THE COURT OF CRIMINAL APPEAL

HON. MADAM JUSTICE NATASHA GALEA SCIBERRAS B.A., LL.D

Appeal Number: 894/2024

The Republic of Malta

vs

Frank SUNDAY

Today, 30th April 2025

The Court:

Having seen the following:

A. THE CHARGES

1. This is an appeal from a judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 27th January 2025 against **Frank SUNDAY**, thirty-three (33) years of age, son of Sunday and Halin, born in Benin City, Nigeria on fifteenth (15th) January of the year one thousand nine hundred and ninety one (1991), declared to reside at Tal-Forn, Flat 3, Triq il-Ġdida, Luqa, Malta and bearer of Nigerian Passport number A13005942, after having been charged as follows:

   On the twenty seventh (27th) of October of the year two-thousand and twenty-four (2024) between the hours of midnight (00:00) and half past

five o'clock in the morning (05:30) and/or in the preceeding weeks and/or preceeding months, on these Maltese Islands:

1. He knowingly made use of a forged document, in breach of Articles 189 and 189A of Chapter 9 of the Laws of Malta;

2. At the same date, time, place and circumstances, without lawful authority imported, exported, transported, purchased, received, obtained or had in his custody or possession forged currency knowing the same to be forged, in breach of Articles 188A and 188C of Chapter 9 of the Laws of Malta;

3. At the same date, time, place and circumstances, drove the vehicle bearing registration number MCA 190, being a Fiat Punto without a valid driving license, and this in breach of Article 15(1)(a) of Chapter 65 of the Laws of Malta;

4. At the same date, time, place and circumstances, drove the vehicle bearing registration number MCA 190, being a Fiat Punto, without having an active policy of insurance in respect of third-party risks, and this in breach of Articles 3(1)(1A)(2)(2A) of Chapter 104 of the Laws of Malta;

5. He had in his possession the whole or any portion of the plant Cannabis in breach of Article 8(d) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for his personal use;

6. He produced, sold or otherwise dealt with the whole or any portion of the plant Cannabis in terms of Article 8(e) of Chapter 101 of the Laws of Malta;

7. That 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 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.

The Court was requested to:

1. *Pendente lite* order a 'Seizing and Freezing Order' and seizes and/or holds in the hands of third parties in general all moneys and other movable or immovable property which are due or belonging to the accused, as well as the Court prohibiting the accused from transferring, promising, creating hypothecates, or change or otherwise dispose of any movable or immovable property which pertains to the accused or is possessed by him, in terms of Article 22A of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta;

2. That in the event that the accused is found guilty of any of the abovementioned offences, apart from meting out the punishment according to law, order the forfeiture of all the objects which have been exhibited, in terms of Article 23 of Chapter 9 of the Laws of Malta;

3. That in the event that the accused is found guilty of any of the abovementioned offences, apart from meting out the punishmnet according to law, order the forfeiture in favour of the Government of Malta of the proceeds of the offence or of such property the value of which corresponds to the value of such proceeds, as well as order the forfeiture of any property in the possession or under the control or belonging to the person found guilty, in terms of Article 22 of Chapter 101 of the Laws of Malta; Article 23B of Chapter 9 of the Laws of Malta; Article 3(5) of Chapter 373 of the Laws of Malta, as well as Chapter 621 of the Laws of Malta;

4. That in the event that the accused is found guilty of any of the abovementioned offences, apart from meting out punishment according to law, applies against the person found guilty the provisions of Article 532A, 532B and 533 of Chapter 9 of the Laws of Malta.

B. THE APPEALED JUDGMENT

2. By means of the above-mentioned judgement, the Court of Magistrates (Malta) as a Court of Criminal Judicature:

    1. Found the defendant (today, the appellant **Frank SUNDAY**) not guilty of the second (2nd) charge proferred against him, and acquitted him thereof;

    2. Abstained from taking cognisance of the sixth (6th) charge proferred against the defendant;

    3. After seeing Articles 189 and 189A of the Criminal Code, Chapter 9 of the Laws of Malta, Article 15(1)(a) of Chapter 65, Articles 3(1),(1A),(2)(a) and (2A) of Chapter 104, Article 8(d), Part IV and Part VI, and Article 22(1)(a) and (f) and Article 22(2)(b)(i) of Chapter 101 of the Laws of Malta and Regulations 4 and 9 of Government Notice 292/1939 (Subsidiary Legislation 101.02), found the defendant guilty of charges numbered one (1), three (3), four (4), five (5) and seven (7) proferred against him, and in the light of all the circumstances of the case, condemned him to a period of eighteen (18) months effective imprisonment, from which one had to deduct any time the person convicted was being kept under preventive arrest in conntection with these proceedings.

    4. Moreover, the Court condemned the defendant to the punishment of a fine (multa) of three thousand and five hundred euro (€3,500) which was to be paid forthwith. If the person convicted failed to pay the amount due as a fine, the fine was to be converted into a period of imprisonment at the rate established by law.

    5. In terms of Article 3(2A) of Chapter 104 of the Laws of Malta, the Court ordered the disqualification of the person convicted from holding or obtaining a driving licence for a period of twelve (12) months from the date of the judgement.

6. The person convicted was also condemned to pay the amount of seven hundred and nine euro and six cents (€709.06), representing the expenses incurred in the appointment of experts, in terms of Article 533(1) of Chapter 9 of the Laws of Malta within six (6) months from the date of the judgement. If he failed to pay this amount, or any balance of the amount within this time limit, this amount or any balance thereof were to become immediately due and payable, and were to be converted into a period of imprisonment at the rate established by law.

7. The Court ordered that the forged documents, drugs and any other object related to drugs exhibited in these proceedings were to be forfeited in favour of the Government of Malta. The Court also ordered the destruction of all these items under the Supervision of the Registrar.

C. THE APPEAL

8. **Frank SUNDAY** appealed from the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature and requested this Court to "*confirm the appealed judgment as regard to the merits of the case whereby whilst affirming that the applicant is not guilty of the second (2nd) charge preferred against him, and acquitted him of it, abstained from taking cognisance of the sixth (6th) charge preferred against the defendant and found the appellant guilty of charges numbered one (1), three (3), four (4), five (5) and seven (7) preferred against him; vary the appealed judgment as regards to the punishment inflicted and instead apply a lesser and more appropriate punishment*".

D. ATTORNEY GENERAL'S REPLY

9. The Attorney General replied to the said appeal application by submitting that appellant's grievance is without merit and should be discarded, for the reasons mentioned in the said reply, requesting also this Court to declare the appeal application filed by **Frank SUNDAY** as null and void

in its entirely. During the parties' oral submissions held before this Court on 17th March 2025, however, the Attorney General clarified that rather than declaring the said application null and void, this Court should reject the appeal and confirm the appealed judgement in its entirety.

E. THE CONSIDERATIONS OF THIS COURT

10. Appellant **SUNDAY** appealed from the decision of the Court of Magistrates (Malta) on the ground that the punishment meted out is disproportionate to the facts of the case. According to appellant, whilst the punishment inflicted is one within the parameters of the law, given the circumstances of the case, it is excessive. He further argues that Maltese Courts have, at various times, emphasized the rehabilitative effect of punishment over its deterrent effect. Appellant states that in its considerations about the punishment to be inflicted, the Court should have taken into account his guilty plea. Although he concedes that this was not an early one, he argues that it still saved the Court a considerable amount of time "*and the fees that would have been involved had the Courts proceeded to appoint the necessary experts*". He further argues that, contrary to the First Court's assertion, he did in fact cooperate with the police throughout the entire process. Although he had the right to remain silent in order to avoid self-incrimination, nonetheless he voluntarily chose to speak to the police, immediately admitting to having drugs in his vehicle, and indicating their exact location, he provided the password to his mobile phone and indicated his residential address, contributing to the effeciency of the investigation. Furthermore, argues the appellant, his decision not to disclose certain information does not negate his overall cooperation, and it would be unjust to diminish his cooperation merely because he did not provide every piece of information that the authorities may have desired.

11. Appellant further submits that the First Court's interpretation of the quantity of drugs found in his possession, fails to take into consideration the evolving legal framework under Chapter 537 of the Laws of Malta. He argues that although he admitted that the drugs were not intended solely for his personal use, the amount found in his possession cannot be

considered as a large quantity. He contends that Chapter 537 has introduced a more rehabilitative and flexible approach to drug related offences, moving away from a rigid reliance on custodial sentences, providing for alternative sentencing options beyond imprisonment. In light of these legislative developments, his case should be assessed within this modern legal context. He states that that the fact that the drugs were not solely for personal use, does not automatically preclude a more proportionate and rehabilitative sentence, particularly given the small amounts involved and the legislative intent behind Chapter 537 to consider alternative penalties, where appropriate.

12. Appellant further submits that the parties had reached an agreement on the appropriate punishment to be meted out, namely a term of imprisonment of eleven months. Whilst he acknowledges that the Court was not legally bound to accept this agreement, he states that it should nonetheless have given it significant weight when determining the final sentence. His admission of guilt was made on this understanding, and on the reasonable expectation that the agreed sentence would be given due consideration. Such agreements, argues appellant, serve an important role in ensuring fair and efficient judicial proceedings. He further states that the discrepancy between the punishment suggested and that meted out is considerably excessive.

13. Firstly, this Court notes that from the minutes of the sitting held before the Court of Magistrates (Malta) on 8th January 2025[1], it transpires that the parties informed that Court that they had reached an informal agreement regarding the punishment to be meted out, in the eventuality that appellant pleaded guilty during that hearing, in respect of which the First Court immediately declared that "*although it will take into consideration the informal agreement, if the defendant pleads guilty it reserves the right to mete out any other different punishment according to law*".

14. At that stage, the Prosecution declared the sixth charge proferred against appellant as alternative to the fifth charge and withdrew the request for the confiscation and forfeiture of the proceeds of the offence in favour of the Government of Malta. The appellant then proceeded to plead guilty to the

[1] At fol. 154 of the records of these proceedings.

charges brought against him, except in respect of the second charge, at which stage the First Court warned the appellant of the serious consequences of registering a guilty plea, and in particular of the maximum punishment for the offences in respect of which he was pleading guilty, and proceeded to suspend the hearing so that he could consult with his defence lawyers to consider whether he wanted to retract the said plea. It also results from the said minute that once the case was called again, the Court asked the appellant whether he had had sufficient time to consult with his lawyers, to which he answered in the affirmative, and he confirmed his guilty plea to the charges proferred against him, with the exception of the second charge. During submissions on punishment, the parties proposed that appellant be sentenced to the minimum punishment prescribed by law, namely to an effective term of 11 months imprisonment and a fine of €2,500, and this in view of his entering a guilty plea at an early stage of the proceedings, and his cooperation with the police during the investigation. Defence counsel further made submissons about the small quantity of drugs found in the possession of appellant, and the manner in which Chapter 537 of the Laws of Malta considers such small amounts as legal, in certain circumstances prescribed by the said law. As held above, the First Court then proceeded to deliver judgement against the appellant on 27th January 2025.

15. It is a recognised principle that an informal agreement regarding sentencing, reached between the parties, is not binding upon the Court when delivering judgement against the accused. Indeed in terms of Article 392A(6) of the Criminal Code, rendered applicable to proceedings before the Court of Magistrates (Malta) as a Court of Criminal Judicature by means of Article 370(6) of the said Code:

> In pronouncing judgement the court **shall not take into consideration** any agreement on the sentence to be awarded which is not made in accordance with sub-article (5). [emphasis of this Court]

In terms of sub-article (5) of the said Article:

> At any stage of the proceedings, the accused and the Attorney General may agree and may request the court by means of an

application, so that in the case where the accused pleads guilty, the Court of Magistrates as a court of criminal judicature, shall apply such sanction or measure or, where it is so provided by law, a combination of sanctions and measures, of the type and quantity agreed upon between them, and in respect of which the accused may be sentenced when he is found guilty for the offence or the offences with which he has been charged.

16. In this case, it is clear that no formal agreement had been reached between the parties in terms of Article 392A(5) of the Criminal Code, and thus, the First Court was not only not bound, but even precluded, in terms of law, from taking into consideration the informal agreement reached by the parties.

17. As held by this Court, differently presided, in its judgement of 8th October 2021, in the names **Il-Pulizija vs Justin Zahra**:

> Jingħad biss, u dan kif ġustament stqarret l-Ewwel Qorti fis-sentenza tagħha, illi l-patteġġjament quddiem il-Qorti tal-Maġistrati bħala Qorti tal-Ġudikatura Kriminali għandu jsir fit-termini ta' l-artikolu 370(6) li jirrendi applikabbli għal dik il-Qorti id-disposizzjonijiet tal-artikolu 392A li allura jfassal il-mod kif għandu isir tali patteġġjament fejn fis-subartikolu 5 tiegħu jiddisponi hekk:
>
> > **"fi kwalunkwe stadju tal-proċeduri, l-imputat u l-Avukat Ġenerali jistgħu jilħqu ftehim u jitolbu lill-qorti permezz ta' rikors, sabiex fil-każ li l-imputat jiddikjara ruħu ħati, il-Qorti tal-Maġistrati bħala qorti ta' ġudikatura kriminali tapplika dik is-sanzjoni jew miżura jew, meta jkun hekk provdut bil-liġi, kombinazzjoni ta' sanzjonijiet jew miżuri, tax-xorta u l-kwanti tà miftehma bejniethom u li dwarhom l-imputat ikun jista' jingħata sentenza meta jinsab ħati għar-reat jew ir-reati li jiġi akkużat bihom."**
>
> Illi huwa bil-wisq evidenti illi din il-proċedura ma ġietx segwita bejn il-partijiet. Kwindi l-Ewwel Qorti ma kienet bl-ebda mod marbuta ma kwalsiasi ftehim li kien sar bejn l-prosekuzzjoni u id-difiża b'mod informali. Illi fis-sub-artikolu 6 jinsab dispost illi:

> **"l-qorti ma għandhiex, meta tagħti sentenza tagħha, tqis kull ftehim dwar is sentenza li tkun ser tingħata li ma jkunx sar skont is-subartikolu (5)."**
>
> Illi dan is-sub-inċiz tal-liġi ġie miżjud permezz ta'l-Att VIII tal-2015 biex b'hekk il-prassi li kienet ezistenti fil-qrati inferjuri fejn ikun sar xi patteġġjament informali mhux irreġistrat kif mitlub fil-liġi, kellu jiġi injorat mill-qorti meta tiġi biex tagħti d-deċiżjoni tagħha. Dan x'aktarx seħħ billi bl-introduzzjoni ta' din l-emenda fil-Kodiċi Kriminali l-kompetenza tal-Qorti tal-Maġistrati zdiedet konsiderevolment biex b'hekk issa l-proċedura addottata hija simili għal dik addotatat quddiem il-Qorti Kriminali.

18. In this case, the Court did not only immediately warn the parties that notwithstanding their informal agreement, it was reserving the right to mete out any other different punishment in terms of law, with this declaration having been made by the First Court prior to the appellant registering a guilty plea, but it actually took into consideration the punishment informally agreed upon between the parties, and delved into the reasons as to why it considered such punishment to be inappropriate in the circumstances of the case. Appellant, therefore, cannot at this stage lament that the First Court's decision to depart from the punishment proposed by the parties, came to him as a surprise, or that the Court should have given such agreement significant weight in pronouncing judgement, when in actual fact it did consider it, and this notwithstanding the provisions of sub-article (5) of Article 392A of the Criminal Code.

19. This Court refers to the judgement delivered by the Court of Criminal Appeal on 24th April 2003, in the names **Ir-Repubblika ta' Malta vs Eleno sive Lino Bezzina**, wherein the Court stated as follows:

> ... din il-Qorti taghmel referenza ghall-kawza fl-ismijiet "**Ir-Repubblika ta' Malta vs David Vella**" deciza fl-14 ta' Gunju, 1999 fejn din il-Qorti kienet qalet illi:-
>
> *"Mhux normali pero`, li tigi disturbata d-diskrezzjoni ta' l-Ewwel Qorti jekk il-piena nflitta tkun tidhol fil-parametri tal-ligi u ma jkun hemm xejn x'jindika li kellha tkun inqas minn dak li tkun fil-fatt"*

Furthermore in the judgement dated 25th August 2005 in the names **The Republic of Malta vs Kandemir Meryem Bilgum and Kucuk Melek**, the Court of Criminal Appeal referred to *Blackstone's Criminal Practice 2004* on this matter, whilst reiterating that this is the position consistently adopted by the Court of Criminal Appeal, both in its superior and in its inferior jurisdiction:

> "***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 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]

20. The Court considers that the punishment inflicted by the First Court, both as regards the term of imprisonment and the fine (*multa*) meted out, were

[2] Page 1695, para. D23.45

well within the parameters prescribed by law. Furthermore, the First Court gave ample reasons as to why it departed from meting out the punishment proposed by the parties or the minimum punishment prescribed by law.

21. Firstly, and rightly so, the Court did not agree that appellant had pleaded guilty at an early stage of the proceedings. In this respect, the First Court considered as follows:

> Although it is true that the defendant pleaded guilty a little more than two (2) months from the beginning of these proceedings, the defendant actually pleaded guilty in the sixth (6th) sitting after a good number of witnesses, including two court experts had testified, and the Prosecution had nearly concluded its evidence. The defendant was caught red handed by the Police with the drugs in his possession, both in the vehicle he was using and at his residence, and with a fake driving license. It is evident that when the defendant realised that he was cornered with the evidence produced by the Prosecution, he agreed to register a guilty plea, in the hope that the punishment would be mitigated to the minimum possible. However, the defendant still wasted the time and resources of the Police and of this Court. Hence the Court is of the opinion that there should be no mitigation in punishment on the basis of the timing of the guilty plea, because the guilty plea was not registered at an early stage of the proceedings, but it was registered when the Prosecution had nearly concluded its evidence. [emphasis of this Court]

22. This Court fully agrees with the considerations made by the First Court in this regard. This is also in line with jurisprudence on the matter. As held by this Court, as differently presided, in the judgement deliverd on 17th July 2002 in the names **The Police vs Emmanuel Testa**, to which reference is also made by the appellant in his appeal application:

> 8. L-appellant jilmenta li l-ewwel qorti ma tatx konsiderazzjoni bizzejjed ghall-fatt li hu ammetta mill-ewwel, kemm mal-pulizija kif ukoll quddiem il-Qorti Inferjuri. Din il-Qorti tosserva qabel xejn li kif gie ritenut (minn din il-Qorti kolleggjalment komposta) fis-sentenza ***Ir-Repubblika ta' Malta v. Mario Camilleri*** (5 ta'

Lulju, 2002) l-ammissjoni bikrija mhux bilfos jew dejjem, jew b'xi forma ta' dritt jew awtomatikament, tissarraf f'riduzzjoni fil-piena. Ir-regoli generali li ghandhom jigwidaw lill-qrati meta jkun hemm ammissjoni gew infissra mill-Qorti Kriminali fis-sentenza preliminari taghha tal-24 ta' Frar, 1997 fl-ismijiet ***Ir-Repubblika ta' Malta v. Nicholas Azzopardi***, u dan b'referenza ghall-prassi fil-Qrati Inglizi. F'dik is sentenza kienet saret referenza ghal bran mill-edizzjoni tal-1991 ta' **Blackstone's Criminal Practice** (Blackstone Press Limited). Din il-Qorti ser tirriproduci il-bran relevanti mill-edizzjoni tal-2001 ta' dan il-manwal, u dan peress li hija taqbel mal-principji espressi f'dana l-bran u qed taghmilhom taghha[3]:

> **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* [1992] 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.**

[3] Here the Court added that: *"S'intendi, dan kollu li ser jinghad huwa bla pregudizzju ghal dawk id-disposizzjonijiet tal-ligi li jipprovdu ghal tnaqqis fil-piena meta javveraw ruhhom certi cirkostanzi espressament imsemmija fl-istess disposizzjonijiet: ez. l-Artikoli 89, 200(1) u 337 tal-Kodici Kriminali, jew l-Artikolu 29 tal Ordinanza dwar il-Medicini Perikoluzi (Kap. 101).*"

> **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. 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 inquiry 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. In *Byrne* [1997] 1 Cr. App. R. (S) 165 it was held that an offender who had absconded and remained at large for 19 months was not entitled to expect a discount for his guilty plea when he pleaded guilty after being re-arrested.**

23. Having established the legal principles involved, the Court cannot but agree with the First Court, that in the circumstances of this case, where the Prosecution had almost rested its case at the time of appellant's guilty plea, which therefore cannot be deemed to have been registered at an early stage of the proceedings, and with appellant having been caught red-handed in possession of drugs, and with a fake international driving license, said appellant cannot expect to benefit from the 'discount' afforded by law.

24. As to the appellant's contestation that he had indeed cooperated with the police during the investigation, this Court likewise agrees with the First Court that appellant had not been fully cooperative. As held by the First Court, his cooperation was limited to not resisting the arrest, to admitting immediately that he had drugs in the vehicle he was driving, and pointing out that some of these drugs were situated behind the passenger's seat (with further drugs subsequently being found also in the said vehicle and on his person), being polite with the police during the search in his vehicle and in his room, as well as throughout his arrest, and providing the police with the password of his mobile phone. Yet, as pointed out also by the First Court, the door to his room had to be forced upon, as appellant stated that he did not have the key, he failed to confirm the source of the fake driving license, he did not divulge the source of the drugs in his possession, claiming that he had bought them from different persons in Marsa, when in actual fact he was found in possession *inter alia* of two bags containing cannabis weighing 23.21 grams and 17.33 grams respectively, and thus not an insignificant amount of drugs. He denied selling drugs and stated that he had bought the drugs to share with his friends that evening, without divulging their names and claiming that he did not know where they were to meet or their contact numbers. His reply that he had found the small plastic bags, normally used for drug dealing, in a garbage bag in the street, merits no further comment. Despite the messages found on his phone, he denied dealing in drugs. He refused to answer several questions posed to him during his interrogation, as was clearly his right, but he cannot now argue that he has fully cooperated with the police. Indeed, this Court notes that the First Court, whilst considering that the cooperation on the part of appellant had not been a full cooperation, yet it did acknowledge that "*the defendant did co-operate to some extent with the Police*" and took this is into consideration in meting out the punishment.

25. As also rightly claimed by the First Court, appellant pleaded guilty to conspiracy in terms of the seventh charge brought against him, as well as to possession of drugs which were not intended for his exclusive use, in terms of the fifth charge proffered against him, and thus, his submission that the amount of drugs found in his possession would be deemed for personal use under Chapter 537 of the Laws of Malta is clearly irrelevant.

In this case, the drugs found were not intended for appellant's personal use, but were intended to be sold to third parties, and thus, the provisions of Article 7 of Chapter 537 of the Laws of Malta – which in any case deals with the cultivation of cannabis - are completely irrelevant and inapplicable in this case. This Court further notes that neither is the recently introduced sub-article (9a) of Article 22 of Chapter 101 of the Laws of Malta applicable, as one of the requisites required by law, namely the rehabilitation of the person found guilty and the change in his way of life and behavior, does not result in any manner from the evidence adduced. The First Court further considered the amount of cannabis found in possession of appellant, and the number of joints which may be produced from the said amount, rightly concluding that even if appellant were to use some of the cannabis himself, he had sufficient cannabis to produce approximately 200 joints, which is not a negligible amount.

26. In view of the above considerations, the First Court noted that:

> … the Court is of the opinion the appropriate punishment of imprisonment should not be the minimum punishment possible according to law, as submitted by both parties, although it should be towards the minimum. For the reasons explained above, the fine of €2,500 must also be increased because it is below the minimum amount of fine which should be imposed in this case. The Court is also of the opinion that this fine should not be the minimum imposed by law, although it should be towards this minimum. [emphasis of this Court]

27. In its initial considerations, the First Court observed that in this case, the punishment of eleven months imprisonment was the very minimum punishment of imprisonment allowed by law. It is this Court's view that the First Court erred in this consideration, as it did not take into account the provisions of Article 17(h) of the Criminal Code in respect of the fifth and seventh charges proffered against the accused. Thus, whilst the minimum punishment at law for the offences forming the merits of the fifth and seventh charges, is that of six months imprisonment, the punishment established for the offence in Article 189 of the Criminal Code, in the first charge brought against the accused, is that of imprisonment for a period of not more than six months, which by

application of Article 17(b) of the Criminal Code, must be deducted by one-third to one-half. Similarly, when considering the fine (*multa*) applicable in this case, the First Court failed to take into account the provisions of Article 17(h) of the Criminal Code in respect of the fifth and seventh charges, thus meting out two fines for each one of these offences, rather than one. In terms of Article 3(2)(a) of Chapter 104 of the Laws of Malta, forming the merits of the fourth charge, the minimum fine payable is that of €2,329.37. To this one must add only one half (and not two-halves) of the minimum fine contemplated in Article 22(2)(b)(i) of Chapter 101 of the Laws of Malta for the fifth and seventh charges, namely half the amount of €465.87 or €232.94 (in terms of the provisions of Article 17(f) of the Criminal Code). Additionally, in terms of the third charge, contemplating the offence under Article 15(1) of Chapter 65 of the Laws of Malta, the applicable fine is one not exceeding €600, representing half the amount of €1,200. Thus, the First Court was right in so far as it considered that the fine of €2,500 suggested by the parties was below the minimum allowed by law.

28. However, considering that the First Court proceeded to mete out a punishment of imprisonment and a fine (*multa*), which did not take into consideration the provisions of Article 17(h) of the Criminal Code in respect of the fifth and seventh charges proffered against appellant, this Court deems that a reduction in the punishment meted out by the First Court is appropriate in order to reflect this circumstance, whilst also taking into consideration that the First Court intended to apply a punishment which was towards the minimum.

DECIDE

For these reasons, the Court upholds the appeal filed by appellant **Frank SUNDAY** and varies in part the judgement appealed from in the following manner:

1. It confirms the judgement in so far as it found appellant not guilty of the second (2nd) charge proffered against him, and acquitted him thereof;

2. It confirms the part of the appealed judgement where it abstained from taking cognisance of the sixth (6th) charge proffered against the appellant;

3. It confirms the part of the judgement where it found the appellant guilty of the first, third, fourth, fifth and seventh charges proffered against the appellant, but revokes it in so far as it condemned him to a period of eighteen (18) months effective imprisonment and condemns him instead to a period of fourteen (14) months effective imprisonment, from which time one must deduct the period during which the appellant has been kept in preventive custody in connection with these proceedings;

4. It revokes that part of the judgement where the First Court condemned the appellant to the punishment of a fine (*multa*) of three thousand and five hundred euro (€3,500) and instead condemns him to a fine (*multa*) of three thousand and two hundred euro (€3,200), which shall be paid forthwith. If appellant fails to pay the fine due, this shall be converted into a term of imprisonment in terms of law.

5. It confirms the remaining parts of the judgement of the First Court.

Natasha Galea Sciberras
Judge