



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

MAGISTRATE DR ELAINE MERCIECA LL.D

POLICE

(Police Inspector Roderick Attard)

against

AMADOU BARRY

Case No.: 150/2021

Today, 14th December, 2021

The Court,

After having seen the charges brought against the accused, **Amadou Barry**, of 22 years, son of Bilo and Dalan, born on the 18th February 1999 in Konkugan, Gambia, without fixed address, holder of Maltese Identity Card no. 9001642A and holder of police number 18N-027;

Charged with having on the 4th October 2021 in these islands:

1. Had in his possession the psychotropic and restricted drug (synthetic) without a special authorisation in writing by the Superintendent of Public Health, in breach of the provisions of the Medical and Kindred Professions Ordinance, Cap. 31 of the 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 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, Cap. 101 of the Laws of Malta. The Court was also requested that in the event of guilt, apart from inflicting the punishment as prescribed by law, orders as well the confiscation of all objects exhibited.

The Court was further requested to apply article 533(1) of Chapter 9 of the Laws of Malta in connection with the expenses incurred by the Court appointed experts.

Having seen the Order of the Attorney General issued in terms of article 120A(2) of the Medical and Kindred Professions Ordinance (Cap. 31 of the Laws of Malta) for this case to be tried summarily by this Court sitting as a Court of Criminal Judicature;

Having heard all the evidence brought forward and the submissions made by the parties;

Having seen all the documentary evidence and the full acts of proceedings;

Considers:

PC974 Shelly Buhagiar testified that on 4th October 2021 at three o'clock in the afternoon was patrolling Triq Pitkali, Marsa, with PC2190. As they surpassed the Yellow Pages Building, they noticed four men sitting on the stairs and as soon as these four men saw the police, one of them look agitated, stood up and started

moving down the stairs. He was stopped by the police and asked if something was wrong to which he replied 'no'. PC974 Buhagiar asked him to empty his pockets and informed him that a frisk search was going to be conducted on himself, to which he agreed. When this search was conducted in his right front pocket the police found sixteen (16) sachets of suspected illegal substance. Hence he was given his rights, arrested and escorted to the Hamrun Police station. PC974 identified this person as being Amadou Barry on the spot given that he had with him his identity card and also a hospital appointment. She also positively identified him physically during her testimony.

PC2190 Julian Caruana also confirmed that whilst he was patrolling Marsa with PC974 Buhagiar, at about 15.00 hrs on the 4th of October 2021, they had seen four men sitting on the stairs next to the Yellow Pages Building. He also noticed that as one of these men saw them, he reacted suspiciously by getting up and going down the stairs in a rush. He confirmed that PC 974 stopped him and ordered him to empty his pockets and place the contents thereof on the ground. Until such point it was noticed that he had only a mobile, documents and keys. They also informed him that a search was going to be done on him and during such search in his right-hand side pocket of his trousers sixteen sachets of suspected substance were found. The witness positively identified the accused as being this person who was found in possession of the suspected illegal substance and he also positively identified *Doc. SB* as being the substance which was found on the accused Amadou Barry. Following the finding of the substance, PC2190 also confirmed that PC974 proceeded to arrest the accused, give him his rights and escort him with the assistance of RIU officers to the Hamrun Police Station.

PS2126 Isabella Galea took the witness stand to confirm that on 4th October 2021 at about 15.30hrs, PC974 and PC2190 from Community Policing brought the accused to the Hamrun Police station. She had prepared the report in connection with this finding which report was exhibited and marked as *Doc. IG*. She also

confirmed that she went to the Marsa Police Station to weight the substance which was found in his possession.

Inspector Roderick Attard confirmed on oath that on 4th October 2021 he was informed by PS2126 Isabella Galea that during an inspection at Triq il-Pitkali, Marsa, near the Yellow Pages Building, a foreign youth was observed acting suspiciously by two community policing police officers – PC974 and PC2190. Hence, he was stopped and searched by the same officers and he was found to be in possession sixteen (16) sachets of suspected synthetic which weighed about 8.83grms. Inspector Attard confirmed that the accused, Amadou Barry, released a statement (*Doc. RM6*) after consulting with Dr. Joseph Brincat.

The accused's statement to the Police (for which, according to the same statement and to the testimony of Police Inspector Attard, the accused had opted not to have a lawyer present during the said statement) was taken after he consulted with the legal aid lawyer Dr. Joseph Brincat. In his statement the accused confirmed that at about 15.00hrs he was stopped by police officers and following a search he was found to be in possession of sixteen sachets of suspected synthetic drugs in his trousers. He stated that he had found the synthetic drugs on the floor prior to his arrest. He also stated in his statement that he used to smoke synthetic drugs.

Dr. Robert Musumeci, the court appointed expert, concluded that:

“Route distance between the location where the accused was allegedly intercepted and the access to a tattoo shop situated in Triq Stiefnu Zerafa, Marsa having a sign displaying ‘Sijsi Ink’ installed on its façade: 59.3 metres;

Route distance between the location where the accused was allegedly intercepted and a building situated in Triq ic-Centru Ewkaristiku, Marsa,

having a sign mounted on the external façade displaying the words 'Fergha Ewkaristika': 20.2 metres”¹

Pharmacist Godwin Sammut, the court appointed expert to analyse the substance concluded that:

“ ADB-BUTINACA, which is a type of synthetic cannabinoid was found in the extracts taken from the green grass which are in the exhibit marked as K/B/353/2021. The total weight of the green grass is 3.73grams. since this is a synthetic cannabinoid, purity cannot be performed nor is any data available regarding the street market value. This substance is controlled by the Laws of Malta under Chapter 31.”²

On 1st December 2021, **the accused, Amadou Barry**, opted voluntarily to take the witness stand. During his testimony he explained that on the day that the police arrested him he was in Marsa, he had found the substance on the floor at Marsa, he made a joint and after about ten minutes the police came. He confirms that he tried to run as he is aware that it is not right to be in possession of all that synthetic. He confirmed that he found all the sixteen sachets of synthetic drugs on the ground in Marsa. In his testimony, notwithstanding being asked during the examination in chief the precise location of where it was found, the accused does not give a clear indication of the said place and repeats that he found it on the floor in Marsa. The accused, in his testimony, also confirms what he told the police in the statement that he used to smoke synthetic. He also confirms that his intention was to smoke the synthetic that, according to him, he found on the floor. He states that he never sold any illegal substance. In cross examination he also confirms that he was sitting with other people whom he does not know when the police came. He also confirms that when the police came the drugs were in his pocket not in his hand.

¹ Fol. 10 of Dr. Musumeci's report.

² Fol. 4 of Mr. Sammut's report.

Considers further:

The **facts in brief** which are not being contested are that whilst the police were patrolling Triq il-Pitkali in Marsa, they notice a group of four people sitting on the stairs next to the Yellow Pages building, amongst them was the accused who as soon as he noticed the police started acting suspiciously and even tried to get away. The police stopped and searched him. In the pocket of his trousers they found sixteen sachets of illegal substance which upon analysis by the Court appointed expert were classified as being ADB-BUTINACA, a type of synthetic cannabinoid. The total weight of this substance was found to be of 3.73 grams. The weight of each individual sachet was as follows: 0.25g; 0.22g; 0.21g; 0.22g; 0.24g; 0.25g; 0.27g; 0.25g; 0.26g; 0.25g; 0.24g; 0.21g; 0.21g; 0.21g; 0.22g; 0.22g.

By virtue of the **first charge**, Amadou Barry is charged with having been in possession of the psychotropic and restricted drug (synthetic) without a special authorisation in writing by the Superintendent of Public Health, in breach of the provisions of the Medical and Kindred Professions Ordinance (Cap. 31 of the 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 his personal use.

From the evidence presented in this case it clearly results that the accused was found red-handed in possession of the 16 sachets containing ADB-BUTINACA, a type of synthetic cannabinoid in the total weight of 3.73 grams. In fact, as previously stated this is not being contested by the defence. However, the defence is arguing that this substance was intended solely for personal use. The accused, in fact, is claiming that he had found the drugs on the ground in Marsa prior to being arrested by the police and he had taken them to consume them himself. Consequently, the Court must now determine whether it has been proved, beyond

any reasonable doubt, that the accused's possession of the said substance was intended for his personal use exclusively or otherwise.

In its judgement of 12th May 2005 in the names Il-Pulizija vs Marius Magri, the Court of Criminal Appeal held that:

“Illi dawn il-kazijiet mhux l-ewwel darba li jipprezentaw certa diffikolta` biex wiehed jiddetermina jekk id-droga li tkun instabet kienitx intiza ghall-uzu personali jew biex tigi spjaccjata. Il-principju regolatur f'dawn il-kazijiet hu li l-Qorti trid tkun sodisfatta lil hinn minn kull dubbju dettat mir-raguni w a bazi tal-provi li jingabu mill-prosekuzzjoni li l-pussess tad-droga in kwistjoni ma kienx ghall-uzu esklussiv (jigifieri ghall-uzu biss) tal-pussessur. Prova, ossia cirkostanza wahda f'dan irrigward tista', skond ic-cirkostanzi tal-kaz tkun bizzejjed.”

In the case Il-Pulizija vs Brian Caruana, decided by the Court of Criminal Appeal on 23rd May 2002, the Court held the following:

“kull kaz hu differenti mill-iehor u jekk jirrizultawx ic-cirkostanzi li jwasslu lill-gudikant ghall-konvinzjoni li droga misjuba ma tkunx ghall-uzu esklussiv tal-akkuzat, fl-ahhar mill-ahhar hija wahda li jrid jaghmilha l-gudikant fuq il-fatti specji li jkollu quddiemu w ma jistax ikun hemm xi “hard and fast rule” x'inhuma dawn ic-cirkostanzi indikattivi. Kollox jiddependi mill-assjem tal-provi w mill-evalwazzjoni tal-fatti li jaghmel il-gudikant u jekk il-konkluzjoni li jkun wasal ghalha il-gudikant tkun perfettament raggungibbli bl-uzu tal-logika w l-buon sens u bazata fuq il-fatti, ma jispettax lil din il-Qorti li tissostitwiha b'ohra anki jekk mhux necessarjament tkun l-unika konkluzzjoni possibbli”

In this case the accused was found in possession of 3.73grams of synthetic cannabinoid, an amount considered as being indicative of both trafficking and personal use. Hence in this Court's view, it is imperative that the Court analyses

all the circumstances of this case and not rely simply on the amount found to determine whether the possession was one for personal consumption or else not for personal use.

The first consideration is how the illegal substance was found in the accused's possession. As mentioned earlier on the 3.73 grams were not found in one sachet but in sixteen different sachets. The amount of these sachets is considerable and is definitely indicative that it was not intended for personal use especially when considering the circumstances in which they were found. Firstly, the said substantial amount of sachets was all found physically on his person. It is, highly unlikely that the accused would be able to consume all of the said substance himself whilst he is outdoors. In this regard the accused states that he was in possession of such substantial amount of sachets given that he had just found them on the ground. However this Court does not find this version credible. Besides it being highly unlikely that such substantial amount of drugs were left on the ground, the accused, even his testimony was not able to give any details of where he precisely found them. Additionally, the accused was apprehended whilst he was in company of three other people whom in his testimony the accused states that he did not know. This Court also makes reference to the accused's reaction when he saw the police coming over. His reaction is not simply based on the police officer's perception but a reaction which was also confirmed by the accused himself on oath. In fact, in his testimony he states that he wanted get away from the police given that it is not right to have that amount of illegal substance in one's possession and not simply because he was in possession of such illegal substance.

“Defence: Why do you think the police approached you?”

“Witness: Because it's not right to catch all that synthetic in me. It's not right to catch all the synthetic in my hand. That is why they catch me.”

Defence: You had the synthetic in your hand?”

***Witness:** I had the synthetic but is not allowed all of synthetics in my hand.*

....

***Defence:** Why did you run from the police?*

***Witness:** Because I know what I have is not allowed all of that because I used to smoke. I know about it.*

***Defence:** All right. Mela, the police knew that you had synthetic in your pocket?*

***Witness:** Because I see them, I want to run, because I know I have synthetic in my pocket and if they find me...”*

This shows that the accused was well aware of the nature of the substance he had in his possession and also the amount thereof. This knowledge indicates that the substance was actually his and that his version that the substance was found on the ground is not a credible one.

In addition to this, upon analysis by the court appointed expert, it was concluded that each sachet of the 16 sachets contained more or less the same amount³. This once again is indicative that the said substance was not intended for personal consumption. Furthermore, as explained earlier on the full 3.73grams were all found physically on his person whilst at Marsa in an area which is renowned for drug trafficking.

Hence in view of all these circumstances this Court believes that the prosecution has managed to sufficiently prove that the drugs found in the accused's possession were not intended for his personal use. Hence the prosecution has managed to sufficiently prove this first charge beyond reasonable doubt.

The **second charge** relates to the fact that conducted attributed by means of the first charge proffered against the accused was committed within 100 metres of

³ The weight of each individual sachet was as follows: 0.25g; 0.22g; 0.21g; 0.22g; 0.24g; 0.25g; 0.27g; 0.25g; 0.26g; 0.25g; 0.24g; 0.21g; 0.21g; 0.21g; 0.22g; 0.22g. Please refer to page 3 of Doc. GS.

the perimeter of a school, youth club or centre, or such other place where young people habitually meet. In view of the nature of this second charge, this grievance is going to be considered in light of and with combination to the first charge namely that of possession not intended for personal use. Here reference is made to the report submitted by the court appointed expert, Dr. Robert Musumeci, who in his conclusions declared:

“Route distance between the location where the accused was allegedly intercepted and the access to a tattoo shop situated in Triq Stiefnu Zerafa, Marsa having a sign displaying ‘Sijisi Ink’ installed on its façade: 59.3 metres;

Route distance between the location where the accused was allegedly intercepted and a building situated in Triq ic-Centru Ewkaristiku, Marsa, having a sign mounted on the external façade displaying the words ‘Fergha Ewkaristika’: 20.2 metres”⁴

The Court notes that the second proviso to article 120A(2) of Cap. 31 of the Laws of Malta stipulates:

“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 metres of the 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.”

The Court finds no reason to depart from the said expert’s opinion in connection with the distance. However, from the reading of the aforementioned proviso it is clear that the legislator was not making reference to any club but specifically to a youth club. The Court of Criminal Appeal has consistently held that this

⁴ Fol. 10 of Dr. Musumeci’s report.

criterion must be established in an objective manner⁵. In this case, the Court has absolutely no evidence at hand that the *Fergha Ewkaristika* is in fact a youth club or that it is a place where young people habitually meet. Likewise, the Court was presented with no evidence that indicated that the Sejsi Ink is a place where young people habitually meet. Hence the Court is of the view that the prosecution did not manage to sufficiently prove that for the purposes of the first charge the accused was in possession of the synthetic cannabinoid within the distance of 100 metres from a place where young people habitually meet.

Considers further:

That for the purpose of punishment to be inflicted, this Court is taking into account the clean conviction sheet of the accused, the serious nature of the charges proffered against the accused, the conduct of the accused, and the amount of drugs found in his possession.

Decide:

For these reasons the Court, after having seen regulation 5 of Legal Notice 22 of 1985 and articles 40A, 120A(1)(a), (2)(b)(i) and the second proviso to subarticle 120A(2) of the Medical and Kindred Professions Ordinance, Cap. 31 of the Laws of Malta, acquits the accused **Amadou Barry** of the second charge proffered against him whilst it **finds him guilty of the first charge brought against him and condemns him to seven months effective imprisonment** (from which period one must deduct the period of time, prior to this judgement, during which the person sentenced has been held in preventive custody in connection with this case) **and to the payment of a fine (multa) of five hundred fifty euros (Eur. 550).**

⁵ Reference is made to judgements: Pulizija vs. Jason Xuereb dated 9th June 2009 and Police vs Abdikarim Isman Omar dated 29th October 2018.

Additionally, in terms of article 533 of Chapter 9 of the Laws of Malta, the Court is ordering the accused to pay the Registrar of this Court the sum of three hundred ninety Euros and seventy euro cents (Eur. 390.70) representing expenses incurred in the employment of experts in relation to the charge for which he was found guilty. The Court is also confiscating document marked as SB.

Furthermore, the Court is ordering the destruction of the contents of Document SB, once this judgement becomes final and definitive, under the supervision of the Court Registrar, who shall draw up a process-verbal documenting the destruction procedure. The said proces-verbal shall be inserted in the records of these proceedings not later than fifteen days from said destruction.

Dr Elaine Mercieca
Magistrate

Christine Farrugia
Deputy Registrar