MALTA

# COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE -- ACTING PRESIDENT**
**DAVID SCICLUNA**

**THE HON. MADAM JUSTICE**
**ABIGAIL LOFARO**

**THE HON. MR. JUSTICE**
**JOSEPH ZAMMIT MC KEON**

Sitting of the 31 st October, 2013

Number 5/2010

**The Republic of Malta**

**v.**

**Daniel Alexander Holmes**

**The Court:**

**1.** Having seen the bill of indictment filed by the Attorney General on the 18th January 2010 wherein the said Daniel Holmes was accused of having on the nineteenth (19th) June of the year two thousand and six (2006) and in the preceding six months by several acts even though

committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, (1) meant to bring or caused to be brought into Malta in any manner whatsoever a dangerous drug (cannabis), being a drug specified and controlled under the provisions of Part I of the First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when he was not in possession of any valid and subsisting import authorisation granted in pursuance of the said law; (2) cultivated the plant Cannabis being a drug specified and controlled under the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta); (3) been in possession of a dangerous drug (cannabis), being a drug specified and controlled under the provisions of Part I of the First Schedule of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law, and with intent to supply the same in that such possession was not for the exclusive use of the offender; (4) been in possession of a dangerous drug (cannabis grass), being a drug specified and controlled under the provisions of Part I of the First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law, and with intent to supply the same in that such possession was not for the exclusive use of the offender; (5) been in possession of a dangerous drug (cannabis resin), being a drug specified and controlled under the provisions of Part I of the First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law;

**2.** Having seen the judgement delivered on the 24th November 2011 whereby the Criminal Court, after having heard the said Daniel Alexander Holmes' guilty plea to all counts of the Bill of Indictment, a plea he persisted in even after having been given time to reconsider such

plea, declared the said Daniel Alexander Holmes guilty of all five counts of the Bill of Indictment, namely:

1. on the 19th June, 2006, and during the preceding six months, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, guilty of meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (cannabis), being a drug specified and controlled under the provisions of Part I of the First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when he was not in possession of any valid and subsisting import authorisation granted in pursuance of the said law, and this according to the First Count of the Bill of Indictment;

2. on the 19th June, 2006, and in the preceding six months by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, guilty of cultivating the plant Cannabis being a drug specified and controlled under the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and this according to the Second Count of the Bill of Indictment;

3. on the 19th June, 2006, and in the preceding six months, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, guilty of possession of a dangerous drug (cannabis), being a drug specified and controlled under the provisions of Part I of the First Schedule of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law, and with intent to supply the same in that such possession was not for the exclusive use of the offender, and this according to the Third Count of the Bill of Indictment;

4. on the 19th June, 2006, and in the preceding six months, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, guilty of possession of a dangerous drug (cannabis grass), being a drug specified and controlled under the provisions of Part I of the First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law, and with intent to supply the same in that such possession was not for the exclusive use of the offender, and this according to the Fourth Count of the Bill of Indictment;

5. on the 19th June, 2006 and in the preceding six months, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, guilty of possession of a dangerous drug (cannabis resin), being a drug specified and controlled under the provisions of Part I of the First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law and this according to the Fifth Count of the Bill of Indictment;

**3.** Having seen that by the said judgement the first Court, after having seen articles **2**, 7, 8(a)(b)(c)(d)(e), 9, 10(1), 12, 14, 15, 15(A)(1), 20, 21, 22(1)(a)(1B)(2)(a)(i)(3)(3A)(a)(b)(c)(d) and 26 of the Dangerous Drugs Ordinance (Chap.101); Regulations 4, 4(a), 8 and 9 of the 1939 Regulations for the Internal Control of Dangerous Drugs (L.N. 292/1939) and articles 17, 18, 20, 22, 23 and 533 of the Criminal Code, sentenced the said Daniel Alexander Holmes to a term of imprisonment of ten years and six months (10 years and 6 months), and to the payment of a fine (*multa*) of twenty three thousand €23,000 Euros, which fine (*multa*) shall be converted into a further term of imprisonment of one year according to law, in default of payment; further

condemned him to pay the sum of one thousand, seven hundred and thirty seven Euros and seventy four Euro cents (€1737.74) 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; ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which he was found guilty and other movable and immovable property belonging to the said Daniel Alexander Holmes; and finally 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 Godwin Sammut, under the direct supervision of the Deputy Registrar of that Court, who shall be bound to report in writing to that Court 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 local and foreign case law regarding a reduction in the punishment when the accused registers an early guilty plea, thereby avoiding useless work and expenses for the administration of justice (Vide "Ir-Repubblika ta' Malta vs. Nicholas Azzopardi", Criminal Court, [24.2.1997] ; "Il-Pulizija vs. Emmanuel Testa", Court of Criminal Appeal, [7.7.2002] and BLACKSTONE'S CRIMINAL PRACTICE, (Blackstone Press Limited – 2001 edit.);**

**"As was held by the Court of Criminal Appeal in its judgement in the case "Ir-Repubblika ta' Malta vs. Mario Camilleri" [5.7.2002], an early guilty plea does not always necessarily and as of right entitle the offender to a reduction in the punishment.**

**"The general rules which should guide the Courts in cases of early guilty pleas were outlined by the Court of Criminal Appeal in its preliminary judgement in the**

**case : "Ir-Repubblika ta' Malta vs. Nicholas Azzopardi", [24.2.1997]; and by the Court of Criminal Appeal in its judgement "Il-Pulizija vs. Emmanuel Testa", [17.7.2002]. In the latter judgement that Court had quoted from BLACKSTONE'S CRIMINAL PRACTICE, (Blackstone Press Limited – 2001 edit. ecc.) :-**

**"*'Although this principle [that the length of a prison sentence is normally reduced in the light of a plea of guilty] is very well established, the extent of the appropriate "discount" has never been fixed. In Buffery ( [1992] 14 Cr. App. R. (S) 511) Lord Taylor CJ indicated that "something in the order of one-third would very often be an appropriate discount", but much depends on the facts of the case and the timeliness of the plea. In determining the extent of the discount the court may have regard to the strength of the case against the offender. An offender who voluntarily surrenders himself to the police and admits a crime which could not otherwise be proved may be entitled to more than the usual discount (Hoult (1990) 12 Cr. App. R. (S) 180; Claydon (1993) 15 Cr. App. R. (S) 526), and so may an offender who, as well as pleading guilty himself, has given evidence against a co-accused (Wood [1997] 1 Cr. App. R. (S) 347 ) and/or given significant help to the authorities (Guy [1992] 2 Cr. App. R. (S) 24 ). Where an offender has been caught red-handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris [1998] 10 Cr. App. R. (S) 216; Landy [1995] 16 Cr. App. R. (S) 908 ). Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage (Hollington [1985] 85 Cr. App. R. 281; Okee [1998] 2 Cr. App. R. (S) 199.) Similarily, some or all of the discount may be lost where the offender pleads guilty but adduces a version of the facts at odds with that put forward by the prosecution, requiring the court to conduct an inquiry into the facts (Williams [1990] 12 Cr. App. R. (S) 415.) The leading case in this area is Costen [1989]***

***11 Cr. App. R. (S) 182, where the Court of Appeal confirmed that the discount may be lost in any of the following circumstances: (i) where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, be passed; (ii) cases of 'tactical plea', where the offender delayed his plea until the final moment in a case where he could not hope to put up much of a defence, and (iii) where the offender has been caught red-handed and a plea of guilty was practically certain ….'***

**"Having considered that, for purposes of punishment, the crimes falling under the first, the second, and the fifth counts of the Bill of Indictment 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 and the fourth count of the Bill of Indictment, as they served as a means to an end for the commission of the offence under the said third Count and fourth counts of the Bill of Indictment in terms of Section 17(h) of the Criminal Code (Chap.9);**

**"….**

**"Having seen the submissions made by the Defence and by the Prosecution which were briefly the following:**

**(a) The Defence submitted that the defendant had lived to smoke cannabis and had even lost his job. Now he has a three month old daughter, has managed to kick the habit and is settling down. At one moment he was on the point of dying. The defence added that nobody was hurt in the process and that the defendant was only trying to satisfy his addiction. The defendant had wasted his life as a junkie and this was a case where the principle 'the quality of mercy is not strained' should apply.**

**(b) The Prosecution submitted that the defendant had planted the cannabis plant with intent to share the produce. The amount involved (1063 grammes) was the dry weight of the product. Some plants were a metre high and this means that they had been sown about four months before. There were also packets ready for distribution. The defendant had been paying a substantial sum of money for the rent of the premises and this at a time when he was not working. The Prosecution was also sceptical about the extent (if any) of the defendant's drug addiction.**

**"The Court considered many other cases where a guilty plea was filed or where no guilty plea was filed, and where the amount of cannabis involved was substantial. But cases may be similar but not necessarily identical. The amount of drugs indicated in particular bills of indictment may be very close but from then on each case has its own story."**

**5.** Having seen the application of appeal of the said Daniel Alexander Holmes filed on the 14th December 2011 wherein he requested that this Court reform the appealed judgement in order that, whilst confirming that part of the judgement finding him guilty of the charges brought against him after having himself admitted to same, it revoke that part of the judgement sentencing him to a term of imprisonment of ten and a half years in addition to the payment of a fine (*multa*) in the amount of €23,000 converted, if unpaid, to a further term of imprisonment of one year, and instead apply the minimum punishment prescribed by law or to any other term of imprisonment higher than the minimum but considerably less than that to which he was sentenced, and also reduce the fine (*multa*) and the term of imprisonment to which such fine (multa) would be convertible if unpaid; 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.** This is an appeal against the punishment awarded as appellant feels that the particular circumstances he

mentions in his application of appeal and indicated during oral submissions militate in favour of a less severe punishment. In his application of appeal, appellant outlines his grievances as follows:

"1. It is a principle of criminal law that the prosecution should always be not only considered but indeed should be 'the accused's best friend'. In Mr. Holmes's case the prosecution acted diametrically in opposition to this general principle:

The prosecution insisted that Mr. Holmes was a drug pusher; although no evidence whatever was produced by the prosecution to substantiate this, not only because there was no evidence of this as this never happened. It went on to impress upon the presiding judge that Mr. Holmes was indeed a drug pusher and that the quantity of cannabis plant found in his possession could not have been for his personal use. This the prosecution did by stating as fact that the accused lived in luxury; in a luxurious apartment; that he could afford to rent this luxurious apartment; that he never worked not because of his addiction and his inability to work being constantly in a drug stupor so much so that he was contemplating suicide on a number of occasions but because he was living off the illicit proceeds from the sale of the plant. This could not be further than the truth. Mr. Holmes' apartment and its furniture were those of practically as pauper. It was his parents who paid even the small rent and this can be confirmed from the bank statements found in the Court file; from the various telephone calls Mr. Holmes made and on which there is a report by the telecommunications expert, all these telephone calls together with all the text messages found in Mr. Holmes' mobile telephone were made either to friends and family in England, to Mr. Barry Lee locally or to other individuals, which were certainly not what one would have expected to find in the telephone of a drug pusher. This notwithstanding however, the prosecution unlawfully and flagrant disregard of the principle not only of fair play but the more important principle that the prosecution should be the accused's best friend, painted Mr. Holmes as an evil drug dealer

who sold the plant recklessly and manipulatively in order to enrich himself from its sale to live like a king. Would a drug dealer, living in a foreign country and therefore seeking to appear free of problems, financial or otherwise, fail to pay his landlord for practically a whole year what was due to her in water and electricity bills, with the natural corollary that the landlord would seek judicial redress for this omission?

"2. Mr. Holmes cooperated with the Police even before he was asked to. When the Police had no information about him, let alone indicating him as a suspect, and when found with a joint in his hand, he led the Police himself to his apartment and showed the plants he was cultivating of his own volition and never because he was forced to or because he was caught 'red-handed' as Mr. Justice Quintano mentioned in his judgement. From the records of the case it can easily be established that there was no search warrant ordered by the Magistrate, nor was there any search warrant ordered by an Inspector or a superior on his Ghajnsielem flat but the only search warrant issued by the Magistrate was for the Zebbug apartment of Mr. Barry Lee to be searched. In the light of the above therefore how could Mr. Justice Quintano in his judgement say and take as proven that Mr. Holmes was caught red-handed.

"3. The Criminal Court sentenced Mr. Holmes to the term of imprisonment and fine mentioned in the judgement on the wrong assumption that the weight of the drugs was that of 1,063 grams when the forensic expert, Mr. Godwin Sammut, who deposed before Magistrate Consuelo Scerri Herrera on the 20th July 2006 stated quite clearly that 'I confirm that on examination carried out by myself, being a scientist on these documents, it resulted that the total amount of dried plants handed over to me had the main stems and roots amounting to 1,063 grams'. In that therefore this amount included the stems and roots, the actual weight of the plant, if one were to subtract from it the weight of the stems and the roots, would be substantially less, possible even less than half as stems,

stalks and roots normally weigh substantially more than the leaf of a plant.

"4. Moreover the cultivation and possession of the cannabis plants and leaves was an enterprise conducted jointly by Mr. Holmes and Mr. Barry Lee and there should be absolutely no doubt about this when it is a fact that the investigations started against Mr. Barry Lee and not against Mr. Holmes. Subsequently the Police arraigned both Mr. Holmes and Mr. Barry Lee, jointly and charged them with the same offence. Indeed the Inquiring Magistrate when appointing Mr. Mario Mifsud as forensic expert, appointed him in order 'to examine and give an estimate of the drug herbal and raza cannabis allegedly found at Daniel Holmes and Barry Lee'. This alone should leave one in no doubt that the Police from day go knew that the cultivation of the plant was a joint enterprise of the accused and Barry Lee so that Daniel Holmes ought to have been responsible only for half of the cannabis found and never for the whole. If one were to divide the weight of the cannabis plants found after reducing the weight by the weight of the stalks and roots by two, the end result would be of a significantly lower weight very much compatible with what a habitual user of the drug could well be found in possession of. When this fact is corroborated by the other facts that emerge from a cursory look at the evidence existing in the records and particularly: (a) that the flat tenanted by Mr. Holmes was a cheap flat at a cheap rent; (b) that Mr. Holmes could not even afford to pay his electricity bills; (c) that the rent was paid by his parents and not from the illegal sale of the plant; (d) that Mr. Holmes could not even afford to buy or rent a car but had to make do with borrowing Mr. Lee's car when in need; (e) that when he was apprehended by the Police he was in possession of a little more than a 100 pounds; (f) that Mr. Holmes' landlady had given evidence to the fact that every time she went to clean the common parts of Mr. Holmes' Ghajnsielem flat she always found Mr. Barry Lee in Mr. Holmes' flat; all this should have led the First Court to appreciate that the cultivation and possession of the cannabis plants were a joint venture between Mr. Holmes and Mr. Lee and that this co-

possession and co-cultivation was only the result of their terrible addiction to the cannabis plant and to the fact that as they were both out of regular work and dependant on receiving money for their daily needs from their family, they could ill afford to purchase cannabis on the market but were forced, given their circumstances and penury, to grow the plants for themselves and assuage their addiction for a fraction of the price. This is not to say that their action was not illegal but only to clarify that the Criminal Court was wrong to have acted on the allegations made by the prosecution that Mr. Holmes was cultivating to sell, was a drug baron and that the plants found in his possession were not intended for his personal use. Indeed Mr. Barry Lee continued to take prodigious quantities of drugs until he took his life whilst at the prison in Corradino with the unfortunate result that he could never testify during these proceedings.

"5. In accordance with the report filed by the forensic expert Mario Mifsud and that can be found in Volume 3 and at page 386 and 387 of the records of the case, the value of the drug was given in the sum of Euro 11,693 while in the judgement the Court declares that the value was of Euro 13,802. This apparent mistake must also have led Mr. Justice Quintano to deliver a higher term of imprisonment of this fact alone [*sic!*] so that the increase in street value by some Euro 2,000 on the correct a mount of Euro 11,693 amounts to some 20%, which 20% should, it is submitted and as a percentage, be deducted from the term of imprisonment at the same percentage and this without prejudice to all the other reasons mentioned in this appeal for having the term of imprisonment sentenced the accused [*recte:* to which the accused was sentenced], reduced considerably.

"6. Mr. Holmes was in preventive arrest for a total period of some 14 months but in its judgement, the Criminal Court only deducted from this period a few days in that the prosecution had insisted that the 14 months spent in prison by Mr. Holmes were not on account of this case but on account of another case still pending against the accused before the Court of Magistrates in Gozo for the

theft of use of a vehicle and a dinghy it was towing, a charge that the Police had made jointly against both Mr. Holmes and Mr. Barry Lee. It so happened that one of the bail conditions of both this case and that of the theft of use still pending, was that Mr. Holmes was to be at home by not later than ten o'clock at night and was not to be out of his residence before seven o'clock in the morning. On a particular occasion Mr. Holmes was caught in Gozo after ten o'clock so that his bail was revoked and he was only decarcerated after approximately 14 or 15 months. The prosecution very wrongly and underhandedly to my mind instead of requesting the revocation of Mr. Holmes' provisional liberty under the much more serious charge of cultivation, possession and trafficking of a considerable number of cannabis plants instead, requested the Court to revoke his bail under the much lesser charge of the theft case so that Mr. Holmes did not benefit from the reduction of the time he spent in preventive custody in this case as ought to have happened particularly bringing back to the fore one of the cardinal principles in Criminal Law that the prosecutor should be the accused's best friend.

"7. Our Criminal Courts, that is the Court of Magistrates, the Criminal Court and the Court of Criminal Appeal, have over the past several years given innumerable judgements on charges similar to those faced by Mr. Holmes when the accused in those cases, having been in possession or having cultivated or having trafficked drugs far more substantial and dangerous than the cannabis sativa plant and in street values of many times higher than the street value of the cannabis plants found in the possession of Mr. Holmes, are far shorter terms of imprisonment and are far smaller fines than that meted out to Mr. Holmes by the Criminal Court. Attached is a document indicating some of these judgements with a judgement given only a few days ago by the Criminal Court per Judge Mallia sentencing the accused in those cases to periods of appreciably less, sometimes even half, and in yet other cases even less than half than the terms of imprisonment meted out to Mr. Holmes. Attached to this appeal is a document, document KG1 showing such judgements and terms of imprisonment and the

appellant reserves the right on the date of the hearing to exhibit other similar judgements.

“8. It was the specific intention of the legislator when the drug Ordinance was promulgated and in the amendments made thereto to give both the Court of Magistrates and the Criminal Court in matters concerning drugs an enormous leeway in terms of punishment so that while the maximum period possible of sentencing is that of life imprisonment the minimum is that of only four years and this specifically and for the sole reason that each case must be judged according to the particular circumstances of the accused so that for a hardened drug pusher who flogs large quantities of heavy drugs to youngsters or to the weak the Court would have the possibility of giving a harsh term of imprisonment, concurrently in those cases where the Court is made aware that the accused is in reality a victim, that he caused no wrong or hardship or consequences on the weak or the young; that the accused did not live in luxury from the illicit proceeds of his nefarious and selfish actions, in these cases the Court would weigh and balance the term of imprisonment deserved.

“Unfortunately this is not what happened in the case in consideration with the Court having treated Mr. Holmes with unnecessary harshness equivalent to that harshness the Court has a duty to impose in cases meriting that harshness. No wonder the public criticism of this judgement when practically simultaneously with its deliverance all of Europe and indeed also our own country have decided to gradually de-penalise or at least treat in a much lesser heavy-handed manner the possession and use of cannabis. Eleven and a half years of imprisonment without even reducing some fifteen months of Mr. Holmes’ preventive arrest at the Corradino prison in Malta would make the accused being imprisoned to a total of nearly 13 years when even persons found guilty of murder, attempted murder, the infliction of grievous bodily harm, rape, fraud of millions of Euros have been sentenced on a regular basis to terms of imprisonment sometimes well

under half the period of imprisonment accorded to the accused.

“9. That furthermore the accused had unsuccessfully argued with the Attorney General to have the case heard before the Court of Magistrates in lieu of going to a jury and after it was decided that the case was to be indeed heard before a jury had met the prosecution on a number of occasions even before the presiding judge before admitting guilt in a genuine attempt to agree on a judgement which would be acceptable to both sides. In fact the accused had through his legal advisor asked the prosecution to accept a term of four years imprisonment with the prosecution however insisting that it would only be happy with a term of imprisonment for a period of eight years. Although agreement was not formally reached, the accused was always led to understand on account of these discussions that the maximum period he was looking at was that of eight years however always in the hope that the presiding judge would possibly sentence him to a period of a term of imprisonment of less than eight years but more than four years. Not only did the judge presiding the Criminal Court ignore the possibility of sentencing Mr. Holmes to a term of imprisonment between four and eight years, Judge Lawrence Quintano went appreciably higher even from the maximum indicated by the prosecution that it was happy with, i.e. that of eight years and went on to sentence Mr. Holmes to an additional two and a half years plus a possible extra year to make the judgement some 40% higher than the maximum amount requested by the prosecution. While it is true that the judge presiding over a jury does not necessarily have his hands bound by what defence and the prosecution indicate, having a judgement 40% than the maximum amount acceptable to the prosecution is way to harsh.

“10. Finally Mr. Holmes after having managed to kick the habit; after having found regular employment as a chef for a number of years; after having formed an honest liaison with a Polish girl and after having with her had a baby daughter, now nearly four months old, is to be hurled into

prison unless this appeal is upheld for a period that will be far too long for this liaison of his to have any decent chance of continuous [*sic!*]; with his baby daughter being nearly nine or ten years old when he is out of prison and who will never have the chance of knowing her father properly and of growing up as other children are brought up and all this because her father, a habitual drug addict, a victim of circumstances, a sick man needing help and having found it at this late stage being penalized in a way that hardened criminals, killers and rapists are not so dealt with."

**7.** Now, this Court has had occasion to remark several times that appeals against punishment following the entering of a guilty plea 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 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.** It is to be stated at the outset that the punishment awarded is well within the parameters set out by law. Indeed the punishment requested by the Attorney General in the Bill of Indictment in terms of law was that of imprisonment for life, and, in addition, a fine (*multa*) of not less than two thousand three hundred and thirty euro (2,330) and not more than one hundred and sixteen thousand and five hundred euro (116,500). Seeing that the Criminal Court awarded a punishment of imprisonment of ten years and six months, it is evident that that Court thought fit to apply article 22(2)(a)(i)(aa) of Chapter 101 of the Laws of Malta which states that "where the court is of the opinion that, when it takes into account the age of the offender, the previous conduct of the offender, the quantity of the drug and the nature and quantity of the equipment or materials, if any, involved in the offence and all other circumstances of the offence, the punishment of imprisonment for life would not be appropriate … then the Court may sentence the person

convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (multa) of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixtyeight euro and sixty-seven cents (116,468.67)." In other words the Criminal Court exercised its discretion, based on the circumstances of the case, not to award the maximum punishment provided by law, and to award a punishment that fell within the lower parameters of four to thirty years imprisonment plus a fine (*multa*).

**9.** Moreover, appellant seems to have overlooked the fact that the offences attributed to him in the Bill of Indictment were continuous offences, meaning that the Criminal Court was entitled to increase the punishment by one or two degrees in terms of article 18 of the Criminal Code. Indeed, *ex admissis*, appellant's activity went on for at least five months, i.e. since his return to Malta in January 2006, and which activity was premeditated as he admits to having brought some cannabis seeds with him from England.[1]

**10.** Something else which appellant seems to have overlooked in his appeal is the fact that not only did he admit to cultivating cannabis – cultivation is considered by law as a "dealing" offence (art. 22(1B) of Chapter 101) – but also to being in possession of cannabis not for his exclusive use. Both of these offences attract the punishments indicated *supra* in paragraph 8.

**11.** Now, in his appeal, appellant insists that he is, or rather was, a cannabis addict. This Court has carefully examined the evidence produced during the compilation proceedings and the only evidence as to appellant's use of cannabis comes from his statement wherein he admits to smoking cannabis and states that the plants he was growing were for his personal use. That he "lived to smoke cannabis" is merely an unproven allegation.

[1] Vide appellant's statement at fol. 32 of the compilation proceedings.

Indeed, the quantity of cannabis found in his residence was more than just a simple domestic operation for self-consumption. When the Police searched his residence, they found a room which had been set aside for the cultivation of cannabis, with the necessary lighting paraphernalia to ensure a healthy growth out of the sight of prying eyes. This room contained several pots filled with soil and/or compost, some of which had cannabis plants growing in them of varying dimensions – one of the plants was six centimeters high while another was one hundred and twelve centimeters high. In all there were thirty-two plants still in their pots. Apart from that, a box was found containing dried cannabis leaves weighing 689 grams, as well as three newspaper packages containing respectively 20.61 grams, 21.65 grams and 89.30 grams. This Court fails to understand why somebody who allegedly lived to smoke cannabis needed to pack cannabis grass in separate packages, two with an average weight just over 20 gm and a larger packet on which was written “100 g”, if all the cannabis grass in the flat was meant for his personal consumption.

**12.** Nor can this Court overlook forensic expert Godwin Sammut’s conclusion that from the cannabis grass found, one could manufacture approximately 5,308 “reefers”. At no point did appellant state how many “reefers” he smoked per day! In any case, here appellant had an on-going production of cannabis with seeds, cannabis plants in various stages of growth, and a considerable quantity of dried leaves in a box and more that had already been packaged. Interestingly too, it does not appear that during their search the Police found evidence of smoking of cannabis in appellant’s residence. What they did find was a small metal box which contained, among several other items, some cigarette roll-up paper. A bottle which they found and suspected might have been used for smoking cannabis, was found to have traces of cocaine.

**13.** When appellant was arrested by the Police on the 19th June 2006 he was found to have in his possession a reefer. From photograph number 06BTX113, it would

appear that this was an unsmoked reefer and that it contained cannabis resin[2].

**14.** Consequently, apart from appellant's admission before the Criminal Court, as well as his admission that he gave some cannabis grass to Barry Charles Lee on at least two occasions, the evidence points to the fact that the cultivation of cannabis could not have been for his own exclusive use.

**15.** As results from the evidence, appellant makes a number of incorrect assertions in his appeal. Thus, contrary to what appellant states, the total weight of cannabis given by forensic expert Godwin Sammut is merely that of the leaves and not of the stalks or stems and roots. This is stated in no uncertain manner in Godwin Sammut's report (he presented three reports, the first one on the 20th July 2006 which included not only the items that had been seized from the possession of appellant, but also those seized from the possession of Barry Charles Lee who had been originally charged with appellant; the second report on the 19th May 2009 indicating only the items seized from the possession of appellant; the third on the 3rd September 2009 in English and in addition stating the price per gram of cannabis resin, the price per gram of cannabis herb and the total number of reefers that could have been produced with the cannabis herb and resin seized from the possession of appellant). Reference is here being made to the third report where Godwin Sammut states at page 11 of his report[3] that **"[t]he weight of the plants is that of the dry leaves only without twigs or roots."** And again at page 12 of his report[4] that the cannabis herb totalled **"1061.7 g without twigs and roots"**.

**16.** In his appeal, appellant also says that Barry Charles Lee was involved in the cultivation of the cannabis. However, this contrasts completely with what he had said in his statement to the Police – which statement appellant

[2] See report by Godwin Sammut.
[3] Fol. 733 of the compilation proceedings.
[4] Fol. 734 *ibidem*.

did not contest in any way as to its legality, voluntariness or contents; indeed, as has already been pointed out, he admitted to the accusations brought against him:

"Q: Did Barry ever help you somehow in the growing of cannabis plants?
"A: No.
"Q: Did Barry know the equipment he bought you was meant for?
"A: I don't know.
"…
"Q: How come he never asked you for what was the equipment meant for?
"A: In fact he asked, but I used to change the subject.
"Q: And if I tell you that he confirmed that he knew about it and that he helped you for the plants, what are you going to answer?
"A: Maybe he knew, but I've never told him about it. Maybe he did help me for the lights to get more money out of me. Probably I've paid more money than what is the real cost of the equipment. But we've never spoken about the cannabis plants, and I've never shown him the plants and the equipment you saw in my flat.
"Q: Did someone help you to put up the equipment?
"A: No I've made it by my own.
"…
"Q: If I'll tell you that this thing was mostly planned by Barry and not only by yourself, what shall you say?
"A: It was only by me. Barry was not involved."

**17.** From this it is clear that appellant was taking full responsibility for the cultivation of the plants in his residence. In any case, Barry Charles Lee was not charged by the Police with the actual cultivation of the cannabis but with being an accomplice thereto. Nor was he charged with being in possession of a dangerous drug in circumstances which denote that it was not for his exclusive use. So, even had Barry Charles Lee been involved, criminal responsibility and therefore the relative punishment would not have been apportioned. For that matter, nor would it have been apportioned had he been

found guilty of having committed the same offences as appellant.

**18.** As regards the value of the cannabis involved, appellant says that the Criminal Court erroneously referred to the amount of €13,802 whereas the correct value was €11,693. It must be stated in the first place that when the Criminal Court in its judgement mentioned the value of €13,802.10, this was in those parts of the judgement which reproduced the Bill of Indictment. It is the Bill of Indictment to which appellant admitted. The value of €13,802.10 was given by forensic expert Godwin Sammut in his third report, while the value of €11,693 had been given by Pharmacist Mario Mifsud in a report presented on the 19th April 2007.[5] Consequently the Criminal Court's decision was correctly based on what appellant had admitted to.

**19.** Appellant says that he cooperated with the Police. This is true in that from the evidence tendered by the police officers who arrested him and conducted the search in his residence, appellant offered no resistance and showed them what they were looking for. But appellant had absolutely no alternative. He was caught red-handed in possession of a reefer and two small packets containing small amounts of cannabis grass, and the Police were, as stated by Inspector Pierre Grech when giving evidence during the compilation proceedings[6], and contrary to what appellant has stated in his appeal, in possession of a search and arrest warrant issued by Magistrate Antonio Micallef Trigona in view of information that the Police had received that cannabis plants were being cultivated at "Sydney", Flat 2, Triq il-Gudja, Ghajnsielem, Gozo, that is to say appellant's residence. It is in terms of article 29 of Chapter 101 that appellant could have obtained a reduction in sentence, but only if the prosecution declared in the records of the proceedings that he had helped the Police to apprehend the person or persons who supplied him with drugs, or if he proved to

[5] Fol. 264 *ibidem*.
[6] Fol. 28 – 30 *ibidem*.

the satisfaction of the Court that he had so helped the Police. This did not happen as appellant provided no such help, and consequently appellant cannot expect any reduction of punishment simply because he did not resist the Police.

**20.** During oral submissions, appellant's counsel stated that cultivation of cannabis for personal use is an offence in England and you get a slap on the wrist. To this Court's knowledge, guidelines in the U.K. now indicate that the cultivation of anything above 9 plants falls to be considered as cultivation with intent to supply.[7] In this case appellant not only had 32 plants being cultivated but also a quantity of other plants which had already been cut and dried, for a total weight, in this case, of over one kilo.

**21.** Appellant seems to try to minimize the possible harm that could be done because the drug here involved is cannabis, but claims, contradictorily, that he was addicted to it. Indeed this Court is aware of literature which describes the dangers of cannabis use and the serious consequences deriving therefrom, be they physical, mental, psychological, medical and social. Furthermore, our law makes no distinction between one dangerous drug and another and the punishments are the same for all the dangerous drugs listed in Chapter 101. *Ubi lex non distinguit, nec nos distinguere debemus*.[8]

**22.** Appellant asks that this Court consider reducing the term of imprisonment to which he has been sentenced by a period of preventive custody spent in connection with another case from which he was acquitted.[9] Deductions of periods of preventive custody are an administrative matter which the prison administrators see to. This Court can only but refer to article 22 of the Criminal Code which is self-explanatory and provides:

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[7] Sentencing Manual: Legal Guidance: The Crown Prosecution.

[8] See, viz., **Ir-Repubblika ta' Malta vs Mohamed Mohamed Abusetta**. 4th December 2003; and Ir-**Repubblika ta' Malta v. Noaman Emhemmed Ramadan El-Arnauti**, 22nd April 2004.

[9] The Police v. Daniel Alexander Holmes per Court of Magistrates (Gozo), 2nd May 2013.

**"Except in the case of a sentence of imprisonment for life or of imprisonment or detention in default of payment of a fine (*multa* or *ammenda*), any time prior to conviction and sentence during which the person sentenced is in prison for the offence or offences for which he has been so convicted and sentenced, not being time in prison in execution of a sentence, shall count as part of the term of imprisonment or detention under his sentence; but where he was previously subject to a probation order, an order for conditional discharge or to a suspended sentence in respect of such offence or offences, any such period falling before that order was made or suspended sentence passed shall be disregarded for the purposes of this article:**

**"Provided that where any time prior to conviction as aforesaid has, by virtue of this article, been counted as part of the term of imprisonment or detention under the sentence in respect of that conviction, such time shall not be counted as part of the term of imprisonment or detention under any other sentence."**

As appellant clearly accepts, the term of preventive custody he refers to has nothing to do with this case. Consequently this Court cannot accede to Appellant's request.

**23.** Appellant also states that other cases have been decided where the persons found guilty have not been treated as harshly as appellant. It has been often said that comparisons are odious. Each case has its own particular circumstances. In *R. v. Large*, 3 Cr.App.R.(S) 80, C.A. regarding the question of disparity of sentences, it was said[10]:

[10] Archbold *Criminal Pleading, Evidence and Practice*, 2001 (para. 5-174, p. 571).

**"The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant."**

In fact:

**"The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in *Fawcett* is satisfied."** [11] (emphasis by this Court)

This Court, differently composed, has already had occasion to refer to these excerpts with which it fully agrees.[12]

**24.** Appellant says that during meetings with the prosecution in an attempt to reach an agreed sentence in terms of article 453A of the Criminal Code, his counsel suggested a period of four years while the prosecutor wanted eight years. No agreement was reached. Appellant says that he was always led to understand on account of these discussions that the maximum period he was looking at was that of eight years however always in the hope that the presiding judge would possibly sentence him to a period of imprisonment of less than eight years but more than four years. Now, from the transcription of the submissions made before the Criminal Court, it results that the prosecutor asked for a term of imprisonment of over ten years. It must be emphasised that not only was no agreement reached in terms of article 453A(1) of the Criminal Code, but even if any such agreement would have been reached, the Court would only have proceeded to pass the sentence indicated to it by the parties if it **"is**

[11] It-test f'Fawcett hu f'dan is-sens: "Would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?" (per Lawton L.J. in *R. v. Fawcett*, 5 Cr. App.R.(S) 158 C.A.)."

[12] See, viz. **Ir-Repubblika ta' Malta v. Anthony Seychell**, 12th March 2009.

**satisfied that the sanction or measure, or combination of sanctions and measures, requested as provided in subarticle (1) is one which it would have been lawful for it to impose upon conviction for the offence to which the accused has pleaded guilty and does not have cause to order the trial of the cause to be proceeded with for a reason referred to in article 453(2) or for any other reason to reject the request"** (article 453A(2) of the Criminal Code).

**25.** Appellant makes several other points to show that he was not a drug baron – viz. that he did not live in a luxurious apartment, that he was being helped financially by his family, that he did not have the money to pay his water and electricity bills. He also says that he has now kicked the habit, although in the same paragraph he then describes himself a habitual drug addict and a sick man, and that he has formed a liaison with a Polish girl and that they have had a child.

**26.** There is no doubt in this Court's mind that the punishment awarded was not the punishment that one would expect to be awarded to "a drug baron", and the Criminal Court was aware of this. It is unfortunate that family also have to suffer for the misdeeds of those who are misguided enough to think that they will not be caught undertaking criminal activity. But the suffering of family is not a reason that can be considered by the Courts to reduce punishment. Whoever is thinking ebout embarking on any form of criminal activity should be concerned about their family's suffering before they decide to so embark. Persons found guilty of committing a criminal offence inevitably then have to pay the price for their wrongdoing. The offences in question – importation, cultivation and possession not for one's exclusive use – **to which appellant admitted**, are serious offences, in this case rendered more serious through being continuous offences.

**27.** Finally this Court cannot but refer to the following excerpt from **Blackstone's Criminal Practice 2004**:

**"The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in *Nuttall* (1908) 1 Cr App R 180, Channell J said, 'This court will…be reluctant to interfere with sentences which do not seem to it to be wrong in principle, *though they may appear heavy to individual judges*' (emphasis added). Similarly, in *Gumbs* (1926) 19 Cr App R 74, Lord Hewart CJ stated: *'…that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle."* Both Channell J in *Nuttall* and Lord Hewart CJ in *Gumbs* use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed."** [13]

This is the position which this Court has consistently adopted.

[13] Page 1695, para. D23.45.

**28.** Consequently this Court finds no reason to disturb the discretion exercised by the Criminal Court in determining the *quantum* of punishment.

**29.** For these reasons this Court rejects the appeal and confirms the judgement given by the Criminal Court on the 24th November 2011 in its entirety, saving that the period within which the Attorney General is to file a note declaring whether the confiscated drugs are required in evidence against third parties is to start running from today.

**< Final Judgement >**

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