



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

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

Case Number: 105/2017

Today, 24th January 2018

**The Police
(Inspector Gabriel Micallef)**

vs

**Mohamed Omar Isse
(ID 128641(A))**

**Yusuf Abdilahi Muktar
(ID 9000080(A))**

**Mohamed Abdel Rashid
(ID 48487(A))**

**Abdiaziz Hazzan Ibrahim
(ID 82359(A))**

**Abdi Ali Mahamed
(ID 9000692(A))**

**Abdifatah Ali Mohamed
(ID 9000079(A))**

The Court,

After having seen the charges brought against the accused:

Mohamed Omar Isse, 21 years old, son of Omar and Miriam, born in Somalia on 1st January 1996, residence at 50 Hilltop Blk A, Flat 1A, Triq is-Sliem, Marsascala and holder of Maltese Identity card number 128641(A);

Yusuf Abdilahi Muktar, 21 years old, son of Yusuf and Tirric, born in Somalia on 18th July 1995, residence at St. Joseph, Flat 3, Triq San Gorg, Hal Safi, holder of Maltese Identity card number 9000080(A);

Mohamed Abdel Rashid, 25 years old, son of Abdirashid and Hawa Ali, born in Somalia on 30th July 1991, residence at 90, Dar il-Liedna, Fgura and holder of Maltese Identity card number 48487(A);

Abdiaziz Hazzan Ibrahim, 26 years old, son of Hassan and Khadra, born in Somalia on 1st February 1991, residence at Hal Far, limiti ta' Hanger Open Centre, Birzebbugia and holder of Maltese Identity card number 82359(A);

Abdi Ali Mahamed, 21 years old, son of Ali and Nuro, born in Somalia on 1st January 1996, residence at Tower A3, Flat 917, Triq l-Arkata, Paola and holder of Maltese Identity card number 9000692(A);

Abdifatah Ali Mohamed, 22 years old, son of Ali and Ivado, born in Somalia on 1st January 1995, residence at 16, Michela, Triq il-Habberxa, Marsascala and holder of Maltese Identity card number 9000079(A);

Charged with having on 1st July 2017 in St. Julian's:

1. Had in their 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 the Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for their personal use;
2. Had in their possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the resin obtained from the plant cannabis, or any other preparation of which such resin formed the base, in

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

3. Had in their possession the drugs (cocaine) specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, when they are 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 they were not licensed or otherwise authorised to manufacture or supply the mentioned drugs, and were not otherwise licensed by the President of Malta or authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs was supplied to them for their 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 intended for their personal use;
4. Produced, sold or otherwise dealt with the whole or any portion of the plant cannabis in terms of Section 8(e) of Chapter 101 of the Laws of Malta;
5. Produced, sold or otherwise dealt in the resin obtained from the plant cannabis, or any preparation of which such resin formed the base, in terms of Section 8(b) of Chapter 101 of the Laws of Malta;
6. Supplied, or distributed, or offered to supply or distribute the drug (cocaine), specified in the First Schedule of the Dangerous Drug 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 other 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 they were not duly licensed or otherwise authorised to manufacture or supply the mentioned drug, when they were not duly licensed to distribute the mentioned drug, in pursuance of the provisions of Regulation 4 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;

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

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

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

Having heard the Prosecution declare that it was resting its case on the evidence produced and final oral submissions made by the defence.

Considered that:

This case rests mainly and primarily on the deposition of the Prosecuting Officer, Inspector Gabriel Micallef, who states that on the night of 1st July 2017, whilst Police Officers were conducting several patrols in the area further down from the Axis Complex in St. George's Road, Paceville, and whilst he was walking through this part of the street, he observed the six accused "*loitering in the street and stopping passers-by and asking them if they wanted something good. The exact words were 'something good, cocaine, hashish'.*"¹ He states that he had heard all six accused saying these words and he instructed his colleagues to arrest them. A search in the area where the said six were loitering, yielded several substances, which resulted to be cannabis and cocaine and which were found in various places, as described by PS 1163 Frans Schembri in his deposition.

Inspector Micallef explains that he passed by the accused on foot several times, that he could hear them stopping passers-by, offering cocaine and hashish and that "*we*" observed several exchanges, although none of the buyers were stopped. Passers-by who had just walked by the accused, were also complaining that they were being stopped and offered drugs. Asked specifically about the exchanges

¹ A fol. 30 of the records of the case.

which he had observed, he explains the *modus operandi* which they employed, namely one would stop a third party offering drugs, and if the latter showed an interest, the first would indicate to the second to get the drug, with the third party then paying another man. He states that this latter man, who had been collecting money, fled the area before the police proceeded with the arrests. He states that all accused were involved in this *modus operandi* and asked specifically by the Court whether he could positively state that each of the six accused was involved in these exchanges, he replied “*Yes we started this about 4.00 p.m. and we concluded it at about 10 p.m.*”² Asked again to identify who of the accused was involved in the exchanges which he indicated, witness again replies that he had heard all six accused stopping passers-by and offering hashish and cocaine. Upon another question by the Court as to who of the accused had passed drugs to the third parties, he states “*One of them. Every time one of them would be passing the drug. Now always the same person but it is like some sort of a shift*”³ He further states that the drugs were being obtained from the area in which, subsequently, the substances were found by the police and that all six accused had been seen approaching this area.⁴

In cross-examination, Inspector Micallef states that he had never seen accused prior to that night. He states that he was walking through the street and that he was alone. He could not recall the time at which his observation started but he states that he was there “*for approximately 30 to 45 minutes*”⁵ During this time, he walked up and down the street several times, though not continuously. He states that the other police officers, who had a good view of the street were PC 760 and PC 1348. Inspector Micallef also states that in all, the six accused had approached circa twenty to twenty five people and that in once instance, a third party had been left waiting for twenty to twenty five minutes. He could not remember who of the accused had approached this prospective buyer. He also states that “*we*” had actually stopped some of the third parties, but the accused by then had noticed that they were being observed by the police and so they were avoiding supplying drugs in that area. He explains that in one instance, one of the accused had walked all the way to the beach by the Millennium Chapel and made contact with a third party there, only to leave him waiting. In another instance, three clients were given a signal to walk down to the beach at the end of St. George’s Road and they were provided with drugs by another, who was not one of the accused. The first contact was made with one of the accused, though the witness did not indicate who this

² A fol. 33 of the records.

³ A fol. 33 of the records.

⁴ *Vide* Inspector Gabriel Micallef’s testimony, a fol. 29 to 35 of the records of the case.

⁵ A fol. 80 of the records.

was. Inspector Micallef explains that he did not take a statement from any of the approached third parties because accused were not supplying any drugs at that time. He states that accused had noticed the police's presence and he followed through with their arrest upon confirming that they were offering drugs to passers-by. He also states that part of St. George's Road is not very busy. The accused were not interrogated and no fingerprints were taken. He further states that he was walking up and down the very end of St. George's Road, close to accused so that he could hear what was being said, but at the same time trying to avoid being noticed. He would stop by the railings leading to the beach, smoke a cigarette and walk up the street again.

It also results that no substances were found on the persons of accused and none were found in those residences where a search was conducted.

PC 1564 Kyle Zammit states that he was conducting an observation with PC 1348 at St. George's Road, St. Julians, Paceville at about 10.30 p.m., during which he was not in a position to observe anything and that at around 11.00 p.m., they proceeded to arrest the accused. PC 1124 Steve Borg also confirms that he had assisted in accused's arrests at about 11.00 p.m.

PC 1348 Joseph Campbell states that he was working on night duty with Inspector Micallef and his colleagues, conducting an observation in the area well known for drug trafficking. He explains that he was carrying out his observation from a higher point, in the parking area of the ex-Axis Discotheque. From this point, *"I could recognise these same people that were in the same area where normally drug trafficking takes place"*⁶, underneath the parking lot, slightly further down from Hugo's. He further explains that he could see them being approached by and approaching passers-by. Asked specifically by the Court as to what he had observed, he states that *"it was just a short time of observation because we just arrived and we decided to hit them straight away"*.⁷ He states that he could observe the accused making contact with third parties and that he was not in a position to hear what was being said as he was far away.

PC 760 Christopher Saliba states that on the same night, he was conducting an observation in St. George's Road, Paceville and at about 11.00 p.m., he noticed several people coming down towards the street and making contact with several dark skinned people. At about 11.00 p.m. or a few minutes after such time, he was

⁶ A fol. 44 of the records.

⁷ A fol. 44 of the records.

informed by Inspector Gabriel Micallef that they were about to search these men, who at that point, were leaning against a rubble wall in the same road. He states that at the time, they were not together in a group, but scattered, though in the same road. He explains that his observation point was close enough to this road, though “*a bit far away*”⁸ and although he could observe the movements, he could not identify the people involved as he was not close enough and it was also dark.

PS 1163 Frans Schembri states that on 1st July 2017, they were patrolling St. George’s Road and the area in the vicinity, where they saw about six dark-skinned people stopping passers-by and “*getting some things from the walls or the pavements*”.⁹ At one point, these six people were together in St. George’s Road, sitting down, and they were instructed to search all six. Nothing was found in their possession during this search. Subsequently, a search was conducted in the area with the assistance of a dog handler and a police dog. This search was conducted from the top of St. George’s Road, all the way down in the direction of Sky Club and on the other side of the road leading to the bay. Various substances were found in about seven or eight spots, which are indicated by the witness in his testimony. He states that they had seen accused walking around these areas and “*touching some places*”¹⁰ and this is what lead them to conduct searches in these spots. In this regard, he explains that he was not close to them but “*from far away I noticed that one of them went on that site and did something over there. For sure he did something. I do not know what he did but I saw him touching that place.*”¹¹ He recognised the six accused as the group of people who were arrested from the area.

From the report exhibited by Professor Emanuel Sinagra¹², it results that he was handed over an evidence bag which contained several substances – four plastic sachets containing white powder that weighed 3 grams, a solid brown substance that weighed 4.6 grams (which tested negative), six black plastic sachets containing green grass, weighing 22.7 grams, 5 pieces of brown substance with a weight of 16.1 grams and 9 transparent plastic sachets that contained in total 48.1 grams of green grass. In terms of the said report, the substance cocaine was found in the white powder, the substance *Tetrahydrocannabinol* was found in the five pieces of brown substance and the same substance was also found in the green grass which in total weighed 70.8 grams.

⁸ A fol. 75 of the records.

⁹ A fol. 48 of the records.

¹⁰ A fol. 49 of the records.

¹¹ A fol. 49 of the records.

¹² *Vide* a fol. 60 to 69 of the records.

All six accused chose to take the witness stand during these proceedings.

Considered further that:

All six accused are being charged with possession of the plant cannabis, cannabis resin and cocaine, found in circumstances denoting that these were not intended for their personal use, as well as with dealing in the said plant, resin and cocaine.

As held above, the case of the Prosecution rests primarily, if not solely, on the deposition provided by Inspector Gabriel Micallef, who states to have heard all six accused offering cannabis and cocaine to passers-by on the night in question. In this regard, the Court observes first of all, that whilst in his examination-in-chief, Inspector Micallef states that this observation lasted between 4.00 p.m. and 10.00 p.m., and therefore, that an extensive six hour observation had taken place, on the other hand, during his cross-examination, he states that his observation lasted approximately between thirty and forty-five minutes. The Court further notes that although Inspector Micallef insists several times that he had heard all six accused offering cocaine and cannabis to passers-by, yet when he is asked by the Court to indicate who of the accused supplied drugs to third parties, he could not indicate any of the accused specifically and merely replied “*One of them ... Now (which in the context should more likely read ‘Not’) always the same person but it is like some sort of a shift*” and neither could he indicate how each accused was involved in the *modus operandi* which they were allegedly adopting, short of stating repeatedly that he had heard all six offering drugs. In this regard, on the basis of a thirty to forty-five minute observation, the Court wonders how many such shifts the Inspector had actually noticed. Moreover, subsequently when asked to identify who of the accused was seen approaching the areas where drugs were eventually found, he again refers to all six accused indiscriminately. When asked to indicate who of the accused had contacted the three people who, he states, had presumably acquired cannabis further down the road, close to NSTS Complex, the Inspector was not in a position to do this. Neither was he in a position to state who of the accused had made contact with the third party who walked all the way to the beach by the Millennium Chapel, allegedly waiting to be supplied with drugs.

Furthermore, whereas in his examination-in-chief, Inspector Micallef states that none of the buyers were stopped, in his cross-examination he states that they had stopped some third parties who had been approached but by that time, accused had

noticed that they were being observed and had therefore stopped supplying drugs. In this regard, the Court notes that it does not result from the records of the case whether such third parties were stopped by Inspector Micallef himself or other police officers and whether for instance, he himself or other police officers had followed one of the accused or the prospective buyer to the beach by the Millennium Chapel. None of the police officers who gave their testimony refer to this part of Inspector Micallef's testimony. In any case, if by the time that Inspector Micallef was on the scene conducting his observation, namely in the thirty to forty-five minutes time frame to which he refers, accused had realised that the police were onto them and had stopped supplying drugs in the area, as Inspector Micallef states, he could not have observed accused's alleged *modus operandi* for such a long span of time. The Court also notes that PC 760 could not identify the accused as his observation point was not sufficiently close to do so and the road was dark, whilst although PC 1384 Joseph Campbell states to have seen "*these people over here*" approaching third parties in the street, he could not hear what was being said as he was too far away and more importantly, he states that his observation time was short "*because we just arrived and we decided to hit them straight away*". This testimony offers no comfort to the Court by way of corroborating Inspector Micallef's testimony that indeed all six accused were involved in offering and dealing in drugs. Likewise, PS 1163 Frans Schembri's testimony is not sufficiently specific, when he describes how 'we' noticed "*about 6 people with dark skin colour stopping other people in the road and getting some things from the walls or pavements*". Apart from specifying that all six accused were present in St. George's Road when it was decided that they should be stopped and searched, he states that "*we*" had seen them walking around the spots from where drugs were later retrieved and "*touching*" some of these spots, and yet he subsequently specifies that he had only seen one of them fiddling in one of the said spots, without however identifying whom he had seen.

In view of the above, whilst the Court does not doubt that drug dealing was taking place in the area at that time, and furthermore does not find most of the accused's version credible particularly when they refer to their state of intoxication, yet it finds that the evidence adduced is not sufficient to lead it to conclude beyond any reasonable doubt that all the six accused were dealing in cannabis and cocaine or were in possession of such drugs in circumstances denoting that these were not intended for their personal use. As held above, despite Inspector Micallef's assertion that he had heard all six accused offering cannabis and cocaine, his testimony is too generic, devoid of any specific indication and elaboration as to how each and every one of them was involved in the alleged *modus operandi* that was being adopted, which consequently, apart from not proving to the degree

required by law that all or some of the drugs found in the area pertained to all six accused, neither does it allow the Court to conclude beyond any reasonable doubt that all accused were offering both cannabis and cocaine and therefore dealing in drugs.

The Court therefore finds that the charges brought against the accused have not been proved to the degree required by law.

Accordingly neither can the Court apply the provisions of the second proviso of Section 22(2)(b) of Chapter 101 of the Laws of Malta.

The Court further notes that although the accused Mohamed Abdel Rashid admits to having used cannabis grass in the afternoon of 1st July 2017, yet he states to having done so in Marsa and not in St. Julians, Paceville. The charge of possession of cannabis grass – albeit in circumstances denoting that this was not intended for his personal use – specifically refers to 1st July 2017, in St. Julians, and therefore neither can accused Abdel Rashid be found guilty of the charge of simple possession of cannabis grass.

Conclusion

For these reasons, the Court does not find the accused Mohamed Omar Isse, Yusuf Abdilahi Muktar, Mohamed Abdel Rashid, Abdiaziz Hazzan Ibrahim, Abdi Ali Mahamed and Abdifatah Ali Mohamed guilty of the charges brought against them and acquits them thereof.

The Court orders the destruction of the drugs exhibited as Document GM once this judgement becomes final and definitive, under the supervision of the Registrar, who shall draw up a proces verbal documenting the destruction procedure. The said proces verbal shall be inserted in the records of these proceedings not later than fifteen days from the said destruction.

Since the accused are being acquitted of the charges brought against them, Section 533 of Chapter 9 finds no application against accused.

Natasha Galea Sciberras
Magistrate