MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 14 th July, 2009

Criminal Appeal Number. 169/2009

The Police
(Insp. P. Grech)

Vs

Khalif Id Ahmed

The Court,

Having seen the charges brought against the appellant Khalif Id Ahmed before the Court of Magistrates (Malta) as a Court of Criminal Judicature for having in these islands on the night between the 21st and 22nd July 2006,

a. Imported or offered to import a 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 a psychotropic and specified drug (cathine) without having proper authorization, in breach of the provisions of the Medical and Kindred Provisions 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 a 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 a 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.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 8th May, 2009 by which, after that Court had seen articles 40A and 120A of Chapter 31 of the Laws of Malta, found accused guilty as charged and condemned him to a term of imprisonment of six (6) months and to the fine (multa) of four hundred and sixty six Euros (€466). And having seen also article 533 of Chapter 9 of the Laws of Malta, ordered that the appellant pays the sum of one hundred and forty six Euros and fifty one Euro cents (€146.51) by way of costs incurred in connection with expert's fees.

Having seen the application of appeal filed by appellant on the 20th May, 2009, wherein he requested this Court to revoke the appealed judgement.

Having seen the records of the case.

Having seen that appellant's grounds of appeal are briefly the following, namely that the manner in which the charges were preferred against him does not represent factually and empirically the facts in issue in that appellant imported and was in possession of the plant Catha Edulis, whereas he was charged with having imported and of being in possession of the drugs *cathine* and *cathinone,* when this could only have occurred if such drugs were imported in a synthetic state, following a manufacturing process. Consequently appellant could not have been convicted on the basis of the facts in issue, namely the importation and possession of the plants themselves since he was not so charged. Appellant was convicted of the charges of importation and possession of *cathine* and *cathinone* - evidently in a synthetic state – when in point of fact he had imported and was in possession of the plant Catha Edulis itself. It was obvious that appellant was charged in this anomalous manner as a result of the legal constraints resulting from the Schedule annexed to the Medical and Kindred Professions Ordinance, which excludes the plant itself but, on the other hand, includes the chemical components themselves (*Cathine* and *Cathinone*). Consequently appellant should have been acquitted of the charges brought against him as he imported and was in possession of the plant itself but not the drugs in a manufactured state

Appellant also draws a comparison with the prohibition contained in the Dangerous Drugs Ordinance with regards to the importation and possession of cannabis where the law – unlike in this case – expressly mentions the plant itself as well as its derivatives in a synthetic state. Following the principle contained in the legal maxim "*Ubi lex voluit , dixit",* it follows that had the legislator in this law

wanted to include also the plant itself, he would have said so.

Appellant referred to a report filed by the court-appointed expert, Dr. Mario Mifsud before the First Court to the effect that in 2005 the response of the competent Maltese authorities to a query raised by the United Kingdom Advisory Council on the Misuse of Drugs was that the plant Catha Edulis was not controlled. The said expert stated that the component chemicals derived from the plant itself are controlled but not the plant itself and this is clear even from a cursory examination of the Schedule annexed to the Medical and Kindred Professions Ordinance. The position was analogous on the 22nd. July, 2006, when appellant was apprehended at Luqa International Airport in possession of the Kath plant and remains analogous to date. Penal laws cannot be extended beyond the cases expressed therein in accordance with the principle contained in the other legal maxim : "*Nullum crimen sine lege. Nulla Poena sine lege."* Therefore, even for this reason, appellant could not have been found guilty as charged.

Having seen the minute entered by Prosecuting Counsel in the course of the hearing of the 9th. July, 2009, whereby he referred to the judgement delivered by this Court presided over by His Honour the Chief Justice, Dr. V. De Gaetano on the 3rd. July, 2009 in the case **"The Police vs. Aweys Maani Khayre"**, where the facts of the case were substantially similar to those in issue in this case and whereby he declared that the Prosecution was agreeing with the grounds of appeal lodged by appellant in this case and was leaving it to this Court to decide the case accordingly.

Having seen the minute of same date whereby Defence Counsel also referred to the same judgement.

Having duly examined the said judgement;

Now duly considers.

That the present case bears an almost identical resemblance to the case to which reference was made by both learned Counsel and which was recently decided by the Chief Justice in the appeal stage after it was decided by the same Magistrate presiding in the First Court in this case. In fact the presiding Magistrate, in her judgement in this case, stated that it had *"already delivered a judgement analysing identical issues – Inspector Pierre Grech (Sic!) vs. Aweys Maani Khayre dated 16th. April, 2009"* and that the First Court was making reference to that case because the legal points being raised were identical.

As in the case of **Aweys Maani Khayre**, appellant was arraigned in court and charged with several offences under the Medical and Kindred Professions Ordinance, to wit (**i**) that in these Islands 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) 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;

Also, as in this case, on the 16th April 2009, the Court of Magistrates (Malta) had 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. Aweys Maani Khayre had likewise filed an appeal from this decision. His main or basic grievance was 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. He had contended that the plant khat was, 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).

The facts of this case are also very similar to those in **Khayre's** case**.** From the evidence heard before the Inferior Court, it transpires that appellant was stopped at Malta International Airport on the night between the 21st and 22nd July, 2006 upon his arrival by air from Amsterdam. He was carrying a quantity of Khat plants. In his statement to the Police (pages 26-27 of the records) he admitted that he had brought the plants into Malta to put it in his fridge and take it for himself and part of it was to give as a present to his Somali friends living in the Marsa Open Centre. He stated that only Somalis eat Khat and in Somali Khat means "salad". He had been given the Khat by his relative Nur Mohammed in Holland and he did not know that it was prohibited in Malta. Had he known that it was illegal in Malta, he would not have given his bag to the Police and Customs Officers. He would not have brought it to Malta but left it in Holland. He always took care (Sic!) of the law in Malta and always complied with it. He never broke the laws of Malta, except when he arrived illegally. Since then he had followed the instructions of Monsignor Philip Calleja, director of the Immigrants Commission to adapt to the laws of Malta and to follow his superiors' instructions.

Having considered

In this present case, the Court Expert Dr. Mario Mifsud, concluded in his findings reported to the First Court that the plants found in appellant's black suitcase, of the net weight of 11,812.3 grams , were Khat plants and that in these plants he found Cathine, which is a mild stimulant,

controlled under Schedule 3, Part B of Chapter 31 of the Laws of Malta and the substance Cathinone, a stimulant likewise controlled by law under Part A of said Third Schedule.

This Court, presided over by the Chief Justice, in **Khayre's** case referred to the quotation from the 2008 edition of **Blackstone's Criminal Practice** made by the First Court in that case, 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…".**

and held that it could not agree with the First Court in finding the accused Khayre 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).

This Court in the **Khayre** case noted that the abovementioned quotation from ***Blackstone's Criminal Practice*** was in fact taken verbatim from the leading judgement of the House of Lords in the case ***DPP v. Goodchild*** [1]. It noted that 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

[1] [1978] 1 WLR 578

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[2], 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 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

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

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."

Chief Justice De Gaetano in **Khayre's** case then noted that **t**he parallels here were 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.

He went on to state that the only exception to the above would 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** [3], 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. He went on to quote what Justice McIntyre had to say in delivering the judgement of the entire Court[4],:

"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

[3] [1982] 2 S.C.R. 677
[4] Ritchie, Dickson, Beetz, McIntyre, Chouinard, Lamer and Wislon JJ

had been adduced to support the charge. The provincial court judge, following the *Parnell* [5] 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* [6].

…

"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 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."

[5] **R. v. Parnell** (1979) 51 C.C.C. (2d) 413
[6] **R. v. Cartier** (1980) 54 C.C.C. (2d) 32

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."

Chief Justice De Gaetano in the **Khayre** case found that there was 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 and that the Court was 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. For these reasons the Court had allowed the appeal, revoked the judgment of the Court of Magistrates (Malta) and acquitted appellant **Aweys Maani Khayre** of all the charges preferred against him.

Likewise, this Court, in the case under review, finds no evidence to suggest that appellant Khalif Id Ahmed intended to import into Malta the drugs cathine and cathinone as such, but that, in line with the social customs of his country of origin, he intended to provide himself and his co-nationals in Malta with a plant to chew or otherwise consume.

As the law stood at the time of the alleged offences and De lege lata, this does not constitute an offence as yet. De lege condenda the authorities might want to consider whether an amendment to Chapter 31 of the Laws of Malta is warranted at his stage to prohibit the use of this practice by the ever-growing number of Somali immigrants into this country who share similar customs and habits as the appellant in the present case.

For the above reasons, this Court is allowing the appeal, revokes the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature of the 8th. May, 2009, in the above mentioned names and acquits Khalif Id Ahmed of all the charges preferred against him.

In view of the public health and social implications of this judgement, orders that copies of this judgement be brought to the attention of the Ministers responsible for Health and Justice and Home Affairs respectively, by the Court Registrar.

< Final Judgement >

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