MALTA

COURT OF CRIMINAL APPEAL

S.T.O. PRIM JUDGE
VINCENT DE GAETANO

HON. JUDGE
JOSEPH A. FILLETTI

HON. JUDGE
DAVID SCICLUNA

Sitting of the 12 th June, 2003

Number 17/2000

The Republic of Malta

vs

…. *Omissis* ….
Perry Ingomar Toornstra

The Court,

Having seen the judgement of the Criminal Court delivered on the 12th June 2001 which reads as follows:

"The Court,

Having seen Bill of Indictment 17/2000.

Having seen the verdict given today whereby the Jurors have found Perry Ingomar Toornstra (**1**) by eight (8) votes in favour and one (1) vote against guilty of the accusation under the 1st Count, (**2**) by seven (7) votes in favour and two (2) votes against guilty of the accusation under the 2nd Count, and (**3**) by seven (7) votes in favour and two (2) votes against guilty of the accusation under the Third and Final Count.

Declares Perry Ingomar Toornstra guilty of:

(1) having with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the provisions of the Medical and Kindred Professions Ordinance (Chapter 31 of the Laws of Malta), and specifically of importing and dealing in any manner in psychotropic drugs, and of having promoted, constituted, organized and financed such conspiracy;

(2) of meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (Ecstasy, also known as designer drug MDMA, and LSD drug, or rather - Lysergic Acid Diethylamide), being a drug restricted and controlled under the provisions of Part A, Third Schedule, as well as part B of the Medical and Kindred Professions Ordinance, when he was not in possession of any valid and subsisting import authorization granted in pursuance of said law; so, however, that the importation was under such circumstances denoting that the importation was not for the exclusive use of the offender, and so, however, too, that said offence is to be deemed a single offence, called a continuous offence, since the several acts committed by the offender, even if at different times, constitute violations of the same provision of the law, and were committed in pursuance of the same design;

(3) knowingly having been in possession of a dangerous drug (Ecstasy, also know as designer drug MDMA, and LSD drug, or rather Lysergic Acid Diethylamide), being a drug restricted and controlled under the provisions of Part A, Third Schedule, as well as part B of the Medical and Kindred Professions Ordinance, when not in possession of any valid and subsisting import authorization granted in pursuance of said law; so, however, that such offence was under such circumstances that such possession was not for the exclusive use of the offender; and so, however, too, that said offence is to be deemed a single offence, called a continuous offence, since the several acts committed by the offender, even if at different times, constitute violations of the same provisions of the Law, and were committed in pursuance of the same design.

Having heard submissions made by Counsel for the Defence and Counsel for the Prosecution regarding the punishment to be inflicted.

Having considered all the circumstances of the case, and in particular the following:

1. The almost unanimous verdict returned by the jury especially as regards the 1st Count;

2. The considerable amount, quality and variety of the drugs in question, namely almost 5000 Ecstasy pills, as well as the LSD drug;

3. The extremely dangerous nature of these drugs, especially the Ecstasy pills which can easily lead to death. In other words the extremely high potential danger which this kind of drug has on society.

4. The fact that the verdict clearly shows that this was an organized conspiracy which involved the importation into Malta of the said drugs on at least two occasions.

5. The fact that had this considerable amount of such dangerous drugs ever been disposed of in the local market, as was planned by the said conspiracy, it would have undoubtedly left very devastating and tragic consequences, possibly fatal ones too, and as such, therefore, this Court considers such illegal activity as a most serious crime againt the Maltese society, which it has a duty to protect.

6. The fact that the punishment to be meted out has to reflect the verdict given in all the 3 Counts.

Having seen Articles 40A, 88, 89, 120 A (1) (f) (2) (a) (i) of Chapter 31, 22A, 22B, 22E, 27, and 30 of Chapter 101, Regulation 8 of Legal Notice 292/39, 18, 23, 17 (b), 20, 31 and 533 of Chapter 9, and Articles 5 (2) (b), and 15 of Chapter 217.

Condemns the said Perry Ingomar Toornstra to twenty (20) years imprisonment, from which period is to be deducted the time he has spent in preventive custody in connection with this case, as well as to a Multa of Forty Thousand Maltese Liri (Lm40,000) which are to be converted into a further period of eighteen (18) months imprisonment should he fail to pay the said Multa according to law.

Furthermore the Court is declaring the said Perry Ingomar Toornstra to be a prohibited imigrant and accordingly, authorizes the issue of a Removal Order from these Islands against him which has to take effect immediately upon him having served the punishment meted out to him by this Court.

The Court also orders the forfeiture in favour of the Government of Malta of the entire immovable and movable property of the said Perry Ingomar Toornstra in which the offences took place as mentioned in the Bill of Indictment and orders the confiscation of all items seized from the possession of Perry Ingomar Toornstra and which have been exhibited in these proceedings.

Finally in terms of Article 533 of Chapter 9, the Court also condemns Perry Ingomar Toornstra to pay 1/3rd of the expenses incurred in the appointment of all experts during these proceedings, which amount he has to pay within one month from being requested by the Registrar of Courts, failing which these will also be converted into a prison term according to law."

Having seen the application of appeal of the said Perry Ingomar Toornstra wherein he requested that this Court cancel and revoke the verdict returned by the jurors and the decision of the Criminal Court of the 12th June 2001, thereby ordering that a "Not Guilty" verdict be registered with regard to appellant; subordinately requesting, in the eventuality that this Court refuses his appeal against guilt, that it reform the punishment given by the Criminal Court, ensuring that a more appropriate one is given in the circumstances.

Having seen all the records of the case and the documents exhibited;

Having heard the submissions made by counsel for appellant and counsel for the respondent Attorney General;

Considers:-

In his application of appeal, appellant alleges that the verdict returned by the jury was incorrect and furthermore that the deliberation carried out by the jury could not have been a serious deliberation as it allegedly lasted for just over two hours. Finally, and without prejudice to the principal ground of appeal, he submits that the punishment inflicted was excessive.

The Court will first deal with appellant's grievance regarding the length of time taken by the jury to deliberate. In this respect appellant indicates that the judge presiding the trial by jury had correctly directed the jurors as to their duty to go through all the evidence in

detail in order to see which facts result from the evidence adduced. However, appellant states in his application of appeal, that is not what happened during the deliberation stage. The jury, he says, was composed of young persons, except for two, all below the age of 32, who had been empanelled for eleven days, and that it was evident that during the last addresses a number of them were disinterested in what was being said. He continues:

"The jurors were sent in to deliberate at 4.15 p.m. on the 12th June 2001. Immediately upon their withdrawal to deliberate, the only items they requested to see and here [*recte:* **hear**] were the exhibits, an exhibited video, which was not shown during the trial, the evidence of Alphonse Cauchi and the statement of the witness Patrick Woudenberg.

In view of the fact that the statement had not been exhibited during the course of the trial, but only referred to, the defence counsel immediately requested that he speak to the Judge. The Judge met counsel for defence and for prosecution w(h)ere a discussion ensued. It was agreed that the statement could not be given to the jurors since this was new evidence that the defence did not have an opportunity to cross-examine on. This discussion took half an hour, therefore the Jurors were informed of the decision, that of not being permitted to see such a statement, and were given the other items requested between 4.45 p.m. and 5 p.m. Just after 7 p.m. the jurors had already reached their verdict on all three of the counts, and defence counsel was called at 7.30 p.m. to return to Court. Therefore the deliberation lasted at best for just after [*recte:* **over**] two hours. One does question what deliberation was actually carried out. Was it clearly a case of cutting corners and deciding on sympathy or on the evidence brought before them?

With respect it is argued that in such a short time, this young jury did not perform the task that it was entrusted to carry out. This trial was not one without question marks and to come to a decision it was expected that several hours would be needed. However it decided in such a

short period, that it raised many questions. Did they analyse the contradictions which arose, did they discuss the different versions given to them by Smits and the appellant?

It is hereby argued that a serious deliberation was not made out in this trial. The jurors decided the case long before they were directed to deliberate and probably even before the commencement of the evidence began. One does hope that the decision had not been taken at the moment they were informed by the Court that the accused was a foreign national. Such a short deliberation, unfortunately raises these issues to those who were a living (p)art of this trial which did have a number of issues which required an in-depth analysis and deliberation for one to conclude whether they prohibited the required threshold of reasonable doubt to be reached."

The Court is of the opinion that appellant has made a number of gratuitous assertions in his application. The jury may have been a young jury but there is no indication that it was irregularly formed. Indeed, according to section 603 of the Criminal Code, persons are qualified to serve as jurors at "the age of twenty-one years or upwards". It is indeed strange that appellant should at this point in time complain of having been judged by a "young" jury when he could have taken any appropriate action at the empanelling stage. Perhaps he believed that a "young" jury would be more sympathetic towards him! Moreover, if, as alleged by appellant, any disinterest was shown, this Court believes that the First Court would have drawn the necessary attention to the jury and even admonished any "offending" juror; but there is nothing in the records to suggest that any of this was deemed necessary. Moreover, from a reading of the transcripts of the evidence given and the questions put by the jury in particular to the main witnesses, it would appear that the jury was quite an attentive one.

Appellant further argues that a serious deliberation could not have been made, given that it lasted for just over two hours.

Now according to section 466 of the Criminal Code, "(o)n the conclusion of the address by the court, the jury shall consider their verdict". And subsection (2) of section 470 provides that "(t)he jury **may** [emphasis by the Court], for the purpose of considering their verdict, withdraw to the place appointed for that purpose." At law, therefore, it would appear that the jury is not even obliged to retire to deliberate. Once the jury does retire to deliberate, the law imposes no minimum or maximum time-limits for reaching a verdict. Moreover, an indication that deliberations should not be protracted unnecessarily is to be found in section 472 of the Criminal Code which states: "After the jury shall have retired for their deliberation and until their verdict is recorded, they shall not be allowed to have food or drink without leave of the court." Naturally, the more serious a case is and the more complex the issues involved are, the more necessary it becomes for a jury to withdraw to deliberate.

Interestingly, in the United Kingdom, subsection (4) of section 17 of the Juries Act, 1974, provides that no court shall accept a verdict by virtue of subsection (1) or (2) of said section "unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury **have had at least two hours for deliberation**" (emphasis by this Court). Moreover, "any period during which the jury return to court to ask a question of or receive a communication from the judge should be included when computing the two hours (*Adams* [1969] 1 WLR 106). Time spent making their way to the jury room, settling themselves down in the room and electing a foreman is catered for by *Practice* Direction *(Crime: Majority Verdict)* [1970] 1 WLR 916, which states that, although s. 17(4) permits the receiving of a majority verdict after a bare two hours, the jury should in fact be allowed at least two hours and 10 minutes for deliberation before being told that they need not be unanimous"

(**Blackstone's Criminal Practice 2001**, para. D16.13, p. 1466 - 1467)

In the case before this Court, there is nothing to suggest that the jury "cut corners", or that there was any evidence of prejudice shown by the jury towards appellant because he is a foreign national. It would appear that the deliberation stage lasted almost three hours, a length of time which, in this Court's opinion, is reasonably long enough for a jury that has followed carefully the proceedings to reach its verdict. Consequently, appellant's grievance on this point is dismissed.

The Court will now turn to appellant's main grievance, that is to say, that the jury allegedly returned an incorrect verdict, inferring thereby that he was wrongly convicted on the facts of the case.

Before considering this grievance, however, it is hardly necessary to point out that we are here dealing with a delicate area relating to the appreciation of the evidence submitted during the trial - an exercise that is reserved to the jury - and this Court will not disturb such appreciation, even though it may not necessarily fully agree with it, if it results that the jury, properly directed by the First Court, had reached their verdict in a legitimate and reasonable manner. In other words it is not this Court's function to consider what conclusion it would have reached had it to evaluate the evidence gathered in first instance, but to see if, on the basis of the evidence produced, the jury could have legitimately and reasonably reached such verdict. If the verdict is regular in this sense, this Court will not alter such verdict.

This Court has thoroughly examined all the records so as to determine whether, on the basis of the evidence brought before it, the jury could have reached its verdict in a legitimate and reasonable manner, bearing in mind the arguments raised by appellant in his application of appeal and through oral submissions by learned counsel.

Appellant directs his attack primarily at one of the main prosecution witnesses, that is to say Roelof Hendrikus sive Roland Smits, who had originally been co-accused with appellant and another main prosecution witness, Patrick Woudenberg. Appellant argues that Roland Smits' evidence is "riddled with lies and contradiction", that the evidence he gave "is full of unanswered questions and lack of explanations when the witness was cornered about details, which took place abroad, but he was rarely cornered during his testimony about what happened in Malta". Appellant states in his application of appeal:

"We have a trial which was inundated with unanswered question(s), a trial where the main prosecution witness, one Woudenberg, indirectly admitted that he had lied during the interrogation phase and in front of the Inquiring Magistrate, whilst the second, Smits, stuck to his story but was incapable of substantiating various parts of what went on, apart from blaming the appellant, and when for logistical reasons he could not blame the accused, he had no explanation and was caught out lying on various occasion(s).

On the other hand there was no evidence to contradict what the accused was stating, on the contrary, a thesis carried forward by the prosecution throughout the whole jury, that the accused had lied in his statement when he had stated that there was a woman in his flat in Paceville before he went to the Airport on the 22 April 2000, had been substantiated through evidence produced by the defence, namely police persons involved in the search, which the prosecution opted not to produce."

Appellant lists what he terms "six crucial lies and contradictions of Roland Smits":

(1) He states that Smits lied about the details surrounding his second visit to Malta when he said that he was carrying drugs for appellant who was accompanying him on the same flight and that in Malta he handed them over to appellant while in a rented car which they took. Appellant says that on cross-examination Smits admitted

that it was a taxi they had taken. He therefore asks what urgency there was to hand over the pills to appellant in the presence of a third person when the two of them were going to reside at the same hotel? He thus submits that there was **no** hand-over of drugs.

(2) Appellant argues that another contradiction relates to the remuneration supposedly received by Smits for the transportation of the drugs and which Smits said amounted to Lm300. Smits also said that appellant paid for his accommodation at Lm70 per night, that he paid for some of his meals and also for the flight to Malta as well as the flight back to Amsterdam. According to appellant, taking into consideration as well what would have been the purchase price of the pills, he would have been left with no profit whatsoever for the transaction.

(3) Appellant says that Smits stated in his evidence that he never booked a ticket from Air Malta office in Amsterdam. This, argues appellant, is not what resulted during the trial and it results that he had in fact booked a ticket. This, he says, results from the evidence given by Alphonse Cauchi who confirmed an exhibit which shows details of the reservations and of the person who carried out such reservation. It resulted beyond any doubt, he continues, that Smits had phoned and booked a ticket for himself and this is being stated and concluded because there appears not only his name on the exhibit, but also his mobile number, a detail which is requested from the person booking a ticket by telephone.

(4) Appellant says that Smits stated that he never spoke to appellant at the airport in Malta while it results from the evidence that he did speak to appellant by means of Patrick Woudenberg's mobile. Why, asks appellant, was Smits lying here?

(5) With reference to where Smits was going to stay when he arrived in Malta on the 22nd April 2000, appellant refers to Smits' evidence where he stated that he was going to reside with appellant and that he knew that

appellant had rented a flat. How does Smits explain, therefore, that on the disembarcation card he had written as place of residence in Malta, the Alexandra Hotel? And this apart from the fact that there were two persons to be accommodated, i.e. Smits and Woudenberg?

(6) Appellant submits that Smits lied as to the manner in which he supposedly collected the pills before coming to Malta on the last occasion.

These matters, which are clearly matters necessitating an appreciation of fact, were put to the consideration of the jury which was free, and was directed in like sense by the judge presiding over the trial, to evaluate all the evidence produced and decide as to whether it was ready to accept one version or another. The jury had the obvious advantage of seeing and hearing the witnesses. Appellant is not complaining in any way about the summing-up by the trial judge. Evidently the jury did not accept appellant's version and appeared satisfied with Smits' version. From a thorough examination of the evidence, this Court does not believe that it can rule out that Smits was telling the truth about appellant's involvement. In other words, it is satisfied that there was sufficient evidence brought before the jury to allow it to reach its verdict in a reasonable manner. The Court is also satisfied that the jury reached its verdict in a legitimate manner in view of independent evidence corroborating not only Smits' evidence but also the sworn statement made by Woudenberg. Such corroboration can be found in particular in the contents of a scrap of paper found in appellant's flat and other circumstances to which the Court will be referrring later on in this judgement.

This Court wishes first to make the following comments with specific reference to the so-called "lies" mentioned by appellant.

Regarding Smits' second visit to Malta with appellant at the end of March 2000, would Smits have volunteered the information to the police when he was interrogated by them and then questioned by the inquiring magistrate if

there was no truth in what he was saying? Is it indeed relevant whether the pills may have been handed over in a rented car or in a taxi? If the pills **were** handed over in a taxi, Smits would undoubtedly not have told the taxi-driver what he was handing over! Moreover, appellant's mathematical calculations regarding the disposal of the pills allegedly brought by Smits on his second visit and the payments made by appellant are based on the assumption that if the pills were in fact brought to Malta then they may have been sold to some intermediary and not directly to consumers. Could they not have been sold directly to consumers, given that, especially in respect of appellant, this was not his first visit to Malta?

As to the matter of the purchase of the ticket to Malta for Smits' third and final visit, appellant makes much of the fact that while Smits says that he did not book his ticket, Alphonse Cauchi stated that Smits phoned to book his ticket. However Alphonse Cauchi was giving evidence on information received from Air Malta's office in Amsterdam and clearly anyone could have phoned and given Smits' name. Nonetheless, reference is made to Smits' cross-examination when he qualified his evidence by saying that "so far as he can remember" he did not book the ticket. The Court further observes that while appellant is willing to rely on Alphonse Cauchi's evidence as to the information received from the Amsterdam office in respect of Smits, why should one not also accept Cauchi's evidence regarding appellant's call to book a flight for Woudenberg?

Regarding the matter as to whether Smits talked to appellant over Woudenberg's mobile while at Malta International Airport, the relevance of this matter appears questionable. Likewise of doubtful relevance is the matter relating to the place where he and Woudenberg were going to reside had they not been arrested; indeed there is no evidence to suggest that Smits knew the size of the flat which appellant had rented and there is nothing surprising about the fact that a person indicates a certain place on the disembarcation card as his place of residence in Malta and then goes to reside in some other

place. Moreover there was no evidence to suggest that the female person who allegedly left a note stuck to appellant's door was in fact residing there.

As to appellant's submission that Smits lied as to the manner in which he collected the ecstasy pills before coming to Malta, the Court has examined the relative evidence and it believes that the "deal" could very well have taken place in the way in which Smits described it as it is in no way unusual for a courier to be given the barest instructions for making contact with the supplier.

Appellant also refers to documents which the prosecution laid some emphasis on. Regarding the bank receipts, this Court does not feel that it needs to dwell on them at all because they give no particular indication as to what the funds were used for. However of major importance is the document found in appellant's residence containing what appellant refers to as "jumbled information", information which appellant says he jotted down - seemingly at different times - "casually as a matter of curiosity".

This Court finds it difficult to believe that certain figures were jotted down "as a matter of curiosity". Indeed this scrap of paper contains mathematical calculations which appear quite meaningful. On this paper we find for instance the figure of 45000 from which is subtracted 10000 with the name of WOUS (Woudenberg's nickname) next to it and 10000 with the name of SMITS next to it. From the evidence tendered by Smits and by Woudenberg, the amount which they were to receive for delivering the ecstasy was precisely 10,000 Dutch guilders each. And the balance of 25000? Did appellant work out this mathematical calculation "as a matter of curiosity"? Where did he derive the starting sum of 45,000 from? This document clearly formed an integral and important part of all the evidence that led the jury to its verdict.

A final observation which this Court wishes to make concerns the evidence given by Patrick Woudenberg. When Woudenberg was arrested, both in his statement

and in his evidence before the inquiring magistrate, he implicated appellant. In his evidence during the trial, he changed his version and seemed to deny appellant's involvement. Apparently appellant and Woudenberg had been friends since childhood. Appellant stated during the trial that when Smits told him that he would be returning to Holland to get more ecstasy pills, he told Smits that he was crazy. Why would appellant therefore, want to involve Woudenberg in such a dangerous matter? Woudenberg's statement, confirmed on oath before the inquiring magistrate, is admissible in evidence in terms of section 121B of Chapter 31 and the scrap of paper to which reference has already been made further corroborates such statement.

Consequently appellant's main grievance is also dismissed.

The Court will finally turn to the question of punishment which appellant feels was disproportionate to the sentencing policy previously adopted by our Courts. He refers to the fact that Smits and Woudenberg who were originally co-accused with him but who pleaded guilty were awarded each a punishment of 8 years imprisonment and a Lm20,000 fine. *Prima facie* therefore there appears to be a considerable disparity between the punishment awarded to Smits and Woudenberg and that awarded to appellant.

This Court has had occasion to comment in a previous case (**Ir-Repubblika ta' Malta vs Brian Godfrey Bartolo** decided on the 14th November 2002) that any person accused has a right to contest the charges brought against him and produce all relevant evidence. Therefore, should he fail to admit to the charges at the outset of proceedings, he should not be penalised simply for having contested such charges. Reference is made to English case-law on the matter.

In **Blackstone's Criminal Practice, 2001** (para. D22.47 a fol. 1650) we read:

"A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by *Stroud* (1977) 65 Cr App R 150. In his judgment in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal - the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his lordship put it, 'The appellant's proposition is that where you have one wrong sentence and one right sentence, this court should produce two wrong sentences. That is a submission which this court cannot accept'. Other similar decisions include *Brown* [1975] Crim LR 177, *Hair* [1978] Crim LR 698 and *Weekes* (1980) 74 Cr App R 161…. However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, *Wood* (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender's sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.

Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where, however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of disparity. The question then is whether the offender sentenced more heavily has been left with 'an understandable and burning sense of grievance' (*Dickinson* [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of

whether the appealed sentence was in itself too severe. Thus, in *Nooy* (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed. Lawton LJ said:

There is authority for saying that if a disparity of sentence is such that appellants have a grievance, that is a factor to be taken into account. Undoubtedly, it is a factor to be taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences."

And in Archbold's **Criminal Pleading, Evidence and Practice, 2003** (para. 5-174, p. 579) we read:

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: "would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?" (per Lawton L.J. in *R. v. Fawcett*, 5 Cr. App.R.(S) 158 C.A.). The court will not make comparisons with sentences passed in the Crown Court in cases unconnected with that of the appellant (see *R. v. Large*, 3 Cr.App.R.(S) 80, C.A.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see *R.v. Stroud*, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as *R. v. Wood,* 5 Cr.App.R.(S) 381. C.A., *Fawcett*, ante, and *Broadbridge*, ante. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or

by the same judge, so long as the test stated in *Fawcett* is satisfied."

As to the matter of the "discount" to be awarded in the case of an admission of guilt, the following guidelines have been prescribed by English Courts:

"… 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).

In the case under examination, when one considers the circumstances involved, the protection that is due to the public, and in particular to our youth, and the fact that the maximum punishment could have been life imprisonment, it would appear that the punishment meted out to Smits and Woudenberg was rather on the lower side of the scale. However, the Court believes that the disparity between the punishments is so substantial that a manifestly unjust situation has been created and a reduction of punishment is warranted, naturally keeping in mind the fact that appellant's role in the importation of the drugs in question was different from that of Smits and Woudenberg. Were this Court not to reduce the punishment, it is obvious that it would be allowing a situation to persist where the appellant is penalised by a manifestly excessive punishment for having contested the charges brought against him. It must also be borne in mind that the proviso of section 120A(2)(a) of Chapter 31 is applicable to the present case, that is to say that where the verdict of a jury is not unanimous, then 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 one thousand Maltese liri but not exceeding fifty thousand Maltese liri.

Accordingly, in this situation, and given all the circumstances of the case, the Court believes that the period of imprisonment should be reduced to fifteen (15) years and the fine (*multa*) to the sum of twentyfive thousand Maltese liri (Lm25,000).

Finally the Court wishes to point out that in its judgement the First Court erroneously referred to Regulation 8 of Legal Notice 292/1939 as one of the provisions of law

applicable to the case. In fact that Regulation is not applicable as Government Notice (and not Legal Notice) 292/1939 was promulgated by virtue of Chapter 101 of the Laws of Malta. What **is** applicable is Regulation 3 of Legal Notice 22/1985 known as the Drugs (Control) Regulations.

For these reasons:

The Court rejects the appeal in so far as the finding of guilt is concerned and reforms the judgement delivered by the Criminal Court on the 12th June 2001 in so far as the punishment is concerned by revoking that part of the judgement whereby appellant was sentenced to imprisonment for twenty years (with the deduction of time spent in preventive arrest) and to the payment of a fine (*multa*) of forty thousand Maltese liri (Lm40,000), and instead sentences appellant to fifteen (15) years imprisonment (from which period is likewise to be deducted the time spent in preventive arrest) and to the payment of a fine (*multa*) of twentyfive thousand Maltese liri (Lm25,000) which fine (*multa*) is to be converted into a further period of imprisonment of twelve months should appellant fail to pay the said fine according to law. It furthermore confirms the remainder of the judgement of the Criminal Court.

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