



MALTA

CRIMINAL COURT

**HON. MR. JUSTICE
JOSEPH GALEA DEBONO**

Sitting of the 27 th May, 2004

Number 3/2004

The Republic of Malta

Vs

Gregory Robert Eyre

And

Susan Jayne Molyneaux

The Court,

Having seen the bill of indictment no. 03/2004 against the accused Gregory Robert Eyre and Susan Jayne Molyneaux wherein they were charged with:

1) After the Attorney General premised in the First Count of the Bill of Indictment that from investigations conducted by the Malta Police, in the light of a tip-off to the effect that a couple arriving on a transit flight from Spain were planning to bring in drugs some time in August, two thousand and three, there began to emerge a clear

picture in which it resulted that indeed, during the period of a number of weeks prior to the 11th August, 2003, Gregory Eyre and Susan Molyneaux had conspired and agreed between them, together with another unknown person abroad who had been exporting drugs to Malta every month for the last fifteen years, to involve themselves in dealing in, and trafficking in drugs.

That not only had they agreed, but they had also concurred on the means to be employed in the realization of said conspiracy. The means to be employed were quite simple: Eyre had to call in an apartment in a complex in Spain, take hold of a luggage in which were concealed drugs, destined for someone who lived in Saint Julians, get paid, go back to Spain and deliver the money to said unknown person. For all his involvement, Gregory Eyre was to be paid a twenty thousand Sterling commission in Spain on August seventeenth, and a two thousand Maltese Liri in commission by the Maltese buyer and some spending money. On her part, Susan Molyneaux, Eyre's girlfriend, had to accompany him to Malta so that he would look less suspicious, although she did not specifically know that drugs were to be imported illegally into Malta, but merely thought and was convinced that something against the law was to be imported into Malta (such as money in order to evade tax on currency).

That by committing the above mentioned acts with criminal intent, Gregory Eyre and Susan Molyneaux rendered themselves guilty of conspiracy to trafficking in dangerous drugs in breach of the provisions of the Dangerous Drugs Ordinance, and the Medical and Kindred Professions Ordinance.

Wherefore, the Attorney General, in his aforesaid capacity, accused Gregory Robert Eyre and Susan Jayne Molyneaux of being guilty of having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and the Medical and Kindred Professions Ordinance (Chapter 31), and specifically of

importing and dealing in any manner in cocaine and Ecstasy Pills, and of having promoted, constituted, organized and financed such conspiracy.

Demanded that the accused be proceeded against according to law, and that each one of them be sentenced to the punishment of imprisonment for life and to a fine of not less than one thousand Maltese Liri (Lm1000), and of not more than fifty thousand Maltese Liri (Lm50,000), and the forfeiture in favour of the Government of the entire moneys, immovable and movable property in which the offence took place as described in the bill of indictment, even if such moneys and property would have passed into the hands of third parties, and even if the said moneys, movable property or immovable property are situated in any place outside Malta, as is stipulated and laid down in sections 9, 10(1), 12, 14(1)(5), 15A, 20, 22(1)(a)(f)(1A)(1B)(2)(a)(l)(3A)(c)(d), 22(f) and 26(1)(2) of the Dangerous Drugs Ordinance (Chap.101), together with sections 120A(2)(a)(l), 2(A)(2B) AND 121A(1)(2) of Chapter 31, and in sections 17(b), 20, 22, 23 and 533 of the Criminal Code, including the issue of a Removal Order with respect to accused in terms of sections 5(2)(b) and 15 of the Immigration Act, or to any other punishment applicable according to law to the declaration of guilty of the accused.

2) And after the Attorney General premised in the Second Count of the Bill of Indictment that on Monday, the eleventh of August of the year two thousand and three, Gregory Eyre and Susan Molyneaux arrived in Malta from Spain. With him, that is to say Gregory Eyre, and well hidden in a suitcase he was carrying, there were two packets of substance, having the appearance of gift-wrapped packages, later analysed to be cocaine, with a net weight of over three kilogrammes and a high percentage of purity.

That an unknown person in Spain had himself hidden the cocaine in that manner while still in Spain. On the day in question, and during the last preceding days, Gregory Eyre and Susan Molyneaux had meant to import and

bring into Malta, that amount of cocaine in order that it be passed on to third persons in Malta with the aim of selling and dealing in it locally.

That cocaine is a dangerous drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance. Neither of Gregory Eyre and Susan Molyneaux was in possession of any valid and subsisting import authorization granted in pursuance of said law.

That by committing the above mentioned acts with criminal intent, Gregory Eyre and Susan Molyneaux rendered themselves guilty of the importation of a dangerous drug into Malta.

Wherefore, the Attorney General, in his aforesaid capacity, accused each of Gregory Robert Eyre and Susan Jayne Molyneaux of being guilty of meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drug Ordinance, when neither was in possession of any valid and subsisting import authorization granted in pursuance of said law.

Demanded that each of the accused be proceeded against according to law, and that he and she be sentenced to the punishment of imprisonment for life and to a fine of not less than one thousand Maltese Liri (Lm1000) , and of not more than fifty thousand Maltese Liri (Lm50,000), and the forfeiture in favour of the Government of the entire moneys, immovable and movable property in which the offence took place as described in the bill of indictment, even if such moneys and property would have passed into the hands of third parties, and even if the said moneys, movable property or immovable property are situated in any place outside Malta, as is stipulated and laid down in sections 2(1), 4, 9, 10, 12, 14, 15A, 20, 22(1)(a)(1B)(2)(ai)(3A)(d), 22E and 26(1)(2) of the Dangerous Drugs Ordinance (Chap.101) and in sections 23, 17(b) and 533 of the Criminal Code,

including the issue of a Removal Order with respect to accused in terms of sections 5(2)(b) and 15 of the Immigration Act, or to any other punishment applicable according to law to the declaration of guilty of the accused.

3) And after having premised in the third Count of the Bill of Indictment that on Monday, the eleventh of August of the year two thousand and three, Gregory Eyre and Susan Molyneaux arrived in Malta from Spain. With him, that is to say Gregory Eyre, and well hidden in a suitcase he was carrying, there were two packets of substance, having the appearance of gift-wrapped packages, later analysed to be the designer drug Ecstasy Pills, with a net amount of seven thousand and one hundred pills.

That an unknown person in Spain had himself hidden the Ecstasy Pills in that manner while still in Spain. On the day in question, and during the last preceding days, Gregory Eyre and Susan Molyneaux had meant to import and bring into Malta, that amount of Ecstasy Pills in order that they be passed on to third persons in Malta with the aim of selling and dealing them locally.

That Ecstasy Pills, or rather the designer drug known as MDMA (methylenedioxymethamphetamine), are a dangerous drug restricted and controlled under the provisions of Part A, Third Schedule, of the Medical and Kindred Professions Ordinance. Neither of Gregory Eyre and Susan Molyneaux was in possession of any valid and subsisting import authorization granted in pursuance of said law.

That by committing the above mentioned acts with criminal intent, Gregory Robert Eyre and Susan Molyneaux rendered themselves guilty of the importation of a dangerous drug into Malta.

Wherefore, the Attorney General, in his aforesaid capacity, accused each of Gregory Robert Eyre and Susan Jayne Molyneaux of being guilty of meaning to bring or causing to be brought into Malta in any manner

whatsoever a dangerous drug (Ecstasy), being a drug restricted and controlled under the provisions of Part A, Third Schedule, of the Medical and Kindred Professions Ordinance, when neither was in possession of any valid and subsisting import authorization granted in pursuance of said law.

Demanded that each of the accused be proceeded against according to law, and that he and she be sentenced to the punishment of imprisonment for life and to a fine of not less than one thousand Maltese Liri (Lm1000) , and of not more than fifty thousand Maltese Liri (Lm50,000), and the forfeiture in favour of the Government of the entire moneys, immovable and movable property in which the offence took place as described in the bill of indictment, even if such moneys and property would have passed into the hands of third parties, and even if the said moneys, movable property or immovable property are situated in any place outside Malta, as is stipulated and laid down in sections 2(1), 120A(2)(a)(I), (2A)(2B), and 121A(1)(2) of Chapter 31, and in sections 17(h), 20, 22, 23 and 533 of the Criminal Code, including the issue of a Removal Order with respect to accused in terms of sections 5(2)(b) and 15 of the Immigration Act, or to any other punishment applicable according to law to the declaration of guilty of the accused.

4) And after having premised in the Fourth Count of the Bill of Indictment that having, on the 11th August, 2003, and on the days preceding that date, imported into Malta the dangerous drug cocaine in breach of the provisions of Chapter 101 of the Laws of Malta, as described under the second count, Gregory Eyre was immediately shadowed and monitored by the Malta Police, even because the latter had every reasonable suspicion that he was not acting alone in the importation and trafficking of drugs.

Thus, as soon as Gregory Eyre entered the arrivals building at the Malta International Airport, he checked in at the Immigration desk on his own and, thereafter, his

luggage was opened with drugs being found in a suitcase which Eyre told police was his.

Blocks of cocaine (three kilos in weight in all) were found in the luggage of Gregory Eyre.

That it became obvious, now, that Gregory Eyre was in possession and in control of the dangerous substance cocaine under such circumstances denoting that such possession and control was not for his exclusive use, event because it resulted that this drug was destined to be handed over for dealing to someone in Saint Julians.

That cocaine is a dangerous drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance. Gregory Eyre was not in possession of any valid and subsisting import or possession authorization granted in pursuance of said law.

That by committing the above mentioned acts with criminal intent, Gregory Eyre rendered himself guilty of the offence of possession of a dangerous drug (cocaine) with intent to supply.

Wherefore, the Attorney General, in his aforesaid capacity, accused Gregory Robert Eyre of being guilty of knowingly having been in possession of a dangerous drug (cocaine) specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance, when not in possession of any valid and subsisting import or possession authorization granted in pursuance of said law; so, however, that such offence was under such circumstances that such possession was not for the exclusive use of the offender.

Demanded that the accused be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to a fine of not less than one thousand Maltese Liri (Lm1000), and of not more than fifty thousand Maltese Liri (Lm50,000), and the forfeiture in favour of the Government of the entire

moneys, immovable and movable property in which the offence took place as described in the bill of indictment, even if such moneys and property would have passed into the hands of third parties, and even if the said moneys, movable property or immovable property are situated in any place outside Malta, as is stipulated and laid down in sections 2(1), 4, 9, 10, 12, 14, 15A, 20 22(1)(a)(1B)(2)(a)(i)(3A)(d), 22E and 26(1)(2) of the Dangerous Drugs Ordinance (Chap.101) and Regulation 8 of the 1939 Regulations for the Internal Control of Dangerous Drugs (Legal Notice 292/39), and in sections 20, 22, 23, 17(b) and 533 of the Criminal Code, including the issue of a Removal Order with respect to accused in terms of sections 5(2)(b) and 15 of the Immigration Act, or to any other punishment applicable according to law to the declaration of guilty of the accused.

5) That after having premised in the Fifth count of the Bill of Indictment that always as a result of the stopping and search effected by the Police on the 11th August, 2003, at the Malta International Airport and on the person and effects of Gregory Eyre, the latter was found to be knowingly in possession of some seven thousand and one hundred Ecstasy Pills. Again, as with regard to cocaine, these Pills were destined to be handed over to someone in Saint Julians immediately upon his existing the International Airport.

That ecstasy Pills, or rather the designer drug known as MDMA (methylenedioxymethamphetamine), are a dangerous drug restricted and controlled under the provisions of Part A, Third Schedule, of the Medical and Kindred Professions Ordinance. Gregory Eyre was in possession of any valid and subsisting import authorization granted in pursuance of said law.

That by committing the above mentioned acts with criminal intent, Gregory Eyre rendered himself guilty of the offence of possession of a dangerous drug (Ecstasy Pills), with intent to supply.

Wherefore, the Attorney General, in his aforesaid capacity, accused Gregory Robert Eyre of being guilty of knowingly having been in possession of a dangerous drug (Ecstasy Pills) being a drug restricted and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance, when neither was in possession of any valid and subsisting import or possession authorization granted in pursuance of said law; so, however, that such offence was under such circumstances that such possession was not for the exclusive use of the offender.

Demanded that the accused be proceeded against according to law, and that each one of them be sentenced to the punishment of imprisonment for life and to a fine of not less than one thousand Maltese Liri (Lm1000), and of not more than fifty thousand Maltese Liri (Lm50,000), and the forfeiture in favour of the Government of the entire moneys, immovable and movable property in which the offence took place as described in the bill of indictment, even if such moneys and property would have passed into the hands of third parties, and even if the said moneys, movable property or immovable property are situated in any place outside Malta, as is stipulated and laid down in sections 120A(2)(a)(I), (2A)(2B), and 121A(1)(2), and 120A(1)(f)(2)(a)(I) of the Medical and Kindred Professions Ordinance, Chapter 31, and in Legal Notices 22/85 (regulation 10(2)), 70/88 and 183/99, as well as in sections 22A, 22B, 22E, 27, 28, and 30 of the Dangerous Drug Ordinance, Chapter 101, and in sections 17(b), 20, 22, 23 and 533 of the Criminal Code, including the issue of a Removal Order with respect to accused in terms of sections 5(2)(b) and 15 of the Immigration Act, or to any other punishment applicable according to law to the declaration of guilty of the accused.

That on being served with the said Bill of Indictment accused Gregory Robert Eyre limited himself to filing a list of witnesses whereas accused Susan Jayne Molyneaux by means of a note filed on the 2nd. April,

2004 , raised a number of preliminary pleas and in particular the fourth and fifth pleas which state:-

“ 4. In view of the fact that the Attorney General in the narrative part of the first count of the Bill of Indictment excludes the accused Susan Jayne Molyneaux from any responsibility , partially since it is therein stated , that she did not specifically know that the drugs were to be imported illegally into Malta, but states, that she “merely thought and was convinced that something against the law was to be imported into Malta [such as money in order to evade tax on currency]” , should the Attorney General be contending that such tantamounts to criminal liability and responsibility , any such disposition which may be quoted by the Attorney General in this regard , is null and void as it runs counter to the basic principles of justice and the provisions of the Constitution of Malta and the European Convention on Human Rights.”

“5. That for reasons mentioned in plea number 3 , the plea mentioned in paragraph 4 supra is also applicable to the second and third counts of the Bill of Indictment.”

Having seen the minute entered in the records of the case in the course of the sitting of the 14th. April, 2004, whereby :-

the Prosecution and the Defence agreed that in view of the above two pleas raised by accused Molyneaux , it was expedient that at this stage the Court hears submissions on the alleged breach of human rights implied therein.

Dr. Mark Said for the Prosecution submitted that the defence of the accused Molyneaux should indicate the specific provisions of the Constitution of Malta and of the European Convention of Human Rights which section 26 (2) of Chapter 101 is being claimed to infringe.

The Court directed Defence Counsel to indicate the provisions in a note of submissions which should be filed within fifteen days , possibly citing the relative

legal authority and case law in support of these pleas. The Prosecution was to file its own note of submissions within 15 days from the date when it was served with the note of submissions of the Defence.

Having seen its Decree dated 27th. April, 2004 whereby it extended the time limit within which the defence was to file its note of submissions until the 15th. May, 2004 ;

Having heard the oral submissions of the Prosecution and the Defence in the course of the same sitting;

Having seen the note of submissions filed by the accused on the 14th. May, 2004 ;

Having seen the note of submissions of the Prosecution filed on the 18th. May, 2004;

Having heard further oral submissions in the course of today's sitting;

Considered that ;

At this stage this Court is being called upon to decide whether these pleas in so far as they raise directly or indirectly a question of breach of human rights protected under section 39 of the Constitution of Malta or Fundamental Rights and Freedoms enshrined in the European Convention of Human Rights as defined in Chapter 319 of the Laws of Malta and in particular Article 6, should be referred to the Civil Court, First Hall in terms of section 46 (3) of said Constitution and/or Section 4 (3) of Chapter 319, or else whether the raising of such an issue is merely frivolous or vexatious.

From the oral and written pleadings it is clear that the accused Molyneaux is pleading that as the Attorney General himself in the First Count of the Bill of Indictment is stating that *“she did not specifically know that drugs were to be illegally imported into Malta, but merely thought and was convinced that something against the*

law was to be imported into Malta [such as money in order to evade tax on currency] “, he is basing her guilt on the provision of Section 26(2) of Chapter 101.

The Prosecution does not contest this.

This sub-section of the law which was introduced by an amendment contained in Act VI of 1994 under the heading “burden of proof” in substance states that when an offence against the Ordinance is that of possession, of selling, or dealing in a drug, the accused may not avail himself of the defence that he believed he was carrying a thing other than the drug indicated in the charge, if it results that the possession, sale or dealing in the article he believed to possess, would have been in breach not only necessarily of the Ordinance , but also of any other law.

The accused submits that this provision of the law leaves an accused person in a situation where, even if he is fooled into thinking that he is not dealing in or carrying drugs or has no knowledge that he is in possession of a drug, he would still be convicted of possession or trafficking in that particular drug and this even if a third party had to admit on oath that he was responsible for the deception and that the person accused was totally oblivious of the fact that he was dealing in or carrying drugs and such evidence would still be of no avail to him under Section 26 (2) . This means that the accused not only finds himself in the situation that the burden of proof to exculpate himself lies on him but that he is also denied a defence which would otherwise , if believed , lead to his acquittal. This would appear to be in conflict with local case law which holds that for the crime of possession to subsist the accused must at least be aware that he was in possession of the drug in question and that the proof that he was not so aware lies with accused. However section 26(2) in fact denies the accused the possibility of raising such a defence and does not afford the accused with an opportunity to present his case.

The accused further submits that although the proviso to Section 39 (5) of the Constitution of Malta makes it constitutionally possible and lawful for the burden of proof to be shifted onto the accused as is the case with Section 26 (2) of Chapter 101, this peculiar departure from the rule is possible as long as the shift in the burden of proof leads to a rebuttable presumption of fact and not of guilt. If it is a shift in the presumption of guilt, then it will not be in conformity with the Constitution. According to this section of the law not only does the accused have to bear the onus of proof, but his line of defence is being so manifestly limited that it is inadmissible for him or for her to show that she believed she was carrying another "thing". Accordingly this section will seriously prejudice accused's fundamental human right to a fair hearing. In fact she is being denied a defence to prove her innocence regardless of her intentions, which could lead to her acquittal of charges under Chapter 101.

The Prosecution rebuts by stating that presumptions of fact or of law operate in every legal system and the Convention does not prohibit such presumptions in principle. It does however require the contracting states to remain within certain limits as regards criminal law. Article 6 (2) does not regard presumptions of fact or of law provided in the criminal law with indifference but requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. While it agrees that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary, the principle of proportionality must be observed. In serious drug cases, such proportionality is strictly observed and has been so observed with regard to Section 26. According to case law of the European Court of Human Rights it is accepted that not all provisions offend against article 6 and each provision should be considered on its own merits according to the test of proportionality. Applying the proportionality test to the facts of the present case, it would appear manifest that accused's conduct in her preliminary note of pleas, as well as in the raising of the constitutional question, is not

merely to create a defence but intended to undermine the intent of Parliament to punish and deter drug smuggling. This non-controversial public policy outweighs the policy against reverse legal burdens. This case shows that the proportionality test does indeed dictate different results in different cases, depending on the seriousness of the offence and the underlying public policy in convicting and deterring offenders.

The Court has given serious consideration to these submissions and to the case-law of the European Court of Human Rights and other foreign judgements quoted by the Prosecution and the Defence and in particular to the principles laid down in “**SALABAIKU vs. FRANCE**” [7.10.1988] (Series A no. 141-A;(1991); 13 EHRR – 379) where the notion of “**PROPORTIONALITY**” between presumptions of fact or of law provided in the criminal law and the presumption of innocence of the accused was developed. Without expressing its own considered opinions and convictions on the matter and on the validity of the arguments put forward by the Prosecution and the Defence at this stage, this Court cannot but feel that the matter at issue is certainly one of considerable relevance and importance and one that merits serious consideration and study by the competent Court. There is no doubt that the Prosecution, whilst granting that accused Molyneaux was **not** specifically aware that drugs were to be imported illegally into Malta, is at the same time seeking a conviction for conspiracy and importation of prohibited drugs by relying on the provisions of section 26 (2). Hence the question of whether this presumption of guilt contained in said section is *proportional* or not and, if not, whether it prejudices accused’s right to a fair trial under a system which respects the other principle of “*equality of arms*” between Prosecution and Defence, is certainly not one of a frivolous or vexatious nature.

Accordingly, the Court, having seen Sections 46 (3) of the Constitution of Malta and 4 (3) of Chapter 319, refers the issue raised in the fourth and fifth pleas of accused Susan Jayne Molyneaux, in so far as they can be construed to imply that Section 26(2) of Chapter 101 of

Informal Copy of Judgement

the Laws of Malta is in breach of Section 39 of the Constitution of Malta and Article 6 of the European Convention of Human Rights , to the Civil Court, First Hall to be determined according to law.

The case is being adjourned “*sine die*” until the constitutional issue in question has been definitively settled by the competent Court. In the meantime both accused are to remain in their present respective situation with regards to preventive arrest and bail.

< Final Judgement >

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