MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF -- AGENT PRESIDENT
DAVID SCICLUNA

ONOR. IMHALLEF
ABIGAIL LOFARO

ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON

Seduta tat-12 ta' Dicembru, 2013

Numru 31/2012

Bill of Indictment No. 31/2010

The Republic of Malta

v.

Stephen Nana Owusu

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 8th June 2010 wherein the said Stephen Nana Owusu was accused of having, (1) on the 13th July 2009 and the previous days, with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug (heroin) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or by promoting, constituting, organizing or financing such conspiracy; (2) on the 13th July 2009,with criminal intent, imported or caused to be imported or any steps preparatory to importing any dangerous drug (heroin) into Malta in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta; (3) on the 13th July 2009 been in possession of a dangerous drug (heroin), with criminal intent, against the law, and which drug was found under circumstances denoting that it was not for his personal use;

2. Having seen the judgement delivered on the 26th September 2012 whereby the Criminal Court, after having heard the said Stephen Nana Owusu plead guilty to all counts of the Bill of Indictment, a plea he persisted in even after having been warned by the Criminal Court in the most solemn manner of the legal consequences of such plea and allowed him a short time to retract it in terms of article 453 of the Criminal Code, declared the said Stephen Nana Owusu guilty of having:

1. on the 13th July 2009 and the previous days, with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug (heroin) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or by promoting, constituting, organizing or financing such conspiracy, and this according to the First Count of the Bill of Indictment;

2. on the 13th July 2009, with criminal intent, imported or caused to be imported or taken any steps preparatory to importing any dangerous drug (heroin) into Malta in breach of 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 13th July 2009 been in possession of a dangerous drug (heroin) with criminal intent, as specified in the First Schedule of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta when he was not in possession of an import or an export authorization issued by the Chief Government Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance, and when he was not licensed or otherwise authorized to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorized by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to him for his personal use, according to a medical prescription as provided in the said regulations and this in breach of the
1939 Regulations on the Internal Control of Dangerous Drugs (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and which drug was found under circumstances denoting that it was not intended for his personal use, and this according to the Third Count of the Bill of Indictment;

3. Having seen that by the said judgement the first Court, after having seen articles 2, 9, 10(1), 12, 14, 15A, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22(A), 24A and 26 of the Dangerous Drugs Ordinance (Chap.101); Regulations 2, 9 and 16 of the 1939 Regulations for the Internal Control of Dangerous Drugs (L.N. 292/1939) and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code (Cap. 9 of the Laws of Malta), condemned the said Stephen Nana Owusu to a prison term of 11 years and to the payment of a fine (multa) amounting to €30,000 which fine (multa) Stephen Nana Owusu has to pay within two months or else the fine (multa) is be converted into a term of one year imprisonment in accordance with the law. Moreover, in accordance with section 533 of Chapter 9 of the Laws of Malta, the Criminal Court ordered Stephen Nana Owusu to pay the expenses incurred in connection

with the appointment of experts, which expenses amount to one thousand and thirty two Euros and seventy one Euro cents (€1032.71). Should this sum not be paid within fifteen days, then it should be converted into a prison term in accordance with the law. Furthermore, the Criminal Court 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 him. 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 as soon as possible by the Assistant Registrar under the direct supervision of the Deputy Registrar of this Court who shall be bound to report in writing to this Court when such destruction has been completed, unless the Attorney General files a note within fifteen days declaring that the 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 heard the submissions of the Prosecution and of the Defence about the penalty to be imposed.

"Having examined other cases decided by the Criminal Court which are similar but not necessarily identical.

"Having also considered that the first and second counts can be considered as absorbed in the third count in accordance with article 17(h) of the Criminal Code.

"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 coaccused (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.) Similarly , 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 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, as they served as a means to an end for the commission of the offence under the said Third Count of the Bill of Indictment in terms of Section 17(h) of the Criminal Code (Chap.9)".

5. Having seen the application of appeal of the said Stephen Nana Owusu filed on the 16th October 2012 wherein he requested that this Court modify the appealed judgement by confirming it in so far as to his guilt and by revoking it in so far as the punishment imposed upon him is concerned and substitute the prison term and the fine (multa) with a lower amount so as to reflect more

appropriately the circumstances of the case, including the application of article 29 of Chapter 101 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 states that his grievance consists in the fact that the term of imprisonment imposed upon him is very harsh in the circumstances of the case. He lists the following reasons:

"1. Appellant, almost immediately, admitted his guilt with the Executive Police (vide statement of accused – fol. 27 – 29 of the records of the case). He persisted in his guilty plea before the Criminal Court without raising any possible defence pleas, including the one that before he was spoken to by the Executive Police about his guilt he was not offered any legal assistance whatsoever. Furthermore, as from his first appearance before the Criminal Court when duly assisted by a lawyer on the 19th September 2011, his lawyer informed the Court that he had already started discussions about plea bargaining with the Attorney General's Office.

"2. Appellant did his best to help the Police in their investigations to catch the eventual receiver of the drugs in Malta and it was not his fault that the controlled delivery operation which the Police were authorized by the Magistrate to carry out did not take place. This was confirmed under oath by Inspector Johann J. Fenech during the compilation of evidence of appellant (vide evidence of Police Inspector Johann J. Fenech – Fol. 23-25 of the records of the case) and as may be seen from a copy of the report made by Police Inspector Johann J. Fenech to his superiors adduced in evidence (vide report by Inspector Johann J. Fenech – fol. 33 and 33 *tergo* of the records of the case). This fact was not considered at all in the appealed judgement. However, on the strength of the evidence of Police Inspector Johann J. Fenech, it is crystal clear that appellant should have benefitted from

the provisions of section 29 of Chapter 101 of the Laws of Malta.

“3. During the discussions which had taken place on plea bargaining between appellant’s lawyer and the Attorney General’s Office, it seems that the Attorney general’s Office was ready to accept ten tears imprisonment in exchange of a guilty plea. The presiding judge was duly informed of this. However, since appellant deemed that even ten years imprisonment were excessive, taking into consideration not only the early guilty plea he was determined to file, and which he eventually filed, and the fact that he had tried to help the Police as much as he could and was prepared to further help them, which further help was not sought without any fault on his part, [he] did not accept the offer.

“4. Although in the appealed judgement several judgements and authors were mentioned regarding the circumstances when in the case of a guilty plea a reduction in punishment or otherwise may be made, the judgement itself does not state the reasons for the term of imprisonment imposed upon him, except that the Criminal Court had underlined the quoted wording, *‘where the offender had been caught red-handed and a plea of guilty was practically certain’*, giving the impression that in this case the Criminal Court was not impressed at all by the fact that appellant had pleaded guilty and thus giving the impression that it was not giving too much weight to the fact that appellant had pleaded guilty even though in his statement to the Police he had already admitted his guilt and was being truthful about everything he told them.

“5. When considering the punishment imposed on appellant, including the fine and the payment of expenses, which appellant is not in a position to pay and at any rate will never be in a position to pay, appellant has practically been condemned to a total of twelve years and three months imprisonment, out of which, in so far as the conversion of the fine (multa) and payment of expenses are concerned, which amount to 1 year and 3 months, no remission applies.

"6. In Chapter 101 of the Laws of Malta the legislator had given the Criminal Court a very wide discretion in so far as punishment is concerned. However, this does not mean that there should not be any guidelines to guide the Criminal Court and, for that matter, the Court of Magistrates, since different judges preside over the Criminal Court and, in the case of the Court of Magistrates several Magistrates preside over this Court. In the absence of such guidelines, appellant humbly submits that it is this Honourable Court that should deal with this topic. In order to better illustrate this humble submission, appellant wishes to bring to the attention of this Honourable Court that within a few days after the appealed judgement, two judgements were delivered by the criminal Court in the case of two different Bills of Indictment with identical; charges to each other and to those of the charges in the appealed judgement, in which cases the amount of dangerous drugs was more or less the same as that in the case of appellant, but with different results. The first of these two judgements was delivered on the 10th October 2012 by the Criminal Court, presided over by the Hon. Mr. Justice M. Mallia, in the case Ir-Repubblika ta' Malta v. Christian Grech, in which case the Criminal Court accepted a plea bargaining agreement and sentenced accused to 8 years imprisonment and, besides the order for the payment of the Court Experts' fees, also to a fine (multa) of €23,000. In this case, the amounts of dangerous drugs involved were 401.424 grams of cocaine, found to be 51.7% pure, and 570.269 grams of heroin, found to be 41.2% pure. In this judgement no mention is made of the application of section 29 of Chapter 101 of the Laws of Malta presumably because there was no case for such application. The second one was delivered on the 15th October 2012 by the Criminal Court, presided over by Mr. Justice L. Quintano, in the case Ir-Repubblika ta' Malta v. Richard Andrews Perez Oberght, in which case the Criminal Court accepted a plea bargaining agreement and sentenced accused to nine years imprisonment and, besides the order for the payment of the Court Experts' fees, also to a fine of €23,000. In this case the amount of

dangerous drugs was 740.41 grams cocaine, found to be on average 27.6% pure. Also in this judgement no mention is made of the application of section 29 of Chapter 101 of the Laws of Malta presumably because there was no case for such application.

"7. It is true that this Honourable Court is normally hesitant to disturb the discretion of the Honourable Judge presiding over the Criminal Court when the term of imprisonment imposed is within the parameters set by the law and that normally it is odious to draw comparisons. However, appellant humbly submits that the interests of justice demand that there is some sort of equilibrium in dealing with different cases where the charges are identical, especially when the amount of dangerous drugs concerned is more or less the same, in the present case besides the fact that the amount of drugs imported by appellant was in one case much less and in the other a little more, there is no doubt that in this case the provisions of section 29 of Chapter 101 of the Laws of Malta is applicable to appellant.

7. 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. Now, in the present case each count of the Bill of Indictment carried the punishment of imprisonment for life. With the absorption of the First and Second Counts in the Third Count, the punishment remained that of life imprisonment. When, instead of an indeterminate punishment, a determinate punishment was applied in terms of article 22(2)(a)(i)*proviso* of Chapter 101 of the Laws of Malta, the maximum punishment of imprisonment that could have been imposed upon appellant was that of

thirty years. Although appellant was caught red-handed with the drugs – indeed appellant was stopped at Malta International Airport as his movements proved suspicious to customs officials and he was accompanied to Mater Dei Hospital where an x-ray showed foreign bodies in his stomach; he eventually passed 74 capsules, each containing an amount of heroin – if one were to consider his guilty plea before the Criminal Court and the fact that he tried to cooperate with the Police, an appropriate reduction of the term of imprisonment could have been that of one-third[1]. A reduction of one-third is equivalent to a maximum punishment of twenty years. Consequently the punishment imposed by the Criminal Court is definitely within the parameters of law.

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9. Appellant, however, believes that article 29 of Chapter 101 of the Laws of Malta applies in his case. Article 29 provides as follows:

"Where in respect of a person found guilty of an offence against this Ordinance, the prosecution declares in the records of the proceedings that such person has helped the Police to apprehend the person or persons who supplied him with the drug, or the person found guilty as aforesaid proves to the satisfaction of the court that he has so helped the Police, the punishment shall be diminished, as regards imprisonment by one or two degrees, and as regards any pecuniary penalty by one-third or one-half."

10. The meaning of this article is clear. A reduction in punishment takes place when the person found guilty in terms of Chapter 101 **"has helped the Police <u>to apprehend</u> the person or persons who <u>supplied</u> him with the drug"** (emphasis by the Court). This meaning cannot be extended to include a situation where such person helps the Police apprehend the person for whom the drugs were destined – although this would be taken into consideration by the Court. Consequently in the

[1] See references made by the Criminal Court and quoted above.

present case where appellant cooperated with the Police by contacting his alleged supplier – but said supplier was not identified, let alone apprehended – and by accepting to participate in a controlled delivery – which was unsuccessful, according to Inspector Johann J. Fenech "due to unforeseen circumstances not within the reach (*sic!*) of the accused", article 29 cannot apply. As was held in **The Republic of Malta v. Kamil Kurucu** decided by this Court (differently composed) on the 14th June 2007:

"So that a person may benefit from the reduction in punishment contemplated in section 29, it is therefore not enough that he mentions the supplier. It has to result that, through such information, the accused has effectively helped the Police to apprehend the supplier. If, notwithstanding such information, the Police did not have sufficient evidence to charge the person mentioned in Court, or if the person mentioned had already been apprehended by the Police before the accused mentioned him, it cannot then be said that the accused helped the Police to apprehend the supplier. Otherwise one could envisage situations where, in order that a person may benefit from a reduction in punishment, he might mention the names of persons who might be innocent, or the names of persons he might know to have already been apprehended in connection with dealing in drugs, or provide false or erroneous indications.[2]"

The fact that the Criminal Court made no reference to article 29 in its judgement means that it did not consider it – correctly so – applicable. Indeed this Court has always maintained that whenever article 29 has been applied, not only should it be mentioned but mention should also be made of what reduction of punishment has been made, i.e. whether one degree or two degrees.

[2] See Criminal Appeals **Ir-Repubblika ta' Malta v. Antoine Debattista**, 19th January 2006; **Il-Pulizija v. Dennis Cuschieri**, 7th January 1999; **Il-Pulizija v. Sandro Mifsud**, 2nd August 1999; **Il-Pulizija v. Philippa sive Filippa Chircop**, 2 ta' Marzu 2007.

11. Appellant says that during plea-bargaining (or, more correctly, sentence bargaining) with the Attorney General's Office, that Office indicated that it was prepared to agree to a punishment of ten years imprisonment. Appellant did not agree because he believed that he should receive a lesser punishment. The fact of the matter is that no agreement was reached and whatever discussions there may have been between appellant and the Attorney General, they have absolutely no bearing on the manner of disposal by the Criminal Court. Indeed, even had an agreement been reached, the Court would not have necessarily been bound by such agreement. Article 453A of the Criminal Code provides that the Court "shall" proceed to pass the sentence indicated to it by the parties **"[i]f the court is 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"**.

12. Appellant complains that the Criminal Court did not state the reasons for the term of imprisonment imposed on him. But, as stated in **The Republic of Malta v. Kandemir Meryem Nilgum and Kucuk Melek** decided by this Court (differently composed) on the 25th August 2005:

"… the Criminal Court is not obliged to give <u>detailed</u> reasons explaining either the nature or the *quantum* of the punishment being meted out, or to spell out any mathematical calculations that it may have made in arriving at that *quantum*. Although the determination of the nature and the *quantum* of the punishment is, of its nature, the determination of a question of law – see Sections 436(2) and 662(2) of the Criminal Code – all that is required is that the Court state the facts of which the accused has been found guilty (or, as in the present case, the facts to

which he/she has pleaded guilty), quote the relevant provision or provisions of the law creating the offence (which provisions generally also determine the punishment applicable), and state the punishment or other form of disposal of the case. Unless expressly required by law to spell out in detail something else – as for instance is required by Section 21 of the Criminal Code or by the first proviso to subsection (2) of Section 7 of the Probation Act, Cap. 446 – the above would suffice for all intents and purposes of law. The principle *nulla poena sine lege* does not mean or imply that a Court of Criminal Justice has to go into any particular detail as to the nature and *quantum* of the punishment meted out, or, where the Court has a wide margin of discretion with various degrees and latitudes of punishment, that it has to spell out in mathematical or other form, the logical process leading to the *quantum* of punishment. This is also the position in English Law. As stated in Blackstone's Criminal Practice 2004 [3]:

"'Save where the statutory provisions mentioned below apply, there is no obligation on the judge to explain the reasons for his sentence. However, the Court of Appeal has encouraged the giving of reasons, and has indicated that that should certainly be done if the sentence might seem unduly severe in the absence of explanation…It has been held that failure by the sentencing court to give reasons when required to do so does not invalidate the sentence…although the failure may no doubt be taken into account by the appellate court should the offender appeal. Where the sentencer does give reasons and what he says indicates an error of principle in the way he approached his task, the Court of Appeal sometimes reduces the sentence even though the penalty was not in itself excessive. Similarly a failure by the judge to state expressly that he is taking into account any guilty plea, although contrary to [statutory provision], does not oblige the

[3] OUP (2003) at p 1546, para. D18.34.

Court of Appeal to interfere with what is otherwise an appropriate sentence…'

"The Court is in full agreement with the principles stated above. Indeed, it is highly recommendable that, when the law provides for a wide margin of discretion in the application of the punishment, reasons, possibly even detailed reasons, be given explaining how and why the court came to a particular conclusion. This is particularly so in drugs cases coming before the Criminal Court where, as in the present case, the punishment of life imprisonment could also have been meted out."

13. In the instant case it is patently obvious that the Criminal Court was of the opinion that life imprisonment was not the appropriate punishment, even though it did not state so *expressis verbis* in the judgement. This means that the starting point, as far as the custodial punishment was concerned, was of a minimum of four years imprisonment and a maximum of thirty years. The Criminal Court did mention some reasons, namely other cases decided by the Criminal Court which are similar but not necessarily identical and appellant's early guilty plea. As already indicated[4], the Criminal Court was certainly aware of the extent of appellant's co-operation. It was also aware of the amount of heroin that appellant had imported – 799.75 grams of heroin with a purity of 41.3%. Appellant refers to other judgements delivered a few weeks after his judgement where comparable amounts of drugs were involved and yet lesser punishments were imposed. It has often been said that comparisons are odious and one case may be similar to but not identical to another. As to the judgements mentioned by appellant in his application of appeal, both were the result of sentence-bargaining agreements. In the case mentioned by appellant's counsel during oral submissions – **Ir-Repubblika ta' Malta v. Walter John Cassar** – there was a sentence-bargaining agreement and the Criminal Court had not accepted the punishment agreed to while this Court determined that

[4] *Supra* para. 8.

there was no objective justification in terms of law in the appealed judgement for the minor increase in punishment.

14. This Court cannot but add another factor which is also patently obvious, namely that heroin is a dangerous drug which is known to cause overdoses that are sometimes fatal. Appellant knew precisely what he had been asked to carry, and yet he accepted to do so. The offences he committed are serious offences and punishments imposed for such offences must necessarily reflect their seriousness. Indeed, in this Court's opinion, when considering all the circumstances of the case, the punishment awarded appellant is neither wrong in principle nor manifestly excessive.

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

16. For these reasons this Court rejects the appeal and confirms the judgement given by the Criminal Court on the 26th September 2012 in its entirety, saving that the periods for the payment of the fine and the Court experts' fees shall start running from today.

< Sentenza Finali >

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