



COURT OF CRIMINAL APPEAL

Judge Hon. Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal no. 142 / 2019

The Police

Inspector Kevin Pulis

Inspector Mark Anthony Mercieca

Vs

Ommissis

Usamah Sufyaan Hajjaj

Today the, 27th February 2020.

The Court,

Having seen the charges brought against Elton Gregory Dsane, 25 years, son of Elton & Bernardette nee' Dunbar, born in London on the 17/09/1993 having no fixed address in Malta and holder of British Passport 522939340. And the appellant Usamah Sufyaan Hajjaj, 26 years, son of Mohammed & June nee' Hajjaj, born in London on the 22/08/1992 having no fixed address in Malta and holder of British Passport 508199233, accused before the Court of Magistrates (Malta):

With having on the 30th April 2019, and/or the previous days on these islands:

Associated and / or conspired with other persons, in Malta and outside Malta, for the purpose of selling, importing, or to deal in any way, in the drugs (MDMA) in these Islands, in breach of the provisions of Art 120 A, of the Medical and Kindred Ordinance Chapter 31 of the Laws of Malta and the Regulations for the Control of Medicines, L.N. 22/1985 as amended, or promoted, constituted, organised or financed such association.

Imported or caused to be imported the psychotropic and restricted drug (MDMA) without due authorization, in breach of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Regulations for the Control of Medicines, L.N. 22/1985 as amended

Had in their possession the psychotropic and restricted drug (MDMA) without a special authorisation in writing by the superintendent of Public Health, in breach of the provisions of the Medical and Kindred Professions Ordinance Chap 31 laws of Malta and the Drugs (Control) Regulations, Legal Notice 22 of 1985 as amended, which drug was found under circumstances denoting that it was not intended for their personal use

Associated and / or conspired with other persons, in Malta and outside Malta, for the purpose of selling, importing, or to deal in any way in the drugs (Ketamine) in these Islands, in breach of the provisions of Art 120A of the Medical and Kindred Ordinance Chapter 31 of the Laws of Malta and the Regulations for the Control of Medicines, L.N. 22/1985 as amended, or promoted, constituted, organised or financed such association

Imported or caused to be imported the psychotropic and restricted drug (Ketamine) without due authorization, in breach of the Medical and Kindred

Professions Ordinance, Chapter 31 of the Laws of Malta and the Regulations for the Control of Medicines, L.N. 22/1985 as amended

Had in their possession the psychotropic and restricted drug (Ketamine) without a special authorisation in writing by the superintendent of Public Health, in breach of the provisions of the Medical and Kindred Professions Ordinance Chap 31 laws of Malta and the Drugs (Control) Regulations, Legal Notice 22 of 1985 as amended, which drug was found under circumstances denoting that it was not intended for their personal use

Rendered themselves as an accomplice with by inciting or strengthened the determination of another to commit a crime, or promised to give assistance, aided or rewarded after the fact, in the importation, or caused to be imported, or took any steps preparatory to import any dangerous drug (Cocaine) into Malta in breach of section 15A of Chapter 101 and sec 42 (e) Chapter 9 of the Laws of Malta

Together with another one or more persons in Malta or outside Malta, conspired, promoted, constituted, organised or financed the conspiracy with other person/s to import, sell or deal in drugs (Cocaine), in these Islands, against the provisions of The Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, or promoted, constituted, organised or financed the conspiracy

Imported, or caused to be imported, or took any steps preparatory to import any dangerous drug (cocaine) into Malta in breach of section 15A of Chapter 101 of the Laws of Malta

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 were 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 were 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

The Court is 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.

Having seen the Attorney General's orders in terms of Article 22(2) of Chapter 101 of the Laws of Malta (Dangerous Drugs Ordinance) and in terms of Article 120A (2) of Chapter 31 of the Laws of Malta (Medical and Kindred Professions Ordinance), wherein the said Attorney General ordered that both accused be charged before the Court of Magistrates (Malta) as a Court of Criminal Judicature.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 1st May, 2019, by which, the Court, having seen Articles 17, 31 and 42 (e) of Chapter 9 of the Laws of Malta, and Part IV and Part VI, Articles 15 A, 22 and 22 (2) (b) (i), and the First Schedule of Chapter 101 of the Laws of Malta and Regulations 4 and 9 of Legal Notice 292/1939, and Article 120 A of Chapter 31 of the Laws of Malta and the Regulations for the Control of Medicines, Legal Notice 22/1985, found and declared offenders Elton Gregory Dsane and Usamah Sufyaan Hajjaj guilty as charged and condemned

them each to a term of imprisonment of four (4) years and each to the payment of a fine of one thousand Euros (€1,000).

Having seen the application of the appellant Usamah Sufyaan Hajjaj filed on the 16th May, 2019, wherein he humbly requests that this Honourable Court to reverse the judgment and allow appellant to have appropriate legal assistance prior to entering a plea or, alternatively, vary the said judgment by confirming the part where he was found guilty of the second, third, ninth and tenth charge and revoking the rest of the judgment thus awarding a more appropriate punishment in the circumstances of the case.

That the grounds of appeal of the appellant Usamah Sufyaan Hajjaj consist of the following:

That the first ground of appeal consists of the fact that, from a large number of aspects, appellant was not given the legal assistance that he required, and which was necessary and appropriate in the circumstances.

That, firstly, appellant requested to be assisted by his own lawyer. This request was denied on the basis that he had already been given the possibility to speak to a lawyer over the phone and that he had no money to pay for a lawyer of his own choice. Appellant explained that he had money which has been seized by the Police. There was and is no evidence whatsoever that such money was linked to the charges brought against him and it is being submitted that the Police had no right to prohibit him from using such money to ensure the appropriate legal representation. It is his fundamental right to be assisted by a lawyer of his own choice and not by a lawyer engaged by the State who, with all due respect, evidently had no time to attend the Police Headquarters and assist appellant when he was in dire need of such assistance.

That, secondly, appellant was not assisted by a lawyer, whether of his own choice or not, during his interrogation on the 30th April, 2019. As stated previously, the lawyer assigned to him by the State did not bother to attend at the Police Headquarters notwithstanding the seriousness of the charges. It is evident from the statement of appellant that he did not refuse to have a lawyer present during such interrogation.

That, thirdly, the lawyer who had spoken to him over the phone was not present to assist him when he was subsequently arraigned in Court. A different lawyer, who he naturally did not know and with whom he had never consulted, turned up in Court to deal with the case. It is evident that none of these lawyers requested the Police to view the material evidence available to them as was appellant's right according to section 534AF(2) of the Criminal Code. It is therefore assumed that their advice was based solely on information given to them by word of mouth from appellant himself and the Police. The Police in this case were in possession of statements of third parties related to this case as well as DNA results related to appellant's case. Therefore, after having been denied the right to a lawyer of his choice, he was not even afforded the right of coherence in legal assistance and ended up, as will be explained in due course, with conflicting advice.

That, fourthly, appellant was, during the proceedings in Court, given the same lawyer assigned to his co-accused when it was evident that their defences could have been conflicting. Appellant ended up entering a plea of guilty as a result of this confusion and is now suffering the consequences of not having been appropriately represented and advised.

That it is being submitted that the guilty plea entered by appellant is highly vitiated and in violation of his fundamental human rights. Such guilty plea, being a consequence of the facts afore stated, should be declared null and void.

That, without prejudice to the first ground of appeal, the second ground of appeal consists of the fact that appellant was placed in a situation where he was given the nebulous option of pleading guilty to all charges notwithstanding that some of the charges were unrelated to him. Appellant had immediately raised, both with his legal counsel present in the Court, who he had never met or spoken to before, and also with the Police there present that he wanted to plead guilty to some of the charges and not to all. This possibility was denied to him in the sense that he was never informed that he would only be facing one question, guilty or not guilty. Appellant is a foreign national with no knowledge of domestic laws and was therefore entitled to proper advice also in this regard. He was entitled to a proper explanation of the consequences of a partial guilty plea and the possibility of future plea bargaining depending on the evidence available which was not made known to him. Appellant ought to have been made aware that the “*sentence bargaining*” being entertained on his behalf, albeit barely understood by him, was not legally correct in that the Attorney General was never roped in. It is trite knowledge that the procedure adopted is common in similar cases but this is not correct if fundamental human rights of the person charged are brushed aside. Appellant acted in haste without being properly advised on the correct procedure. With all due respect, this also renders his guilty plea null and void.

That, without prejudice to the previous grounds of appeal, the third ground of appeal consists of the fact that being charged with a third party whose case was unrelated was prejudicial to appellant.

That appellant had no connection to this third party. He did not travel with him and they coincidentally met up as a result of the grouping which the Police themselves directed outside the strip search room at the Airport. The Police are well were aware of this fact as this was stated to them numerous times including in appellant’s statement. Probably as a consequence of his perceived “lack of cooperation” in his statement, the Police decided to charge him with a third party

who had no connection to him. From a purely legal point of view, the Police needed to charge them together to substantiate the charge of conspiracy to import drugs to Malta. This obviously led to the situation that gave rise to the previous grievance.

That the Police knew that they had not travelled together because another accused, Elton Dsane, had confirmed this separately in his statement. The Police opted to discard this important fact and charged these two persons together rendering the charges of a more serious nature and, more importantly, rendering an incorrect picture of the amount of drugs connected to each individual case. The Police are in possession of information that could help highlight the true nature of this case.

That, without prejudice to the previous grounds of appeal, the fourth ground of appeal consists of the fact that the punishment meted out was excessive and disproportionate in the circumstances of the case. Appellant humbly submits that the prosecution together with his own legal counsel bargained a punishment that does not reflect the true circumstances of the case and that therefore the consequences of the actions carried out by appellant do not merit the punishment accepted by and meted out by the Court of Magistrates as a Court of Criminal Judicature since it is not proportionate to the said circumstances of the case.

In view of the nature of the aggravations of the appeal filed on the 16th May, 2019 the defense lawyer asked to hear a number of witnesses during the sitting of the 16th July 2019¹, particularly those not heard at first instance and the appellant himself. The Attorney General during this same sitting requested that in the following sitting a number of witnesses were to be summoned and this for the purpose of entertaining the grievance with regards to the alleged violation of the admission of the appellant registered before the Courts of Magistrates.

¹ Fol. 46

On the 3rd October, 2019 **Inspector Kevin Pulis** gave evidence and stated that on the 29th April 2019 he had received confidential and reliable information that five British Nationals were coming over to Malta for a festival which was organized in a number of localities in Malta. He then managed to trace five nationals on board a Ryan Air flight from Luton that landed during the night of 29th and 30th April 2019. The appellant is one of these five nationals that were apprehended.

He explains that all five nationals were searched on their person as well as in their luggage. Visually on their person nothing was seen to be illegal. However, he says that these nationals appeared to behave in a suspicious way and thus he informed them that he was going to accompany them to Mater Dei Hospital for an abdominal X ray, to ascertain that there were no foreign packages in their body. He then proceeded to ask them for their consent though none of the five gave their consent for this to happen. He then informed the duty Magistrate who ordered the police to use the necessary force to take them to Hospital for this X ray. In the van going towards hospital at the back seat in the middle was the appellant sitting in court and next to him was Elton Gregory.

The witness stated that at one point they smelt a foul smell of human excretion. His colleague then noticed Elton Gregory putting his hand behind the appellant and throwing something at the back of the van towards the boot. They then opened the boot and removed the people from the van and immediately they realized that there were capsules of drugs. The appellant had dirt on his backside in his pants and on his shorts.

He then informed the Magistrate and in no time at all the police responsible for the scene of the Crime were on site. Both the appellant and Elton Gregory were photographed, and their clothes were seized for further investigation and handed over to Dr Marisa Cassar who was nominated in the acts of the Inquiry which had been ordered by the Magistrate on duty.

Dr Marisa Cassar was nominated to carry out tests of DNA on the capsules to try and link them with the arrested persons whom at that moment were five. The same five who had arrived on board the same flight from Luton earlier on the night before. He also said that it resulted to him that all five nationals worked together and came over to Malta together to have a good time.

He insisted that the appellant, like the others, were given their rights whilst they were still at the airport and then again when he found the excreted capsules. In fact, he claims that the accused asked to speak to a lawyer, and he spoke with Dr Christopher Chircop. Asked if Dr Chircop was present when the appellant released his statement the witness replies in the negative. He also informed the British High Commission with such arrest and in fact on the 30th April 2019 at about 9.00a.m there was a call between the appellant and the British Consular and at about 2.30p. Ms. Diana Terpogoff from the British High Commission called to speak with the appellant who at that time was detained. Once the appellant was ready from speaking with the Consulate, he was informed by the Custodial officer that the appellant was ready for interrogation.

At about 3.30pm he started interrogating the appellant together with Inspector Mark Mercieca and proceeded to take a statement which ended at 16.40, which statement was duly signed by appellant and exhibited in the acts of these proceedings marked as doc. KP 10.

In a nutshell the appellant denied his knowledge of the drugs despite there being four capsules with human excretion at the back of the van they were in. He confirmed that two of the capsules were linked to the accused through a DNA examination.

The appellant together with Elton Dsane, on the 1st May 2019 were arraigned and he remembers that the appellant was assisted by a legal aid lawyer Dr Simon

Micallef Stafrace. He confirmed that the appellant spoke with his appointed lawyer outside the court room in his absence and then returned back to the court and Dr Micallef Stafrace informed him that the accused now appellant wanted to register a guilty plea. The witness then confirmed the charges on oath and then the Magistrate told them to re think their guilty plea and go outside with their lawyer to re consider the guilty plea and the appellant came back in and insisted on registering a guilty plea. He also stated that one of the accused asked if he could serve his prison sentence in his country and the Magistrate replied that it did not depend on him.

He said that he spoke with the appellant at the airport, in hospital and even at the CID and explained to him their findings and what was going on. Asked who of the other three persons who were not arrested accompanied the appellant to Malta he says he does not know. He explained that the information he had specified that the five individuals had the same booking which for him was an indication that they were travelling all together and in fact he said that all five confirmed that they had been travelling together on the same flight.

He explained that whilst all five were at the airport they seemed to know each other since they were addressing each other by names. He said that they all said that they came to Malta to attend the Lost & Found festival to have fun. He confirms that all five were given their right to legal assistance at the airport.

Asked if he knew that three of the apprehended national were seated different to the other two, he says it did not interest him to know such a fact. Likewise asked if he knew that three of them had a different accommodation to the other two, he replied that he did not know this fact either. Asked if he was certain that there was 100 grams of drugs, he said that he did not know he only asked Dr Cassar for an amount so that he could direct the courts on account of its competence. Asked if he knew with whom the DNA match was and if the match related to all

types of drugs found he says that as far as he knew there was some form of match between the drugs and the appellant, particularly, with two of the capsules.

The witness confirmed that the appellant had money in his possession however he denies having heard the appellant saying that he wanted to appoint lawyer with his own money. In fact, the witness confirms that the appellant did not ask for a legal aid lawyer but to be assisted by a lawyer. He also confirms that Dr Chircop who was the appointed legal aid lawyer did not go to the Police Headquarters and did not ask for any form of disclosure either.

Dr Christopher Chircop gave evidence on the 3rd October 2019 and explained that on the 30th April 2019 early in the morning he received a phone call from the inspector of police where he was requested to give advice to four or five persons who according to the information, he received were carrying drugs. He asked if there were any DNA tests and the police told him that at that stage there was none of that. He confirmed that he spoke to the four or five persons on the phone. He said that he introduced himself to them and told them about their rights. He also says that he told them not to admit anything since it was the duty of the police to prove every element of the offence and thus should remain silent. He told them that at that stage they were considered as suspects. Asked if he was asked to assist them in person, he says no he was not. He only remembers speaking to the five over the phone and detailing their rights to them. Asked if he could not have given advice to all five persons since potentially there could have been a conflict of interest, he states that the police usually insist that he speaks to them all.

Maria Mifsud Court Registrar gave evidence on the 3rd October 2019 and said that she remembers that the arraignment took place on 1st May 2019 being a public holiday. She remembers that they were two accused accompanied by their

lawyer. She says that they wanted to admit to the charges out forward in their regard and were asked several times by the sitting magistrate if they wanted to confirm their guilty plea. She says that both parties being the defence and the prosecution agreed on the punishment to be awarded. The Magistrate confirmed with the accused that they understood what they were charged with and at no moment in time did any of the accused state that he did not understand the nature of the charge.

Asked if the accused now appellant spoke to his lawyer outside the court room or inside, she says that she cannot remember clearly. She said that the Magistrate stated once judgment was given that they could apply to serve their prison sentence in their country. She stated that when the accused pleaded guilty the Magistrate informed them straight away that they would be going to jail. Being shown the verbal in the acts of the proceedings at page 7 confirms that it was done by her and confirms its contents. Asked if the Magistrate explained the type of drug, they were accused of particularly the name of the drug, she says that she has no recollection of this. She says that she is certain however that he stated that the charges were of a serious nature.

Dr Simon Micallef Stafrace gave evidence on the 17th October, 2019 and confirmed that he works as a Legal Aid Lawyer. He said that he remembered the day of the arraignment and that the appellant was present in court together with a co accused who was a taller person than him. He remembers that there were two prosecuting officers. Once he received the call from the police he came over to court and discussed the case with the police officers first. After having been briefed by the inspector, he then spoke to the two accused persons together. Asked if he spoke to any of them individually he says that he does not remember though he says that he may have. He said that when he spoke to the two persons he got the impression that they wanted to get on with this so that they could carry on with serving their judgment in England. He felt that the appellant was

not in the lead but was just tagging along. He was simply complacent though never said NO.

The witness explained that in every case and in this one too he explains to the accused that they are not obliged to register a guilty plea, and that in the absence of a guilty plea they would ask for bail. Though in this case he was sure that the courts would not grant bail. He said that four or five days would pass before the case would be appointed before another Magistrate.

He said that both accused agreed to plead guilty. He states that he had discussed the merits of the case with the police and they told him that one of the accused had excreted the drugs. He said that the accused person listened attentively and understood him well.

Being shown the charge sheet he confirms that this was given to him prior to the arraignment and he took care to show it to the accused persons too. He confirms that he did not speak to them individually but in generic terms. He said that he explained to them that they were facing a number of years in prison though they still insisted on pleading guilty. Asked if he was aware that his clients were given legal aid advice the day before he states that he knew about it. Asked if he had seen the statement they released he says he did and that is why he told them that they did not have to admit the charges at that stage since their statement contained no admission. He however did not speak to the previous lawyer at any stage. Asked if the police explained to him which drugs pertained to whom he said NO. He said that he would have given them all scenarios re the charges. But he did not explain the individual drugs to them or ask them which drugs they wanted to admit too. It was a case of possession, importation and conspiracy of drugs in general. He got the impression that his clients only wanted to get it over.

Dr Marisa Cassar testified on the 11th December, 2019 and confirmed that she had been appointed as a court expert by the Inquiring Magistrate wherein she was handed over some pieces of plastic which contained drugs and she also collected some swabs from the police van and also analysed some under wear. She exhibited a copy of the report she presented in the acts of the inquiry which was marked as document MC. Asked what were her conclusions with regards to the appellant. She said that she had a profile match with the appellant on two of the drugs. From the six exhibits that were given to her only two or three proved positive. From an examination of the report it results that there was a positive match from two of the swabs taken from the car and one positive match with the swab taken from the under wear of the appellant.

PC 844 Carl Micallef gave evidence on the 9th January 2019 and presented his report which was marked as doc SOCO relating to suspected illegal substance found in the vehicle make Renault registration number GVP 425. He explained that in the original report there were a number of photos attached to the report.

PC 1491 Kurt Attard, court appointed forensic expert gave evidence on the 9th January 2019 and presented his report which was marked as doc SOCO 1. He stated that he was in charge of seizing exhibits from the scene of the crime wherein in fact he seized 11 exhibits and which were handed over to Dr Marisa Cassar for her to carry out her work. He confirms that there were 3 exhibits one of which had 2 capsules. These were found randomly at the back of the car in the boot and not taken from anybody. Asked why he put two capsules in one bag he said that he found them together so he bound them together He did not want to tamper with the evidence. One of the capsules was found at the back of a seat where the passenger sits there is a gap between the seat and the back of the same seat. He explained that documents 19BAP 201 A, B, C and D were taken from the person named Elton Hussein and documents 19 BAP 204 A, B, C and D were taken from the appellant He confirmed that document 19 BAP

204 A is a sweater.

Dr Gilbert Mercieca testified on the 4th February 2019 and explained that he has a Masters in Forensic Psychology and Bachelors in Biology and Chemistry. He confirmed that on the 30th April, 2019 he was nominated by the Inquiring Magistrate to examine some drugs, namely to examine the substance inside three evidence bags which were handed over to him by Dr Marisa Cassar. He says there were three different substances inside three different capsules that were Cocaine, Cathamin and MDMA which is also known as Ecstasy. He says there were 13 grams of Cocaine, 58.526 grams of Cathamin and 20.901 grams of MDMA. The documents he received from Dr Marisa Cassar were documented as 19 BAP 201A, 19 BAP 201B and 19 BAP 202. As indicated in the report he exhibited and marked as doc GM. He confirmed that the document that contained Cathamin consisted of two capsules.

The appellant **Hajjaj Usamah Suffyan** gave evidence voluntarily before this court on the 4th February 2020 and confirmed that on the 30th April 2019 he was carrying a small amount of Cocaine and a small amount of MDNA on the day he arrived from Luton Asked if he knew the weight of such drugs he says he did not weigh them though he reckons that he had between 10 to 15 grams of MDNA and about 15 grams of Cocaine. He confirms that on the same night as him were Leon Fontana, Elton Dsane' Louis Lindsey and Paul Caffery. He confirms that the moment they arrived in Malta they were apprehended by the Police. He elaborates further and states that there were about 6 to 7 undercover police waiting for them at the bottom of the escalators. He said that a group of them were pulled aside and had their mobiles and passports confiscated. He confirms that he was carrying the drugs on his person inside him.

He said that on the way to the Hospital for an X ray with the police, he became scarred and anxious so he tried to get rid of the drugs by discarding them He

said that whilst in the van he excreted two plastic capsules that contained two types of drugs one had Cocaine and the other had MDMA. He confirmed that with him in the car were three others, four including him. Whilst Leon was taken in a car. From what he had been told Elton also excreted drugs from his system, however he did not see this happen. He was sitting on one side of the car and Elton was on the other side not next to him. Between them sat another person. He says that he had spoken with Elton chit chat prior to them going in the same car but had no idea he too was carrying drugs.

Asked if he had any recollection of Elton on the flight he says no, he explains that he got to the airport in a cab with Leon and Paul. That was his group. He states it was only when they were going down the escalator that they were further grouped with the other two.

Therefore, it results that there was no conspiracy with regards to the drugs that were imported by the appellant. As a matter of fact, it can be assessed that there were two groups of people that arrived in Malta from Luton. The appellant was in the company of another person and there was no connection with the other persons importing the drugs. Moreover, it is the duty of the prosecution to prove that there was some form of conspiracy, something which was not undertaken by the prosecution.

Asked if he remembers his arraignment he says he does and goes on to explain that he remembers that the lawyer who assisted him in court was not the same lawyer he spoke with at the Police Headquarters. He claims he spoke with the lawyer outside the court room in the presence of the Police Inspector and this was a very brief meeting. Asked if the lawyer assisting him explained the charges brought forward against him individually he categorically states NO. He states further that he was not given a copy of the charge and furthermore the appointed lawyer assisted him as well as the other co accused. He said that he also

informed the lawyer that the drugs in question were not all his but he believes that the lawyer was not know much about his case. Asked if he attempted to make his case he says he did but everything was so rushed. He states that everything took place so fast. Both the inspector and the lawyer were giving them advice at the same time and then the court seems to pas its judgment. He confirms that although in court there were two police inspectors, only one of them was present when he was spoken to by the appointed lawyer. He also claims that most of the sitting was held in the Maltese language and more or less only understood that the Magistrate said that the charges were serious though nothing was read out to them In fact he says that the charges were not read out to him because if they were he would not have pleaded guilty to something he had nothing to do with.

He also states that he had asked for his own appointed lawyer since he had money though the police told him that the money he had would become the property of the state and thus had no money. He confirms that he was given his right to be assisted by a lawyer though since he had no money at that stage once he was told that the money he had would be confiscated he did not know how that could take place. Asked if he brought this up with the first lawyer he spoke to he says no because the first lawyer only spoke to him briefly over the phone. He was no happy at all with the legal service he was given. He says the first lawyer told him not to admit to anything and then the second lawyer who spoke to him less than twelve hours later encouraged him to admit to the charges and in fact told him that he was looking at a term of imprisonment between 8 to 10 years.

Having seen what the parties declared during the sitting of the 20th February namely the defence declared that *'in view of the evidence presented during the preceding sittings, the defence is withdrawing its first, second and third grievance and is insisting on the fourth ground of appeal which relates to a mitigation in punishment.*

Furthermore, the defence humbly sustains that the evidence presented in the preceding sitting, namely that of the accused, Godwin Sammut and Dr Marisa Cassar manifestly supports a mitigation in punishment consistent with a reduction in the prison sentence ad fine meted out to the accused'.

The prosecution on the other hand stated that ' it was fully aware of the evidence presented before this Honorable Court, is not objecting to the position taken by the defense with regard to the first, second and third grievance as found in the defense's appeal application and agrees with the defense that after this Honorable Court hears submissions from both parties on the fourth grievance of the defense, it should proceed to review the punishment given by the First Court in order to determine whether it truly reflects the facts of the case concerning Usamanah Sufyaan Hajjaj as evidenced in the acts of the proceedings.'

Considers further.

From an examination of the verbal dated 20th February 2019 it results that the defense is no longer insisting on all its four grievances listed in its original Appeal application but is insisting on its fourth grievance relating to a decrease in punishment due to the fact that the appellant should not have been found guilty of all charges but only those relating to the drugs MDMA and Cocaine.

It transpires that the appellant had arrived in Malta together with two other British nationals from Luton on the 30th April 2019 to attend to a festival. It appears that when they arrived in Malta they were immediately apprehended by the police together with two other nationals for further investigation. All five national appeared suspicious and thus the police felt that they should take the nationals to the Hospital to carry out an abdominal X ray since they suspected that they could be carrying drugs in their body.

The accused was put in a van with three other nations whereas his friend Leon was taken to Hospital in a car. En route to hospital the appellant was very anxious and nervous and he escorted the two capsules he had in his body containing Cocaine and MDMA. Whilst still in the car it appears that Dsane Elton had also excreted some drugs. These capsules were later given to Dr Marisa Cassar to be examined for DNA purposes since they were found in the car they were in at the back of it namely in the booth and thus the police were not in a position to state who the drug belonged to simply with a visual examination.

The Inquiring Magistrate nominated a number of experts in her inquiry to confirm and identify the consistency of the drugs.

Whilst the appellant was under arrest he asked to speak with a lawyer and the police provided him with the legal aid lawyer on duty who happened to be Dr Chircop. In fact the appellant spoke with him over the phone briefly prior to him releasing his statement and upon instructions given to him by this lawyer he did not admit to any wrongdoing. A few hours later the appellant was arraigned in court together with another person namely Dsane Elton Gregory and charged with a number of offences relating to importation, possession and conspiracy in relation to the drugs Cocaine, Cathamine, MDMA despite the appellant stating in court that he imported into Malta the drugs MDMA and cocaine.

It results that the appellant and the co accused Elton Dsane Gregory were once again given a legal aid lawyer to assist them. The appellant states that they met up with him briefly before the arraignment took place. He spoke with them together outside the court room in the presence of a police officer and told them that they were facing along prison sentence between 8 to 10 years. However, if they admitted to the charges then they would get a shorter prison sentence. Asked if the court or lawyer read out the charges to them and explained to them the charges individually the appellant states No. The court registrar too could not confirm whether the sitting Magistrate read out the charges and explained to each accused the charges he was facing. In this situation the appellant pleaded

guilty only getting to know after judgment was given that he was found guilty of offences he had not committed and thus filed his appeal. It was in the light of these allegations that the court went on to hear witnesses which were not heard before the first court to see whether what he alleged was correct or not.

The following facts resulted from the acts of the proceedings without a shadow of a doubt, namely: -

1. That the appellant arrived in Malta from Luton on a Ryanair flight in the evening of the 30th April 2019.
2. That the appellant was not alone but was travelling with two other nationals.
3. That all these three nationals including two others were all apprehended at the airport and treated as one group.
4. All suspects were put in a van and car to be taken to hospital for a medical X ray to verify if there were any drugs hidden in their body.
5. Whilst in the van the appellant excreted capsules and with the help of the court appointed expert Dr Marisa Cassar it transpired that two of the capsules found in the van had DNA traces of the Appellant.
6. The capsules which had a positive match with the appellant contained MDMA and Cocaine.
7. The appellant admitted under oath that he had imported the drug Cocaine and MDMA on his person on the night of 30th April 2019 but denied any connection with the other capsules found in the van which contained Ketamine.

It is opportune at this stage to make reference to a judgment delivered by this court in a different composition in the names **Il-Pulizija vs Martin J. Camilleri**² in relation to the effect of an admission of guilt made before the Courts of Magistrates: *“Dwar l-effett ta’ ammissjoni fuq l-appell tal-persuna misjuba hatja din il-Qorti (jew ahjar, il-Qorti Kriminali li allura kienet tisma’ l-appelli mid-decizjonijiet tal-*

² Decided on the 20th January 1995

Qorti tal-Magistrati tal-Pulizija Gudizzjarja) diga' kellha l-opportunita' li tippronunzja ruhha fis-sentenza taghha tas-27 ta' Ottubru, 1962 fil-kawza fl-ismijiet Il-Pulizija vs George Cassar Desain (Kollez. Deciz. XLVI.IV.911). F'dik is-sentenza gie ritenut, mill-kompjant Imhallelf William Harding, fuq l-iskorta ta' guriprudenza kemm Ingliza kif ukoll lokali, li fuq ammissjoni ta' l-imputat, Qorti ma tistax hlief tghaddi ghall-kundanna tieghu ammenoke' ma jirrizultax li l-imputat ma jkunx fehem in-natura ta' l-imputazzjoni jew li ma kienitx l-intenzjoni tieghu li jammetti li hu hati ta' dik l-imputazzjoni jew li fuq il-fatti minnu ammessi l-Qorti ma setghetx skond il-ligi, tikkundannah, cioe' ssibu hati ta' reat³ .

In this case it appears that the appellant was not aware of the charges he was accused of in the sense he did not know that he was charged with the importation and possession of the drug Ketamine, a drug which he had no association with. The court makes reference to what was stated by the appellant in his testimony of the 4th February 2020 namely the following:

"Court. Let me ask you the question two questions I would like to ask. Did the lawyer explain to you each individual charge ?

Witness. No he did not and at no point was I provided with a charge sheet"

When the court registrar Marica Mifsud gave evidence on the 3rd October 2019 she stated the following:-

"Lawyer: When you explain that the Magistrate explained the charges, am I correct in saying that he did not say you are accused of Cathamine, Cocaine or MDMA. He explained that you are accused of drug possession, conspiracy, importation and that it brings with it serious consequences including imprisonment for a long time. Is this the way he explained or did he mention Cathamine, Cocaine...?"

Witness I am not sur if he mentioned the drug s specifically.

³ Il-Pulizija vs Martin Camilleri 20/01/1995 (Vol.LXXIX.v.1538). Emphasis of this same court

Lawyer. Exactly.

Witness. He mentioned that they were accused of...

Lawyer. Serious accusations.

Witness. Yes.

Lawyer Issa can you confirm that he said that?

Witness. I do not remember, I am not sure if he mentioned the drugs. I do not remember."

Of relevance to this matter is the evidence given by the legal aid lawyer Dr Simon Micallef Stafrace who was also present in court during arraignment.

"Lawyer. So when you explained the charges, did you explain to the accused that there was a benefit in an early admission?

Witness. Yes of course.

Lawyer. Of course when you explained the charges per se, did you explain the charges, am I correct in stating that you explained the gravity of the situation what possession means, what conspiracy means and what importation means and what trafficking means?

Witness.. yes I would have given them the worse scenario.

Lawyer Correct and do you recall that there was the advice you gave them in the sense that you explained those elements of the four accusations a multitude of which they are facing? That is what you advised them?

Witness. I cannot recall individually on that day what happened in the sense that....

Lawyer. So you do not.;.. we can stop at that, so you do not recall whether you actually explained Peter you are charged with Cathaimen this that or whether you have explained as I imagine as usually happens because I was a legal aid lawyer for ten years as well and you explained the generality and the gravity ant the benefits of an early admission correct?

Witness. And you go through the charge sheet with it.

Lawyer. So this is the point I am trying to establish whether you actually told my client that he has been charged of three individual drugs possession, three individual drugs trafficking, three individual drugs conspiracy and three individual drugs importation and as a general one because there are ten accusations specifically I am asking this because this is a bone of contention.

Witness. Yes yes..

Lawyer. If you remember, If you do not remember...

Witness I do not remember as this happened some months ago/. I do not know that...let me be blunt..."

It thus results to the satisfaction of the courts that there is reasonable doubt as to whether the charge sheet was actually explained to the accused. The court is not satisfied that prior to his admission the appellant knew each individual charge he was admitting too.

Also it appears that what the appellant said particularly that he admitted to the charges because he was told that he would face a prison sentence of 8 to 10 years and if he admits he will get a reduced punishment is also likely because the legal

aid lawyer too said that he explained to the appellant the fact that if he registers an early plea of guilt there would be a reduction in punishment.

The appellant says that the proceedings did not take long in fact the lawyer too says this and states that the appellants seemed only interested in getting on with this case and pleading guilty to make arrangements to carry out this prison sentence in their country.

It also appears that both legal aid lawyers did not ask for disclosure prior to the interrogation and neither prior to the sitting and that in fact not even the police knew which drugs could be attributed to a particular accused person since it did not have the admission of the accused prior to the issuance of the charges since in his statement the appellant does not admit to anything and also because the forensic expert appointed by the court had not yet given them her findings. It was only on the basis of the forensic reports that the police could have arranged the charges to be individualized to each accused person.

It also transpires from the evidence given by the forensic experts namely Gilbert Mercieca and Dr Marisa Cassar that the DNA of the appellant was only found on the capsules of the drug Cocaine and MDMA and not on the capsule of Ketamine and thus this corroborates the evidence given by the appellant that he had nothing to do with the drug Ketamine.

The court thus feels in the light of the above that it should nullify the judgment given in relation to the appellant however does not feel that it should send the acts of the proceedings back to the first court but should deal with the case itself. It should base its decision on the basis of the witnesses heard before her and also upon the admission of the accused today appellant limited to the drugs MDMA and Cocaine. Consequently, it should decide not to find guilty to those charges

relating to the drug Ketamine and thus on the basis of this should also order a temperment on the punishment awarded by the first court

This is not a case where the appellant did not know what he is charged of but did not know that he was charged with the same charges in relation to three drugs instead of two and thus it is evident that his admission was directed in relation to the drug Cocaine and MDMA .

The Criminal Code imposes an obligation on the Criminal Court under article 436(3)(c) that it *'shall in all matters which are not prohibited or prescribed by law under pain of nullity, whatever it may, in its discretion, deem necessary for the discovery of the truth.'* Thus the appellant is correct when he states that this court cannot simply disregard his allegation that the judgment given in his regard was unjust and unfair due to the fact that the impugned judgment is reflecting facts which are not only not substantiated with the evidence brought forward but negated by forensic evidence even though the appellant had registered a guilty plea to such charges.

Thus this court has no alternative but to annul the appealed judgment and this n the basis that the judgment delivered is incorrect as contemplated in article 428(5) of the Criminal Code which provides the following:-

"(5) If the appeal is entered on the ground of want of jurisdiction or of any breach or omission of formalities, and also on the ground of a wrong judgment on the merits, the superior court, if it finds that the appeal, in so far as it is entered on the ground of want of jurisdiction or of any breach or omission of formalities, is without foundation, shall make a pronouncement to that effect and shall decide on the merits in accordance with the following sub-article"

Namely

(6) If the appeal refers only to the merits, the superior court shall pronounce judgment either affirming or varying or reversing the judgment appealed from."

The Court directs the courts of Magistrates so as to ascertain that the admission that the accused puts forward is done after being ascertained that he understood the nature and seriousness of each individual charge so that similar circumstances to the one under examination will not arise. At the same time the court directs the legal aid lawyers so as to make use of the new Directive that was transposed into our local legislation namely that regarding to the Right to Disclosure so that he will be in a better position to advice his client. It is also directs the legal aid lawyers to acquaint themselves with the Directive regarding the right to legal aid (even though not transposed into our legal system though the transposition date has passed) namely EU Directive 2016/1919. It is imperative for the legal aid lawyer to explain each individual charge to the accused person so that he may know whether he should register a guilty plea or not. The question of reduction of punishment should only come into play once the accused considers pleading guilty and should not be used as an instrument so that proceedings are cut short. They should ascertain that the accused is really guilty of each offence attributed to him and not get a general admission to everything that the prosecution charges the accused person with.

The Court is thus annulling the judgment delivered by the Courts of Magistrates as a court of Criminal Jurisdiction in the above names and after hearing the evidence brought forward by the parties and after having seen the admission of the accused in relation to the drugs Cocaine and MDMA and after having seen all the relevant articles at law namely 17, 31 and 42 (e) of the Criminal Code, Articles 15A, 22, 22 (2) (b) (i) and the First schedule of Chapter 101 of the laws of Malta and regulations 4 and 9 of Legal Notice 292 /1939 and article 120A of Chapter 31 of the laws of Malta and the regulations for the Control of Medicines

finds and declares the appellant not guilty of the first, fourth, fifth, sixth and eight charges and guilty of the second, third, seventh, ninth and tenth charges and condemns him to a term of imprisonment of eighteen months and to the payment of a fine 'multa' to the sum of eight hundred euros (€800) which payment is to be effected prior to the appellant leaves prison.

The Court also orders that this judgment is notified to the Advocate of Legal Aid so that he may instruct his team of legal aid lawyers to follow the teachings of this judgment.

Consuelo Scerri Herrera

Judge