MALTA

COURT OF CRIMINAL APPEAL

HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO

Sitting of the 3 rd July, 2009

Criminal Appeal Number. 131/2009

The Police

v.

Aweys Maani Khayre[1]

The Court:

1. This is an appeal filed by Aweys Maani Khayre from a judgment delivered by the Court of Magistrates (Malta) on the 16th April 2009. The said Khayre was arraigned in court on the 11th May 2008 and charged with several offences under the Medical and Kindred Professions Ordinance, to wit (**i**) that in these Islands on the night between the 9th and 10th May 2008 he imported or offered to import a psychotropic and restricted drug (cathinone) into Malta without the necessary permission and in breach of the said Ordinance and of the Drugs (Control)

[1] Son of Maani and Asli nee Muhammed, born in Somalia on the 3rd May 1977, and residing at 102 Church Road, North Hall, West London – holder of British Travelling document C00005027.

Regulations, 1985; (**ii**) that on the same day and under the same circumstances, he imported or offered to import a psychotropic and specified drug (cathine) into Malta without the necessary permission and in breach of the said laws; (**iii**) that he was in possession of the said cathinone in breach of the law under such circumstances which denoted that such possession was not for his personal use; and (**iv**) that he was in possession of the said cathine in breach of the law under such circumstances which denoted that such possession was not for his personal use;

2. On the 16th April 2009, the Court of Magistrates (Malta) found Aweys Maani Khayre guilty as charged and sentenced him to six (6) months imprisonment, a fine of four hundred and sixty six Euros (€466), and to the payment of court experts' fees (amounting to €535.12). The operative part of the judgment reads as follows:

"Thus, seeing the charges proffered [recte: preferred] **with regards to cathinone and cathine, finds Aweys Maani Khayre guilty as charged, having seen Section 40A and 102A of Chapter 31 of the Laws of Malta. Considers the minimality** [recte: minimal amount] **of the substance cathine retrieved from the khat plant and condemns him to six months imprisonment and for** [recte: to] **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."**

3. Aweys Maani Khayre filed an appeal from this decision on the 22nd April 2009. His main or basic grievance is that, on the facts of the case, he could not have been found guilty of the importation and of "aggravated" possession (i.e. possession under such circumstances which showed that such possession was not for his personal use) of the drugs cathinone and cathine. Appellant contends that the plant khat is, as such, not scheduled or listed under either the Dangerous Drugs Ordinance (Cap. 101) or under the Medical and Kindred Professions Ordinance (Cap. 31),

and the fact that such a plant may contain cathinone or cathine, does not *per se* render the importer or the possessor of the plant guilty of the importation or possession of a restricted drug (cathinone) or of a specified drug (cathine).

4. From the evidence heard before the Inferior Court it transpires that appellant was stopped at Malta International Airport on the night between the 9th and 10th May 2008 upon his arrival on flight KM103 from London Heathrow. Appellant was carrying one suitcase stuffed with khat plants. The plants – to the total gross weight of 20,851 grams – were in bunches, each bunch wrapped in banana leaves. This kind of wrapping was clearly intended to preserve as much as possible the freshness of the plants. Appellant, who hails from Somalia but is the holder of a British Travel Document issued for the purposes of the United Nations Convention of the 28th July 1951, admitted that he had brought the plants into Malta to share them with his cousins and other Somali friends who live in Floriana and at the Marsa Open Centre in connection with a belated birthday party, and that he had bought the same in England where they can be freely purchased without breaching English law.

5. In its judgment the Inferior Court, after making a number of general observations on the presence of cathinone and cathine – which are psychoactive substances – in the khat plant, and after noting in particular that if the plant is left unrefrigerated for more than 48 hours, only cathine will remain in it, went on to draw some parallels between the English Misuse of Drugs Act 1971 and our drugs legislation. It noted in particular that our laws have followed the "legal pattern" adopted in the United Kingdom, where possession and trafficking in the khat plant is not in itself illegal, but where the alkaloids cathinone and cathine are scheduled drugs. The first court went even so far as to quote from the 2008 edition of ***Blackstone's Criminal Practice*** to the effect that –

"…any controlled drug described in schedule 2 [of the Misuse of Drugs Act 1971] **by its scientific name is not**

established by proof of possession of naturally occurring material of which the described drug is one of the constituents unseparated from the others. This is so whether or not the naturally occurring material is also included as another item in the list of controlled drugs…".

6. However, and rather surprisingly in view of the above quotation, the Inferior Court went on to find the accused guilty of the importation and possession of both cathinone and of cathine – even though the court appointed expert, Mr Mario Mifsud, had clearly stated that he had only found the substance cathine in the plants imported by appellant (in his evidence he explained that this was due to the process of degeneration of the plant itself).

7. Now, the abovementioned quotation from ***Blackstone's Criminal Practice*** is in fact taken verbatim from the leading judgment of the House of Lords in the case ***DPP v. Goodchild*** [2]. The facts of that case were, briefly, the following: at the time that case was decided, cannabis was classified as a Class B drug under the 1971 Act. However the more potent derivative, cannabinol, contained within cannabis, was classified as a Class A drug, possession of which amounted to a more serious offence than possession of a Class B drug. Mr Goodchild, having been found to be in possession of cannabis, was indicted not only for possession of a Class B Drug, but also for possession of a Class A drug, given that the cannabis that he was found with contained cannabinol within it. In quashing the appellant's conviction for the higher offence, Lord Diplock, delivering the main opinion in the House of Lords[3], had this to say:

"Schedule 2 contains a list of more than 120 different drugs. Most of these are in Class A, but cannabis and cannabis resin are listed in Class B. The majority of drugs in all three classes are synthetic substances only, that is to say they are man-made. All these are

[2] [1978] 1 WLR 578

[3] Viscount Dilhorne, Lord Salmon, Lord Fraser of Tullybelton and Lord Scarman concurring.

described in Schedule 2 by their scientific name which, to a skilled chemist, would indicate their molecular composition. There are, however, a few drugs which also occur naturally in plants, in fungi or in toads. Apart from cannabis, the most important of these are opium and its narcotic constituents, which include such well-known alkaloids as morphine, thebaine and codeine. "Opium" is specified as a Class A drug under that name (which is not a scientific one). It consists of the coagulated juice of the opium poppy. All parts, except the seeds, of the opium poppy, are also included separately in the list of Class A drugs under the description "poppy-straw"; while morphine, thebaine and other alkaloids contained in opium appear as separate items in Class A, and codeine as an item in Class B. Cocaine occurs naturally in coca leaf which is the leaf of a plant of the genus Erythroxylon: "coca leaf" and "cocaine" appear as separate items in Class A.

"These, together with cannabis, are instances of where a naturally occurring substance which contains drugs specified by their scientific names in Schedule 2, is itself included as a separate item in the Schedule. There are other drugs listed under their scientific names which also occur in nature, but the natural source from which they can be obtained is not itself specified as a controlled drug in the Schedule. The following are examples.

"Lysergamide and lysergide occur in nature in the stalks, leaves and stem of the flowering plant known as Morning Glory; mescaline is found in the flowering heads of the Peyote Cactus; psilocin and psilocybin are to be found in the toadstool sometimes called the Mexican magic mushroom; and bufotenine occurs in the common toadstool and in three other varieties of toadstool, in the stalks and leaves of a semi-tropical plant, and even as a secretion of the common toad and natterjack toad.

….

"The question directly involved in this appeal will not arise again in future, as the definition of "cannabis" has now been amended…so as to include the whole of the plant except the mature stalk and fibre produced from it and the seeds. However, similar questions may arise in relation to those other listed drugs described by their scientific names, but which also occur naturally in plants or fungi or animals. As I have already indicated as a necessary step in the reasoning which has led me to the conclusion in the instant appeal that no offence was committed by the appellant, the offence of unlawful possession of any controlled drug described in Schedule 2 by its scientific name is not established by proof of possession of naturally occurring material of which the described drug is one of the constituents unseparated from the others. This is so whether or not the naturally occurring material is also included as another item in the list of controlled drugs."

8. The parallels here are obvious. To limit oneself to plants, our law, in the Dangerous Drugs Ordinance, targets specifically the opium poppy (*papaver somniferum*), the coca plant (*Erythroxylum Coca)* and the cannabis plant. However it cannot be said that any other drug which is listed in the schedule to either the Dangerous Drugs Ordinance or the Medical and Kindred Professions Ordinance (or regulations made thereunder), and which may occur naturally in some other plants, automatically renders that other plant "illegal", whether for purposes of possession (simple or aggravated) or for purposes of trafficking (which includes importation and cultivation). If that were to be the case, it would open a Pandora's box, rendering liable to prosecution people in possession of certain plants simply because the particular plant happens to contain, alone or in combination with other substances or alkaloids, a prohibited drug or substance.

9. The only exception to the above would, it is submitted, occur where the mind of the agent – whether possessor or

trafficker – was specifically directed to the possession of or trafficking in the drug naturally occurring in the plant. In other words there must be knowledge of the nature of the substance possessed or trafficked. This point was made by the Supreme Court of Canada in **The Queen v Dunn** [4], overruling the decisions in the same procedures of both the County Court of Vancouver Island and the British Columbia Court of Appeal. The case concerned the sale of Mexican magic mushrooms – mentioned in the above excerpt from **Goodchild** – where the indictment charged trafficking in psilocybin. In delivering the judgment of the entire Court[5], Justice McIntyre had this to say:

"Throughout these proceedings it had been agreed by all parties that Psilocybin is a restricted drug listed in Schedule H to the *Food and Drugs Act,* that it appears in nature in some types of mushrooms, several of which grow wild in British Columbia, and that the mushrooms offered for sale in the case at bar did contain the drug Psilocybin. At trial the respondent at the conclusion of the Crown's case moved for a dismissal of the charge on the basis that no evidence had been adduced to support the charge. The provincial court judge, following the *Parnell* [6] case, *supra,* allowed the motion and acquitted the respondent. An appeal to the County Court was dismissed on the same basis as was a further appeal to the British Columbia Court of Appeal. The matter comes before us and the Crown asks us to review and overrule *Parnell* and *Cartier* [7].

…

"In *Parnell* Nemetz C.J.B.C., speaking for the court (Nemetz C.J.B.C, Aikins and Lambert JJ.A.), considered a case where a charge of possession resulted from the finding of a mushroom-like

[4] [1982] 2 S.C.R. 677
[5] Ritchie, Dickson, Beetz, McIntyre, Chouinard, Lamer and Wislon JJ
[6] **R. v. Parnell** (1979) 51 C.C.C. (2d) 413
[7] **R. v. Cartier** (1980) 54 C.C.C. (2d) 32

substance containing Psilocybin in the accused's residence. He reached the conclusion that the simple possession of mushrooms containing the restricted drug as it occurs in nature would not support a conviction for possession. At p. 414 of the report he said:

""There is no doubt that the mushrooms found in the possession of the respondent contained psilocybin, though there was no evidence of what quantity of the drug was present in the mushrooms. Counsel for the respondent submitted, first, that the mere possession of the substance psilocybin as an integral part of the natural plant cannot support a conviction for possession of a restricted drug, and, second, that in enacting s. 41(1) and Sch. (H), Parliament intended to prohibit only the possession of the separated crystalline chemical substance. After anxious reflection, and after considering the circumstances of this case, as outlined above, I conclude that the first submission is correct insofar as psilocybin is concerned. It is not necessary for me to decide to what extent the second submission is correct."

He found support in the reasoning of Lord Diplock in *Director of Public Prosecutions v. Goodchild, …* a case based on different English legislation, but expressing the same principle. He referred to the words of Lord Diplock at p. 166, where he said:

""…the offence of unlawful possession of any controlled drug described in Sch 2 by its scientific name is not established by proof of possession of naturally occurring [sic] material of which the described drug is one of the constituents unseparated from the others."

"He also found support in a comparison with the provisions of the *Narcotic Control Act* noting that in the Act where Parliament intended to prohibit possession of the plant as well as the drug it made specific provision for that result by naming the plant.

He also expressed the view that the position adopted by the Crown, that is that mere possession of the plant containing the naturally occurring drug was sufficient to support a conviction for possession, would lead to an absurd result opening the door to prosecution of farmers and others who merely by an accident of nature might have growing upon their land the nefarious 'magic mushrooms'.

…

"In approaching the construction of the relevant provisions of the *Food and Drugs Act* I must observe that the words employed are clear and unambiguous and in this case there seems to be no real difficulty in statutory interpretation. Section 40 provides in unmistakable language that possession means possession as defined in the *Criminal Code.* Reference to s. 3(4) of the *Criminal Code* describes the elements which must be shown to find possession. Section 40 also describes a restricted drug as "any drug or other substance included in Schedule H" and Schedule H specifically includes Psilocybin. Section 41 prohibits possession of a restricted drug and s. 42, which is the relevant section in this case, prohibits trafficking in a restricted drug.

"In reaching his conclusion on the 'no evidence' motion the trial judge followed *Parnell* and decided that there was no evidence before him because Psilocybin contained in a mushroom is not listed in Schedule H as a restricted drug. The question which faced him, however, was not whether Psilocybin naturally occurring in a mushroom is listed in Schedule H but whether there was evidence before him upon which a properly instructed trier of fact could have found the respondent guilty of trafficking in Psilocybin which clearly is.

"In the face of the evidence given at trial and the concession made by counsel for the respondent that

Psilocybin, not merely the constituents from which it could be made, existed in the mushrooms, it could not be said that there was not some evidence of trafficking in Psilocybin. The mushrooms contained the drug. There was evidence that the respondent knew it and that he assured his prospective purchasers that it was 'good stuff', that he invited them to try it, and that he had offered a pound for sale for $3,000, which would tend to exclude the possibility that the mushrooms were to be sold for their value as food. In my opinion, it is impossible to come to any other conclusion than that there was evidence before the trial judge upon which a properly instructed trier of fact could have convicted the respondent of trafficking in Psilocybin and that the trial judge was in error in allowing the motion of no evidence."

10. In the instant case, there is no evidence to suggest that appellant Aweys Maani Khayre's mind was in any way specifically directed to the drug cathinone or to the drug cathine. This Court is satisfied that in line with the social and cultural habits of his country of origin, he simply intended to provide his friends in Malta with a plant to chew, even if that plant would have, as he must certainly have known that it would have, a stimulating effect on whoever consumed it.

11. For these reasons the Court allows the appeal, revokes the judgment of the Court of Magistrates (Malta) of the 16th April 2009 in the abovementioned names, and acquits appellant Aweys Maani Khayre of all the charges preferred against him.

< Final Judgement >

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