Court of Criminal Appeal

Hon. Mr. Justice Giovanni M Grixti LL.M., LL.D

Appeal No. 3/2017

The Police

(Inspector Jonathan Cassar)

vs

Abdikarim Isman Omar

Sitting of the 29th October, 2018.

The Court;

Having seen the charges brought against Abdikarim Isman Omar, holder of Maltese Indentification card number 119662(M) with having;

On 4th of September 2016 and the days before this date on the Maltese Islands;

1. Had in his possession (otherwise than in the course of transit through Malta of the territorial water thereof) the whole or 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;

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

And also for having on the Maltese Islands on the 4th of September 2016;

3. Committed an offence against decency or morals, by an act committed in a public place or in a place exposed to the public (Chapter 9, Section 209);

4. In the harbours, on the seashore or in any other public place, exposed himself naked or was indecently dressed (Chapter 9, Section 338(q));

5. Spit any substance or expelled mucus from the nose, or left or deposited human material excretion, including vomit, or left deposited any animal material excretion upon or unto any street or any public place (L.N. 344 of 2005, Schedule 1 Regulation 4(e)).

And also for having on the Maltese Islands between the month of November 2013 and the month of June 2014;

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

resin formed the base, in terms of Section 8(a) of Chapter 101 of the Laws of Malta.

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 expert.

Having seen the judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature delivered on the 26th December, 2016 whereby it found the accused not guilty of the third, fourth and fifth charges brought against him and acquitted him thereof, but found him guilty of the first, second and sixth charges (though with respect to the first charge, limitedly to 4th September 2016 and not the previous days) and condemned him to nine (9) months effective imprisonment – from which term one must deduct the period of time during which he has been detained in preventive custody in connection of which he is found guilty by means of the judgment – and to a fine of nine hundred and fifty Euro (€950). Furthermore, in terms of Section 533 of Chapter 9 of the Laws of Malta, the Court condemned the accused to payment of the costs incurred in connection with the employment of experts in these proceedings, namely half the expenses relating to the appointment of expert Scientist Godwin Sammut, amounting to the sum of one hundred and twelve Euro and ten cents (€112.10), half the expenses relating to the appointment of expert PS 659 Jeffrey Hughes, amounting to the sum of thirty six Euro and thirty cents (€36.30) and the expenses relating to the appointment of Dr. Steven Farrugia Sacco, amounting to the sum of four hundred and fifty Euro and fifty two cents (€450.52). The said expenses amount in total to the sum of five hundred, ninety eight Euro and ninety two cents (€598.92). The Court ordered the release of the mobile phone exhibited as

Document JC 7 and of the sum of one hundred and forty five Euro (€145) exhibited as Document JC 8 in favour of the accused. Furthermore, the Court ordered the destruction of Documents JC 5 and JC 6 once the judgment becomes final and definitive, under the supervision of the Registrar, who shall draw up a process verbal documenting the destruction procedure. The said process verbal shall be inserted in the records of these proceedings not later than fifteen days from the said destruction.

Having seen the appeal application presented by Abdikarim Isman Omar in the registry of this Court on the 3rd of January, 2017 whereby this Court was requested to **reform** the judgment being appealed, and **confirm** it only as to the sixth charge, and where he was acquitted of the 3rd, 4th and 5th charges, and **revoke** it for the remainder including punishment to be substituted by adequate measures and more pertinent to the case;

Having seen the updated conduct sheet of the appellant, presented by the prosecution as requested by this Court;

Having seen the grounds of appeal as presented by the appellant Abdikarim Isman Omar;

Having seen the records of the case;

Considered:

1. That appellant presented four grounds of appeal for consideration by this Court, the first being with regard to the lack of sufficient evidence for a finding of guilt accompanied by various arguments which will be dealt with in sequence. The second ground concerns the aggravation of distance from a place where young people habitually meet, whereas the third ground concerns the order for payment of the fees of experts with the fourth and final ground referring to the punishment meted out by the first Court;

2. The facts of this case relate to the discovery of sachets of drugs which the police claim to have been discarded by appellant on noticing their presence. From the evidence adduced by the witnesses of the prosecution which are all police officers, appellant was observed speaking to a group of persons in an area in Paceville when he then crossed the road and entered into a disused field. He was then noticed bending down and picking something up. When the police officers approached him, he appeared to throw away something which were later found to be six sachets which, after examination, were found to contain cannabis grass. The police then returned to the area where he was seen bending down and called in the canine section and a further four sachets were discovered hidden in nearby bushes together with several empty bags. Appellant claims that he did not have any drugs on him and that his only intention going into to the field was to urinate;

3. The Court must point out that the facts as summarised by appellant in his application of appeal are fraught with inexactitudes. The police decided to intercept appellant not simply because he was in a field but because he was followed there due to his suspicious behaviour in approaching people including a group of six persons subsequent to which he entered into a secluded area. When he again crossed onto the road, sachets of drugs were found in the immediate vicinity of appellant and not ten meters away as alleged by him. Empty bags were found next to the area where he

was previously seen bending down and then five other sachets containing cannabis grass were found hidden in the bushes and not next to appellant but the first Court acquitted the accused from any connection with regard to these last mentioned items.

4. The first reasoning of appellant is that the first Court attached great importance to the testimony of PS 518 Anthony Degiovanni who states that he was close to appellant yet states that it was his colleagues that had been observing him. Appellant is not correct in his first observation since PS 518 states that it was his colleagues who had been observing the accused speaking to people but when they approached him, he (PS 518) was three or four meters away and actually saw him throwing something away. This Court quite frankly cannot understand appellant's following remark: "*Within three meters it is so easy for anyone to hold up the extended arm of someone who is throwing away a packet or anything from his hand!*" and will therefore refrain from making any other consideration on same;

5. Appellant considers the presence of empty packets as perplexing "*and here the question of the finger prints was crucial. The material was plastic and consequently it marks more easily with fingerprinting. There was not even an attempt to have a mechanical fit of the packets. The empty and the full!*" As explained in para.3, the first Court found no connection between the accused, the empty sachets and the 5 full sachets found in the bushes. Since this conclusion is to the benefit of appellant and his reasoning, therefore, would only have been worthy of consideration had the first Court found otherwise;

6. The next argument brought forward by appellant is that the evidence of PS 518 Anthony Degiovanni is tantamount to a deduction or opinion and therefore not acceptable as evidence. The above mentioned witness testified that "*we tried to stop him and he threw away something which later resulted to be suspected*

cannabis grass. There were 6 bags" (fol 25). The only questions put to the witness under cross-examination were with regards to whether he found anything on the person of appellant. It was the first Court that asked the witness how far he was from appellant when he threw away something and what was it that he actually saw. The following answer ensued: "*Just behind him, Maybe 3 or 4 metres away. And as the others tried to stop him, he just threw them away"*;

7. The decision of the first Court is not only based on the testimony of PS 518 as is evident from the records of the proceedings. WPC 298 Stephanie Spiteri also stated in clear words that: *"As soon as he* [appellant] *crossed again the road and came near us, we stopped him and as soon as we told him we were police, he threw some sachets from his hand*". The evidence adduced by both the police officers is not an opinion or a deduction but a recounting of facts and the first Court could therefore safely consider same as direct evidence;

8. Appellant then argues that another opinion was expressed during the proceedings and included by way of evidence when referring to the packets found ten meters away as belonging to appellant. As already stated, appellant was acquitted from this charge. The inclusion of that charge is at the complete discretion of the prosecution and by doing so it is only alleging a fact attributable to the accused put for the decision of the Court which found in favour of appellant on this point;

9. This Court can not accept appellant's next argument that seems to imply that the first Court was impressed by the number of witnesses brought by the prosecution rather than by the content of their depositions. The first Court examined in detail the contents of the deposition of all the witnesses and was thorough and meticulous to the extent of discarding any evidence that might have led to a

finding of guilt on the 5 sachets discovered hidden in bushes as not being related in any way to the accused;

10. Appellant also argues that on the principle that a person charged has no duty to prove his innocence, then "*it is enough if what he deposes, or his attack on the case of the prosecution is enough to challenge the proof "beyond reasonable doubt" that remain the ultimate responsibility of the prosecution,* ***even in the appeal proceedings"***. If by such argument appellant contends that offering his testimony will automatically mean that the case against him can not be proved beyond reasonable doubt then he is utterly wrong. It has been affirmed in many a judgement, and perhaps at times needs to be restated, that the requirement of proof beyond reasonable doubt is very often misunderstood. Suffice it to cite one example where the Court of Criminal Appeal (Il Pulizija vs Ommissis 51/2003 of the 4 September, 2003) made reference to the judgement Miller vs Minister of Pensions – [1974 2 All E R 372] per Lord Denning:

"Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence: "of course it is possible but not in the least probable.", the case is proved beyond reasonable doubt, but nothing short of that will suffice".

11. The first Court dismissed appellant's declaration that his presence in the disused field was for the purpose of urinating. This was not a capricious decision or one taken lightly in that the Court chose to dismiss such a version based on the strong evidence of the police officers who first saw him bend down and pick up something

from the ground then saw him throwing something away as soon as they informed him that they were police officers. The argument brought forward by appellant is there being dismissed and the first ground of appeal is therefore being rejected;

12. The second grevience registered by appellant relates to the finding of guilt on the second charge, or rather the aggravating circumstance, in that it could not be presumed that the offence took place within a distance of 100 meters where young people habitually meet. The second charge, as appears on the charge sheet, emanates from the second proviso of article 22 subsection (2) subsection (b) of Chapter 101 of the laws of Malta as follows:

> *Provided further that where a person is convicted as provided in paragraph (a)(i) or paragraph (b)(i) and the offence has taken place in, or within 100 meters of a perimeter of, a school, youth club or centre, or such other place where young people habitually meet, …. the punishment shall be increased by one degree.*

13. Appellant argues that the prosecution had to prove that the area where the offence took place is, in this case, one where young people habitually meet and not where young people pass. The reasoning of the first Court with regard to this aggravating circumstance was as follows: "*As regards <u>the second charge</u>, namely that the offence in the first charge has been committed in or within 100 meters of the perimeter of a school, youth club or centre or such other place where young people habitually meet, it results from the evidence adduced that the accused was apprehended in Dragonara Road, Paceville, and there is no doubt therefore that the said offence occurred in a place where young people habitually meet. Therefore this aggravating circumstance has also been sufficiently proved to the degree required by law".*

14. Appellant is right in his contention in that given that Paceville is a place where young people, like many others of various

ages, meet yet it can not be presumed that the offence took place in or within a distance of 100 meters young people habitually meet. This particular aggravating circumstance could only be proven by objective means and it is manifestly evident from the records of the proceedings that there is no evidence that the crime of which the accused was found guilty took place in or within the said one hundred meters. Dragonara Road in Paceville is a fairly long road and the fact that it is common knowledge that young people frequent Paceville is not of itself sufficient to safely conclude that the crime took place in or within the said one hundred meters more so when not all areas of Paceville are invariably frequented by young people let alone on a habitual basis;

15. The judgement of the first Court states that the crime took place in Dragonara Road and the witness of the prosecution states that it took place close to the Dragonara Hotel (PS 518 fol 24). Another witness states that it was between Paranga and Estin (PC 482 fol 42). For PC 23 (fol 45) the scene is described as being in St. Julians, near the Dragonara Resort in a construction site full of rubble and bushes. It is common knowledge that the Dragonara Hotel is quite a distance from any place where it could be argued that young people habitually meet and it was for the first court to primarily decide where the offence took place and then to proceed to decide whether that is a place where young people habitually meet. This grevience is therefore being upheld;

16. Appellant also felt aggrieved by that part of the judgement of the first Court which ordered the payment of fees incurred in the nomination of experts in that he should not be obliged to pay for those experts' reports the conclusions whereof had no bearing on his case. In accordance with Article 533 of the Criminal Code, the Court shall sentence the person convicted to the payment, wholly or in part, of the costs incurred in connection with the employment in the proceedings of any expert or referee. Such payment shall be

made within such period and in such amount as shall be determined in the judgment or order;

17. Whereas the above cited article is of a mandatory nature, the Court still has discretion in ordering payment for the whole or part of the amount. In this case, and as rightly pointed out by appellant, the only report of an expert witness which was beneficial to the prosecution was that of Scientist Godwin Sammut amounting to €224.20 (in this case half of that amount). The IT expert appointed to examine a mobile phone belonging to appellant concluded that he extracted date from a SIM card, transferred that data to a DVD and that no call profiles were requested and that therefore the report only contains data exported from the device and SIM cards. The contents of this report had no use in the process against appellant and his mobile phone was also returned to him by the first Court. Indeed appellant was not charged with trafficking in drugs and any data from his mobile phone would have been beyond the scope of charges actually proferred against him. These costs amounted to €450.52;

18. The finger print expert likewise found no prints on the exhibits submitted to him and once again, this conclusion was of no material use to the first Court with costs amounting to €72.60. Appellant's grievance in respect to court expert fees will therefore be upheld;

19. Appellant's last grievance relates to the punishment meted out by the first Court , however, this is linked to his contention that he should only have been found guilty of drug possession at the time when he was at the Hal Far Open Centre and not for the other charges. As this Court has not upheld appellant's grievances regarding the first charge, this grievance is also being dismissed

except, of course, where appeal refers to a substitution of the punishment by adequate measures being an alternate grievance put forward by appellant;

20. Wherefore, this Court hereby dismisses the first and fourth grievances raised by appellant and upholds the second and third so however that the judgement of the first Court is being varied as follows that is: (1) by confirming that part of the judgement which found the accused guilty of the first and sixth charges; (2) confirming acquittal of the accused on the third, fourth and fifth charge; (3) revoking that part of the judgement which found the accused guilty of the second charge being the aggravation of distance; revoking that part of the judgment whereby appellant was condemned to a term of imprisonment of nine (9) months and to a payment of fine (multa) of €950 and instead condemns him to a term of imprisonment of **seven (7) months and to a fine (multa of seven hundred euros (€700)** from which term shall be deducted the time spent by appellant in preventive custody; (4) confirms the order of the first court for payment of expert fees amounting to €112.10; and (5) revokes the order of the first court for payment of court expenses amounting to €36.30 and €450.52.