COURT OF CRIMINAL APPEAL

His Honour Chief Justice Silvio Camilleri – President
Hon. Madam Justice Abigail Lofaro
Hon. Mr. Justice Joseph Zammit McKeon

Sitting of Monday, 9th April 2018

Bill of Indictment No. 6/2017

The Republic of Malta

v.

Carine Rose-Marijke Donckers
Johnny Jos Haest

The Court :

I. The Bill of Indictment

1. Having seen the charges brought against Carine Rose-Marijke Donckers holder of Belgian Identity Card number 592-1332074-54 and Johnny Jos Haest holder of Belgian Identity Card number 592-1332059-39, accused in front of the Court of Magistrates (Malta) of having :

On the 18th June, 2017 and/or in the previous months in these islands :-

1. Together with another one or more persons in Malta or outside Malta, conspired, promoted, constituted, organised or financed the conspiracy with other persons to import, sell or deal in drugs (cocaine), in these Islands, against the provisions of The Dangerous Drugs Ordinance, Chapter 101 of the 2 Laws of Malta, or promoted, constituted, organised or financed the conspiracy.

2. Imported, or caused to be imported, or took any steps preparatory to import any dangerous drug (cocaine) into Malta in breach of section 15A of Chapter 101 of the Laws of Malta.

3. Supplied or distributed, or offered to supply or distribute the drug (cocaine), specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, to persons, or for the use of other persons, without being licensed by the President of Malta, without being fully authorised by the Internal Control of Dangerous Drugs Regulations (G.N.292/l939), or by other authority given by the President of Malta, to supply this drug, and without being in possession of an import and export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of paragraph 6, of the Ordinance and when they were not duly licensed or otherwise authorised to manufacture or supply the mentioned drug, when they were not duly licensed to distribute the mentioned drug, in pursuance of the provisions of Regulation 4 of the Internal Control of Dangerous Drugs Regulations (G.N.292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

4. Had in their possession the drugs (cocaine) specified in the first Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, when he was not in possession of an import or an export authorisation 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 authorised to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorised 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 was 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, of the Internal Control of Dangerous Drugs (G.N.292/1939) as subsequently 3 amended by the Dangerous Drugs Ordinance Chapter 101 , of the Laws of Malta which drug was found under circumstances denoting that it was not intended for their personal use.
And also charged with having during the month of April 2017 and/or in the previous months in these islands :-

5. Together with another one or more persons in Malta or outside Malta, conspired, promoted, constituted, organised or financed the conspiracy with other persons to import, sell or deal in drugs (cocaine), 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.

6. 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 Grass), 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.

7. Imported, or caused to be imported, or took any steps preparatory to import any dangerous drug (cocaine) into Malta in breach of section 15A of Chapter 101 of the Laws of Malta.

8. Imported, or caused to be imported, or took any steps preparatory to import any dangerous drug (Cannabis Grass) into Malta against the provisions of The Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

9. Supplied or distributed, or offered to supply or distribute the drug (cocaine), specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101, of the Laws of Malta , to persons, or for the use of other persons, without being licensed by the President of Malta, without being fully authorised by the Internal Control of Dangerous Drugs Regulations (G.N.292/l939), or by other authority given by the President of Malta, to supply this drug, and without being in possession of an import and export authorisation issued by 4 the Chief Government Medical Officer in pursuance of the provisions of paragraph 6, of the Ordinance and when they were not duly licensed or otherwise authorised to manufacture or supply the

mentioned drug, when they were not duly licensed to distribute the mentioned drug, in pursuance of the provisions of Regulation 4 of the Internal Control of Dangerous Drugs Regulations (G.N.292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

10. Produced, sold or otherwise dealt with the whole or any portion of the plant Cannabis in terms of Section 8 (e) of the Chapter 101 of the Laws of Malta.

11. Had in their possession the drugs (cocaine) specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, when he was not in possession of an import or an export authorisation 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 authorised to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorised 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 was 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, of 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 which drug was found under circumstances denoting that it was not intended for their personal use.

12. Had in their 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 the Chapter 101 of the Laws of Malta, which drug was found under circumstances denoting that it was not intended for their personal use. The Court was humbly requested to attach in the hands of third parties in general all moneys and other movable property due or pertaining or belonging to the accused, 5 and further to prohibit the accused from transferring, pledging, hypothecating or otherwise disposing of any movable or immovable property in terms of Article 120E of Chapter 3 1 of the Laws of Malta, Article 22A of the Dangerous Drugs Ordinance Chap 101 of the Laws of Malta and of Article 23A of the Criminal Code Chapter 9 of the Laws of Malta The Court was also requested to apply Section 533(1) of Chapter 9 of the Laws of Malta, as regards to the expenses incurred by the Court appointed Experts.

The Court was requested to attach in the hands of third parties in general all monies and other movable properties 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 Article 120E of Chapter 31 of the Laws of Malta, Article 22A of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta and of Article 23A of the Criminal Code – Chapter 9 of the Laws of Malta.

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

II. The Admission

2. Having seen the minutes of the proceedings held before the Court of Magistrates of the 20th June, 2017, whereby the accused admitted all charges brought against them and confirmed such guilty plea even after that Court solemnly warned them of the legal consequences of their admission and after they were allowed time to reconsider their decision.

III. The Note of the Attorney General

3. Having seen the note of the Attorney General of the 13th July 2017, whereby it was declared that :

1. The Attorney General received the acts of the Inquiry in the names the Police vs Carine Rose-Marijke Donckers and Johnny Jos Haest on the twenty first (21) day of the month of June of the year two thousand and seventeen (2017), and this after that the Court of Magistrates (Malta) as a Court of Criminal Inquiry ordered that the Acts of the said Inquiry be sent to the Attorney General in terms of Article 392B(1)(a) of Chapter IX of the Laws of Malta, and this in view of the fact that the persons charged, Carine Rose-Marijke Donckers and Johnny Jos Haest, in the sitting held on the twentieth (20) day of the month of June of the year two thousand and seventeen

(2017), confirmed their guilty plea with regards to the offences with which they stand charged, which offences are liable to a punishment exceeding twelve (12) years imprisonment,

2. Whereas, in terms of Article 392B(2) of Chapter IX of the Laws of Malta, the charges proffered against the said Carine Rose-Marijke Donckers and Johnny Jos Haest before the Court of Magistrates (Malta) as a Court of Criminal 6 Inquiry, to which the accused registered the aforementioned guilty plea, should be considered as a Bill of Indictment for all the purposes and effects of Law.

3. And whereas, in terms of Article 392B(4) of Chapter IX of the Laws of Malta, the Attorney General requests that he brings forward evidence relevant for the purposes of punishment, amongst which the proces verbal, the statements released by the accused, the appointed expert to testify with regards to the quantity and quality of the drugs and the prosecuting officers Inspector Kevin Pulis and Inspector Frank Anthony Tabone.

IV. The Judgement of the Criminal Court

A. The Conviction

4. Having seen the judgement delivered by the Criminal Court on the 8th November 2017 whereby, in view of the declaration of guilt of both accused before the Court of Magistrates on the 20th June 2017, which admission of guilt they confirmed, after being given time according to law to re-consider, the Court declared the accused Carine Rose-Marijke Donckers and Johnny Jos Haest guilty of the charges brought in the indictment against them as aforesaid which charges have been reproduced above[1].

B. The Punishment

5. Having seen the judgement of the Criminal Court whereby that Court, after having seen articles 2, 8, 9, 10(1), 12, 13, 14, 15, 15A, 16, 17, 18, 22(1)(a)(d)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22(A), 24A, 26 and 29 of the Dangerous Drugs Ordinance and of Regulations 2 and 9 of

[1] See paragraph **1** *supra*

the Government Notice 292 of 1939 and of articles 17, 23, 23A, 23B, and 23C of the Criminal Code, condemned the said Carine Rose-Marijke Donckers and Johnny Jos Heast to a term of imprisonment of nineteen (19) years and the imposition of a fine of thirty-five thousand Euros (€35,000), which fine (multa) shall be converted into a further term of imprisonment of one year according to Law, in default of payment. Moreover, the Court ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which they were found guilty and other moveable and immovable property belonging to the said Donckers and Haest. Finally, the Court ordered the destruction of all the objects exhibited, consisting of the dangerous drugs or objects related to the abuse of drugs, which destruction was to be carried out by the Assistant Registrar of the Criminal Court, under the direct supervision of the Deputy Registrar of the Court who was bound to report in writing to the Court when such destruction had been completed, unless the Attorney General filed a note within fifteen days declaring that said drugs are required in evidence against third parties.

C. <u>The Criminal Court`s considerations regarding Punishment</u>

6. The first court made the following considerations as regards punishment:

" ... That in this case the amount of drugs found in the possession of the accused was substantial, the accused facing charges of conspiracy, importation and drug trafficking for two separate consignments which took place in April and June of this year, although they were only apprehended during the second consignment in June. In fact according to court appointed expert pharmacist Godwin Sammut the 9.1 kilogrammes of cocaine found in the possession of accused and which was to be trafficked in the Maltese market had an average level of purity of 55%, the accused admitting to a further importation of five kilogrammes of cocaine and one kilogramme of cannabis during the April consignment. This latter consignment although being monitored by the Drug Squad, did not however lead to any arrests, since according to Inspector Kevin Pulis investigations were still ongoing at the time and therefore this consignment was unfortunately not intercepeted by the Police and therefore ended up in the Maltese drug market. Although there is no indication as to the type of drug imported in

April or the quantity thereof, however, as already pointed out the accused himself Johnny Haest indicates that the consignment was of about five kilogrammes of the drug cocaine, and one kilogramme of cannabis. For this consignment the accused pocketed a total of €10000, a similar amount was to have been recieved for the June consignment had they not been apprehended.

"Although it is not being contested that the role played by both the accused was that of drug couriers, their partecipation, therefore being limited to the acutal transportation of drugs from their place of origin to the traffickers in Malta, however the Court cannot ignore the fact that they both accepted to participate in this drug chain in full knowledge that their actions were illegal and that they were accepting to transport drugs for onward trafficking. The remuneration for services rendered by them was not negligible having as already pointed out cashed the amount of €10000, and were about to pocket a further €10000.

"Now it is true that both accused fully co-operated with the police to the extent that they are to benefit from the effects of Section 29 of Chapter 101 of the Laws of Malta to its maximum meaning by two degrees, since the information given by them to the police has led to the apprehension and prosecution of third parties involved in this drug chain. It is also true that the accused were enticed into commiting the crimes with which they are being accused in order to have sufficient funds for accused Donckers to be able to receive life-saving treatment for her serious medical condition. This, however, in the opinion of this Court is not a sufficient reason at law for them to benefit from a further reduction in punishment.

"The Court cannot ignore the fact that both accused on two separate occasions had agreed to transport dangerous drugs into Malta and this in large quantities, without taking into account the damage to be inflicted on Maltese society, mainly young people who are led into drug addiction and will therefore find the drug readily available for sale on the market thanks to people like accused who for their own personal gain agree to bring drugs to Malta. This Court cannot agree with submissions by the defence that the role played by the accused in this drug chain was a lesser one within the parametres laid out in the the Fourth Schedule to the Dangerous Drugs Ordinance, the level of partecipation of both the accused was in fact a significant one in that they were "motivated by the prospect of financial or other advantage,

irrespective of whether the accused was acting alone or with others" and that they "appeared to be aware and to understand the scale of the operation", with the high level of purity of the drug being taken into consideration according to the said Schedule as an aggravating circumstance. That these guidelines established by law with regard to the discretion to be applied by the Attorney General when considering whether a person is to be tried by the inferior courts or the superior courts thus facing a heftier punishment, were based on the Drug Sentencing guidelines in the United Kingdom.

"Thus in considering the punishment to be inflicted the Court will take into consideration the following aggravating circumstances :

"1. The amount of drugs involved being 9.1 kilogrammes of cocaine in June 2017, together with around 5 kilogrammes of cocaine and one kilo of cannabis in the April 2017 consignment bringing a total of around 14 kilogrammes of cocaine together with the kilogramme of cannabis.

"2. The significant role played by the accused in this drug chain, being fully aware of their partecipation and having the intention of making a financial gain of €20000 of which €10000 had already been received.

"3. This was not an isolated incident, having admitted to transporting drugs to Malta on two separate occasions.

"4. The high purity of the drug relating to the second consignment being that of 55%.

"The Court will also take into account the following mitigating circumstances :

"1. The voluntary assistance of both the accused in the investigations leading to the apprehension and prosecution of third parties involved in the drug chain, thus leading to the application of section 29 of Chapter 101 of the Laws of Malta by two degrees.

"2. Their early admission of guilt upon arraignment.

"Now the punishment for the offences with which Haest and Donckers are being accused of carry a term of imprisonment for life. However in the circumstances of this case, the Court deems that the punishment of life imprisonment would not be appropriate and this when taking into account the mitigating circumstances surrounding the facts in issue, and most notably the early admission of guilt by the accused and their full co-operation in the investigations triggering the application of Section 29 of Chapter 101 by two degrees. The punishment however, cannot be meted out in its minimum taking into consideration the aggravating circumstances outlined above."

V. The Appeal

7. Having seen the application of appeal of the said Carine Rose-Marijke Donckers and Johnny Jos Haest filed on the 28th November 2017 wherein they requested this Court to vary the judgement of the Criminal Court by revoking it in that part where they were condemned to a term of imprisonment of nineteen (19) years, meting out instead a more appropriare punishment, and confirming the rest of the judgement.

VI. The Greviance

8. Having seen the greviance submitted by appellants whereby they submitted that :-

... the punishment meted out by the Criminal Court was manifestly disproportionate, taking in to account the circumstances of the case, particularly in the light of the applicants` early admission of guilt and full cooperation throughout the investigation carried out by the Police and during the course of the judicial proceedings.

VII. The Appellants` Reasons

9. Having seen the appellants` reasons in support of their greviance, which in substance are the following :-

1. That whereas the cooperation throughout the investigation was acknowledged in the judgement with the declaration that Article 29 of Chapter 101 of the Laws of Malta was to be applied, the early admission of guilt was not taken into consideration other than with a laconic mention in the final part of the judgement.

2. That by their admission of guilt at the first available opportunity, they set into motion the new procedure under Article 392B of the Criminal Code and reconfirmed their guilty plea before the Criminal Court entrusted to mete out the punishment in terms of the said Article 392B of Chapter 9.

3. That the nineteen (19) years of imprisionment meted out to each of the accused is towards the higher end of the spectrum of punishment which could have been meted out by the Court in the worst hypothesis.

4. That the punishment meted out does not effectively render justice to the accused in the light of the spirit of the Law in creating a benefit for those who register an early admission of guilt.

VIII. Oral submissions

A. The Appellants

10. Further to what was stated in the appeal application, the appellants made oral submissions through their counsel during the hearing of the 8th March 2018 where they detailed their greviances namely, (a) the manner how the charges were formulated, (b) the consideration given to the alleged crime of April 2017, (c) their role in the commission of the crime as per Schedule IV of Chapter 101 and (d) the spirit of the law vis a vis the reduction in punishment when a suspect collaborates with the authorities and justice.

11. They submitted that the punishment meted out sends the wrong message to persons who are inclined to register an early guilty plea and to collaborate with the authorities. After referring to the facts of the case, appellants stated that the application of article 392B of Chapter 9 was set in motion following their admission of guilt of all

charges against them before the Court of Magistrates (Malta) as a Court of Criminal Inquiry.

12. Appellants complain on the multiple charges which were brought against them. They submit that due to the manner how article 392B is drafted, if they decide to admit, they are bound to admit to all charges. In this case they had no option other than to admit to all twelve charges, despite the formulation of the charges.

13. Appellants accept that calculating the quantum of punishment is not an easy matter. They insist that the relevant provision which should find application by the Court is article 22 of Chapter 101 to the exclusion of article 31 of Chapter 9.

14. Appellants lay emphasis on the fact that once the first Court applied the proviso of article 22(2)(aa) of Chapter 101 to rule out life imprisonment as a punishment, their maximum punishment was that of 30 years imprisonment. Taking into account the application by a reduction of two degrees as per article 29 of Chapter 101 and also the application of article 17(b) of Chapter 9, the maximum punishment awardable was 24 years. Appellants complain that despite their very early guilty plea, the punishment meted out against them was that of 19 years imprisonment.

15. Appellants express their disappointment on the manner how their questioning was conducted before the Inquiring Magistrate prior to their arraignment. They extend their regret to the extent that they state that words were put into their mouth before the said Magistrate.

16. Appellants plead for a reduction in punishment because they allege that that they did not have any other option especially with regard to the charges arising from the incident of April 2017, even though they were accepting that by stating so much they were not challenging the admission.

17. Appellants submit that they would not be amiss if they were to plead to this Court for a reduction in punishment on the basis of the fact that

they were just couriers, not organisers or financers of the operation ; nor did they have any understanding of the scale of the operation.

B. The Attorney General

18. In his submissions, the Attorney General laid emphasis on the fact and the relative legal effect of appellants` admission to all charges without any reservation whatsoever.

19. The Attorney General acknowledges the fact that appellants did indeed register an early guilty plea, together with the fact that appellants did help the police in charging other persons, by giving their evidence. For their contribution, they did benefit from a reduction in punishment by two degrees, in accordance with article 29 of Chapter 101.

20. The Attorney General highlights the fact that when awarding punishment, the first Court did take all circumstances into consideration : both the mitigating and the aggravating circumstances.

21. The Attorney General questioned the maximum punishment of 24 years that appellants submitted to be applicable in this case.

22. According to the Attorney General, article 31 of Chapter 9 as amended in 2014 should apply in the sense that the maximum punishment in lieu of life imprisonment should be that of 40 years not 30 years with the application of the proviso to article 22(2)(aa) of Chapter 101.

23. The Attorney General submits that the greviances of the appellants are completely unfounded. The Criminal Court awarded a fair punishment after taking into account all aggravating and mitigating circumstances. And therefore the judgement as is should stand.

X. The Considerations of this Court

24. 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.

25. 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 law or in special circumstances where a revision of the punishment meted out is manifestly warranted (**The Republic of Malta v. Ahmed Bem Taher** : Court of Criminal Appeal : 6th October 2003)

26. The appellants felt aggrieved that in its considerations on the quantum of punishment, the Criminal Court did not take into account their early admission of guilt, even though they accept that the Court made what they described as *a laconic mention*.

27. This Court points out that when charges – whatever the number – are admitted, that unconditional admission – as was the case under scrutiny – means that the charges have been proved according to law. This is a clear and unequivocal point of law as results from article 392B(4) of the Criminal Code which provides that "The Criminal Court shall … after examining the submissions by the Attorney General and the accused relating to punishment, proceed to pass on the accused such sentence as would according to law be passed on an accused convicted of the offence".

28. Appellants` contention that they had no choice but to admit to all charges is totally unfounded. If the appellants wanted to admit to only one or some of the offences charged but not to the rest nothing whatsoever precluded them from admitting only to the charges they wanted to admit to. Then it would have been up to the prosecution to decide whether or not to accept any such partial admission on the part of the accused or insist that the trial should proceed.

29. Article 392B was designed to benefit all and sundry. This Court rejects any suggestion by appellants that article 392B is flawed. The use of "offence" in the singular in article 392B is of no consequence since it is a well established principle of interpretation as also enshrined in article 4(c) of the Interpretation Act Cap 249 that "words in the singular shall include the plural". The said article 392B is of benefit to both the prosecution and the defence since it is meant to expedite the proceedings when the accused admits to the charges at the very initial stages. It benefits the State for the reasons submitted by appellants themselves and it also benefits the appellants since not only the time frames of the trial are reduced considerably which leads to the celerity of the proceedings but also allows the accused to reap any eventual benefits of their guilty plea.

30. This Court disagrees with the appellants` assessment of the first Court`s exercise of its discretion when meting out punishment. In its considerations, the first Court highlighted appellants` early admission of guilt (*supra*) and this Court does not see anything "laconic" in the first court's reference. After all there are not so many different ways for the court to say that it took into consideration the accused's admission of guilt upon arraignment, and indeed the first court did not need to say more than that: being concise is a virtue not a vice.

31. The function of this Court is to determine whether the punishment of the first Court was excessive or not.

32. During the course of these appellate proceedings the parties made submissions on the mathematical basis of the quantum of punishment imposed by the first court.

33. In this respect reference is made to the judgement of this Court of the 25th August 2005 in re **The Republic of Malta v. Kandemir Meryem Nilgum and Kucuk Melek** which held:

> *"... the Criminal Court is not obliged to give detailed 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*** *[OUP (2003) at p 1546, para. D18.34].*

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

"This 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.

34. After having considered the submissions made before this Court by the parties regarding the provisions of law relevant to the quantum of punishment, this Court concludes that article 31 of Chapter 9 was applied correctly by the first Court even though no mention of the provision was made in the decision of the first Court regarding punishment. Article 31 of Chapter 9 is the only provision which regulates degrees of punishment, and how there is to be descent or ascent from one degree to another. The first Court did apply a reduction of two degrees in favour of the accused following the application of article 29 of Chapter 101 and therefore it must have necessarily applied article 31 of the Criminal Code which it was not obliged to expressly cite in its decision.

35. This Court further observes that while article 31 of Chapter 9 regulates the ascent and descent from degrees of punishment in general, it is article 22(2)(a)(i)(aa) of Chapter 101 which specifically regulates the margin of punishment, including the maximum, in cases relating to the charges that are the merit of this appeal. In accordance with that provision, the person convicted may be punished to a term of imprisonment of not less than four years but not exceeding thirty years and therefore the maxim – *lex specialis derogat legi generali* – is to prevail.

36. This Court therefore does not accept as valid at law the argument raised by appellants that in their case the maximum punishment awardable was 24 years imprisonment when taking into account (a) that the first Court set aside the punishment of life imprisonment (b) that the maximum punishment of 30 years was reduced to 12 years following the application by two degrees of article 29 of Chapter 101 and (c) the application of article 7(b) of Chapter 9.

37. When the law provides for a reduction of punishment of one or two degrees then the maximum degree of punishment is to be decreased by one degree while the minimum degree of punishment is to be decreased by two degrees. Taking into account that the first court found the accused guilty of a continuous offence[2], so much so it mentions two occasions in April 2017 and in June 2017, the

[2] Article 18 of the Criminal Code, also cited by the first court in its judgment in the part dealing with imposition of the punishment.

maximum punishment went up to 40 years imprisonment plus solitary confinement for not more than twelve terms[3]. As a result of article 29 of the Criminal Code the increase of punishment consisting in solitary confinement for not more than twelve terms is removed and this brings back the maximum punishment to 40 years imprisonment without any solitary confinement.

38. During submissions the apellants submitted that a "reduction" of only five (5) years is disproportionately low and that the "reduction" should have been higher. It should be immediately pointed out that the appellant's assumption that the "reduction" was of 5 years, the sentence of the first court being to imprisonment for 19 years, is based on the appellant's further assumption that the maximum was 24 years. As results from the above[4], both assumptions are wrong. The maximum punishment was of 40 years and therefore the "reduction" from the maximum was much greater than 5 years. What this court has to determine is whether the calibration of the punishment imposed by the first court, taking into account the applicable margin of punishment laid down in the law, was excessively harsh as to be inappropriate when one takes into consideration the appellants' early guilty plea.

39. In the course of his submissions for appellants, defence counsel remarked that the maximum punishment ever given in a "drugs case" was 25 years in re **The Republic of Malta v. Mark Charles Kenneth Stephens** decided by this Court – differently composed – on the 24th June 2010.

40. In the case of appellants, it was patently clear that the Criminal Court was of the view that life imprisonment was not the appropriate punishment. Therefore the starting point, as far as the custodial punishment was concerned, was of a maximum of 30 years. In their oral submissions, appellants imply that when the first Court awarded the 19 year punishment against them on the 12th July 2017, that Court was influenced by another judgment that had been given on that same date in re **The Republic of Malta vs Lorena Vanessa Hernandez Munoz et**.

41. On the question of the quantum of punishment given in other proceedings not related to the case of the appellants, **Archbold** in

[3] Article 31(1)(e) of the Criminal Code
[4] Paragraphs 36-37

Criminal Pleading, Evidence and Practice, 2009 (para. 5-106, p. 635) comments that :-

> *"The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see R. v. Large, 3 Cr.App.R.(S) 80, C.A.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see R. v. Stroud, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as R. v. Wood, 5 Cr.App.R.(S) 381. C.A., Fawcett, ante, and Broadbridge, ante. 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."*

42. This Court is of the same view and will therefore consider appellants` case on its merits.

43. Appellants argue that the punishment given by the Criminal Court was *manifestly disproportionate.*

44. In **Blackstone's Criminal Practice 2004**[5] it is stated that :

> *"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).*

[5] at page 1695, para D23.45

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."

45. This Court is of the view that the first Court adopted a fair and balanced approach to the determination of the punishment to be imposed on the appellants after having considered all the facts and circumstaces of the case. Furthermore the Court took also into account both aggravating and mitigating circumstances which were listed in its judgement, including in the case of the latter, the early guilty plea.

46. In its judgement of the 5th July 2002 in re **Ir-Repubblika ta' Malta v. Mario Camilleri** this Court - differently composed – remarked that :-

"l-ammissjoni bikrija mhux bilfors jew dejjem, jew b'xi forma ta' dritt jew awtomatikament, tissarraf f'riduzzjoni fil-piena".

47. The principles that have guided these Courts when there is a guilty plea have been articulated by the Criminal Court in its preliminary judgement **Ir-Repubblika ta' Malta v. Nicholas Azzopardi** decided on the 24th February 1997 and the judgement of the Court of Criminal Appeal (Inferior Jurisdiction) in its judgement **Il-Pulizija vs. Emmanuel Testa** decided on the 17th July 2002. In the

latter case reference was made to an excerpt from **Blackstone's Criminal Practice, 2001**, para. E1.18, p.1789, to the effect that:-

"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 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 [1999] 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 (1988) 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) 82 Cr App R (S) 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 facts at odds with that put forward by the prosecution, requiring the court to conduct an enquiry 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 might 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 had been caught red-handed and a plea of guilty was practically certain. It was also established in Costen that the discount may be reduced where the accused pleads guilty to specimen counts."

48. Today in the United Kingdom, guidelines have been issued by the Sentencing Guidelines Council.

49. In a judgement dated 19th February 2004 in re **Ir-Repubblika ta' Malta v. Basam Mohamed Gaballa Ben Khial**, this Court - differently composed – made these observation :-

"fejn si tratta ta' traffikar tad-droga (inkluża importazzjoni) l-element tad-deterrent ġenerali fil-piena hija konsiderazzjoni ewlenija li kull Qorti ta' Ġustizzja Kriminali għandha żżomm f'moħħa fil-għoti tal-piena, basta, s'intendi, li jkun hemm element ta' proporzjonalita` bejn il-fattispeċi partikolari tal-każ u l-piena erogata"

50. In a judgement of the 16th October 2003 in re **Ir-Repubblika ta' Malta v. Thafer Idris Gaballah Salem**, it was further affirmed that :

"Ma hemmx dubbju li l-element ta' deterrent, speċjalment fil-każ ta' reati premeditati (a differenza ta' dawk li jiġu kommessi "on the spur of the moment") hi konsiderazzjoni leġittima li Qorti tista', u ħafna drabi għandha, iżżomm quddiem għajnejha fil-għoti tal-piena .... S'intendi, hemm dejjem l-element tal-proporzjonalita`: qorti ma tistax, bl-iskuża tad-"deterrent", tagħti piena li ma tkunx ġustifikata fuq il-fatti li jirriżultaw mill-provi."

51. The punishment awarded in this case is well within the parameters set out by law and this Court is also of the considered opinion that the punishment imposed on the accused is fair and reasonable taking into account all facts and circumstances of the case, including the reasons given by the first Court in support of the punishment imposed, amongst which the appellants' early guilty plea, concerning which it expressly stated "*That in considering the punishment to be inflicted, therefore, in this case, the Court will take into consideration first and foremost the guilty plea filed by accused at the outset of the proceedings*".

52. This Court must underline that the appellants as *drug mules* were paid the sum of EUR 10,000 (out of a promised figure of EUR 20,000) to import into Malta 5 kilos of cocaine and one kilo of

cannabis in April 2017 and 9.1 kilos of cocaine in June 2017. The cocaine of the second delivery had a purity marker of 55% which is objectively high. The repeated offences committed by appellants were very serious, and therefore punishment must reflect the gravity of the offences and of their circumstances.

53. When considering all factors, this Court is of the view that the punishment imposed by the Criminal Court is neither wrong in principle nor manifestly excessive, that it is proportional to the circumstances of the case, and therefore a fit and proper one. It therefore finds no reason to disturb the Criminal Court's discretion in determining the quantum of punishment.

For these reasons the Court dismisses the appeal and confirms the appealed judgement in its entirety, save that the fifteen day period within which the Attorney General is to declare whether the dangerous drugs or objects related to the abuse of drugs are required in evidence against third parties shall commence from today.

Hon. Chief Justice Silvio Camilleri – President

Hon. Madam Justice Abigail Lofaro

Hon. Mr. Justice Joseph Zammit McKeon