THE COURT OF CRIMINAL APPEAL

The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Appeal number: 281/2021

The Police
vs.
Ibrahim Abdalla MUSAH

Sitting of the 3rd March 2022

The Court:

1. Having seen that this is an appeal from a judgment delivered by the Court of Magistrates (Malta) on the 5th August 2021 lodged by Ibrahim Abdalla MUSAH, who was charged with having on the 4th August 2021 and the months prior in these islands (in brief):

    i. 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;
    ii. Had in his possession 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 in circumstances denoting that it was not intended for his personal use;
    iii. Had in his possession the whole or any portion of the plant Cannabis in terms of section 8(d) of Chapter 101 of the Laws of Malta;
    iv. Had in his possession the drugs (cocaine) specified in the First Schedule of the Dangerous Drugs Ordinance when he was not in possession of an import or export authorisation issued by the Chief Government Medical Officer;

v. Had in his possession the psychotropic and restricted drug (extacy) without a special authorisation in writing by the superintendent of Public Health;
vi. Had in his possession drugs and/or a new psychoactive substance as defined in Article 118A(1) of Chapter 31 of the Laws of Malta;
vii. Committed these offences in, or within 100 metres of the perimiter of a school, youth club or centre, or such other place where young people habitually meet.

The Court was also requested to order the confiscation of all the objects seized and to order the guilty person to pay the expenses incurred by the Court appointed experts.

2. By means of the said judgment, the Court of Magistrates (Malta), after having seen the charges brought against the accused, declared the accused guilty of all the charges brought against him and condemned him to a one year imprisonment sentence together with the payment of a fine (multa) of two hundred euro (€200) and ordered the forfeiture of all articles in respect of which the offence was committed in favour of the Government of Malta and ordered the destruction or disposal of these articles.

3. Ibrahim Abdalla MUSAH filed an appeal against this said judgment wherein he requested this Court to reform the sentence of the Court of Magistrates abovementioned substituting it with a less onerous sentence that reflected the case under appeal while claiming that the one year imprisonment sentence and two hundred euro fine were manifestly unjust and exagerated.

Considers the following:

4. That the appellant contends that the punishment imposed by the Court of Magistrates (Malta) was excessive. This Court begs to differ.

5. First of all, the accused admitted to all the charges brought against him. As stated by the Court, collegially composed, in its judgment of the 4th December 2003 in re: **Ir-Repubblika ta' Malta vs. Serag F. H. Ben Abid** Maltese Courts constantly and consistently held the view that an appeal from the punishment meted out in a judgment delivered by a court of criminal justice following an admission of the charges by the accused is deemed to be particularly odious whenever the said punishment falls within the parameters of the Law. This is deemed to be so since whoever pleads guilty to the

charges brought against him, assumes responsibility for his plea of guilt and remits himself to the punishment that the court of criminal justice deems fit in his case. On an appeal from any such sentence, the Court of Criminal Appeal assesses all the circumstances of the case to verify whether the punishment so meted out would be excessive. However, this Court does not disturb the discretion exercised by the Court of Magistrates in arriving at this sentence whenever the punishment so meted out would be within the parameters of punishment set by Law and where nothing indicates that it should have been a lesser punishment than that actually meted out.

Furthermore, this Court assesses the sentence meted out at first instance to see whether it was wrong in principle or if it was manifestly excessive. This Court makes reference to the Court of Criminal Appeal judgment of **The Republic of Malta vs. Kandemir Meryem Nilgum and Kucuk Melek** decided on the 25th August 2005:

> It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is **neither wrong in principle nor manifestly excessive**[1], even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in Blackstone's Criminal Practice 2004 (supra):
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> "The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will...be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '...that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle." Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the

[1] Emphasis of this Court.

appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed."2

This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.

6. The principle in **Kandemir** was also embraced by the Court of Criminal Appeal in **Ir-Repubblika ta' Malta vs. Marco Zarb**, decided on the 15th December 2005 that being that, a Court of Criminal Appeal does not overturn a judgment given by the Court of Magistrates by reason of the fact that the punishment as inflicted by the latter is greater in quantum than that which would have been imposed by the former. The sentence of the Court of Magistrates may be overturned if the appellant proves that the punishment handed down against him was either wrong in principle or was manifestly excessive.

7. In this particular case, the appellant unconditionally admitted to all the charges brought against him. His guilty plea was registered, inter alia, to the charges of drug trafficking (by reference to cannabis plant), drug possession with the intent to supply (once again by reference to cannabis plant). However, he admitted being in possession also of the drug cocaine, the drug ecstasy, and another new psychoactive substance; all this aggravated by the qualification that these offences were committed in or within one hundred metres of the perimeter of a school, youth club, centre, or such other place where young people habitually meet.

8. The case of the appellant was referred to for judgment by the Attorney General to the Court of Magistrates. This is shown by the Order of the Attorney General in the record of the proceedings. This therefore means that the offences which the appellant pleaded guilty to fell within the parameters of punishment provided for by article 22(2)(b)(i)(ii) of Chapter 101 of the Laws of Malta as well as article 120A(2)(b)(ii) of Chapter 31 of the Laws of Malta.

9. The higher punishment in this case is attached to the first charge, which deals with drug trafficking. This is the punishment specified in article 22(2)(b)(i) of Chapter 101 of the Laws of Malta which states that:

(i) where the offence is one under article 4 or under article 8(c) except in such circumstances that the Court is satisfied that such cultivation was for the exclusive use of the offender, or consists in selling or dealing in a drug

> contrary to the provisions of this Ordinance or in an offence under sub-article (1)(f), or of the offence of possession of a drug, contrary to the provisions of this Ordinance, under such circumstances that the court is satisfied that such possession was not for the exclusive use of the offender, or of the offences mentioned in sub-articles (1C) or (1D) or (1E), to imprisonment for a term of not less than six months but not exceeding ten years and to a fine (multa) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) but not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87).

10. However, the punishment mentioned in this sub-article is to be increased by one degree since these offences were admittedly committed in or within one hundred metres of the perimeter of a school, youth club, centre, or such other place where young people habitually meet. According to article 31(1)(b) of the Criminal Code, the increase by one degree entails a minimum of seven months imprisonment up to a maximum of twelve years imprisonment. This is indeed a very wide margin of discretion that is given by Law to the sentencer.

11. When the Court of Magistrates imposed the one-year prison sentence in this case, it was therefore maintaining its sentence very close to the statutory minimum established by Law simply and solely for the first charge which the appellant pleaded guilty to. Apart from that first charge, the appellant pleaded guilty also to the other criminal offences brought forward against him in the charge sheet. So once again the appellant must realise that the Court of Magistrates could have considered the second charge as being a means for the commission of the first charge, that is trafficking. The third charge could have been deemed absorbed in the second charge too. Yet when it comes to the fourth, fifth and sixth charges, each possession of cocaine, extasy and new psychoactive substance constituted a standalone offence. Hence the Court of Magistrates had to find the appellant guilty of each offence and then calibrate its punishment on the provisions of article 17 of the Criminal Code.

12. The first three charges could be deemed to be subject to the provisions of article 17(h) of the Criminal Code, and therefore

> when several offences, which taken together do not constitute an aggravated crime, are designed for the commission of another offence, whether aggravated or simple, the punishment for the graver offence shall be applied.

13. This means that as far as these offences are concerned, the Court meted out the punishment by reference to the first charge, with the punishment for the two subsequent charges being absorbed in that meted out for the first charge as qualified by the seventh charge. This is the punishment that varies between seven months and ten years imprisonment mentioned above.

14. But to this punishment then must be added the punishment for the other offences which the appellant pleaded guilty to. The punishments for the offences mentioned in the fourth, fifth and sixth charge are regulated by article 22(2)(b)(ii) of Chapter 101 of the Laws of Malta and article 120A(2)(b)(ii) of Chapter 31 of the Laws of Malta respectively.

> For any other offence, to imprisonment for a term of not less than three months but not exceeding twelve months, or to a fine (multa) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) but not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) or to both such imprisonment and fine.

15. These then must be expressed in terms of article 17(b) of the Criminal Code that states:

> A person guilty of more than one crime liable to temporary punishments restrictive of personal liberty, shall be sentenced to the punishment for the graver crime with an increase varying from one-third to one-half of the aggregate duration of the other punishments;

16. When the punishment meted out by the Court is expressed on these lines, then it is amply clear that the one-year imprisonment sentence meted out is almost the bare minimum that could have been imposed by the Court of Magistrates.

17. However insofar as the fine (multa) of two hundred euro is concerned, this is clearly already below the statutory minimum inasmuch as according to article 22(2)(b)(i) and (ii) of Chapter 101 of the Laws of Malta, as well as article 120A(2)(b)(ii) of Chapter 31 of the Laws of Malta, the minimum fine that should have been imposed was to be not less than four hundred and sixty-five euro and eighty-seven cents (€465.87). In this case the Court of Magistrates imposed a fine (multa) to the tune of two hundred euro (€200), which is below the statutory minimum

in this case. No appeal was lodged from this point by the Attorney General and therefore this Court cannot revise and increase the said fine.

18. This Court sees no valid reason why the discretion of the Court of Magistrates in meting out its imprisonment sentence should be revised in this case. After all, despite the fact that the appellant protests this punishment due to the "small" amount of drugs found, this Court has seen that the Court of Magistrates was presented with a scenario where the appellant trafficked drugs on more than one occasion. So much so that the appellant was charged with having committed these criminal offences not only on the 4th August 2021, but also during the previous months. While the Prosecution did not impute these offences as continuous offences, on the otherhand it is clear that the Prosecution thesis envisaged the appellant being involved in drug trafficking over a period of time. Therefore the amount of drugs seized from him were not the only drugs forming part of his trafficking operations. And if the Court of Magistrates believed that the text messages referred to in this case reflected the past drug dealings of the appellant, then, a one year imprisonment punishment would have been very lenient in this case. However there again, there is no possibility of increasing this punishment at appellate stage in this case.

Decide

Consequently, the Court is hereby rejecting the appeal and confirming the judgment given by the Court of Magistrates (Malta).

Aaron M. Bugeja,
Judge