



**COURT OF MAGISTRATES (MALTA)  
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE NATASHA GALEA SCIBERRAS B.A., LL.D.**

**Case Number: 150/2015**

**Today, 22nd February 2016**

**The Police  
(Inspectors Jonathan Cassar)  
(Inspector Pierre Grech)**

**vs**

**Stefan Asenov Ivanov  
(ID 72521A)**

The Court,

After having seen the charges brought against the accused Stefan Asenov Ivanov, son of Nella nee` Andonova, born at Plodiv, Bulgaria on 26<sup>th</sup> November 1992, residing at 'Tower Place, Flat 5, Triq San Gerardu, San Pawl il-Bahar and holder of Maltese identity card bearing number 72521A;

Charged with having on 7<sup>th</sup> May 2015 and on the previous months on these Islands committed several acts, even if at different times, constituting violations of the same provision of law and committed in pursuance of the same design:

1. Together with another one or more persons in Malta or outside Malta, conspired, promoted, constituted, organised or financed the conspiracy with other person/s to import, sell or deal in drugs (cannabis plant), in these Islands against the provisions of the Dangerous Drugs Ordinance, Chapter

101 of the Laws of Malta or promoted, constituted, organised or financed the conspiracy;

2. Together with another one or more persons in Malta or outside Malta, conspired, promoted, constituted, organised or financed the conspiracy with other person/s to import, sell or deal in drugs (cannabis resin), in these Islands against the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta or promoted, constituted, organised or financed the conspiracy;
3. Produced, sold or otherwise dealt with the whole or any portion of the plant cannabis in terms of Section 8(e) of Chapter 101 of the Laws of Malta;
4. Produced, sold or otherwise dealt in the resin obtained from the plant cannabis, or any preparation of which such resin formed the base, in terms of Section 8(b) of Chapter 101 of the Laws of Malta;
5. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the whole or any portion of the plant Cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for his personal use;
6. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the resin obtained from the plant Cannabis, or any other preparation of which such resin formed the base, in terms of Section 8(a) of Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for his personal use;
7. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the whole or any portion of the plant Cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta;
8. Had in his possession (otherwise than in the course of transit through Malta of the territorial waters thereof) the resin obtained from the plant Cannabis, or any other preparation of which such resin formed the base, in terms of Section 8(a) of Chapter 101 of the Laws of Malta;
9. Committed these offences in, or within 100 metres of the perimeter of a school, youth club or centre, or such other place where young people

habitually meet in breach of Article 22(2) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

The Court was also requested to apply Section 533(1) of Chapter 9 of Laws of Malta as regards the expenses incurred by the Court appointed experts.

The Court was further requested to attach in the hands of third parties in general all monies and other movable property due or pertaining or belonging to the accused and further to prohibit the accused from transferring, pledging, hypothecating or otherwise disposing of any movable or immovable property in terms of Section 22A of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and of Section 23A of the Criminal Code, Chapter 9 of the Laws of Malta.

Having heard the evidence and having seen the records of the case, including the order of the Attorney General in virtue of subsection two (2) of Section 22 of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), for this case to heard by this Court as a Court of Criminal Judicature;

Having seen that the accused pleaded not guilty to the charges brought against him;

Having heard final oral submissions by the parties.

**Considered that:**

### **Considerations on Guilt**

The facts which led to this case were as follows: On 7<sup>th</sup> May 2015 at around 6.15 p.m., police officers from the Drug Squad, namely, WPC 317 Alishia Mamo, PS 839 Stephen Micallef, PC 760 Christopher Saliba, PC 773 Ryan Tonna and PC 1311 Gregory Pizzuto proceeded to execute a warrant of search and arrest in respect of a certain Todd Henderson Drake at 5, Tower Place, Triq San Gerald, St. Paul's Bay. Upon entering the common parts of the block of apartments, they noticed two persons about to enter apartment numbered 5 in the said block and the said police officers proceeded by gaining access to the said apartment as soon as the said two persons had entered same. It later transpired that these two persons were George Cutajar and Lee Dimech.<sup>1</sup> George Cutajar had an amount of cash and

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<sup>1</sup> *Vide* evidence given by WPC 317 Alishia Mamo (a fol. 51 of the records), PC 773 Ryan Tonna (a fol. 56 of the records), PC 760 Christopher Saliba (a fol. 71 and 72 of the records), PC 1311 Gregory Pizzuto (a fol. 80 of the records) and PS 839 Stephen Micallef (a fol. 111 and 112 of the records).

a mobile phone in his possession<sup>2</sup>, whilst a search on the person of Lee Dimech yielded a packet of cigarettes containing a brown substance, suspected to be cannabis resin and a bag with white powder suspected to be cocaine.<sup>3</sup> In the said apartment, the police officers found Yannick Just<sup>4</sup>, Larry Camilleri<sup>5</sup>, Julia Giorgeva Naidenova<sup>6</sup>, Stephen Peter Crouch<sup>7</sup> and Stefan Asenov Ivanov, namely, the accused in the present case. The police conducted searches in all the rooms of the apartment, whereby in the kitchen, they found electronic weighing scales, a crusher, two laptops and two bongos/pipes.<sup>8</sup>

Nothing illegal was found on the person of the accused.<sup>9</sup> A search was also conducted in the accused's bedroom, wherefrom the police officers collected a pipe (yellow in colour), a pair of scissors, a knife, a green crusher with traces of cannabis, a set of notes, a laptop and a dark container containing white powder.<sup>10</sup> In this room, the police noted a glass door leading to an enclosed balcony. The door to this balcony was locked and its keys were not found during the search of the apartment and of the persons present.<sup>11</sup>

At about 7.00 p.m., Todd Henderson Drake walked into the said apartment and after he was arrested and informed of his rights, a search on his person yielded a sum of money.<sup>12</sup> In the presence of Mr. Henderson Drake, the police proceeded to gain access to the balcony in the accused's room, by removing a glass pane from the door leading to the said balcony<sup>13</sup>, where on the left side, hidden against a

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<sup>2</sup> *Vide* evidence tendered by PS 839 Stephen Micallef, a fol. 112 of the records of the case.

<sup>3</sup> *Vide* evidence tendered by PC 1311 Gregory Pizzuto, a fol. 80 of the records of the case.

<sup>4</sup> Nothing illegal was found on Yannick Just (*vide* evidence given by PC 773 Ryan Tonna, a fol. 55 of the records and PC 760 Christopher Saliba, a fol. 73 of the records).

<sup>5</sup> According to PC 760 Christopher Saliba, a search on the person of Larry Camilleri yielded a packet of cigarettes containing a brown substance suspected to be cannabis resin.

<sup>6</sup> Nothing illegal was found in Ms. Giorgeva Naidenova's room (*vide* evidence given by WPC 317, a fol. 51 of the records and PC 760, a fol. 73 of the records).

<sup>7</sup> Nothing illegal was found in the area which Mr. Crouch occupied in the apartment, according to evidence tendered by PC 760 Christopher Saliba (a fol. 73 of the records).

<sup>8</sup> *Vide* evidence tendered by PC 760 Christopher Saliba (a fol. 73 of the records of the case).

<sup>9</sup> *Vide* evidence given by PC 773 Ryan Tonna (a fol. 55 of the records of the case).

<sup>10</sup> *Vide* evidence given by WPC 317 Alishia Mamo (a fol. 51 of the records of the case) and PC 1311 Gregory Pizzuto (a fol. 80 of the records).

<sup>11</sup> *Vide* evidence given by WPC 317 Alishia Mamo (a fol. 51 and 52 of the records of the case), PC 773 Ryan Tonna (a fol. 55 of the records), PC 760 Christopher Saliba (a fol. 74 of the records) and PS 839 Stephen Micallef (a fol. 114 of the records).

<sup>12</sup> *Vide* evidence tendered by PC 760, a fol. 74 of the records and PS 839 Stephen Micallef, a fol. 113 of the records.

<sup>13</sup> *Vide* evidence tendered by PC 773 Ryan Tonna (a fol. 55 of the records) and PC 760 (a fol. 75 and 77 of the records). A photograph of the said balcony and its contents (15 AYU 106) is exhibited as part of the photo album exhibited a fol. 107 of the records, forming part of the report exhibited by Scene of the Crime Officers PS 612 Theo Vella and PC 1362 Jonas Schembri (a fol. 100 *et seq* of the records).

drainage pipe<sup>14</sup>, they found a spotted grey bag, in which there were a block measuring circa 20 cms by 10 cms suspected to be cannabis resin, a block also suspected to be cannabis resin covered in masking tape, three bags of different measurements containing a substance suspected to be cannabis grass, a bag containing white powder suspected to be cocaine, a bag with blue pills suspected to be ecstasy and a small green sealable pouch measuring circa 7 cms by 5 cms containing a substance suspected to be LSD.<sup>15</sup> They also found a bottle marked with the letters BCAA, which contained four pieces of a substance suspected to be cannabis resin, some notes and a bag that contained a substance suspected to be cannabis grass and a transparent bag containing white powder suspected to be cocaine.<sup>16</sup>

According to the report filed by forensic expert Godwin Sammut, the following documents were handed over to him for his analysis:

- i) Evidence bag with ID L00159731 that contains a black plastic container with the words BCAA (095\_15\_01);
- ii) Evidence bag with ID M00575204 that contained (i) 4 pieces of brown substances and (ii) a plastic bag containing green grass (095\_15\_02). It seems that the expert here failed to indicate another document containing white powder, since further on in his report (a fol. 208), he states he indicates that the brown substances in this bag tested positive to Tetrahydrocannabinol and weighed 345 grams, the green grass also tested positive to Tetrahydrocannabinol and weighed 1.18 grams and the white powder tested positive to cocaine and weighed 50 grams;
- iii) Evidence bag with ID M00575205 that contained an empty plastic bag with the words IKEA (095\_15\_03);
- iv) Evidence bag with ID L001159732 that contained a transparent plastic bag containing: (i) a piece of transparent plastic containing 15 blue pills; (ii) a piece of blue plastic containing green grass; (iii) plastic bag containing white powder; (iv) a transparent plastic bag containing green grass; (v) plastic bag containing brown substances; (vi) 9 brown blocks

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<sup>14</sup> *Vide* evidence tendered by PS 839 Stephen Micallef, a fol. 114 of the records.

<sup>15</sup> Photographs of these substances are exhibited as Doc. 15 AYU 202, a fol. 107 of the records.

<sup>16</sup> *Vide* evidence tendered by PC 760 (a fol. 75 and 76 of the records), PC 1311 Gregory Pizzuto (a fol. 81 of the records) and PS 839 Stephen Micallef (a fol. 114 and 115 of the records). Photographs of these substances are exhibited as Doc. 15 AYU 110 and 15 AYU 111, a fol. 107 of the records.

- wrapped in tape; (vii) a green with yellow paper; (viii) empty packet (095\_15\_04);
- v) Evidence bag with ID L00289477 containing a plastic container with the words 100% Creatine that contains white powder (095\_15\_05);
  - vi) Evidence bag with ID S00698791 containing a grey crusher (095\_15\_06);
  - vii) Evidence bag with ID S00698828 that contains small scales (095\_15\_07);
  - viii) Evidence bag with ID S00698792 that contains a bong (095\_15\_08);
  - ix) Evidence bag with ID M00389078/9 that contains a bong (095\_15\_09).

The said expert concluded as follows with respect to the above documents:

- a) Tetrahydrocannabinol was found in the extracts taken from the brown substances in exhibits labelled as 095\_15\_02 (paragraph ii above) and 095\_15\_04 (paragraph iv above). The total weight of these substances is 1225.79 grams and the purity of THC was approximately 7%.
- b) Tetrahydrocannabinol was found in the extracts taken from the green grass in the exhibits labelled as 095\_15\_02 (paragraph ii above) and 095\_15\_04 (paragraph iv above). The total weight of the green grass is 20.38 grams and the purity of THC was circa 7.5%.
- c) Cocaine was found in the extracts taken from the white powder in the exhibits labelled as 095\_15\_02 (paragraph ii above) and 095\_15\_04 (paragraph iv above). The total weight of the white powder is 94.03 grams. The purity of cocaine was circa 15%.
- d) 3,4methylenedioxy-metamphetamine (MDMA) was found in the extracts taken from the blue pills in exhibit 095\_15\_04 (paragraph iv above). The total number of pills is 15.
- e) Tetrahydrocannabinol was found in the swabs taken from the crusher, scales and bong in exhibits 095\_15\_06 (paragraph vi above), 095\_15\_07 (paragraph vii above) and 095\_15\_08 (paragraph viii above).

- f) 25B-NBOMe or 2-(4-iodo-2,5dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine was found in extracts taken from the paper in exhibit 095\_15\_04 (paragraph iv above). This substance is not currently controlled by Maltese law.
- g) No illicit substances were found in extracts taken from the white powder in the bottle in exhibit 095\_15\_05 (paragraph v above) and from the swab taken from the bong in exhibit 095\_15\_09 (paragraph ix above).

The accused released a statement on 8<sup>th</sup> May 2015, after he was duly cautioned and also after having obtained legal advice in terms of law.<sup>17</sup> Such statement was signed by the accused. Furthermore, the accused confirmed his statement on oath before the Inquiring Magistrate on the same day in terms of Section 24A(12) and (13) of Chapter 101 of the Laws of Malta.<sup>18</sup>

### **Considered further:**

The Court will first deal with the third and fourth charges brought against the accused, namely the charges contemplating dealing in cannabis grass and cannabis resin respectively.

In his statement released as aforesaid, **the accused** stated that he lives with Yanick, Steven, George and Julia at Tower Place, Flat 5, Triq San Gerardu, St. Paul's Bay. With respect to the drugs found in the balcony, he stated that Todd (Henderson) told him about 100 grams or 200 grams of weed and he was not aware of all the drugs that had been found. He further stated that the balcony was closed, that he did not have a key to the balcony and so he had no idea about its content. He also stated that Todd and George had asked him to hide the drugs in the balcony and that he simply gave the keys to Todd. When asked if he was thus stating that he was in no way involved with these drugs except to procure a hiding place, he replied "*Not really sometimes a friend would ask me if I had cannabis and I would get it and sell it to him for 15 or 20 Euros*"<sup>19</sup> and in this respect he explains that "*I would ask Todd to give me what I need and he would do it. I go collect the money from the guy, keep 5 euro and hand over the rest to Todd*".<sup>20</sup> Upon being asked whether he recalled anyone in particular to whom he had sold cannabis, he stated

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<sup>17</sup> The statement is exhibited a fol. 25 *et seq* of the records.

<sup>18</sup> A fol. 132 *et seq* of the records.

<sup>19</sup> A fol. 26 of the records.

<sup>20</sup> A fol. 26 of the records.

that the persons who were arrested went there to buy drugs from Todd, but “*maybe if they ask me and the guy is not around I give them*”.<sup>21</sup> The accused stated that he had been selling cannabis for “*like one year or something like that*”.<sup>22</sup> As regards George, the accused stated that the latter gets the big amount, which he gives to Todd and that his (the accused’s) part was to sell some every now and then. Upon being questioned as to the amount of drugs which he sells, the accused replied that he sold “*5, 6, 7 packets containing 0.775 grams of cannabis resin sold for 20 euro each a day. Friday, Saturday and Sunday it’s more. I give 15 euro from each packet to Todd and keep 5 euro. I’ve been doing this for the last year but for the last one month it’s daily. Before the last month the average was 4 packets a day. For the last month I stopped working and people started to get to know me more.*”<sup>23</sup> As regards the previous day, namely the day of his arrest, he stated that it could be that he gave drugs to Larry, but he did not collect any money from him. Upon being asked whether he had ever dealt with George about drugs, the accused stated that he always asked Todd for drugs and never dealt with George. He stated that George merely gives the drugs to Todd and leaves and that he had seen Todd handing over drug money to George. He stated that he did not know anything about the weighing scales, that the scissors, the two pieces of gold coloured metal and the round green grinder sealed in bag S00698790 were his, that he used the gold coloured metal for his keys and the grinder to crush the weed. The accused also stated that apart from cannabis resin, he sold cannabis grass and that sometimes he sells grass and sometimes resin. He stated that Todd hides the drugs in the balcony, although he did not know in which container and upon being asked whether Todd lives in the apartment, he stated that he comes and goes, that he sleeps there occasionally and has the keys to the apartment, but that he does not have any belongings there.

As stated above, the accused confirmed his statement on oath on the same day before the Inquiring Magistrate. He further stated that he paid the rent of the apartment he lived in with Yanick and that Todd helped him with the money. They paid €700 monthly, water and electricity. He stated also that there were a few Maltese people, who went home to buy drugs. The accused also stated that he knew that George (Cutajar) got drugs for Todd at least once or twice a week.

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<sup>21</sup> A fol. 26 of the records.

<sup>22</sup> A fol. 26 of the records.

<sup>23</sup> A fol. 26 of the records.



In his testimony during these proceedings, **Larry Camilleri** stated that on the previous Thursday<sup>24</sup>, he went to meet his friend Steve at 5, Tower Place in St. Paul's Bay. He was waiting for his friend since they had planned to go out, when he asked the accused if he had some resin. The accused replied in the affirmative, pulled out a piece from his pocket and upon being asked the price, the accused replied that it was €20. The witness thus paid him €20 and the accused gave him the resin. Upon being asked how often he bought cannabis, he stated that he had met the accused and the other residents of the apartment about a month or a month and a half before when his friend moved in, that he has been to the apartment “*a couple of times*” and that each time he bought cannabis from the accused.<sup>25</sup>

From the above, and by the accused's own admission, therefore, it clearly results that during the period indicated in the charges namely 7<sup>th</sup> May 2015 and on the previous months, the accused sold both cannabis resin and cannabis grass. Witness Larry Camilleri further confirmed that he bought the substance suspected to be cannabis resin which was found in his possession on the day of his arrest from the accused – indeed even the accused indicated in his statement that he might have given the drug to the witness on the day of his arrest, although he stated that he had not obtained any payment for it – and also that he bought cannabis resin on other occasions during the previous month or month and a half, from the accused.

The Court is thus satisfied that the third and fourth charges have been proved beyond any reasonable doubt.

### **Considered further that:**

By means of the fifth and sixth charges, the accused has also been charged with possessing cannabis grass and cannabis resin under such circumstances denoting that this was not intended for his personal use.

In this respect, first of all once it has been determined to the degree required by law that the accused dealt both in cannabis resin and cannabis grass in the circumstances above indicated, it follows necessarily that the accused was in possession of both cannabis grass and cannabis resin in circumstances denoting that it was not intended for his personal use.

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<sup>24</sup> This witness tendered his evidence on 18<sup>th</sup> May 2015 (a Monday) and since he was arrested together with the accused on 7<sup>th</sup> May 2015, the accused having been kept under preventive custody since then, said witness could not have been referring to the previous Thursday (14<sup>th</sup> May 2015), but to the Thursday before that, which was precisely 7<sup>th</sup> May 2015.

<sup>25</sup> A fol. 39 *et seq* of the records.

As regards the drugs which were found in the balcony accessible from the accused's room, the Court first of all notes that the Prosecution did not charge the accused with aggravated possession of all the various kinds of illicit substances that were found in the said balcony, but merely with aggravated possession of cannabis grass and resin. In his statement, the accused stated that he knew that drugs were being hidden by Todd in the balcony, since Todd himself had asked him for the key to the door leading to such balcony, thinking that this was an ideal hiding place, but that Todd had only mentioned 100 grams or 200 grams of cannabis to him. He had no clue about the drugs that were actually hidden and eventually found in the balcony. Furthermore, he also stated that the doors to the balcony were locked and he had no keys.

In the judgement delivered by the Court of Criminal Appeal on 23<sup>rd</sup> June 1997, in the names **Il-Pulizija vs John Borg**, it was stated that:

*“Dwar x’jammonta ghal pussess ghall-finijiet tal-ligi in dizamina, din il-Qorti diga` kellha l-opportunita` li telabora dwaru fis-sentenza tagħha tal-21 ta’ Ottubru, 1996, fil-kawza fl-ismijiet Il-Pulizija v. Seifeddine Mohamed Marshan. F’dik is-sentenza din il-Qorti osservat li l-presenza ta’ oggett f’post (dar, karozza, kamra, ecc.) li fuqu persuna għandha xi forma ta’ kontroll tista’, taht certi cirkustanzi, tammonta għal pussess ta’ dak l-oggett; u jekk dak l-oggett jirrisulta bhala fatt li hu droga li taqa’ taht il-Kap. 101, allura l-ligi tippresumi, salv prova kuntrarja imqar fuq bazi ta’ probabilita`, li l-pussessur kien jaf li dak l-oggett kienet droga (ara wkoll P. v. Charles Clifton, App. Krim., 5 ta’ Lulju, 1982).”*

In another case decided by the Court of Criminal Appeal on 27<sup>th</sup> April 2006 in the names **Il-Pulizija vs Keith Stagno Navarro**, the Court held as follows:

*“Illi ma hemmx dubju li d-droga kokajina nstabet f’post li kien jaqa’ taht il-kontroll effettiv tal-imputat, pero` dan mhux bizzejjed biex jirrizulta pruvat ir-reat in dizamina w jrid ukoll jirrizulta l-element tax-xjenza li f’dan il-post kien hemm id-droga. Din trid tirrizulta jew mic-cirkostanzi jew minn xi ammissjoni da parti tal-persuna akkuzata. Dan għaliex mhux eskluż li f’post li fuqu persuna jista’ jkollha l-kontroll anki esklussiv, li persuna ohra, ad insaputa tal-persuna li jkollha l-kontroll, tkun poggiet jew hbiet xi droga jew sustanza illecita. Hekk per ezempju wiehed jista’ jkollu kontroll effettiv u esklussiv fuq karozza ipparkjata registrata fuq ismu imma ma jkunx jaf li xi hadd, ad insaputa tieghu, ikun tefghalu nitfa droga mix-xaqq tat-tieqa miftuha, biex forsi jinkriminah. L-istess missier li għandu l-kontroll fuq ir-residenza tieghu ma jistax jinstab hati ta’ pussess ta’ droga jekk per ezempju ad insaputa tieghu, wiehed minn uliedu li jghix mieghu*

*jkun dahhal droga u hbieha jew zammha f'daru. Ghalhekk mhux bizzejjed li jigi pruvat il-kontroll effettiv jew sahsitra esklussiv fuq xi post, imma jrid jigi pruvat, sal-grad tac-certezza morali, l-element tas-scienter, cioe` li jkun konsapevoli li f'dak il-post li jaqa' taht il-kontroll tieghu attwalment hemm id-droga. L-Ewwel Qorti jidher li m'ghamlitx distinzjoni bejn il-kuncett tal-pussess kostruttiv tad-droga w cioe` meta ghalkemm id-droga ma tkunx fil-pussess fiziku ta' dak li jkun, tkun f'post fejn hu jkollu l-kontroll effettiv u l-kuncett ta' pussess effettiv jew kontroll ta' post. F'ta' l-ewwel, element essenzjali hu dejjem l-element tax-xjenza dwar l-esistenza tad-droga f'dak il-post u, jekk ma jigix pruvat dan l-element, ma tistax tinstab htija”.*

And as stated in the case decided by the Court of Criminal Appeal on 17<sup>th</sup> March 2005 in the names **Ir-Repubblika ta' Malta vs Godfrey Ellul**:

*“Persuna hi fil-pussess ta' medicina perikoluza meta hi konxja tal-prezenza taghha f'post partikolari u ghandha xi forma ta' kontroll fuqha”.*

From the above cited judgements therefore, it is clear that in order that the offence of drug possession may result, it must be proved that the accused had either the material possession of the drug or otherwise the constructive or legal possession thereof – in other words that although he did not physically possess the drug, yet he had effective control over it as for instance would be the case, where the drug is situated in a place over which he has effective control. Secondly, the formal element must also be proved in the sense that the accused knew that the drug was situated in such place or the place over which he has effective control. In the present case, although the accused claims that he knew or rather was under the impression that there were circa 100 grams or 200 grams of cannabis hidden in the said balcony, and although this balcony was accessible from his room, yet it has not been proved beyond reasonable doubt that the accused had any effective control of the balcony and consequently of the drugs that were found therein. Indeed, the door to the balcony was locked when the police acceded to the apartment and the key was not found in the apartment or on any of the persons present during the search. As a result, the police acceded to the balcony by removing a glass pane from its door. As has already been noted, the accused stated that he had given the keys to Todd, since the latter had asked him whether he could hide the drugs in the balcony. There is no proof in fact that the accused himself had any access to the balcony or the drugs therein, since he claimed that he would always obtain the drugs which he required from Todd.

Furthermore, none of the witnesses who testified in these proceedings indicated ever seeing the accused in the balcony or obtaining drugs from said balcony. Witness **Larry Dimech**, who confirmed his statement under oath before the Inquiring Magistrate<sup>26</sup> and also tendered his evidence during these proceedings<sup>27</sup>, wherein he again confirmed the statement which he had released to the police on 8<sup>th</sup> May 2015, stated that two days prior to his statement, he had seen Todd opening the door leading to the balcony, that he had obtained what looked like a black and white pillow case therefrom<sup>28</sup> and from it, he took out a bag which contained cannabis grass. He further stated that Todd put some of this grass in a small bag and gave it to a third party, who had come to purchase drugs from him. He had also seen Todd giving a black protein bottle to George, the latter opened the bottle and took out a big block, the size of a packet of cigarettes and that subsequently, he had seen George handing the bottle back to Todd. He stated that a week before, he had also seen Todd giving a bag containing a gram to Stefan – the accused. He had not seen any monies passing between the two.<sup>29</sup> This witness therefore indicated seeing third parties meddling with drugs obtained directly from the balcony, but he had merely seen the accused obtaining drugs directly from Todd and not from the balcony. It is also worth noting in this context that a comparison between the fingerprints and palm prints of the accused with fingerprints developed on a piece of blue plastic<sup>30</sup> – which according to the report of forensic expert Godwin Sammut was found to contain cannabis grass and which, as results from the said report together with the evidence tendered by the police officers and photograph marked as Doc. 15 AYU 202<sup>31</sup>, formed part of the contents of the spotted grey bag found in the balcony – provided negative results.<sup>32</sup> The above considerations can only lead the Court to one conclusion, namely that although the accused knew that there was an amount of cannabis in the balcony, which he thought amounted to circa 100 to 200 grams, he did not have any effective control over the drugs situated therein.

Consequently the Court may only find the accused guilty beyond any reasonable doubt of aggravated possession of cannabis grass and cannabis resin in relation to the cannabis grass and resin, which he possessed for the purpose of selling. The

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<sup>26</sup> Larry Dimech's statement is exhibited a fol. 143 *et seq* of the records. He confirmed this statement on oath before the Inquiring Magistrate on the same day (a fol. 134 *et seq* of the records).

<sup>27</sup> *Vide* his evidence a fol. 231 *et seq* of the records.

<sup>28</sup> It is worth noting that when tendering evidence, Inspector Pierre Grech stated that the spotted bag found in the balcony looks like a pillow cover (a fol. 60 of the records).

<sup>29</sup> A fol. 239 and 240 of the records.

<sup>30</sup> *Vide* report of expert PS 659 Jeffrey Hughes, a fol. 354 of the records and relative photograph a fol. 360 of the records.

<sup>31</sup> A fol. 107 of the records.

<sup>32</sup> *Vide* report of expert Joseph Mallia, a fol. 372 *et seq* of the records of the case.

offences contemplated in the fifth and sixth charges therefore will be deemed as having been designed for the commission of the offences contemplated in the third and fourth charges.

The Court will now examine the elements of the offences contemplated in the first and second charges in order to determine whether the facts proved in this case give rise to the said offences of conspiracy to the degree required by law.

Section 22(1)(f) of Chapter 101 of the Laws of Malta states that “*Any person who with another one or more persons in Malta or outside Malta conspires for the purpose of selling or dealing in a drug in these Islands against the provisions of this Ordinance or who promotes, constitutes, organises or finances the conspiracy, shall be guilty of an offence against this Ordinance*”. Furthermore, in terms of Section 22(1A) of the said Chapter, the substantive crime of conspiracy to deal in a dangerous drug exists and is completed “*from the moment in which any mode of action whatsoever is planned or agreed upon between*” two or more persons.

In the judgement delivered by the Court of Criminal Appeal on 6<sup>th</sup> March 2003 in the names **The Republic of Malta vs Steven John Caddick, Phillip Walker, Omissis**, the said Court indicated the three essential elements for the crime of conspiracy to subsist:

*“... the First Court correctly stated that the three elements that had to be proved for the crime of conspiracy to result, were the agreement between two or more persons, the intention to deal in drugs and the agreed plan of action; and, as also correctly stated by the First Court, “it is irrelevant whether that agreement was ever put into practice.*

*... although it is true that for the crime of conspiracy to subsist it does not have to be proved that the agreement was put into practice, the converse is not true, that is that evidence of dealing does not necessarily point to a conspiracy.*

*Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed “from the moment in which any mode of action whatsoever is planned or agreed upon between two or more persons” (section 22(1A) Chapter 101). Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of the mere agreement to deal and agreement as to the mode of action there is a*

*commencement of the execution of the crime intended, or such crime has been accomplished, the person or persons concerned may be charged both with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming (for the purpose of the attempted or consummated offence) co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason, namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement.”*

As stated in the case decided by the Court of Criminal Appeal on 17<sup>th</sup> March 2005 in the names **Ir-Repubblika ta’ Malta vs Godfrey Ellul**:

*“Din il-Qorti ezaminat bir-reqqa t-tieni stqarrija ta’ Philip Magri u x-xhieda li ta waqt il-guri u tistqarr li minnhom ma jirrizultax li gew “ikkumbinati jew miftehma l-mezzi” li bihom l-appellant u Magri kellhom jimxu sabiex ibieghu d-droga jew jittraffikaw medicina perikoluza.*

*F’Archbold’s Criminal Pleading, Evidence and Practice 2003 naqraw:*

*“The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: **Mulcahy v. R. (1868) L.R. 3 H.L. 306 at 317; R. v. Warburton (1870) L.R. 1 C.C.R. 274; R. v. Tibbits and Windust [1902] 1 K.B. 77 at 89; R. v. Meyrick and Ribuffi, 21 Cr.App.R. 94, CCA. Nothing need to be done in pursuit of the agreement: O’Connell v. R. (1844) 5 St.Tr.(N.S.) 1.**” (Ara para. 33-4, pagna 2690).*

*“The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it: **R. v. Parsons (1763) 1 W.BI. 392; R. v. Murphy (1837) 8 C. & P. 297. Proof of the existence of a conspiracy is generally a “matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them”: R. v. Brisac (1803) 4 East 164 at 171, cited with approval in Mulcahy v. R. (1868) L.R. 3 H.L. 306 at 317**” (Para. 33-11, pagna 2692).”*

In this case, it was necessary for the Prosecution to prove beyond reasonable doubt that the accused and at least another person, not only intended to deal in drugs, but that they had agreed to sell drugs to third parties and that to this effect, they had also agreed on or devised a mode or means of action. From the evidence tendered,

particularly the statement of the accused himself, it results that the accused obtained the cannabis resin and grass which he eventually sold to third parties from Todd Henderson, that he charged €20 for each packet sold and that whilst he kept €5 from each sale, he passed on the remaining €15 to Henderson. The accused further stated that he knew that Henderson procured drugs from Cutajar and that he had seen Henderson paying Cutajar for the drugs, but he had never dealt with Cutajar in any way. He had been asked by Cutajar and Henderson for permission to hide the drugs in the balcony accessible from his room, but he had merely given the keys to the door of the balcony to Henderson and had no access to it himself. Neither did he know the actual contents hidden in the balcony, though he knew that there were drugs. He further stated that Cutajar supplied drugs to Henderson and his part consisted in selling some drugs every now and then. The Court must therefore examine whether there was in effect any conspiracy, in terms of law, between the accused and Henderson, since there is no evidence that the accused ever agreed with Cutajar to sell drugs. It is clear that both Henderson and the accused had the intention of selling cannabis and indeed the accused admitted to selling such drugs. However, although the fact that the accused acquired cannabis from Henderson, which he subsequently sold to third parties and provided Henderson with most of the money so acquired, keeping a quarter share for himself, certainly indicates some form of agreement between the accused and Henderson, yet this does not necessarily mean that they had agreed to sell drugs and that they had also agreed on the mode of action for the purpose of so doing. Indeed Henderson acquired the drugs from a third party and there is no evidence to suggest that the accused was in any way involved in such acquisitions or most importantly, that he had agreed with Henderson on the manner or mode in which the drugs were to be acquired, even though he was privy to some details regarding acquisition. The part played by the accused is more akin to that of a runner for Henderson in the sense that he sold the drugs for Henderson and although as already stated, there must have been some kind of agreement between the two as to the mode of payment of the accused, this does not translate necessarily into clear and unequivocal evidence pointing to an agreement between the two to sell drugs and to a clear and unequivocal evidence pointing to an agreement between them with respect to a particular mode of action or to a common design to deal in cannabis.

For these reasons, the Court finds that the Prosecution has not proved the first and second charges brought against the accused to the degree required by law.

By means of the seventh and eighth charges, the accused is also being charged with simple or illegal possession of the whole or any portion of the plant cannabis and

the resin obtained from the plant cannabis in terms of Sections 8(d) and (a) of Chapter 101 respectively.

In his statement, the accused stated that he does not have a drug problem, but that he smokes weed every now and then. He also states that he uses the grinder found in his room to crush the weed. It is evident that here the accused was referring to cannabis grass because a grinder is normally used to crush grass and not resin and therefore that the accused made use of cannabis grass results beyond reasonable doubt. Furthermore, witness Yannick Just stated that he had been living in the apartment for about two months and that he had seen the accused abusing cannabis resin.

The Court is thus satisfied that the Prosecution has proved these two charges to the degree required by law.

Finally, by means of the ninth charge the accused has also been imputed with the aggravated circumstances of having committed these offences in, or within 100 metres of the perimeter of a school, youth club or centre, or such other place where young people habitually meet. No evidence has been adduced by the Prosecution to sustain such circumstances. Indeed, only Larry Camilleri in his evidence mentioned having bought cannabis resin from the accused whilst in the apartment in which the accused resided. Otherwise there is no other indication, from the evidence tendered, of any other place in or from which the accused sold cannabis. Thus, this aggravating circumstance has not been proved beyond any reasonable doubt.

### **Considerations on Punishment**

For the purposes of the punishment to be inflicted, the Court took into consideration the clean criminal record of the accused and that although the accused did not register a guilty plea in these proceedings, yet he cooperated fully with the police as is clear from his statement and as confirmed by Inspector Jonathan Cassar during his testimony.<sup>33</sup> The accused also confirmed his statement on oath before the Inquiring Magistrate.

In respect of the cooperation provided by the accused, the Prosecution did not declare that the provisions of Section 29 of Chapter 101 of the Laws of Malta are applicable. In fact although Inspector Pierre Grech stated, in his testimony, that “I

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<sup>33</sup> A fol. 21 of the records.



think the best thing is that when at the end of the case, we will make the declaration, not at this stage”<sup>34</sup>, no such declaration was made. Section 29 of Chapter 101 of the Laws of Malta states that:

*“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.”*

In this case, although the Prosecution did not declare the applicability of Section 29, as above stated and neither did the defence raise this matter or request its applicability at any point during these proceedings, apart from submitting that the accused cooperated fully with the police during its investigations, in view of the evidence tendered, the Court deems the provisions of this section to be applicable in the present case.

In the case **Ir-Repubblika ta’ Malta vs Anna Spiteri**, decided on 10<sup>th</sup> April 2014, the Court of Criminal Appeal referred to another case decided by the Court of Criminal Appeal in its inferior jurisdiction in the names of **Il-Pulizija vs Sandro Mifsud** decided on 2<sup>nd</sup> August 1999, where it was held as follows in respect of the said section of law:

*“Kif din il-Qorti diġa` kellha l-opportunita` li tfigger f’sentenzi oħra, biex persuna tibbenefika mir-riduzzjoni ta’ grad jew tnejn fil-piena ta’ prigunerija (u riduzzjoni ta’ terz jew nofs fil-piena pekunjarja) skond l-imsemmi Artikolu 29 mhux biżżejjed li dak li jkun isemmi l-persuna mingħand min ikun xtara d-droga; irid jirrizulta li b’dik l-informazzjoni l-akkużat ikun effettivament **għen lill-pulizija sabiex taqbad lil dik il-persuna**. Jekk minkejja dik l-għajnuna, il-pulizija ma jkollhiex provi biżżejjed biex tressaq lill-persuna indikata l-qorti, jew jekk dik il-persuna indikata tkun diġa` nqabdet mill-pulizija qabel ma tissemma’ mill-akkużat, ma jkunx jista’ jingħad li l-akkużat ikun għen lill-pulizija sabiex taqbad lil dik il-persuna. Altrimenti faċilment jiġri li, biex persuna tnaqqas mill-piena tagħha, tibda ssemmi*

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<sup>34</sup> A fol. 66 of the records.

*ismijiet ta' nies li jistgħu jkunu innocenti, jew l-ismijiet ta' nies li tkun taf li diga` nqabdu in konnessjoni mal-bejgh ta' droga lilha.*"<sup>35</sup>

The Court then held:

*“Fil-każ in eżami l-prosekuzzjoni ma għamlet l-ebda dikjarazzjoni illi l-appellanti kienet “għenet lill-Pulizija biex taqbad lill-persuna jew lill-persuni li jkunu pprovdewlha l-mediċina”. Ciononostante jirriżulta li l-persuna ndikata mill-appellanti bħala dik li kienet responsabbli biex tipprovdilha d-droga, Nagi Al Maraash, inqabdet mill-Pulizija u ttieħdu proċeduri kontra tiegħu. Dan jirriżulta kemm mix-xieħda tas-Supretendent Stephen Gatt kif ukoll mix-xieħda ta' l-Ispettur Pierre Grech. Inoltre matul il-ġuri huwa ġie prodott bħala xhud u għażel biex ma jixhidx “peress li l-każ għadu għaddej”. Fil-fehma ta' din il-Qorti għalhekk l-artikolu 29 tal-Kap. 101 għandu jiġi applikat a benefiċċju ta' l-appellanti. Ma jistax ma jiġix innotat ukoll illi l-appellanti anke ndikat il-persuna li lilha kellha tghaddi l-bagalja, Mohammed Ahmed Al Maraash li jiġi hu Nagi Al Maraash. Fil-fatt ittieħdu proċeduri wkoll kontra dan Mohammed Ahmed Al Maraash kif ukoll kontra Issam Zbeda li kien qiegħed l-ajruport.”*

And in the case **Ir-Repubblika ta' Malta vs Joseph Borg u John Sultana**, decided by the Court of Criminal Appeal on 3<sup>rd</sup> February 2005, it was held that:

*“L-espressjoni “għenet ... biex taqbad lill-persuna jew lill-persuni” (“has helped ... to apprehend the person or persons”, fit-test Ingliz) tfisser mhux semplicement li l-hati jkun indika lil xi persuna jew persuni bħala l-persuna jew persuni li pprovdewlu d-droga, izda li tali indikazzjoni tkun verament ikkontribwiet sabiex il-Pulizija tkun f'posizzjoni li tressaq lit-traffikant il-Qorti, dak pero`, li jkun ipprovdielu d-droga.”*

Now in the present case, it results clearly that Todd Robert Henderson Drake was apprehended together with the accused and other persons on the same day when the police effected a search at the accused's residence. Yet, as clearly results from the evidence tendered by Inspector Pierre Grech, Mr. Henderson Drake denied any involvement in drugs during the previous years and subsequently, the accused, Henderson Drake and another person were arraigned in court accused with drug related charges. Furthermore, from the evidence tendered by the police officers involved in the search and arrest of Mr. Henderson Drake, no drugs were found on

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<sup>35</sup> Here the Court referred to a number of judgements by the Court of Criminal Appeal dealing with this provision – The Republic of Malta vs Kamil Kurucu, 14<sup>th</sup> June 2007; The Republic of Malta vs Antoine Debattista, 19<sup>th</sup> January 2006, Police vs Dennis Cuschieri, 7<sup>th</sup> January 1999; Police vs Philippa sive Filippa Chircop, 2<sup>nd</sup> March 2007.

his person. The accused then released a statement wherein he indicated Mr. Henderson Drake as the person who supplied him with cannabis resin and grass, which statement he also confirmed on oath before the Inquiring Magistrate in terms of Section 24A (12) and (13) of Chapter 101 of the Laws of Malta. In this respect, although Mr. Henderson Drake was actually physically apprehended by the police independently of the accused's cooperation – with the caveat that even here the accused had already indicated to the police that Mr. Henderson Drake was due to return to the apartment at about 7.00 p.m. and in actual fact he did – from the evidence tendered it is clear that the accused's subsequent cooperation and statement contributed significantly to place the police in a position to arraign Mr. Henderson Drake in court on drug-related charges. For these reasons, the Court deems the provisions of Section 29 to be applicable in the present case and accordingly is reducing the punishment, as regards imprisonment, by one degree and as regards the pecuniary penalty, by one third.

Furthermore, the Court took into consideration that the accused had been selling cannabis resin and grass for a year and that whereas previously he sold an average of four packets a day (4 packets x 0.775 grams x 30 days x 11 months = circa 1023 grams), during the previous month he sold five to seven packets containing 0.775 grams of cannabis daily for the price of €20 and that he sold more between Friday and Sunday. This means that during the previous month, between Monday and Thursday, the accused sold between 3.875 grams and 5.425 grams daily (5 packets x 0.775 grams to 7 packets x 0.775 grams) or 15.5 grams to 21.7 grams (3.875 grams x 4 days to 5.425 grams x 4 days) or 62 grams to 86.8 grams (15.5 grams x 4 weeks to 21.7 grams x 4 weeks) during that month. This apart from the cannabis sold during the weekend, which he states to be more than five to seven packets daily.

Furthermore for the purpose of punishment, in terms of the provisions of Section 17(h) of Chapter 9, the Court is considering the offences contemplated in the fifth and sixth charges respectively as having been designed for the commission of the offences in the third and fourth charges and the offences contemplated in the seventh and eighth charges respectively as comprised in the offences in the fifth and sixth charges respectively. The Court is also applying the provisions of Article 17(b) and (f) of Chapter 9 in respect of the offences in the third and fourth charges.

For the purposes of determining the expenses to be borne by the accused in connection with court appointed experts or the experts appointed in the course of the inquiry, the Court took into consideration the conclusions of the Court of Criminal Appeal in the case of **Repubblika ta' Malta vs Walter John Cassar**,

decided on 4<sup>th</sup> October 2007, wherein it was held that “*L-ispejjez peritali l-ohra kollha gew inkorsi regolament u kollha kienu potenzjalment jistghu jincidu fuq il-htija ta’ l-istess appellant*” and that the Court in that case, therefore, took into consideration that the expenses incurred could have potentially had a bearing on the guilt of the appellant and that he had rightly been condemned to pay such expenses.

## Conclusion

For these reasons, the Court after having seen Sections 8(a), (b), (d) and (e), 22(1)(a), 22(2)(b)(i) and (ii) and 29 of Chapter 101 of the Laws of Malta, Sections 17(b), (f), (h) and 18 of Chapter 9 of the Laws of Malta and Regulations 4 and 9 of Subsidiary Legislation 101.02, finds the accused not guilty of the first, second and ninth charges brought against him and discharges him therefrom, but finds him guilty of the third, fourth, fifth, sixth, seventh and eighth charges brought against him and condemns him to **twenty four months effective imprisonment** – from which period there must be deducted the time during which the person convicted has been kept in preventive custody in respect of the offences of which he is being found guilty by means of this judgement – and **a fine (multa) of three thousand Euro (€3,000)**.

Furthermore, in terms of Section 533 of Chapter 9 of the Laws of Malta, the Court orders the person convicted to pay the expenses in relation to the experts appointed during the inquiry and during these proceedings in the following manner:- one third<sup>36</sup> of the expenses incurred in connection with the report of forensic expert Godwin Sammut, one third of the expenses incurred in connection with the report of PC 1362 Jonas Schembri and PS 612 Theo Vella amounting to forty four Euro and eighty one cents (€44.81), one third of the expenses incurred in connection with the report of PS 659 Jeffrey Hughes, amounting to eleven Euro and five cents (€11.05), the expenses relating to the report of expert Joseph Mallia amounting to four hundred, eighty six Euro and eighty nine cents (€468.89) and the expenses incurred in connection with the report drawn up by Dr. Martin Bajada but only in so far as this relates to the items seized from the accused, namely, LG mobile phone, Samsung mobile phone including sim card and Samsung mobile phone without sim card (*vide* receipt a fol. 30 of the records) and a laptop found in the room of the accused, amounting to five hundred, fifty one Euro and sixty five cents

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<sup>36</sup> The Court here is taking into consideration that the inquiry held in connection with this case eventually led to the arraignment of three persons, including the accused.

(€551.65).<sup>37</sup> The Court is not providing the total amount of these expenses, since the costs incurred by forensic expert Godwin Sammut are not indicated in the records. For this purpose, the Court orders a copy of this judgement to be communicated to the Registrar of Criminal Courts in order that such costs may be determined.

Natasha Galea Sciberras  
Magistrate

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<sup>37</sup> Another two laptops were found by the police in the apartment, but no evidence has been brought to indicate that any of these two belonged to the accused. Although in his testimony, Dr. Martin Bajada states that he has apportioned the costs according to the equipment seized from each party, the costs apportioned to the accused indicate two hard disk drives and not one. The Court is therefore reducing the costs accordingly. In so doing the Court reduced by half the costs relating to two hard disk drives and recalculated the costs on this basis.