MALTA

COURT OF CRIMINAL APPEAL

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

HON. MR. JUSTICE
JOSEPH A. FILLETTI

HON. MR. JUSTICE
DAVID SCICLUNA

Sitting of the 25 th August, 2005

Number 9/2004

The Republic of Malta

v.

Kandemir Meryem Nilgum and
Kucuk Melek

The Court:

In this case the Court will be dealing with two separate applications of appeal filed by Nilgum and Melek. Appellants are appealing from the sentence delivered by

the Criminal Court on the 31 May 2004. Both appellants were originally charged with conspiracy in the importation and dealing of heroin in Malta in breach of the law (first count), importation of heroin into Malta in breach of the law (second count) and possession of heroin, always in breach of the law, with intent to supply (that is to say, not for their own personal use). Both appellants pleaded guilty to all the charges preferred against them and were each sentenced to thirteen (13) years imprisonment (with the reduction of any term spent in preventive custody), and to a fine of twenty thousand liri (Lm20,000), convertible into an additional eighteen (18) months imprisonment; both appellants were also sentenced to pay the court experts' fees. The relevant part of the judgement of the first Court is being here reproduced for ease of reference:

"Having seen the Notes filed by the said accused respectively on the 18th and 19th May, 2004, whereby they declared that they were filing a guilty plea to the charges put forward in their regard in the said Bill of Indictment;

"Having seen the Minute whereby both accused declared that they were renouncing to any time limit in their favour and that they had no objection to their case being heard and decided today;

"Having seen that in today's sitting the accused, in reply to the question as to whether they were guilty or not guilty of the charges preferred against them under the three counts of the Bill of Indictment, stated that they were pleading guilty thereto;

"Having seen that this Court then warned the accused in the most solemn manner of the legal consequences of such statement and allowed them a short time to retract it, according to Section 453 (Chap. 9);

"Having seen that the accused being granted such a time, persisted in their statement of admission of guilt;

"Declares both accused, namely Kandemir Meryem Nilgun and Kucuk Melek guilty of all three counts in the Bill of Indictment, namely of:

1. having, during the first months of 2003, 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 Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and specifically of importing and dealing in any manner in heroin, and having promoted, constituted, organized and financed such conspiracy as stated in the first count of the Bill of Indictment;

2. meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (heroin), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance, on the third March, 2003 and on the fourteenth April, 2003 , when they were not in possession of any valid and subsisting import authorization granted in pursuance of said law as stated in the second count of the Bill of Indictment;

3. knowingly, between the end of February and the fifteenth of April, 2003, in Malta, having been in possession of a dangerous drug (heroin) specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance, when not in possession of any valid and subsisting import or possession 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 offenders and this as stated in the third count of the Bill of Indictment;

"Having heard the evidence of both Kandemir Meryem Nilgun and Kucuk Melek as well as that of Inspector Nezren Grixti, Muhittan Kucuk and Anna Vella supervisor female section, Corradino Corrective Facility, Paola;

"Having seen the authentic and genuine translations of both convicted persons' criminal conduct sheet in Turkey exhibited by the defence in agreement with the prosecution;

"Having heard submissions of Defence Counsel and of Counsel for the Prosecution regarding the plea in mitigation for the purposes of punishment;

"Having seen the minute entered in the records of today's sitting whereby the Prosecution and Defence agreed that the first and third counts of the Bill of Indictment are, for purposes of punishment, to be considered as having served as a means for the commission of the offence under the second count of the Bill of Indictment , according to Section 17 (h) of Chapter 9 of the Laws of Malta (vide "Ir-Repubblika ta' Malta vs. Mansour Muftah Nagem" [30.10.2002] ; "Ir-Repubblika ta' Malta vs. Ahmed Esawi Mohamed Fakri")

"Having considered both local and foreign case law regarding the plea in mitigation of punishment when the accused person files an early plea of guilt and in particular "Ir-Repubblika ta' Malta vs. Nicholas Azzopardi" [24.2.1997] (Criminal Court); "Ir-Repubblika ta' Malta vs. Mario Camilleri" [5.7.2002] (Court of Criminal Appeal); "Il-Pulizija vs. Emmanuel Testa" [17.7.2002] (Court of Criminal Appeal) and others) as well as BLACKSTONE'S CRIMINAL PRACTICE (Blackstone Press Limited 2001 edit) ;

"Having considered that in this case both persons convicted had actually admitted their guilt in their respective statements to the Police made on the 16th April, 2003 (pages 15 et seq. and 19 et seq. of the record) and even confirmed their statements on oath before the Inquiring Magistrate (Pages 86 and 87 of the records). And although in the course of their arraignment before the Court of Magistrates on the 17th April, 2003 (Page 8-9 of the records) they

reserved their position when asked how they were pleading to the charges preferred against them, in the course of their second appearance before that Court on the 21st April, 2003 (Page 10) they filed a plea of guilty. Furthermore on the 18th and 19th May, 2004, they respectively filed a note admitting their guilt on all counts of the Bill of Indictment immediately after they were served with said Bill of Indictment – a plea which they confirmed in the course of today's sitting.

"On the other hand having considered that, as stated in BLACKSTONE'S,
"Where an offender has been caught red handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris [1998] 10 Cr. App. R. (S) 216; Landy [1995] 16 Cr. App. R. (S) 908)"

"Having considered all the submissions made by defence counsel of both convicted persons which have been duly recorded and in particular - but not only - the following, i.e. the filing of a timely and early plea of guilt; the fact that their criminal conduct sheets in Malta and in Turkey was without blemish; the fact that they had identified the person to whom the drugs they had imported were to be delivered and contributed in bringing him to justice ; that they had given very detailed statement to the Police and mentioned various names; that the Prosecution agreed that in this case Section 29 of Chapter 101 was applicable in favour of both persons convicted; that the suffering of both accused by being imprisoned in a foreign country with a different culture and language was of a graver nature than if they were imprisoned in their own country; that the convicted persons, as couriers, were victims of stronger people and had even exposed themselves to great risk when ingesting the capsules containing dangerous substances, that they had done all this because they found themselves in a difficult financial situation in Turkey where they were both single mothers of a child; that they had apologized to Maltese society and that although they had repeated

the drug smuggling operation a second time this in a way had helped the Police to discover their operation and that it was the convicted persons themselves, who on being caught on their second drug-smuggling trip to Malta informed the Police that they had done the same thing on a previous occasion; that not all drug travelers who are caught reveal the names of their suppliers and receivers as the persons convicted had done; and that the conduct of both persons convicted in the Corradino Correctional Facility had been exemplary to date. That therefore the Court should show maximum clemency in inflicting punishment;

"Having considered all the submissions made by Counsel for the Prosecution, namely : that although it agreed that section 29 of Chapter 101 applied to both persons convicted it disagreed with the submission of the defence that the fact that the convicted persons had repeated the operation a second time was " a blessing in disguise". In fact had not the Police intervened in the course of the second operation and caught both convicted persons red handed it would have been fair to assume that the operation could have been repeated over and over again. If the persons convicted felt threatened or placed under pressure by others, how is it that they only disclosed what was happening to the Police Authorities after they were caught? The Prosecution further submitted that both convicted persons were in the operation for financial gain and that the part couriers play in such operations was not to be minimized as couriers were an indispensable link in the whole operation. In view of the frequency of such smuggling drugs operations the Court should send a message to society by awarding the right punishment. Furthermore the Court should take into account the quantity and purity of the drug imported and the fact that this had happened on two successive occasions;

"Having also considered that both persons convicted are to benefit from the provisions of Section 29 of

Chapter 101 of the Laws of Malta as evidenced by the minute entered into the records of the case in the course of today's sitting by both Prosecution and Defence;

"Having on the other hand considered the quantity (816.06 grams), the quality (heroin) and the purity (47%) of the dangerous drugs imported into Malta by the convicted persons on the second occasion, namely on the 14th. April, 2003 and that this operation had been preceded by a previous "run" on the 3rd. March, 2003, when, according to accused Nilgun's statement, she had imported a further 430 grams in some 56 capsules and, according to Kucuk's statement, the latter had also ingested about 40 capsules prior to flying out to Malta; Having considered the havoc that the importation and distribution of such drugs causes on the local market and that both convicted persons abused of the hospitality extended to them as visitors to this Island by using such visits to further their criminal ends ;

"Having seen other cases decided by this Court where the facts of the case were somewhat similar - though obviously never identical - for the purpose of maintaining a desirable degree of uniformity in punishment;

"Having seen Sections 9, 10,10(1) 12, 14, 14 (1)(5), 15A, 20, 22 (1)(a), (2) (a) (f) (1A) (1B) 2 (a) (i) (ii) (3A)(c)(d), 23, 26 and 29 of the Dangerous Drugs Ordinance (Chap.101); Regulation or Rule 8 of the 1939 Regulations for the Internal Control of Dangerous Drugs (L.N. 292/1939) and Sections 17(a)(b)(h), 20, 22, 23, 23A, 26, 31, 492 and 533 of the Criminal Code, as well as sections 5(2)(b) and 15 of the Immigration Act;

"Condemns said Kandemir Meryem Nilgun to a term of imprisonment of thirteen (13) years with the reduction of any term spent in preventive custody only in connection with these offences and to a fine

multa of twenty thousand Maltese Liri (LM20,000) and condemns said Kucuk Melek to a term of imprisonment of thirteen (13) years with the reduction of any term spent in preventive custody only in connection with these offences and to a fine multa of twenty thousand Maltese Liri (LM20,000), and , if these fines are not paid at once , orders that such fines are to be automatically converted into a further period of eighteen (18) months imprisonment according to law and further orders that each one of them should pay the sum of three hundred , thirty nine Maltese Liri , thirty seven cents , five mils, (LM339.37c5m), being one half of the total court expenses incurred in this case which amount to LM678.75c, according to Section 533 of Chapter 9 of the Laws of Malta within fifteen (15) days from today ;

"Furthermore orders that all objects related to the offences and all monies and other moveable and immovable property pertaining to both persons convicted should be confiscated in favour of the Government of Malta ;

"Furthermore the Court is issuing a Removal Order against both persons convicted and both of them are to be deported from these Islands in terms of Sections 5 (2) (b) and 15 of the Immigration Act, as soon as they have served their respective terms of imprisonment and paid the said respective fines or else served the further term or terms of imprisonment, should such fine or fines be converted into a term or terms of imprisonment

"Finally the Court orders the destruction of all drugs under the direct supervision of the Deputy Registrar of this Court duly assisted by Court Expert Godwin Sammut, unless the Attorney General informs this Court within fifteen days from today that said drugs are to be preserved for the purposes of other criminal proceedings against third parties and, for this purpose, the Deputy Registrar should enter a minute

in the records of this case reporting to this Court the destruction of said drugs."

The first to lodge an appeal was Kucuk Melek, who was assisted by learned counsel Dr Peter Fenech who also made extensive oral submissions during the sitting of the 14 July 2005. Basically, Melek has put forward for consideration by this Court three grounds of appeal. The first ground of appeal is to the effect that the first Court, in its judgement, did not explain how, in the light of the various provisions of the law regarding punishment and the equally divers possibilities for decrease in punishment, it had reached the figure of 13 years. According to appellant, *"…the [first] Court was in duty bound to explain how it arrived within the parameters as a result of which the Court then decided the term of imprisonment of 13 years. This is being stated because appellant contends that she has a right to understand how the punishment was computed and this to ensure (1) that she could follow the build up of the punishment in view of the accepted principle that all punishments are to be clearly stipulated before hand (nulla poena sine lege) and (2) that the Court made no mathematical errors in arriving at such term."* Under this ground of appeal, appellant Melek also contends that the punishment should have been less than that effectively meted out by the first Court, especially in view of the fact that even the prosecution agreed that Section 29 of the Dangerous Drugs Ordinance was applicable in the present case (both with regard to appellant Melek and with regard to the other appellant Nilgum). The second ground of appeal is to the effect that the first Court laid too much emphasis on the fact, stated by it in the judgement, that appellant had been caught "red handed". Appellant contends that this is only partially true, in the sense that, without her admissions to the police, she would, at most have been charged only with the offence of possession with intent. Finally, in her third ground of appeal, Melek states that the sentence passed upon her was disproportionate when compared to that passed on other persons found guilty of similar offences.

This Court, having reviewed all the evidence compiled by the Court of Criminal Inquiry, as well as all other evidence which was before the Criminal Court and before this Court (notably the evidence given by Inspector Nezren Grixti at the sitting of the 14 July 2005), cannot entertain any of these grounds of appeal. With regard to the first ground of appeal, the Criminal Court is not obliged to give detailed reasons explaining either the nature or the *quantum* of the punishment being meted out, or to spell out any mathematical calculations that it may have made in arriving at that *quantum*. Although the determination of the nature and the *quantum* of the punishment is, of its nature, the determination of a question of law – see Sections 436(2) and 662(2) of the Criminal Code – all that is required is that the Court state the facts of which the accused has been found guilty (or, as in the present case, the facts to which he/she has pleaded guilty), quote the relevant provision or provisions of the law creating the offence (which provisions generally also determine the punishment applicable), and state the punishment or other form of disposal of the case. Unless expressly required by law to spell out in detail something else – as for instance is required by Section 21 of the Criminal Code or by the first proviso to subsection (2) of Section 7 of the Probation Act, Cap. 446 – the above would suffice for all intents and purposes of law. The principle *nulla poena sine lege* does not mean or imply that a Court of Criminal Justice has to go into any particular detail as to the nature and *quantum* of the punishment meted out, or, where the Court has a wide margin of discretion with various degrees and latitudes of punishment, that it has to spell out in mathematical or other form, the logical process leading to the *quantum* of punishment. This is also the position in English Law. As stated in **Blackstone's Criminal Practice 2004** [1]:

"Save where the statutory provisions mentioned below apply, there is no obligation on the judge to explain the reasons for his sentence. However, the Court of Appeal has encouraged the giving of

[1] OUP (2003) at p 1546, para. D18.34.

reasons, and has indicated that that should certainly be done if the sentence might seem unduly severe in the absence of explanation…It has been held that failure by the sentencing court to give reasons when required to do so does not invalidate the sentence…although the failure may no doubt be taken into account by the appellate court should the offender appeal. Where the sentencer does give reasons and what he says indicates an error of principle in the way he approached his task, the Court of Appeal sometimes reduces the sentence even though the penalty was not in itself excessive. Similarly a failure by the judge to state expressly that he is taking into account any guilty plea, although contrary to [statutory provision], does not oblige the Court of Appeal to interfere with what is otherwise an appropriate sentence…"

This Court is in full agreement with the principles stated above. Indeed, it is highly recommendable that, when the law provides for a wide margin of discretion in the application of the punishment, reasons, possibly even detailed reasons, be given explaining how and why the court came to a particular conclusion. This is particularly so in drugs cases coming before the Criminal Court where, as in the present case, the punishment of life imprisonment could also have been meted out.

In the instant case it is patently obvious that the Criminal Court was of the opinion that life imprisonment was not the appropriate punishment, even though it did not state so *expressis verbis* in the judgement. This means that the starting point, as far as the custodial punishment was concerned, was of a minimum of four years imprisonment and a maximum of thirty years. Reducing these parameters by the maximum two degrees allowed by Section 29 of Cap. 101, the punishment applicable would have been a minimum of two years and a maximum of twelve years; whereas, with the reduction of only one degree, the parameters are a minimum of three years and a maximum of twenty years. This Court can find no valid reason why the Criminal Court should necessarily have

applied the reduction by two degrees, as opposed to a reduction by one degree, which appears to have been the case. It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is neither wrong in principle nor manifestly excessive, even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in **Blackstone's Criminal Practice 2004** (*supra*):

"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]

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

All told, therefore, this Court finds no reason why it should disturb the punishment awarded by the first Court to appellant Melek.

Turning now to appellant Nilgum[3], assisted by learned counsel Dr Emmanuel Mallia and Dr Giannella Caruana Curran, her grievances boil down, in effect, to one, namely that she did not deserve the punishment awarded by the first Court. Appellant Nilgum states that *"The Court failed to take into account certain circumstances that, properly evaluated to their minutest detail, ought to have been instrumental in the further decrease of punishment."* Appellant then goes on to indicate several circumstances which, according to her, should have meant a further reduction of the punishment from that actually awarded to her. These features include, among others, that she was not caught "red handed", as the judgement of the first Court seems to imply, that she co-operated fully with the police and supplied them with information which they would not otherwise have had access to, and that there was no proper indication of how the punishment was calculated by the first Court.

Several, if not all, of the arguments brought by appellant Nilgum have already been dealt with and disposed of in connection with Melek's appeal. In other words, what this Court has to determine is whether, in the light of all the circumstances of the case, the punishment awarded to appellant Nilgum was wrong in principle or manifestly excessive. This Court notes in particular that the first Court went to great lengths to spell out in its judgement all the mitigating and aggravating factors, and that in itself is

[2] Page 1695, para. D23.45
[3] Her application of appeal was filed on the 22 June 2004.

an indication that this Court should not interfere with the punishment meted out except for grave reasons. The Court notes that Nilgum – and to a lesser extent Melek – have laid great emphasis on that part – actually two parts – of the judgement of the first Court where reference is made to a person being caught "red handed". Now it is true that whereas Melek was actually caught in material possession of the drugs, appellant Nilgum was only found by the police in the hotel where she was staying, and no drugs were actually found in her possession – her involvement in the whole affair stems principally from her own admissions to the police when she was arrested after her friend was also arrested. This Court, however, considers this to be a minor detail. In the judgement of the first Court, the first reference to someone being caught "red handed" is in the quotation from **Blackstone's**, and that quotation is very much by way of a general observation, applicable strictly speaking only to appellant Melek. The second reference is where the Court is repeating, in condensed form, the submissions made by the prosecution. There is nothing in the judgement to suggest that this question of being caught "red handed" was a determining factor in the sentencing process. Both Nilgum and Melek have benefited extensively from reduction in the punishment for their timely plea of guilty, no less than for their co-operation with the police in Malta; and the evidence clearly shows that they both participated equally and fully – and to the same degree – in the offences with which they were charged and to which they pleaded guilty. This Court therefore finds absolutely no reason for varying the punishment meted out to appellant Nilgum.

For these reasons the Court dismisses both appeals and confirms the judgement of the Criminal Court of the 31 May 2004.

< Final Judgement >

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