guilt in so far as the third charge proffered against him is concerned but not the

punishment inflicted relatively to these two charges, namely the second and the third charges;

Fifthly by revoking and cancelling the fourth charge proffered against appellant on the basis of the legal maxim *ne bis in idem* and consequently acquits appellant of this charge and consequently revokes and cancels the penalty of twelve months effective imprisonment inflicted upon appellant relatively to this charge; and in the sixth place, in so far as the punishment related to the second and third charges is concerned to impose upon appellant a penalty which is appropriate to the case in which one is found in possession of a very small amount of the plant cannabis (0.18 g) for one' s personal use is concerned after also considering that section 50 of the Criminal Code (Chapter 9 of the Laws of Malta) does not impose upon the Court an obligation to inflict a heavier punishment for recidivism but only empowers the Court to do so if it may so deem fit.

Finally, in case that this Honourable Court does not accept this appeal as regards guilt under the first charge to impose a punishment which is more appropriate to all the circumstances surrounding this case by also considering the small amounts of dangerous drugs involved.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of the appellant Mumen Traore sive Mumin Trabule', whereas the grievances of the appellant are clear and manifest and consists of the following:

The Court of First Instance came to the conclusion that appellant is guilty of the first charge proffered against him (possession of the dangerous drug heroin not intended for his own use) even if there is conflicting evidence as to whether it was appellant who had actually thrown away the capsule which contained was later found to contain heroin. It is true that PS 1086 Johann Micallef and appellant do not agree on the number of persons who were gathered together prior to appellant' s arrest but even PS 1086 agrees that there were other persons gathered on the scene besides appellant. It

has been established that at the lime of appellant' s arrest it was dark and the only lighting available was a public lamp post. Indeed, it could easily have happened that the capsule which landed near to the foot of PS 1086 was thrown away by one of the other persons. What is certain is the fact that PS 1086 Micallef could not remember almost any other details regarding the case except that the capsule las thrown away by accused.

The Court of First Instance whilst giving one hundred per cent credibility to PS 1086 Johann Micallef, who could easily have easily been mistaken given all the circumstances obtaining at the time of the arrest of appellant, did not give any credibility to appellant amongst others because of his demeanour on the witness stand. In this reoens it must be stated that whilst PS 1086 is a seasoned witness in our Courts of Criminal Justice appellant is not. Furthermore appellant had testified in English which is not his mother language which is French. Furthermore whilst the Court of First Instance acknowledged that accused had the right to remain silent during the police interrogation castigated him for refusing to tell the police the truth about another subject matter (the possession of cannabis). Furthermore, without having any proof at all, the Court of First Instance came to the conclusion that appellant can write and read English because some messages received in English were found cn his mobile phone. Since when the receiving of a message in a particular language means beyond reasonable doubt that the receiver of that message knows how to read and write in that language?

Indeed there are several circumstances, besides the testimony of appellant who denied that the capsule belonged to him and / or was thrown away by him, which raise a reasonable doubt as to the guilt appellant regarding the first charge proffered against him.

In so far as the Fourth charge proffered against apappellant is concerned, appellant has already been found guilty of the offence in a previous separate case and it appellant' s guilty is confirmed in the case The Police vs Moumen Troure pending on appeal before this same Honourable Court then appellant may not be found guilty on the basis of the legal rule *ne bis in idem*.

Finally appellant humbly submits that the punishment inflicted upon him is at any rate very high considering the small amount of dangerous drugs

involved as well as the fact that section 50 of the Criminal Code (Chapter 9 of the Laws of Malta) does not render the increase in punishment mandatory in the case of recidivism.
Considers,

The grievance put forward by appellant attacking the judgment delivered by the First Court is directed mainly towards the finding of guilt for the first charge brought against him regarding the offence of aggravated possession of the drug heroin. He laments that the First Court made an erroneous appreciation of the facts expounded before it and this when accepting the evidence of the only witness PS 1086 Johann Micallef as credible contrary to that of appellant which was discarded by the said Court as untruthful and unreliable and this on the basis of a series of inconsistencies found in the said testimony when compared to the written statement released by him upon his arrest.

Now it has been constantly affirmed by jurisprudence that a court of second instance will very rarely vary the findings of the First Court based on an appreciation of the facts of the case as outlined in the evidence heard before that Court unless such appreciation was incorrect both legally and factually to the extent that a miscarriage of justice will result based on such conclusions. The oft quoted maxim delivered in the case R vs Cooper(1969) by Lord Chief Justice Widgery by our courts in their appellate jurisdiction advocates:

"assuming that there was no specific error in the conduct of the trial , an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone . However, should the overall feel of the case – including the apparent weakness of the prosecution evidence as revealed from the transcript of the

proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed[1]*."*

In fact in this case the First Court based its findings on the demeanour of the two conflicting witnesses on the witness stand being PS1086 and the appellant, an exercise this Court unfortunately is not in a position to conduct, having to rely on the transcribed evidence as found in the acts as compiled before the First Court. Therefore although appellant laments that the First Court has relied partially on this fact in reaching its guilty verdict, being the demeanour and conduct of the witnesses, however our Criminal Code provides as one of its guidelines in assessing the credibility of a witness as being his conduct and demeanour on the witness stand, article 637 of the Criminal Code stating that with regards to the credibility of a witness:

"….the decision shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case."

Consequently the objection put forward by appellant regarding the exercise carried out by the First Court as to the credibility of the evidence of PS1086 and his own testimony are unfounded at law since it is left in the hands of those who are to judge to assess such credibility based *inter alia* on the demeanour, conduct and character of the witnesses.

The Court however has examined the evidence found in the acts of these proceedings and has found that the probative facts which the First Court has relied upon in its judgment all point towards the guilt of the accused to this first charge brought against him. Although as appellant rightly points out the Prosecution has relied on the testimony of PS1086 Johann Micallef as the only witness who saw the drug heroin in the possession of the accused, appellant having denied this fact, however the circumstantial

[1] The Police vs Jason Joseph Farrugia amongst others. 30/06/2004

evidence found in the acts all go to corroborate such a testimony. Appellant alleges that it was impossible for PS1086 to have seen him throw the capsule of heroin towards him as the witness claims. He affirms that together with him there were around another ten people present and it was dark, thus putting into doubt the veracity of the testimony of Micallef alleging that it was impossible for the witness to have actually seen him throw the capsule. Indeed PS Micallef confirms that there were other people present with appellant although he does not agree as to the number of such persons and also that it was dark, however the witness clearly affirms that he was a short distance away from appellant when he actually saw him throw the capsule which capsule landed exactly next to his shoe. The First Court gave a very detailed analysis of the evidence at hand in the acts and this Court sees no valid reason at law to disturb such findings. There is no doubt that PS0186 observed appellant throw the capsule which landed at his feet while he was standing a short distance from him. PC760 also observed appellant throw his mobile phone as well thus clearly indicating appellant's intention of ridding himself of all incriminating evidence. In fact from the report complied by court-appointed expert Steven Farrugia Sacco an incriminating message in the English language was found and although appellant alleges that at the time his knowledge of the English language was minimal, however he also admits that the phone belonged to him and that he alone makes use of it. Also the testimony of appellant is lacking in any detail and he does not give a clear explanation of what transpired on that evening of the 7th March 2017 as opposed to PS1086's testimony. Now once the appellant had decided to waive his right to silence and take the witness stand, the burden of proof was transferred onto him and this to prove on a balance of probabilities that his version of facts was correct. Therefore it is not enough fro him to simply state that he was not the person to throw the package away containing the heroin and stop there but he has to disprove the evidence of the prosecution and this on a balance of probabilities, a degree of proof which in the opinion of this Court he does not manage to achieve through his testimony.

"*The principles applied by Maltese Courts of Criminal Justice in this field are quite clear: (i) it is for the prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence.*[2]"

Applying consequently these fundamental principals of our criminal justice system, this Court cannot but affirm that appellant has not proven his case and the findings of the First Court are therefore legally and factually justified and finds no reason to vary the same.

The appellant puts forward no grievance regarding the finding of guilt with regards to the second and third charges, however laments that he had already been tried with regard to the fourth charge, being accused therein of having committed the offences he stands charged with in this case within the probationary period imposed by the Court of Magistrates in its judgment of the 7th November 2014. This grievance is well-founded since appellant had been tried for breach of the Probation Order issued on the date indicated by the Magistrates Court and this by a judgment of this same Court as presided of the 27th October 2016. Consequently this grievance is being upheld and the further period of 12 months imprisonment imposed by the First Court for the said breach is being revoked.

[2] The Republic of Malta vs Gregory Robert Eyre et – Constitutional 01/04/2005

Finally the appellant maintains that the First Court should not have treated him as a recidivist in terms of Section 50 of the Criminal Code taking into consideration the fact that a small amount of drugs was involved and that the increase in punishment is not mandatory on the Court in the fixing of punishment. Apart from this the 21 month term of imprisonment, he argues, is excessive in the circumstances.

Now it has been constantly affirmed by local and foreign jurisprudence that a court of second instance will very rarely vary the punishment meted out in the appealed judgment and this where such punishment falls within the parameters defined by law. Now in this case the Court cannot ignore the conduct sheet of accused wherein it results that he is a repeat offender and this for a variety of offences. Also the punishment inflicted by the First Court was well within the parameters laid down by law for the crime of aggravated possession of drugs, appellant having clearly had the intention to traffic such drugs which as admitted by himself he did not make use of. Consequently even this grievance is being rejected.

Consequently for the above-mentioned reasons, the Court upholds the appeal only partially, confirms the judgment of the First Court with regards to the finding of guilt for the first three charges brought against him and confirms also the punishment of 21 months imprisonment and the fine of two thousand Euro (€2,000) imposed by the First Court, together with the payment of the court expenses in terms of Section 533 of the Criminal Code, the destruction of the drugs exhibited in this case and the forfeiture of the Document NS2, however revokes the finding of guilt with regards to the fourth charge and acquits the accused from the same.

(ft) Edwina Grima

Judge

VERA KOPJA

Franklin Calleja

Deputy Registrar