



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

**MAGISTRATE DR.
MIRIAM HAYMAN**

Sitting of the 16th April, 2009

Number 421/2008

**THE POLICE
INSPECTOR PIERRE GRECH**

VS

AWEYS MAANI KHAYRE aged 31 years, born in
Somalia on the 3rd May, 1977, son of Maani and Asli
nee' Muhammed, residing at 102, Church, Road, North
Hall, West London, holder of British Traveling
Document bearing number C00005027;

The Court;

Seen charges brought against the above-mentioned
AWEYS MAANI KHAYRE, accused of having in these
Islands, on the night between the 9th and 10th May, 2008:

- a. Imported or offered to import psychotropic and
restricted drug (cathinone) without a special authorization
in writing by the Superintendent of Public Health, in

breach of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended;

b. Also of having imported or offered to import psychotropic and specified drug (cathine) without having proper authorization, in breach of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended;

c. Also of having been in possession of psychotropic and restricted drug (cathinone) without a special authorization in writing by the Superintendent of Public Health, in breach of the Provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended, under such circumstances that such possession was not intended for his personal use;

d. Also of having been in possession of psychotropic and specified drug (cathine) without having proper authorization, in breach of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended, under such circumstances that such possession was not intended for his personal use

Seen that at the state of the examination of the accused (folio 6), accused answered in English that he was not guilty of the charges proffered against him;

Seen also that on arraignment accused declared he understood the English language, thus the Court ordered that the proceedings be conducted in the English language;

Seen all the records of the case.

Considers:

That from all the evidence gathered and especially from accused's statement there is unrebutted proof that accused imported to Malta the khat plant. He was quite clear as to the purpose of such importation, he brought it over to enjoy with his friends living in Malta, for its consumption as part of his birthday celebrations. He explained that in his country Somalia, khat is commonly chewed. He explained that its popularity is not only limited to Somalia but that the plant was also readily available for purchase in the United Kingdom.

Regarding the legality of the importation of the khat plant in Malta, he answered that he did not check this point since as far as he knew it was legal in the United Kingdom.

Seen also Attorney General's order under Chapter 31 of the Laws of Malta and the relative counter order thereto.

Seen also Pharmacist Mifsud's report DOK MM, folio 66 – 7, the analysis of the substance results in a bundle of khat plants from which extracts, were taken for the presence of cathinone and cathine. The result of Pharmacist's Mifsud analysis reads:

'from the results Court Expert Mario Mifsud can conclude that all plants that were in the black luggage.....were those of the khat plant. These plants were found to contain the substance cathine. The substance cathine is classified as a controlled substance in Chapter 31, Schedule 3, Part B of the Laws of Malta' (folio 68).

At a later sitting Pharmacist Mario Mifsud deposed that no official retail price has been published regarding the khat plant.

Considers:

It would be simply rhetorical to say that a lot of contestation was presented in this case. Defense (also having attempted a Constitutional redress) primarily contests two points – that the khat plant is not scheduled anywhere under our Drugs Laws (in this case Chapter 31 of the Laws of Malta), therefore relying on the maxim ‘*nullum crimen sine legge*’, and the consequent lack of ‘*mens rea*’ on the part of the accused to commit such an offence.

Be it premised *a priori*, in determining the issue that as a point of Law khat plant is not a scheduled substance under our Drug Laws. On the other hand cathinone is so scheduled under the Third Schedule, Part A, of Chapter 31 of the Laws of Malta, whereas cathine is scheduled under Part B of the said Schedule of the said Chapter.

Both substances cathinone and cathine are in fact found in the plant khat, begin being alkaloids thereof.

It is apt at this point to understand what substances we are hear dealing with;

‘Khat leaves contain psychoactive ingredients known as cathinone, which is structurally and chemically similar to d-amphetamine and cathine, a milder form of cathinone. Fresh leaves contain both ingredients, those left in unrefrigerated beyond 48 hours would contain only cathine, which explains users’ preference for fresh leaves.’ (Khat Plant by Dr Mohamed Al Kamel Ain-Shams, Faculty of Medicine, Cairo, Egypt – <http://www.geocities.com/forceps1974/khat.html?20098page1>.)

In the same paper the treatment for khat dependence is outlined.

‘Khat is sympathomimetic and its pharmacological effects are believe to parallel those of amphetamine.

Psychiatric manifestations induced by khat are similar to the effects of other known stimulants.’ (ibid page 3).

The same paper outlines the legal stature of the khat plant in the United Kingdom, where it is currently legal. On the other hand the paper further discusses that though until recently khat was classified as a Schedule IV substance by DEA, Cathinone, as an ingredient present only in fresh packed leaves (within forty-eight hours of its harvest) has now been classified as a Scheduled (narcotic), that is the most restrictive category used by the DEA. Cathine as the ingredient that remains in the khat plant after forty-eight hours, is still classified as a Schedule IV drug.

Be it also noted that this paper, though excepting khat's popularity in the Yemen also accepts that recently the consumption of the plant is prevented by Law inside Governmental Buildings therein.

The Court deemed it fit to outline these researches to have a better appreciation of the plant and its effect as a stimulant.

Considers:

Supporters in favour of the legality of the khat plant advocate greatly that the use of this plant in Eastern countries is one very culturally embedded and thus because of inter-racial mixtures, such as immigrants in there thousands in the West, should favor the acceptance of its use (through chewing) in Western Countries thus avoiding culture conflicts and easier integration therein of eastern cultured peoples. Thus the website [http://www.street /drugs.org/khat.htm](http://www.streetdrugs.org/khat.htm) estimates that over 10 million people use and abuse khat today, primarily in the Middle East.

The paper '*University of Pennsylvania – African Studies Centre – Everything about Qat/Khat/Kat*', <http://www.africa....edu/.../qat.html> explains who the traditional users of khat are '*Khat has been used since antiquity as a recreational and religious drug by natives of Eastern Africa, the Arabian Peninsula, and throughout the Middle East. In the United States, khat use is most*

popular among immigrants from Yemen and the East African nations of Somalia and Ethiopia.' Page 2.

Be it also premised at this stage that khat is banned in the United States and Canada and other European countries – Norway, Sweden, Denmark, Finland, Ireland, France, Germany, Switzerland. It is not however illegal in the United Kingdom, although the mentioned alkaloids cathinone and cathine are. It is in the opinion of this Court that this is the legal pattern that our legislature has copied in our present day Drug Laws.

Thus as in our legal system, under the Misuse of Drugs, Act 1971, Schedule 1, Class A Drugs, lists the substance cathinone, whilst Part III, Class C Drugs lists the substance cathine. Khat is nowhere there listed. So much so that khat can be freely bought in the United Kingdom. This being exactly how accused came to purchase the khat plant imported.

The problem, cultural antics and other legal systems apart is the position our legislature intended to sustain in the Maltese Islands in this respect. In resolving this issue one could simplistically argue that '*ubi lex volet lex dixit*'. Certainly Maltese Law is silent in mentioning the khat plant. This a contrario to the clarity of the Law with regards to particular plants and their chemical counterparts, for example peyote cactus and mescaline (Chapter 31 of the Laws of Malta); tetrahydrocannabinolis (Chapter 31 of the Laws of Malta), and marijuana (Chapter 101 of the Laws of Malta); cocaine and coca leaves (Chapter 31 of the Laws of Malta). The Law was thus with regard to these and similar substances, clear in its control.

Considers:

In determining the above-mentioned issues raised by Defense primarily – '*nullum crimen sine legge*' – and lack of '*mens rea*' on the part of the accused, regard must be had to the word of the charges proffered against accused, those regarding cathinone and cathine, not the khat plant.

Clearly in actual fact accused did import the khat plant, the substance cathine resulted to be the present alcaloid therein, cathinone having already degenerated, as well explained by Pharmacist's Mario Mifsud and in the papers above referred to. It is very clear that the Law as it stands wanted to control both the stronger substance cathinone and the lesser cathine, in whatever amount existent, as no sealing to the minimum or the maximum of the substance found is stated in the Law.

Thus to quote Blackstone's Criminal Practice, 2008, page 915 in this regards *'Controlled drugs are defined by their scientific name (for example 'diamorphine' (heroin)). But any controlled drugs described in Schedule 2 by its scientific name is not established by proof of possession of naturally occurring material of the described drug is one of the constituents unseparated by the others. This is so whether or not the naturally occurring material is also included as another item in the list of the Controlled Drugs. In the case of the latter possibility, the offence would allude to the naturally occurring material and not to its constituent elements.'*

Certainly cathine was found in the khat plant imported by accused, certainly this is a scheduled substance. It is the opinion of the Court that although the plant itself is unscheduled yet two of its alcaloids are, the alcaloid found cannot co-exist without the plant (since in this case it was not man made). Logically then this does not and cannot legalize its presence.

It is apt at this stage to examine the letter of the Law in determining this issue. Section 40A of Chapter 31 of the Laws of Malta reads:

40A. (1) *The Minister responsible for public health may, after consulting the Council of Health, and so far as he may consider necessary or expedient for the protection of the public health, make regulations for controlling the manufacture, exportation, importation, possession, distribution and sale of psychotropic drugs as may be deemed by him to require such control in the public*

interest, and for preventing their improper use, and in particular but without prejudice to the generality of the foregoing powers for:

(a) Regulating the issue by the persons mentioned in Article 31(1) of prescriptions containing any such drug or chemical product and the dispensing of any such prescription

There is certainly no contestation that both alcaloids cathinone and cathine have by Regulation been included in the Schedules to the said Chapter, therefore rendered illegal substances within the parameters of the quoted Article.

The regulations under Section 40A are intended to control the manufacture, exportation, importation, possession, distribution and sale of the psychotropic drug referred to in the Third Schedule.

Certainly as stated no doubt exists about the fact that accused brought into Malta, therefore had possession of the khat plant, '*ex admissis*' always in his statement, he intended to share it with his friends.

Defense strongly contested the fact that accused besides not being knowledgeable of the prohibited alcaloids contained in the khat plant was never furnished or did not have an access to any laboratory facilities to produce the above-mentioned alcaloids. Certainly since the khat plant as exhaustively mentioned naturally degenerates into these alcaloids, no manufacture thereof is necessary. Without any doubt the word manufacture as mentioned in Section 40A of Chapter 31 of the Laws of Malta, necessitates a human intervention, laboratory or not. Therefore the argument submitted by Defense in this regard does not hold ground.

Furthermore the argument of Defense that accused was legally ignorant of the fact that these alcaloids, constituent of the khat plant, were illegal in Malta, thus this proving his lack of *mens rea* to commit the crime is in the opinion of the Court a weak one. What accused did is not an

ignorance of fact but one of Law, therefore certainly not excusable. Cultures defer, their implications defer. The influx of peoples from different cultures in our Island does not and should not mean the acceptance of extraneous traditions especially ones with serious illegal implications.

The excuse that accused had no *mens rea* is lame at best. Because of his cultural background accused knows full well the stimulant effect that khat has when chewed. It is quite irrelevant that he was unaware of the presence of the two scheduled substances, or that he has misled by the legal position in the United Kingdom where khat is freely purchased. Officials at the Malta International Airport testified that on being singled out at the Airport, once so accompanied to the luggage reclaim, accused refuted the luggage he had traveled with – witnesses Hilary Fenech folio 28 and PC 1031 Raymond Fenech folio 179). Accused's antics are to say the least suspicious with regards to the contents of his baggage.

Accused's cultural knowledge of the plant is further reiterated by the fact that in order not to lose its stimulant effect, he wrapped it in banana leaves, so as not to undermine its freshness and therefore its effects. Therefore though the actual carrier of the alcaloids itself is not scheduled under our Law, its natural constituents most definitely are through natural degeneration.

Thus, seeing the charges proffered with regards to cathinone and cathine, finds Aweys Maani Khayre guilty as charged, having seen Section 40A and 120A of Chapter 31 of the Laws of Malta. Considers the minimality of the substance cathine retrieved from the khat plant and condemns him to six(6) months imprisonment and for a fine of four hundred and sixty six Euros (€466), and to the payment of the sum of five hundred and thirty five Euros, and twelve Euro cents (€535.12), incurred as expenses in terms of Section 533 of Chapter 9 of the Laws of Malta.

< Final Judgement >

Informal Copy of Judgement

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