



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 5th July, 2012

Number 42/2010

The Republic of Malta

v.

Mike Diala

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 25th August 2010 wherein the said Mike Diala was charged with having, (1) on the 18th April 2009 and during the previous months, by several acts committed even though at different times but constituting

a violation of the same provision of the law and committed in pursuance of the same design, 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 selling and dealing in any manner in the drug cocaine, and having promoted, constituted, organized and financed such conspiracy; (2) on the 18th April 2009 and during the previous months, by several acts committed even though at different times but constituting a violation of the same provision of the law and committed in pursuance of the same design, supplied or procured or offered to supply or procure an illegal substance (cocaine) to or for any person whether in these Islands or elsewhere, or advertise the drugs for sale in breach of the law; (3) on the 18th April 2009 and during the previous months, by several acts committed even though at different times but constituting a violation of the same provision of the law and committed in pursuance of the same design, knowingly had in his possession a dangerous drug (cocaine) in breach of the law and under such circumstances that such possession was not for his exclusive use;

2. Having seen the judgement delivered on the 18th October 2010 whereby the Criminal Court, after having seen the said Mike Diala's guilty plea to all three counts of the bill of indictment, which plea he persisted in even after having been given some time to retract it, found the same Mike Diala guilty of all the three counts of the bill of indictment, and declared him guilty of having:

1. on the 18th April 2009 and during the previous months, by several acts committed even though committed at different times but constituting a violation of the same provision of the law and committed in pursuance of the same design, having 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 selling 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 18th April 2009 and during the previous months, by several acts committed even though committed at different times but constituting a violation of the same provision of the law and committed in pursuance of the same design, supplied or procured or offered to supply or procure an illegal substance (cocaine) to or for any person whether in these Islands or elsewhere, or advertise the drugs for sale, without a license by the Minister responsible for Health or without being authorised by these Rules or by authority granted by the Minister responsible for Health to supply the drug mentioned (cocaine), or without being in possession of an import or export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of Parts IV and VI of the Ordinance, and without being licensed or otherwise authorised to manufacture the drug or without a license to procure the same, and this according to the Second Count of the Bill of Indictment;

3. on the 18th April 2009, and during the previous months, by several acts committed even though committed at different times but constituting a violation of the same provision of the law and committed in pursuance of the same design, being guilty of 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 such possession was not for the exclusive use of the offender, and this according to the Third Count to the Bill of Indictment;

3. Having seen that by the said judgement the first Court, after having seen articles 9, 10(1), 12, 14, 15A, 20,

22(1)(a)(f)(1A)(1B)(2)(a)(i) and *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 articles 18, 23 and 533 of the Criminal Code (Chap. 9 of the Laws of Malta), condemned the said Mike Diala to a term of imprisonment of seven (7) years and to the payment of a fine *multa* of twenty thousand euros (€20,000) which fine is to be converted into a further term of imprisonment of twelve months according to law in default of payment. The Criminal Court further condemned the said Mike Diala to pay the sum of four thousand one hundred and sixty-seven euros and twenty cents (€4,167.20) being the sum total of the expenses incurred in the appointment of court experts in this case in terms of article 533 of Chapter 9 of the Laws of Malta, which could be converted to a term of imprisonment according to law. Said Court also ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which the said Mike Diala was found guilty and other moveable and immovable property belonging to the same Mike Diala; and ordered the destruction of all the objects exhibited in Court, consisting of the dangerous drugs or objects related to the abuse of drugs, which destruction shall be carried out by the chemist Mario Mifsud, under the direct supervision of the Deputy Registrar of that Court who shall be bound to report in writing to it when such destruction has been completed, unless the Attorney General files a note within fifteen days declaring that said drugs are required in evidence against third parties;

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

“Having considered that for purposes of punishment, the first and third counts of the Bill of Indictment regarding the crimes of conspiracy and unlawful possession of drugs were not intended for the exclusive use of the offender should be absorbed in the offence of trafficking contemplated in the second count of the Bill of Indictment;

“Having considered that accused is entitled to benefit from the provisions of Article 29 of Chapter 101 of the Laws of Malta;

“Having heard the submissions of the prosecution and the defence;

“Having considered the submissions on punishment by the defence namely, but not exclusively, that accused was found in possession of only 30.88 grms of cocaine in three capsules, that he intended to keep one and sell two capsules. That he was not the mastermind but only a runner and that his cooperation led to the arrest of Victor Anokwu. That he started trafficking eight months before his arrest but interrupted his activities with a period abroad and started again three months before his arrest. That this Court should make use of Article 31 of Chapter 9 of the Laws of Malta where starting off with a twelve year term and applying a 2^o reduction should award a punishment of between 4 and 5 years imprisonment. That reference was made to recent judgements in, more or less similar circumstances, where the award was indeed of a 5 year prison term;

“Having considered submissions by the prosecution that accused had been trafficking for eight months before being arrested and according to his admission had trafficked between 1 and 3 capsules a week (p.86) so that the penalty has to reflect this continuity which was the reason why the Attorney General opted for a jury trial instead of summary proceedings before the Magistrates Court. That the 2^o reduction is not mandatory but discretionary and the Court should apply a lower percentage. That reference was made to recent judgements and demanded a prison term of 12 years with a fine of €35,000;

“Having considered that the punishment for all the crimes admitted to by the accused would amount to life imprisonment, that Article 492(1) of the Criminal

Code provides that when at same stage before the empanelling of the jury, accused admits to his guilt the Court may instead of the above mentioned punishment award a punishment between eighteen and thirty years;

“That what’s more, according to the proviso of Article 22(2)(a)(i)(aa) of Chapter 101 when the Court is of the opinion when considering the age of the accused, his previous conduct, the amount of prohibited drug and other circumstances of the case, that life imprisonment would not be appropriate, the Court may award the accused a prison term not less than four years but not more than thirty years and a fine of not less than €2,329.37 and not more than €116,468.67;

“Having considered the amount of drugs involved in this case including the amount accused trafficked during the months before his apprehension, his cooperation with the police that led to the arrest of Victor Anokwu and having seen today’s note verbal whereby both the prosecution and the defence agreed that accused should benefit from the provisions of Article 29 of Chapter 101;

“Having considered on the other hand that this Court cannot ignore the fact that this crime has become an open sore wound in Maltese society and the cause of many a ruin in the lives of so many persons especially youths and that the crime has been committed in spite of the welcome and hospitality extended by the Maltese to visitors to these shores, illegal or otherwise.”

5. Having seen the application of appeal of the said Mike Diala wherein he requested that this Court vary the judgement delivered by the Criminal Court by (1) confirming the part wherein he was declared guilty of all charges proferred in the bill of indictment, (2) revoking the part wherein he was condemned to seven years imprisonment and instead impose a lesser term of

imprisonment, (3) revoking the part where he was condemned to pay the expenses relative to the appointment of Court experts in terms of article 533 of Chapter 9 of the Laws of Malta; 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 are the following: (1) that the term of seven years imprisonment constitutes too harsh a punishment when one considers all the objective relevant factors which would clearly warrant the application of a lesser term of imprisonment. According to appellant, the first Court (i) did not give sufficient weight to the entity of appellant's co-operation with the Police following his apprehension, (ii) failed to take any note of the fact that he was himself a victim of a drug addiction, (iii) that the minimum term of imprisonment applicable in this case was in fact less than four years as erroneously indicated in the appealed judgement, (iv) that when compared with other recent judgements delivered recently and dealing with more or less similar facts, a term of seven years imprisonment would transpire as being excessive; (2) that the first Court was incorrect in condemning appellant to pay the sum of €4,167.20 representing the expenses incurred in the appointment of Court experts as (i) there were no grounds for the application of article 533 of Chapter 9 of the Laws of Malta; (ii) most, if not all, the expert reports were in fact incurred in the course of separate proceedings against third parties and thus appellant should not have borne the obligation to pay the same.

7. This Court has had occasion to remark several times¹ that appeals against punishment following the entering of a plea of guilty will only be considered favourably in exceptional cases. It is not the function of this Court as a Court of appellate jurisdiction to disturb the discretion of the First Court as regards the quantum of punishment

¹ See, viz., criminal appeals: **The Republic of Malta v. Ahmed Ben Taher**, 6th October 2003; **Ir-Repubblika ta' Malta v. Mohamed Mohamed Abusetta**, 4 ta' Dicembru 2003; **Ir-Repubblika ta' Malta v. Serag F. H. Ben Abid**, 4 ta' Dicembru 2003.

unless such discretion has been exercised outside the limits laid down by the law or in special circumstances where a revision of the punishment meted out is manifestly warranted.

8. Now, as to appellant's co-operation with the Police, it is true that appellant informed the Police as to who was involved with him in the trafficking of drugs and that at least one of these persons (Victor Anokwu) was arrested and charged in Court, and that he eventually pleaded guilty and was duly sentenced.² The first Court evidently took this co-operation into consideration as it specifically made reference to the note verbal whereby both the prosecution and the defence agreed that the appellant (then the accused) should benefit from the provisions of article 29 of Chapter 101 of the Laws of Malta. In virtue of this article, it would have been possible for the first Court to award a punishment even lower than that of four years which it correctly indicated as being the minimum punishment awardable in terms of the *proviso* of article 22(2)(a)(i)(aa) of Chapter 101 of the Laws of Malta. However, the first Court also kept in mind the seriousness of the offences with which appellant was charged.

9. Drug trafficking is a serious offence and has led over the years to a number of deaths and to the commission of innumerable offences by those who succumb to the use of drugs. Counsel for appellant submitted that the amount seized in this case was relatively small, 30.88 grams with the purity of the cocaine in the capsules which had a blue paper being approximately 39% and those without a paper being approximately 30%.³ However, that is not the only amount of drugs which appellant dealt in. In fact, appellant admitted to having been selling cocaine for a number of months. Moreover, it results from the record that appellant formed part of a group of irregular immigrants who, rather than earn an honest living, decided to deal in cocaine.

² Judgement delivered by the Criminal Court on 2nd March 2011.

³ See Godwin Sammut's report at p. 157 – 171.

10. Appellant says that he himself was a victim of drug addiction. This in no way detracts from his responsibility. No evidence was produced that suggests any form of diminished responsibility, and it is evident that he was clearly aware of what he was doing.

11. Counsel to appellant referred to a number of judgements where a lesser punishment was imposed for a larger amount of drugs. This Court has often stated that comparisons are odious and each case is to be decided and punishment determined on the merits of each case. So, for example, the cases **Ir-Repubblika ta' Malta v. Enervina Lara Zepeda**⁴, **Ir-Repubblika ta' Malta v. Rui Miguel Da Silva Simoes Rosa**⁵, and **Ir-Repubblika ta' Malta v. Brigitte Annemarie Malwal**⁶ dealt with the importation of drugs which, in the first two cases were intercepted at Malta International Airport, and, in the third case, shortly after the accused left the airport. In **Ir-Repubblika ta' Malta v. Murad G. M. Erhuma**⁷, the accused was found guilty only of conspiracy. The circumstances in **Ir-Repubblika ta' Malta v. John sive Johan Mifsud**⁸ and in **Ir-Repubblika ta' Malta v. Owen Bonnici**⁹ were completely different. Moreover, as already pointed out, appellant had already dealt in a larger amount of cocaine than was found by the Police.

12. Finally, this Court must point out that the punishment imposed by the Criminal Court is undoubtedly within the parameters of the law and this Court does not find any reason to disturb the first Court's discretion.

13. As to appellant's second grievance, this Court finds no reason why article 533 of Chapter 9 of the Laws of Malta should not be applicable. However, appellant is correct in stating that he should not have been ordered to pay the full amount mentioned in the appealed judgement. This Court has in fact examined the record of these

⁴ Criminal Court, 19th October 2011.

⁵ Criminal Court, 27th January 2012.

⁶ Criminal Court, 27th January 2012.

⁷ Criminal Court, 28th February 2008; Court of Criminal Appeal, 22nd January 2009.

⁸ Criminal Court, 3rd June 2009; Court of Criminal Appeal, 17th February 2011.

⁹ Criminal Court, 4th March 2009; Court of Criminal Appeal, 19th May 2009.

proceedings and the record of the proceedings against Victor Anokwu and it finds that appellant was ordered to pay the expenses for the reports by a number of experts in respect of whom an order was also made for them to be paid in the judgement delivered on the 2nd March 2011 against the said Victor Anokwu. It results that said amount has since been converted into a period of imprisonment. These are reports which relate to the said Victor Anokwu and a copy of which was produced in the proceedings against appellant, namely (1) a report by P.C. 122 Arthur Borg – Dok. AB at pp. 174 to 181 – for the amount of €207.08; (2) a report by P.S. 186 Kristian Mintoff – Dok. Km at pp. 184 to 191 – for the amount of €33.19; and (3) a report by P.C. 1525 Patrick Farrugia – Dok. PF at pp. 210 to 225 – for the amount of €246.91. Appellant was also ordered to pay the expenses amounting to €332.76 for a report by Martin Bajada and in respect of which an order was made for payment in the case against the said Victor Anokwu. Payment cannot be made twice for the same report. Consequently, from the amount of €4,167.20 there has to be deducted the sum of €819.94 such that the amount payable amounts to €3,347.26.

14. For these reasons, this Court reforms the appealed judgement by (1) revoking it insofar as it condemned the said Mike Diala to pay the sum of four thousand one hundred and sixty-seven euros and twenty cents (€4,167.20) being the sum total of the expenses incurred in the appointment of court experts in this case in terms of article 533 of Chapter 9 of the Laws of Malta, which could be converted to a term of imprisonment according to law, and instead orders him to pay the sum of three thousand three hundred and fortyseven euros and twentysix cents (€3,347.26) representing the sum total of the expenses incurred in the appointment of court experts in this case in terms of article 533 of Chapter 9 of the Laws of Malta, which sum is to be paid within fifteen days from today and failing which it will be converted into a term of imprisonment according to law, and (2) confirming it as to the rest, save that if the drugs are still required in proceedings against third parties, the Attorney General is

Informal Copy of Judgement

to file a note before this Court within fifteen days from today informing it of such.

< Final Judgement >

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