MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE -- ACTING PRESIDENT
RAYMOND C. PACE

THE HON. MR. JUSTICE
DAVID SCICLUNA

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 14 th June, 2012

Number 6/2009

The Republic of Malta

v.

John Udagha Omeh

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 9th March 2009 wherein the said John Udagha Omeh was charged with having, (1) with another one or more persons in Malta or outside Malta, conspired for the purpose of selling or dealing in a drug in these

Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and specifically of importing and dealing in any manner in the drug cocaine, and having promoted, constituted, organized and financed such conspiracy; (2) meant to bring or caused to bring or caused to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), contrary to the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta); (3) had in his possession a dangerous drug (cocaine) contrary to the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), so, however, that such offence was under such circumstances that such possession was not for the exclusive use of the offender;

2. Having seen the judgement delivered on the 13th January 2010 whereby the Criminal Court, after having seen the jury's verdict by which the said John Udagha Omeh, by seven (7) votes in favour and two (2) votes against, was found guilty of all the three counts of the bill of indictment, declared him guilty of having:

1. on the 9th December 2007, with another one or more persons in Malta or outside Malta, conspired for the purposes of selling or dealing in a drug in these Islands against the provisions of the Dangerous Drugs Ordinance, (Cap. 101 of the Laws of Malta), and specifically of importing and dealing in any manner in the drug Cocaine, and having promoted, constituted, organised and financed such conspiracy, and this according to the First Count of the Bill of Indictment;

2. on the 9th December 2007, brought or caused to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance (Cap. 101 of the Laws of Malta) when he was not in possession of any valid and subsisting import authorization granted in pursuance of the Dangerous Drugs Ordinance (Cap. 101 of the Laws of

Malta), and this according to the Second Count of the Bill of Indictment;

3. on the 9th December, 2007, knowingly having been in possession of a dangerous drug (cocaine) being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance (Cap. 101 of the Laws of Malta) when he was not in possession of any valid and subsisting import or possession authorization granted in pursuance of the Dangerous Drugs Ordinance (Cap. 101 of the Laws of Malta); so, however, that such offence was under such circumstances that indicated that such possession was not for the exclusive use of the offender;

3. Having seen that by the said judgement the first Court, after having seen Sections 9, 10, 10(1), 12, 14, 15A, 20, 22(1)(a)(f)(1A)(1B)(2)(a)(i) proviso (aa)(3A)(a)(b)(c)(d), and 26 of the Dangerous Drugs Ordinance (Chap. 101), regulations 4, 8 and 9 of the 1939 regulations on the Internal Control of Dangerous Drugs (L.N. 292 of 1939), and sections 17(h), 23 and 533 of the Criminal Code (Chap. 9 of the Laws of Malta), sentenced the said John Udagha Omeh to a term of imprisonment of twenty (20) years and to a fine *multa* of seventy thousand euros (€70,000) which fine is to be automatically converted into a further term of imprisonment of two (2) years according to law if it is not paid within fifteen days from the day of the appealed judgement; the Criminal Court further ordered the said John Udagha Omeh, in terms of Section 533 of the Criminal Code, to pay the sum of one thousand, nine hundred and nineteen euros and forty-two cents (€1,919.42) being the court experts' fees incurred in this case. The first Court furthermore ordered that all objects related to the offence and all monies and other moveable and immovable property appertaining to the person convicted are to be confiscated in favour of the Government of Malta; and, finally, ordered the destruction of all drugs exhibited in this case under the direct supervision of the Deputy Registrar of that Court duly assisted by court expert Mario Mifsud, unless the Attorney General informs the said Court within fifteen days from the

day of the appealed judgement that the drugs are also to be preserved for the purposes of other criminal proceedings against other third parties and, for this purpose, the Deputy Registrar is to enter a minute in the records of this case reporting to that Court the destruction of said drugs;

4. Having seen that the first Court reached its decision after having considered the following:

"Having considered ALL submissions made by defence counsel which are duly recorded and in particular – but not only – the following:

"1. that accused had a clean conduct sheet as was verbally confirmed in the course of the sitting by Inspector Aquilina himself;

"2. that he was kept in preventive arrest for just over two years;

"3. that although section 29 of Chapter 101, technically speaking, did not apply to his case, accused had offered his assistance to the Police in the attempted controlled delivery held on the 10th of December 2007 and the fact that nobody called to pick up the drugs, was outside the accused's control;

"4. that he gave his full co-operation to the Police;

"5. he did not object to the forcing of the lock of the luggage bag;

"6. that he was a Nigerian national who would now be incarcerated in a Maltese prison and far away from his family which was in financial straits;

"7. and that as stated in his letter attached to the application dated 10th September 2008, he was making a plea for mercy.

"Having considered prosecuting counsel's submissions that :

"1. article 29 of Chapter 101 was not applicable in this case as no actual prosecution could be conducted against third parties on the basis of the information supplied by the accused;

"2. that, in any case, accused always denied his involvement in the drug deal, so one could never be sure if he had actually given the correct information to the Police;

"3. However, and more importantly, the case was a very serious one in view of the considerable amount of drugs involved of a purity above average and the peril it would have created in Maltese society had the drug not been intercepted at the airport.

"Having considered the gravity of the case.

"Having considered that for purposes of punishment, the First and Second Counts of the Bill of Indictment regarding the crimes of conspiracy and importation respectively, should be absorbed in the offence of unlawful possession of drugs under circumstances which indicate that said drugs were not intended for the exclusive use of the offender, contemplated in the Third Count of the Bill of Indictment. Accordingly it is being made expressly clear that no punishment is being awarded for the offences included in the first two Counts of the Bill of Indictment.

"In this case the Court cannot but take a very serious view of the considerable amount of drugs which accused imported into Malta with a total street retail value of €229,664.00 which would have been one of the largest consignments of cocaine imported into Malta in any one go. This, in the Court's view, should militate in favour of a punishment much closer to the maximum of life imprisonment than the minimum of four years imprisonment allowed by law in terms of

article 22 (2)(a)(1) and proviso (bb) of Chapter 101 of the Laws of Malta."

5. Having seen the application of appeal[1] of the said John Udagha Omeh wherein he requested that this Court revoke the verdict and consequently acquit him of all charges; alternatively, in the event that this Court confirms the verdict, that it varies the punishment of imprisonment by inflicting a more fair and equitable one which reflects better his responsibility and the circumstances of the case; 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:-

6. Appellant's grievances may be, briefly, summed up as follows: (1) that from the evidence produced, the jurors could not reasonably determine him to be guilty; (2) that during the trial by jury there were a number of errors and irregularities which did not allow him to have a fair trial; that, without prejudice to the first two grievances, the punishment meted out is excessive and not proportional to the crime committed. This Court will be dealing first with the second grievance relating to the alleged "errors and irregularities" that took place during the trial by jury.

7. Appellant refers first to a letter that he had written and which his defence counsel objected to its being shown to the jurors. This letter had been exhibited by means of a note by his former defence counsel on the 10th September 2008 before the Court of Magistrates. Appellant says that the prosecution asked Inspector Victor Aquilina to present this letter, whereas Inspector Aquilina was in no way involved with its having been exhibited during the compilation of evidence. Consequently this document was inadmissible and the first Court should not have permitted it to be produced during the trial and distributed to the jurors.

[1] Appellant filed two applications of appeal, one on the 11th November 2008 and another on the 21st November 2008. During the sitting of the 23rd April 2009, appellant's counsel – Doctor Joseph Brincat – stated that the application of appeal that appellant was requesting this Court to consider was that dated 21st Novembr 2008.

8. Now, in terms of subarticle (2) of article 590 of the Criminal Code, with the indictment the Attorney General shall also file the record of the inquiry together with a list of the witnesses, documents and other exhibits which he intends to produce at the trial. Indeed, in this case, together with the indictment, the Attorney General filed a list of witnesses, a list of exhibits and a list of documents. The documents indicated by him include "the compilation of evidence against the accused" and "all the documents that are mentioned in the said acts". The letter in question was described in the note by which it was exhibited as "a written note duly prepared by the accused" and by means of which he requested that he be authorized to retrieve his clothes and his money. As such, this letter constitutes a document forming part of the record of the compilation of evidence and therefore a document to which the Attorney General, when filing the indictment and listing the documents, could have conceivably made reference.

9. Subarticle (1) of article 438 of the Criminal Code provides that an official copy of the indictment and of the list referred to in article 590(2) is to be served on the accused. Subarticle (2) of article 438 then specifically states: **"The accused shall, by means of a note to be filed in the registry of the court not later than fifteen working days from the date of such service - (i) give notice of any pleas referred to in article 449 and any plea regarding the admissibility of evidence which he intends to raise"**. Consequently it was at that stage, i.e. within fifteen working days from being notified with the bill of indictment, that appellant could have raised a plea as to the admissibility of the document in question. From the record it results that no such plea was raised by appellant, nor indeed was any plea raised.

10. Appellant says that Inspector Victor Aquilina was not the appropriate witness to present the application [*recte:* note] and letter, and that the appropriate witness would have been the Registrar or a representative from the Attorney General's office. This Court disagrees. Apart from the fact that Inspector Victor Aquilina, who

conducted the prosecution before the Court of Magistrates, had access to the note and letter, and had even replied to a previous similar application by appellant[2], the fact that they were distributed to the jurors while Inspector Aquilina was giving evidence is irrelevant. Indeed there is no contestation about the fact that the note was presented by appellant's former defence counsel and that the letter was written by appellant.

11. Consequently the first Court was correct in allowing said documents to be distributed to the jurors.

12. Appellant further laments that a number of documents proving that he had come to Malta on a business trip to investigate whether he was to purchase spare parts for cars were unavailable during the trial. Appellant says that the matter was raised by one of the jurors in a question to the photographic expert. He says that on the 9th December 2007 the police took a number of documents from appellant's bag. These showed that he was in the car spare part business and that he had arrived in Malta with that purpose in mind. He says that when the defence asked for the documents "it seems that they were not listed and all that Inspector Victor Aquilina could come up with was that he was under the impression that they had been presented, but clearly they were not. All that could have been done was that the presiding judge offer the jurors 'if they wanted' to use a magnifying glass to see the photos better and see what could be deciphered. This was totally inappropriate and did not have the same effect if the documents were in the jurors hands which could have been read in detail and with ease. This fact certainly effected the appellant's credibility in the eyes of the jurors and prejudiced his position. To add insult to injury, the prosecutor in his rejoinder submitted that there was no evidence that the appellant came to Malta to purchase spare parts."

13. This Court examined the record of the compilation proceedings and it results therefrom that the documents in

[2] See fol. 134 of the compilation proceedings.

question were not exhibited before the Court of Magistrates. Indeed none of these documents are mentioned in the lists marked Dok. PG6 and PG7 (at folio 33 to 36). If appellant had intended to make reference to these documents in his defence, he should have seen to this through his counsel prior to the actual trial or produce alternative evidence thereto. He was notified with the bill of indictment and list of witnesses, exhibits and documents on the 10th March 2009. The trial started on the 12th January 2010. So there were ten months within which the necessary preparations could have been made. That appellant had such documents in his possession results in particular from photographs 07CQN23 and 07CQN25 found in the photo album Doc. JC[3]. In the circumstances, the least the presiding judge could do was to offer the jurors a magnifying glass to have a closer view of such documents as they appear on the photographs. These photographs were in fact examined by this Court. Two of the documents in photograph 07CQN23 give a list of auto parts and the relative vehicle. The consignee's address is given as Omehn Enterprises Nig. in Lagos while the overseas addressee is in Hamburg, Germany. On the same photo there is a letter on a letterhead given as Omehn Enterprises Nig. that appears to be addressed to the same Hamburg address and signed by John Omeh. These documents bear dates in 2006 (the list 15th December 2006 and the letter 31st October 2006). Photograph 07CQN25 shows a document containing a list of cars, their respective chassis number and the cosignee names, four of them being Omehn Enterprises Nig. and three of them being John U. Omeh. All this is being pointed out to show that the contents are identifiable.

14. For these reasons appellant's second grievance is dismissed.

15. Appellant's first grievance is that there wasn't sufficient evidence for the jury to reach a guilty verdict beyond reasonable doubt. He says that his only defence was that he had no knowledge that the luggage contained

[3] See fol. 73 *ibidem*.

three kilos of cocaine.Therefore he had no intention to conspire with anyone to traffic drugs, nor did he have any intention to distribute them and had no knowledge of their possession. He submits that (a) no witnesses contradicted his statement and no witnesses could testify of his involvement; (b) there was a total absence of forensic evidence, so much so that fingerprints retrieved from the packages containing drugs did not match his; (c) the police investigations were unreliable. He offered his full co-operation and accepted to assist the police in a controlled delivery, yet the police officers present in the hotel room took no notes, no numbers of incoming calls, no numbers dialed, no notes of conversations, and no recordings of such conversations. As a result no one was arrested and appellant could not thus avail himself of article 29 of the Dangerous Drugs Ordinance; (d) the numbers found on appellant's mobile did not indicate the owner of the numbers. Consequently these could not be used against him, although the prosecution tried to imply that they belonged to drug traffickers.

16. These matters, which are clearly matters necessitating a reappraisal of the facts of the case, 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 appellant's version of events as it results from his statement to the police or whether to accept the prosecution's contention that appellant was not credible. The jury had the obvious advantage of seeing and hearing the witnesses. What this Court is called upon to do is to determine whether the jurors, who were correctly addressed by the presiding judge, could have legally and reasonably reached the verdict which they eventually gave.

17. Appellant contends that he did not know that the luggage which he brought to Malta and which was found to contain two packets hidden in it containing a total of 3,021.9 grams of cocaine actually contained cocaine. In his statement he says that at Togo airport he met a certain Simon Oko who was his schoolmate eighteen

years before. He says: “I saw him and I was very happy that I saw him. So he asked me where am I going and I told him that I was going to Malta. Then he told me that he was going to Malta but his ticket was not ok. So he begged me that he has 1 luggage for his friend from Nigeria very important. The name of the man of that his friend is Chief Joe Uka. He brought the bag, then I asked him what is inside the bag and he told me clothes and I opened the bag and I saw clothes. So I have my own luggage then and my own luggage is too heavy for me and he told me that he will check in his luggage in my name and I will take mine as a hand luggage. So I removed some of my clothes from my luggage and put them in his luggage. He check it in and gave him my mobile number which I used before when I came to Malta and he told me that Chief is going to call me when I arrive in Malta and he gave me Chief number. If Chief did not call me, I will call Chief. So Chief will tell me his friend in Malta who will come and pick his bag.” On being asked whether he knew that there was something illegal in the luggage, he replied: “No. I only saw clothes.”

18. The jurors probably disbelieved that someone who wanted to send drugs (and a considerably large quantity at that) would have done so by simply waiting at the airport for a chance encounter with a friend or acquaintance. In the normal run of events, an agreement is reached previously with the courier and the luggage consigned to him or her at the airport. Appellant suggests that he was naïve in accepting to transport the luggage simply because it was given to him by an old schoolmate. The jurors probably did not believe that he was naïve, particularly in view of the fact that he declared he was a businessman who ran “many shops of auto spare parts”. They must have thought that appellant was certainly endowed with business acumen and that he was wise about the ways of the world. They probably also did not believe appellant because they felt that, even if appellant had not been told that the luggage contained drugs, he would have realized that something was amiss from the weight of the luggage itself – what appeared to be a lightweight luggage had an additional three kilos plus

weight because of the drugs inside it. This Court cannot also but ask: If Simon Oko “begged” appellant to take the luggage because it was “important”, wouldn’t appellant have queried what was so important about some clothes which appellant says he saw when he opened the luggage and which he says he was “begged” to transport all the way from Togo? If the luggage contained only clothes, in the normal run of events would appellant not have been given the contact number of the person to whom they were to be delivered rather than having it done in such a roundabout fashion, waiting for a call from Chief Uka or having to phone Chief Uka overseas?

19. In his statement appellant states further: “Then from Togo there was a transit in Tripoli and then I came here. Then I bring my hand luggage and the other luggage which was checked in my name. Then when I was going I was stopped by the customs to check the two luggages which I was carrying. Then they find out that there is something in my friend’s luggage and had to open it. When they opened the bag they saw some clothes and then break the bag and saw cocaine inside the luggage. Then I told them that is not my luggage but it is my friend’s luggage. They called the Police and the Police came.”

20. From the evidence heard before the first Court, it would appear that the first person to speak to appellant was Customs Officer John Azzopardi who is an inspector in the Enforcement Section. He decided that appellant’s luggage should be carefully examined after appellant gave him the reason of his visit to Malta as being to buy car parts. He therefore sent the luggage to be x-rayed and some suspicious objects were noticed by senior customs assistants Emanuel Bonnici and Victor Sant who decided to open the luggage to examine it. Appellant however informed them that he had lost the keys. The customs officers broke the lock and opened the luggage and it was at this point that appellant said that the luggage did not belong to him. This Court cannot but ask why appellant did not say that the luggage was not his until this point had been reached, i.e. when he realized that a thorough

examination of the luggage was being made and, according to appellant's statement, when the drug had been found; and this when, according to Customs Officer John Azzopardi, appellant had previously said that the luggage was his. Perhaps a minor inconsistency, but one which the jurors certainly noticed.

21. This Court further observes that the jurors undoubtedly noticed a further inconsistency in appellant's declarations. P.S. 1086 Johann Micallef, who was the first police officer to talk to appellant, stated that when speaking to appellant he asked him whether he had any personal belongings in the luggage and "he kept telling me that he had no personal effects". Inspector Victor Aquilina also asked him whether the clothes inside the luggage which contained the cocaine were his and appellant replied that the clothes did not belong to him. When Inspector Aquilina asked him whether he was willing to give fibres so that he could check whether the clothes were appellant's, appellant stated that some of the clothes were his and that he had put them in the luggage at Togo airport.

22. Perhaps the more serious inconsistency is in respect of a local mobile number found on the contacts list on appellant's mobile. According to P.S. 1086 Johann Micallef, appellant told him that he had been given the luggage by a friend in Togo, was given Maltese mobile number 99801955 together with Nigerian number 070315990, that he was asked to come to Malta with the luggage, book a hotel, and as soon as he had booked a hotel to call the Nigerian number and inform that he was safe in the hotel, and soon after someone would come to pick up the luggage and the person who was supposed to pick up the luggage should call from the Maltese number that he was given. When Inspector Aquilina asked him about the Maltese number, appellant told him that the number had been given to him the previous November by someone he had met when he had come to search for spare parts business. In his statement appellant denied having said that the local mobile number is the number of the person who had to collect the luggage and said that

what he had said was that it belonged to a friend who wanted to help for his spare parts business.

23. In his statement appellant says that the first time he came to Malta he came as a tourist and to search for business of auto spare parts. He returned because the first time he did not see what he wanted. It may have appeared strange to the jurors that, rather than asking locals, he asked just a black man to help him find a place for spare parts and this person "told me that he don't have chance now and that I can call him later." He would probably have had more success with his query at the hotel reception desk, as there are several spare parts outlets in Malta. Even consulting the Yellow Pages would have helped him. So, even though there may be little doubt that appellant had some sort of auto part business, as evidenced by a number of contacts on his mobile phone and by the documents as they appear in the photographs mentioned in paragraph 13, there is no evidence to show that he had previously made any serious attempt to establish contact with any local businesses. This Court would not therefore be surprised if the jurors believed that the auto parts business was used as just a cover-up. This Court must also ask why, if appellant intended returning to Malta because of said business, did he have to come from Lome` in Togo rather than from Lagos in Nigeria.

24. From all the above it would therefore appear that the jurors did not believe that the appellant's story was in fact credible. What appellant said in his letter attached to the note presented on the 10th September 2008 before the Court of Magistrates – "It is true that I fell into this temptation" – merely serves as confirmation of this conclusion.

25. Thus this Court, on the basis of the above considerations, is of the opinion that the jurors could have legally and reasonably reached their verdict of guilt in respect of all three counts.

26. Appellant's last grievance is in respect of the punishment imposed which he deems excessive. He refers to the overall circumstances of the case, his young age, his clean conduct and status in Malta and especially the fact that the majority of the jurors pleaded for clemency for him. Moreover, he says that the punishment is excessive when compared with other punishments meted out by the same Court in similar cases, some of which more serious than appellant's.

27. First of all, as to his age, this Court does not consider a person thirty-nine years of age to be "young" for purposes of commission of the offences in question. Moreover his clean conduct sheet reflects appellant's status in Malta when it is known that he had been to Malta on one previous occasion for a limited period of time. As to the recommendation of the jurors to the mercy of the Court, article 484 of the Criminal Code provides that any juror may recommend to the mercy of the Court the accused person found guilty, stating the reason for so doing; and the Court may take into consideration any such recommendation. This means that it lies in the Court's discretion whether or not to take such recommendation into consideration. The offences in question are very serious offences and the first Court indeed declared that it was taking a very serious view of "the considerable amount of drugs which accused imported into Malta with a total street retail value of €229,664 which would have been one of the largest consignments of cocaine imported into Malta in any one go." As to other judgements mentioned by the defence, this Court points out that, as has often been said, comparisons are odious and each case is decided and punishment determined on the merits of each case. The punishment is here undoubtedly within the parameters of the law and this Court does not find any reason to disturb the first Court's discretion.

28. For these reasons the appeal is dismissed and the appealed judgement confirmed in its entirety, save that the time for the payment of the fine is to commence from today, as also the time within which the Attorney General is to informs the Court whether the confiscated drugs are

to be preserved for the purposes of other criminal proceedings against other third parties.

< Final Judgement >

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