The Court of Criminal Appeal

His Honour the Chief Justice Mark Chetcuti

The Hon. Judge Edwina Grima

The Hon. Judge Giovanni Grixti

Today, Wednesday the 22nd of January 2025

Bill of Indictment No : 597/2022

The Republic of Malta

vs

Lamin Jobe

The Court,

1. Having seen the charges brought against the accused Lamin Jobe, before the Court of Magistrates (Malta) as a Court of Criminal Inquiry wherein he was charged with having on the 11th of October 2022, and/or in the previous months in the Maltese Islands:

i. Imported or caused to be imported or took any steps preparatory to import any dangerous drugs (*Cannabis Grass*) into Malta against the provisions of The Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

ii. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the whole or any portion of the plant Cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for his personal use.

2. Having seen the minutes of the proceedings held before the Court of Magistrates as a Court of Criminal Inquiry of the 22nd of January 2024, and of the 12th of March 2024 whereby the accused, assisted by defence counsel, declared that he was pleading guilty to the charges brought against him, and after having been warned by the Court of the legal consequences of his admission, re-affirmed his guilty plea.

3. Having seen the note of the Attorney General filed in terms of Article 392B of the Criminal Code, Chapter 9 of the Laws of Malta, of the 2nd of April 2024, whereby it was declared that the charges brought against the accused before the Court of Magistrates (Malta) as a Court of Criminal Inquiry, and for which the accused had admitted his guilt, shall be considered as a Bill of Indictment for all intents and purposes at law.

4. Having seen the judgment of the Criminal Court of the 16th of May 2024 wherein the Court, after having seen the provisions of Articles 2, 7, 15A(1), 22(1)(a), and 22(2)(a)(i) of Chapter 101 of the Laws of Malta, found the accused Lamin Jobe guilty of all the charges brought against him and condemned him to a period of nine (9) years and six (6) months imprisonment and to the payment of a fine (*multa*) of fifteen thousand Euros (€15,000). After having seen and considered Article 533 of Chapter 9 of the Laws of Malta, the Court condemned the accused to pay the amount of three thousand, nine hundred and seventy-two Euros and ninety-eight cents (€3972.98) within a period of three (3) months, which amount represents the costs incurred in connection with the employment of experts in this case. The Court ordered the destruction of all the objects exhibited in Court, consisting of the dangerous drugs or objects related to the abuse of drugs, which destruction shall be carried out as soon as possible under the direct supervision of the Court Registrar who shall be bound to report in writing to this Court when such destruction has been completed, unless the

Attorney General files a note within fifteen days declaring that the said drugs are required in evidence against third parties. Finally, the Court ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which the accused has been found guilty and other moveable and immovable property belonging to the said Lamin Jobe

5. Having seen the appeal application filed by accused on the 27th of May 2024 wherein he requested this Court to "amend the judgment imposed on him by the Criminal Court on the 16 May 2024 by revoking that part where it found him guilty of the second charge and declare that the second charge forms part (kompriza u involuta) of the first charge, confirms the judgment of the Criminal Court where it found him guilty of the first charge, varies and modifies the punishment meted out to the accused and to provide a lesser and more reasonable punishment in the circumstances."

6. Having seen the reply of the Attorney General of the 4th of July 2024 wherein she maintained that the imposed penalty falls well within the appropriate legal and jurisprudential parameters and consequently, the discretion exercised by the Criminal Court in determining the punishment in this case should not be subject to interference by this Court. Thus, the Attorney General requested that the Court reject the grievances of appellant and uphold the appealed judgment in its entirety.

7. Having heard oral submissions by the parties.

8. Having seen all the acts of the case.

Considers:

9. Appellant puts forward two main grievances in his appeal application, the first one referring to the finding of guilt for the second charge brought against him, and the other one concerning the *quantum* of the punishment inflicted upon him. With regards to the first grievance, the Court notes that although it transpires from the acts of the proceedings that appellant admitted to all the charges, and this during the compilation of evidence, thus triggering the procedure established in article 392B of the Criminal Code, in his final request to this Court he asks for a revocation of the

finding of guilt from the said charge of aggravated possession of the drug *cannabis grass*, although he has admitted his guilt and this when duly assisted by his lawyer throughout the entirety of the proceedings.

10. The Court has considered the grievance brought forward by appellant and on which basis he is asking for the revocation of the finding of guilt for the second charge relating to the offence of aggravated possession of *cannabis grass*, and it is evident that appellant is resorting to the institute of the concurrence of offences when he maintains that the second charge should have been absorbed in the first one, and the sole punishment to be meted out by the Criminal Court should have been that relating to the first charge of importation of the said illicit substance, of which he should have solely been found guilty. He then goes on to confound matters further by stating that the charges are alternative the one to the other. He maintains that it is legally impossible for a person to be accused of importing drugs without having the possession of the said drug especially if that person would have been acting as a drug mule. Appellant also contends that if the Court had to conclude otherwise, then a person can never be charged with the importation of drugs without also being charged with the possession thereof, which according to him does not make juridical sense.

11. Now, appellant has registered a guilty plea to two charges, one relating to the offence of drug importation and the other concerning the offence of aggravated possession of an illicit substance. Appellant was intercepted by Customs Officials, at the Malta International Airport upon his arrival on a Ryanair flight from Bologna in Italy, in possession of 6 kilogrammes of *cannabis grass*.

12. Article 2(1) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta defines the word 'import' as:

> **"import", with its grammatical variations and cognate expressions, in relation to Malta, means to bring or cause to be brought into Malta in any manner whatsoever.**

That by means of the second charge appellant is being charged with having in his possession (otherwise than in the course of transit through Malta or the territorial waters 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.

13. In his grievance, however, appellant seems to confuse two legal institutes, that of the concurrence of offences and the other dealing with alternative charges. With regards to the latter, Article 467 of the Criminal Code lays out the manner in which the jury is to proceed in its deliberations prior to reaching its verdict, when it is stated that the jury shall first consider, whether the accused is guilty of the offence charged against him in the indictment, with all the aggravating circumstances, if any, therein specified, and, if the jury shall be of opinion that such guilt is proven, they shall, in the manner provided in articles 468 and 469, find the accused "guilty". If the jury finds no proof that the accused is guilty as a principal in the commission of the offence, they may find him guilty as an accomplice or as a co-conspirator, or *vice-versa*. Then sub-section 4 of article 467 lays down the rules to be followed by the jury in its deliberations when alternative verdicts to the offence mentioned in the Indictment by the Attorney General is reached.

> **Where the offence is not proved in the terms in which it was specified in the indictment, but it shall appear at the trial that either the same offence but of a less aggravated character, or a lesser offence, or an attempted offence only has been committed, provided the same be included or involved in any part of the indictment, the jury may either exclude the aggravating circumstances or add those circumstances which make the offence of a less aggravated character, or find the accused guilty of such lesser offence or of an attempted offence, or of the facts constituting such lesser offence or attempted offence, as the case may be.**

14. The Criminal Code then, in article 487, lays down the instances where the person accused may be found guilty of an alternative offence, although the same is not included in the Indictment.

> **(1) If a woman tried for the murder of her child or for infanticide is acquitted thereof, it shall be lawful for the jury, by whose verdict such woman is acquitted, to find, in case it shall so satisfactorily appear in evidence, that such woman had given birth to a child and that, by secretly burying or otherwise disposing of the dead body of such child, she endeavoured to conceal the birth thereof.**

(2) If a person tried for the theft, whether simple or aggravated, of any object is found not guilty of that charge, it shall be lawful for the jury to find him guilty of misappropriation of that object or of the offence contemplated in article 334 with regard to that object, if there is proof to that effect; and, conversely, a person tried for misappropriation or for the offence contemplated in article334 may be found guilty of theft, whether simple or aggravated, of the object concerned if there is proof to that effect

15. Thus, the offence of importation of dangerous drugs is not at law considered to be an alternative offence to that of aggravated possession of the drug, such that were appellant to be acquitted of the first charge, he could very well have been found guilty of the second, and vice-versa. Hence, although there may not be evidence in the case to lead a jury to believe, beyond a reasonable doubt, that the accused actually imported the drugs himself, he could still be found guilty of being in possession of that dangerous drug. Alternatively, although the accused may not have been found in the material possession of the drugs, he could still be found guilty of importing the same, or of causing the drug to be so imported within the definition laid out by law as cited above.

16. Appellant also contends that the one charge is to be considered as 'kompriz u involut' in the other charge. Now, as decided in the case ***Il-Pulizija vs. Carmelo Farrugia*** on the 11th of February 2002 by the Court of Criminal Appeal in is inferior jurisdiction:

> ***Biex reat jista' jitqies li hu kompriz u involut f'iehor, l-ingredjenti kollha ta' l-ewwel wiehed iridu jkun jinsabu fir-tieni wiehed. Kif jispjega l-awtur Francesco Antolisei fir-rigward ta' dak li jsejjahlu "reato complesso in senso lato", ikun hemm din il-figura ta' reat "quando un reato, in tutte o in alcune delle ipotesi contemplate nella norma incriminatrice, contiene in se` necessariamente altro reato meno grave". Proprju minhabba l-intenzjoni ossia l-element formali rikjest fir-reat ta' hsara volontarja minn naha u ta' ragion fattasi minn naha l-ohra, iz-zewg reati jeskludu wiehed lill-iehor, b'mod ghalhekk li ma jistax wiehed minhom ikun kompriz u involut fl-iehor.***

17. Thus, from the teachings laid out by jurisprudence, it is evident that the lesser offence must be such as containing the same elements as the graver offence for it to be 'absorbed' into the more serious one. In the case ***Ir-Repubblika ta' Malta vs. Davide Bonanno*** decided on the 4th of October 2023 by the Court of Criminal Appeal (Superior

Jurisdiction), the elements of the offence of the aggravated possession of drugs were listed as being the following:

> **Issa sabiex tirriżulta kundanna għar-reat tal-pussess aggravat ta' droga il-Prosekuzzjoni trid neċessarjament tipprova, u dan lil hinn minn kull dubju dettat mir-raġuni, zewġ fatturi:**
>
> **i. Illi l-persuna akkużata kellha x-xjenza dwar l-esistenza tad-droga.**
>
> **ii. Illi l-persuna akkużata setghet teżerċita l-kontroll fuq dik id-droga.**[1]

This contrast with the elements of the offence of importation as defined above. Consequently, the constitutive elements of the two charges are different and distinct the one from the other such that neither one may be 'absorbed' into the other as appellant contends.

18. Moreover, from the acts of the proceedings especially from the testimony of PS 88 Aldo Cassar (fol. 46), PS 118 Eman Joe Borg (fol. 52), PC 1564 Karl Zammit (fol. 54), Customs Inspector Anthony Scerri (fol. 57), Customs Officer Kevin Borg (fol. 63), Customs Officer Emanuel Aquilina (fol. 274) and Customs Officer Jurgen Farrugia (fol. 277), and also from the appellant's statement (fol. 186), it transpires that on the 11th of October 2022, appellant arrived in Malta from Bologna and whilst carrying his suitcase was stopped by the Customs Officials who requested him to pass said suitcase through the X-ray machine. Customs Officer Jurgen Farrugia, who was in charge of this scanning machine, noticed that this suitcase was completely empty except that it contained seven spherical unknown objects. Subsequently, a narcotic field test was carried out and it resulted positive to Cannabis. In his statement appellant stated that this suitcase had been given to him by a certain Sherif to be handed over in Malta to a certain Kabila (fol. 210). Therefore, appellant brought over *Cannabis grass* into Malta and, after importing it into Malta, he was also found in the material possession of said *Cannabis grass* with the ultimate aim of handing it over directly to a certain Kabila in

[1] *Vide* also Ir-Repubblika ta' Malta vs. Godfrey Ellul decided by the Court of Criminal Appeal (Superior Jurisdiction) on the 17th March 2005.

Malta and thus excluding the scenario of the use of the drugs for his personal consumption.

19. Having thus premised, the Court understands that what appellant is referring to in his grievance is the institute of concurrence of offences or the so-called *concursus delictorum,* with the formal or ideal concurrence, as distinguished from the material concurrence, arises when the same fact or facts give rise to the violation of more than one disposition of the law, in which case there is a finding of guilt for the more serious offence.

20. Now, in this case, although the possession of the drug by accused was carried out as a means for the importation of the same, however, although there is a singleness of purpose, there are several distinct facts which lead to a plurality of offences since appellant was not only in possession of the drug, but he was also in the possession of the drug with the intent to enter into the territory of Malta. As the learned Professor Sir Anthony Mamo states:

> **Where the criminal effects which the agent determines to produce are several it does not matter that the one of them is, in his mind, connected with the other or others as the means to an end: for even so, he has the consciousness that this action is the cause of several offences in as much as he knows that he is producing several distinct criminal events or, in other words, several effects each of which can be contemplated as a distinct offence irrespective of the other or others.**

21. Neither can the offence of importation be considered as an aggravation of the offence of possession of a drug not for personal use, since the two offences cannot be considered to be naturally and legally inseparable such as that they may constitute one single offence, as appellant is suggesting, but in this case the two offences are linked together in an accidental manner created by the offender himself.

22. The prosecution of two offences against appellant in this case can only amount to a real or material concurrence of offences as envisaged in article 17 of the Criminal Code, with the offender necessarily having to answer for each and every one of them, the mitigation applying solely with regard to the punishment to be inflicted, and does not in any way have a bearing on the finding of guilt for such offences. Consequently,

the grievance put forward by appellant is legally and juridically unfounded and the Court cannot accede to his request and revoke the finding of guilt for the second charge brought against him.

Considers,

23. Appellant also complains that the Criminal Court did not weigh all the circumstances of the case which could have led to a mitigation in punishment. He begins by maintaining that the low, if not negligible, percentage of the purity of the drug should have been given more weight by the Criminal Court since had the drug been dispersed in society at large, the potential harm caused would have been minimal.

24. Now, the Criminal Court in its considerations on the punishment to be inflicted, contrary to what appellant alleges, took into account the purity of the drugs found in his possession. The Criminal Court, in fact, made the following considerations when deliberating on the punishment to be meted out:

> **That in considering the punishment to be inflicted on the accused for the charges brought against him, this Court will be taking into consideration various factors, particularly the amount of drugs involved being 6 kilogrammes of cannabis, its value as indicated by the Scientist and the role of the accused being aware of his participation. The Court will also take into consideration the purity related to the drugs found and the accused's admission of guilt. Now the punishment for the offences which the accused is being accused of carry a term of imprisonment for life. However in the circumstances of this case, this Court deems that the punishment of life imprisonment would not be appropriate and this when taking into account the admission of guilt by the accused in front of the Court of Magistrates (Malta) as a Court of Criminal Inquiry. However the punishment cannot be meted out in its minimum taking into consideration the circumstances outlined above**.

25. Thus, it is clear that the Criminal Court, when quantifying the punishment considered other aggravating factors which it counterbalanced with the mitigating factors, being the low purity of the drugs and the admission of guilt by appellant. Appellant also complains that he was being used by others as a carrier/drug mule and that he is a vulnerable person who has escaped from his country of origin, Gambia, where he was suffering severe poverty and also came from a diverse cultural

background making him even more vulnerable. That, according to appellant, these circumstances were to be taken into consideration when awarding punishment.

26. Now, although from the acts of the proceedings it does result that appellant's role was that of a drug mule, this does not minimise his involvement in the importation of *Cannabis grass,* since drug mules are the vehicles used in the importation of drugs in the country, without whose participation in the criminal organization, the circulation of drugs within the community would hardly be possible. Appellant was fully aware of his involvement and was paid one thousand Euros (€1,000) for his participation in this criminal organization. Moreover, with regard to his personal circumstances, appellant failed to bring forward evidence to substantiate his claims of oppression, vulnerability and poverty before the Criminal Court, as was his right in terms of article 392B(4) of the Criminal Code. Having thus premised, however, this Court does not consider such circumstances as deserving a further mitigation, since this does not in any way diminish the severity of the criminal act committed by him when importing drugs illegally for the purpose of onward trafficking.

27. Appellant also complains that the Criminal Court should have given weight to the fact that he admitted his guilt during the Inquiry stage and that an early admission should also be considered as a mitigating factor. That from the acts of the proceedings it transpires that appellant was arraigned in Court on the 13th of October 2022. He then pleaded guilty before the Court of Magistrates on the 22nd of January 2024 and confirmed his guilty plea on the 12th of March 2024. It also results that appellant was caught *in flagrante delicto* importing into Malta, and being in possession of, *Cannabis grass.* In the case ***The Republic of Malta vs. Tony Johnson*** decided on the 23rd of October 2014 the Court of Criminal Appeal (Superior Jurisdiction) held the following:

> **23. The principles which have been considered to guide these Courts when there is a guilty plea have been described by the Criminal Court in its preliminary judgement Ir-Repubblika ta' Malta v. Nicholas Azzopardi decided on the 24th February 1997 and the judgement of the Court of Criminal Appeal (inferior jurisdiction) in its judgement Il-Pulizija vs. Emmanuel Testa decided on the 17th July 2002. In the latter**

case reference was made to an excerpt from Blackstone's Criminal Practice, 2001, para. E1.18, p.17893:

> **""Although this principle [that the length of a prison sentence is normally reduced in the light of a plea of guilty] is very well established, the extent of the appropriate 'discount' has never been fixed. In Buffery (1992) 14 Cr App R (S) 511 Lord Taylor CJ indicated that 'something in the order of one-third would very often be an appropriate discount', but much depends on the facts of the case and the timeliness of the plea. In determining the extent of the discount, the court may have regard to the strength of the case against the offender. An offender who voluntarily surrenders to the police and admits a crime which could not otherwise be proved may be entitled to more than the usual discount (Hoult (1990) 12 Cr App R (S) 180; Claydon (1993) 15 Cr App R (S) 526) and so may an offender who, as well as pleading guilty himself, has given evidence against a co-accused (Wood[1997] 1 Cr App R (S) 347) and/or given significant help to the authorities (Guy [1999] 2 Cr App R (S) 24). Where an offender has been caught red-handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris (1988) 10 Cr App R (S) 216; Landy (1995) 16 Cr App R (S) 908)). Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage (Hollington (1985) 82 Cr App R (S) 281; Okee [1998] 2 Cr App R (S) 199)). Similarly, some or all of the discount may be lost where the offender pleads guilty but adduces a version of facts at odds with that put forward by the prosecution, requiring the court to conduct an enquiry into the facts (Williams (1990) 12 Cr App R (S) 415). The leading case in this area is Costen (1989) 11 Cr App R (S) 182, where the Court of Appeal confirmed that the discount might be lost in any of the following circumstances: (i) where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, be passed; (ii) cases of 'tactical plea', where the offender delayed his plea until the final moment in a case where he could not hope to put up much of a defence, and (iii) where the offender had been caught red-handed and a plea of guilty was practically certain. It was also established in Costen that the discount may be reduced where the accused pleads guilty to specimen counts." (Blackstone's Criminal Practice, 2001, para. E1.18, p.1789).**

28. It is uncontested that appellant was caught red-handed by customs official in the possession of a quantity of drugs. Moreover, when releasing his statement to the police in the course of the investigations, appellant did not provide any concrete

information with regards to the identity of the person who commissioned the crime and paid him the amount of one thousand Euros (€1,000) to carry and import *Cannabis grass* into Malta. He just identified this person as a certain Sherif. Once again, in his statement appellant does not provide any concrete information as to the identity of the person to whom he had to consign the drugs in Malta, and simply identified this person as a certain Kabila. Nor did he assist the police in their investigations, thus not being entitled to a reduction in punishment in terms of article 29 of Chapter 101 of the Laws of Malta. Consequently, his request for a further reduction in punishment for these reasons may not be entertained by this Court.

29. Finally, appellant also enters a grievance with regard to the fine imposed upon him lamenting that this is also excessive. In the case ***The Republic of Malta v. Carine Rose-Marijke Donckers et*** decided on the 9th of April 2018 the Court of Criminal Appeal (Superior Jurisdiction)) held the following:

> **44. In <u>Blackstone's Criminal Practice 2004</u> it is stated that :**
>
> ***"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 – <u>an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed</u>***

> ***<u>to being merely more than the Court of Appeal itself would have passed</u>.”(***emphasis added by the Court***).***

And in the case ***Ir-Repubblika ta’ Malta v. Basam Mohamed Gaballa Ben Khial*** decided on the 19th of February 2004 the Court of Criminal Appeal (Superjor Jurisdiction) made the following observation:

> Din il-Qorti mhux biss tikkondividi pjenament dan il-hsieb ta’ l-ewwel Qorti, izda anzi zzid li **<u>fejn si tratta ta’ traffikar tad-droga (inkluza importazzjoni) l-element tad-deterrent generali fil-piena hija konsiderazzjoni ewlenija li kull Qorti ta’ Gustizzja Kriminali ghandha zzomm f’mohha fil-ghoti tal-piena, basta, s’intendi, li jkun hemm element ta’ proporzjonalita` bejn il-fattispeci partikolari tal-kaz u l-piena erogata.</u>** (emphasis added)

30. That, as rightly pointed out by the Criminal Court in its judgment, the offences of which appellant was found guilty, carry a punishment of imprisonment for life in accordance with article 22(2)(a)(i) of Chapter 101 of the Laws of Malta. However, in terms of article 22(2)(a)(i)(aa) of Chapter 101 of the Laws of Malta, the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (*multa*) of not less than €2,329.37 but not exceeding €116,468.67, where it deems that punishment of imprisonment for life is not appropriate. Therefore, although the Criminal Court does not indicate in its judgment that it is applying article 17 of the Criminal Code, however the punishment of nine years and six months imprisonment together with the payment of a fine (*multa*) of fifteen thousand Euros (€15,000) is closer to the minimum envisaged by law and contrary to what appellant maintains, is certainly not excessive.

31. In view of these considerations the Court cannot find fault with the judgment of the Criminal Court, such judgment being passed against appellant who was duly assisted by a lawyer all throughout the proceedings, when he chose to admit unconditionally to the two charges brought against him of importation of drugs and aggravated possession of the same. Furthermore, the Criminal Court in meting out the appropriate punishment, took into account all the circumstances indicated by

appellant in his grievances, such that there is no legal and/or factual basis that may entitle him to a further reduction in the punishment inflicted upon him.

Consequently, for the above-mentioned reasons the Court dismisses the appeal filed by appellant and confirms the judgment of the Criminal Court in its entirety.

The Chief Justice Mark Chetcuti.

Judge Edwina Grima.

Judge Giovanni Grixti