MALTA

COURT OF CRIMINAL APPEAL

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

HON. MR. JUSTICE
DAVID SCICLUNA

HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 14 th June, 2007

Number 18/2006

The Republic of Malta

v.

Kamil Kurucu

The Court:

Having seen the bill of indictment filed by the Attorney General in the Criminal Court on the 24th July 2006 against Kamil Kurucu whereby he accused the said Kamil Kurucu of having: (1) with another one or more persons in Malta, and outside Malta, conspired for the purpose of

committing an offence in violation of the law and specifically the offence of dealing illegally in any manner in ecstasy pills and of having promoted, constituted, organized and financed such conspiracy; (2) meant to bring or caused to be brought into Malta in any manner whatsoever a dangerous drug (ecstasy), in breach of the law; (3) knowingly been in possession of a dangerous drug (ecstasy pills) in breach of the law and under such circumstances that such possession was not for his exclusive use;

Having seen the judgement delivered by the Criminal Court on the 11th December 2006 whereby said Court, pursuant to a guilty plea entered by Kamil Kurucu to all the charges preferred against him, in which plea he persisted even after he was warned by that Court in the most solemn manner of the legal consequences of such statement and was given a short time to retract it, declared the said Kamil Kurucu guilty under all three counts in the bill of indictment, sentenced him to a term of imprisonment of twelve years and to a fine *multa* of twelve thousand Maltese liri (Lm12,000) which fine will be automatically converted into a further term of imprisonment of eighteen months if not paid within fifteen days from the date of said judgement, and further ordered him to pay the sum of eight hundred and three Maltese liri and seventyone cents (Lm803.71), representing the Court experts' fees, within fifteen days from the date of same judgement. The Criminal Court also ordered that all objects related to the offences and all monies and other movable and immovable property pertaining to the said Kamil Kurucu be confiscated in favour of the Government of Malta, and that the drugs be destroyed under the direct supervision of that Court's Deputy Registrar duly assisted by Court expert Godwin Sammut, unless the Attorney General informed the Court within fifteen days from the date of that judgement that the drugs were to be preserved for the purposes of other criminal proceedings against third parties and, for this purpose, the Deputy Registrar was to enter a minute in the records of the case detailing the destruction of said drugs;

Having seen that the Criminal Court arrived at its decision after it had considered the following:

"Having seen the minute entered by Prosecution and Defence Counsel whereby they declared that, for purposes of punishment, the charges contained under the first and second counts of the Bill of Indictment should be absorbed in the charge under the Third Count in terms of Section 17(h) of the Criminal Code;

"Having heard the evidence of Inspector Nezren Grixti and Catherine Kurucu, summoned to testify by the defence on the plea in mitigation;

"Having heard submissions of Defence Counsel regarding the plea in mitigation of punishment;

"Having considered ALL submissions made by defence counsel which are duly recorded and in particular – but not only – the following, namely that the convicted person should benefit from any reduction in punishment as contemplated in Section 29 of Chapter 101 of the Laws of Malta as rendered applicable to the offences under Chapter 31 by virtue of section 120A(2B) of Chapter 31 and this because of the full co-operation he extended to the police in the course of the investigation, where he provided all the information regarding the person who sent him from abroad by the name of Yasar and regarding the phone call he was meant to receive on his mobile phone telling him to whom he had to deliver the drug in Malta, as resulted also from the convicted person's statement to the police. He also handed over his mobile phone to the police who could have taken up the matter from then onwards;

"In addition from the four finger prints lifted by the police from the container of the pills, which did not match those of the convicted person, the Police could eventually have been able to match these with those of the person who had given the drugs to accused in Turkey;

"Having considered the submissions made by prosecuting counsel, namely that no proceedings could be taken against third parties as a result of the information given by the convicted person to the police, as no person could be identified as a result of that information. Therefore the convicted person could not benefit from any reduction of punishment under section 29 of Chapter 101 as rendered applicable to Chapter 31 of the Laws of Malta;

"Prosecuting Counsel also stressed that in this case a considerable quantity of ecstasy pills was involved, which at a value of five Malta Pounds (LM5) per pill, added up to a total value of some fifty thousand Malta Pounds (LM50,000). It was also of significance to the Prosecution that on the convicted person's previous five visits to Malta between the 11th. March, 2004 and the 28th February, 2005, he had always stayed in expensive hotel accommodation and not in his then girlfriend's house, when he himself admitted in his statement that he had big financial problems;

"On the other hand however, the Prosecution agreed that the convicted person should benefit from his early declaration of guilt. The Prosecution was therefore requesting the Court to sentence him to a minimum of twelve years imprisonment in lieu of a life sentence, in addition to any fine (multa) the Court would be imposing according to law;

"Having seen that the offences under the first and second counts of the Bill of Indictment are, for purposes of punishment, to be considered as having served as a means for the commission of the offence under the third count of the Bill of Indictment, for the purpose of and according to Section 17(h) of Chapter 9 of the Laws of Malta (vide "**Ir-Repubblika ta' Malta vs. Mansour Muftah Nagem**" [30.10.2002] ; "**Ir-Repubblika ta' Malta vs. Ahmed Esawi Mohamed Fakri**" and others);

"Having considered that the punishment laid down by law for the offences of which the convicted person has been declared guilty is imprisonment for life together with a fine *multa* of not less than LM1000 and not more than LM50000;

"Having also considered however that according to section 492(1) of the Criminal Code, whenever, at any stage prior to the empanelling of the jury, the accused pleads guilty to an offence attracting the punishment of life imprisonment, the Court may, instead of said punishment, award a sentence of imprisonment for a period ranging between eighteen and thirty years;

"Having also considered that according to the proviso (aa) of section 120A(2)(a)(i) of Chap. 31 of the Laws of Malta, when the Court is of the opinion that, having regard to the offender's age, his previous conduct, the quantity of the medicine and the quality of the equipment or material involved and all the other circumstances of the offence, life imprisonment is not warranted, the Court may sentence the person so convicted to a term of imprisonment of not less than four years and not more than thirty years together with the fine above mentioned;

"Having considered the convicted person's clean criminal conduct sheet at least in Malta;

"Having considered both local and foreign case law regarding the plea in mitigation of punishment when the accused person files an early plea of guilt and in particular "**Ir-Repubblika ta' Malta vs. Nicholas Azzopardi**" [24.2.1997] (Criminal Court); "**Ir-Repubblika ta' Malta vs. Mario Camilleri**" [5.7.2002] (Court of Criminal Appeal); "**Il-Pulizija vs. Emmanuel Testa"** [17.7.2002] (Court of Criminal Appeal) and others) as well as **BLACKSTONE'S**

CRIMINAL PRACTICE (Blackstone Press Limited 2001 edit);

"On the other hand having considered that, as stated in BLACKSTONE'S,
"Where an offender has been caught red handed and a guilty plea is inevitable, any discount may be reduced or lost (*Morris* [1998] 10 Cr. App. R. (S) 216; *Landy* [1995] 16 Cr. App. R. (S) 908)";
"Having considered that from the evidence tendered by Inspector Nezren Grixti it resulted that the only details given by the convicted person regarding the person from whom he had obtained the drugs were that his name was YASAR, *"who may live somewhere* (Sic!) *at Tarlabasi at Taksim in Istanbul. He is about fifty years of age and normally he is always found in a certain restaurant by name* (Sic!) *of Asmalimescit.."* and that this information did not lead to the identification of this Yasar or of any potential consignee of the drugs in Malta. The Inspector also testified that convicted person's mobile phone had been turned off by a police officer and that no call to accused had therefore come through;

"Having considered that according to Section 29 of Chapter 101, as rendered applicable to Chapter 31 of the Laws of Malta, for the person convicted of an offence under the Ordinance to benefit from the appropriate reduction in punishment, it is necessary for the prosecution to have declared in the records of the proceedings that the convicted person has helped the Police to apprehend the person or persons who had supplied the convicted person with the drugs in question, or else that said convicted person proves to the Court's satisfaction that it had so helped the Police;

"Having also considered that the person convicted cannot benefit from the provisions of Section 29 of Chapter 101 of the Laws of Malta as rendered applicable to offences under Chapter 31 by virtue of section 120A (2B) of said Chapter 31 of the Laws of Malta, as the information given was obviously insufficient to enable the police to identify

the supplier of the drugs in Turkey, even if it had pursued such sketchy information with investigations in Turkey. Nor, for all that it matters, was it possible to identify the consignee of the drugs in Malta, if ever there was one. The Prosecution in fact not only failed to make the declaration required under Section 29 of Chapter 101, but actually opposed its application in this case. The Court is likewise not satisfied that the convicted person had helped the police to a degree which renders said section 29 applicable in this case;

"Having also considered the considerable quantity amounting to 10006 tablets containing the substance 3,4 Methylenedioxymethamphetamine (MDMA), according to the report of the Court Expert, Godwin Sammut B.Sc., M.Sc., imported into Malta by the convicted person;

"Having considered the havoc that the importation and distribution of such a considerable amount of drugs would have caused on the local market had it not been intercepted by Customs and the Police and that the convicted person abused of the hospitality extended to him by Maltese society as a visitor to this Island by using his visit to further his criminal ends and to make a considerable profit thereby;

"Having seen other cases decided by this Court where the facts of the case were somewhat similar - though obviously never identical - for the purpose of maintaining a desirable degree of uniformity in punishment;

"Having seen Sections 120A (2)(a)(i)(aa)(I), (2A)(2B), 121A (1)(2), and 120A (1)(f),(2)(a)(I), and Part A of the Third Schedule of the Medical and Kindred Professions Ordinance, (Chapter 31), Sections 22A, 22B, 22E, 27, 28 and 30 of the Dangerous Drugs Ordinance (Chapter 101), Sections 17(h), 20, 22, 23, 492 (1) and 533 of the Criminal Code, as well as Legal Notices 22/85 (regulation 10(2)), 70/88 and 183/99";

Having seen the application of appeal of the said Kamil Kurucu filed on the 3rd January 2007 wherein he

requested that this Court reform the said judgement by including the application of section 29 of Chapter 101 and apply a lesser punishment in lieu of that to which he was sentenced or, if this Court feels that said section is not applicable, that it apply a lesser punishment considering the particular circumstances of the case;

Having seen the record of the case and the documents exhibited;

Having heard the submissions made by counsel for appellant and counsel for the respondent Attorney General;

Considers:-

This is an appeal against punishment. Appellant's main grievance is that, according to him, the first Court misinterpreted the application of section 29 of Chapter 101 of the Laws of Malta as rendered applicable to offences under Chapter 31 of the Laws of Malta by virtue of section 120A(2B) of Chapter 31. Appellant contends that the test which the Court should apply should be an objective one, that is to say whether there was at the time of the investigation enough evidence to justify the applicability of section 29. His second grievance is that the first Court should in any case have considered the fact that he was prepared to cooperate with the Police even by answering his mobile phone so as to identify both the caller – allegedly the person who had handed him the drugs in Turkey – and the consignee in Malta, but he was not allowed to do so by the Police who themselves switched off his mobile phone.

As pointed out by appellant, section 29 of Chapter 101 of the Laws of Malta is rendered applicable to offences under Chapter 31 of the Laws of Malta by section 120A(2B) of said Chapter 31. Section 29 of Chapter 101 specifically provides as follows:

"Where in respect of a person found guilty of an offence against this Ordinance, the prosecution

declares in the records of the proceedings that such person has helped the Police to apprehend the person or persons who supplied him with the drug, or the person found guilty as aforesaid proves to the satisfaction of the court that he has so helped the Police, the punishment shall be diminished ….”

It is clear that the law is here considering two situations. The first occurs when the prosecution itself declares in the records of the case that the person who is requesting the application of section 29 has helped the Police to apprehend the person or persons who had supplied him with the drug. The second situation arises when, in the absence of such a declaration by the prosecution, the accused proves to the satisfaction of the Court that he has so helped the Police.

So that a person may benefit from the reduction in punishment contemplated in section 29, it is therefore not enough that he mentions the supplier. It has to result that, through such information, the accused has effectively helped the Police to apprehend the supplier. If, notwithstanding such information, the Police did not have sufficient evidence to charge the person mentioned in Court, or if the person mentioned had already been apprehended by the Police before the accused mentioned him, it cannot then be said that the accused helped the Police to apprehend the supplier. Otherwise one could envisage situations where, in order that a person may benefit from a reduction in punishment, he might mention the names of persons who might be innocent, or the names of persons he might know to have already been apprehended in connection with dealing in drugs, or provide false or erroneous indications[1].

Now, as evidenced by appellant’s statement dated the 1st April 2005, appellant gave the Police the following information: *“These pills were given to me by a certain Yasar who may live somewhere at Tarlabasi at Taksim in*

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

Istanbul, he is about 50 years of age and normally he is always found in a certain restaurant by the name of Asmalimescit. But I cannot give you more information because I do not know more."

The prosecution specifically declared that no proceedings could be taken against third parties as a result of the information given by appellant to the Police as no person could be identified as a result of that information; and in giving evidence before the first Court Inspector Nezren Grixti stated that the information given could not lead the Police to any person in Turkey as the details were insufficient. Furthermore, the first Court also declared in its judgement that it was not satisfied that the appellant had helped the Police to a degree which rendered section 29 applicable.

As already indicated, a reduction in punishment in terms of section 29 is only possible if the supplier is actually apprehended by the Police and not if the supplier could or may be apprehended. Therefore, irrespectively of what the Police could or should have done during their investigations, in the present case, where no supplier was apprehended, section 29 cannot be invoked by appellant. In other words, this Court is in complete agreement with the interpretation given by the first Court and consequently appellant's first grievance is dismissed.

As to appellant's second grievance, where he complains that his mobile phone was switched off by the Police and that therefore he could not receive the call he was expecting from Turkey that would have led him, and therefore the Police, to the consignee in Malta, it is true to say that it is regrettable that his mobile phone was switched off and not reactivated even after he had stated to the Police during interrogation that he would be contacted by "Yasar" and he would receive instructions as to his Malta contact. However, this is a factor which the first Court did take into consideration in determining punishment. Indeed in its judgement, in referring to defence submissions, that Court specifically refers to the fact that once the mobile phone had been handed over to

the Police they "could have taken up the matter from then onwards." Moreover, this Court in listening to the tape-recording of the evidence given by Inspector Nezren Grixti before the first Court on the 4th December 2006, found that the judge presiding the Criminal Court even commented upon what may be described as the investigator's lack of proactiveness, as evidenced by the following extract:

"Insp. Grixti: … with just a telephone number which obviously won't be registered in a name we would obviously end up with negative results as well.

"Defence: The sim card gives you details of any calls, messages, etc. Did you work on that with the Turkish authorities?

"Insp. Grixti: No.

"Defence: But you had the information. So, although you had the information.

"Insp. Grixti: Your Honour, we were much more focused on the intended supply of the drugs to the local market instead of the supply from Turkey.

"The Court: Yes. But if that phone call had to come through and that phone call had to indicate a place or a time where the consignment had to take place that certainly would have gone a long way to helping you to identify whoever was receiving or was meant to receive the drugs in Malta.

"Insp. Grixti: In my opinion, if I could state an opinion, we would have ended up with just a telephone number again. we cannot identify the person himself. We could only have a telephone number, a series of numbers and end up nowhere again with just the telephone number.

"Defence: But a telephone number is an information.

"The Court: Still good enough to have a good try I would say. Anyway, that's what you did and that's it now."

Since the first Court clearly took all this into consideration, appellant's second grievance is also dismissed.

In conclusion it is to be pointed out that the punishment inflicted by the first Court is undoubtedly within the parameters established by law. The applicable punishment in this case is that of imprisonment for life together with a fine of not less than one thousand Maltese liri (Lm1,000) and not more than fifty thousand Maltese liri (Lm50,000). In awarding a punishment of twelve years imprisonment, the first Court decreased the applicable punishment by no less than three degrees. The fine imposed is also within the parameters established by law, is closer to the minimum than to the maximum, and was imposed by the first Court in its discretion. Appellant has thus clearly benefited extensively from a reduction in punishment for the offences with which he was charged and to which he pleaded guilty. This Court, having examined the records of the case, and in particular the records of the compilation proceedings, believes that the circumstances of the case – all of which have been taken into consideration by the first Court – do not warrant any further reduction in punishment by this Court.

For these reasons:

The Court dismisses the appeal and confirms the judgement of the Criminal Court delivered on the 11th December 2006 in the names **The Republic of Malta vs Kamil Kurucu**, so however that the payment of the fine and the Court expenses is to be made within fifteen days from today, and the Attorney General is to inform this Court within fifteen days from today whether the drugs exhibited are to be preserved for the purpose of criminal proceedings against others.

< Final Judgement >

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