



**QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI**

**MAGISTRAT DR.
LAURENCE QUINTANO**

Seduta tal-25 ta' Jannar, 2008

Numru. 151/2006

The Court

1. Having seen the charges laid against Dean John Harvey 31 years old born on the 4th January 1975, son of John and Jennifer nee Reid, resident in Malta at Flat 2 Brake Point Court, Qawra and Flat 3 Saint Paul's Flats Nakkri Street Qawra and holder of British Passport number 540286013

Being charged as follows:

- a) On the 27th May 2006 and during the last months prior to this date conspired, promoted, constituted, organized or financed a conspiracy with other person/s to import, sell or deal in the drug cocaine and MDMA in Malta;
- b) for having on the 25th May 2006 imported or offered to import into these Islands or made arrangements for the importation of a dangerous drug (cocaine) into these

Islands in breach of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta;

c) for having on the 25th May 2006 imported or offered to import psychotropic and restricted drugs (MDMA) without a special authorization in writing by the Superintendent of public Health, in breach of the provisions of the Medical and Kindred Profession Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations), Legal Notice 22 of 1985 as amended;

d) for having on the 27th May 2006 in these Islands had in his possession the drug cocaine, a drug which is specified in the First Schedule of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, when he was not in possession of an authorization for its importation or exportation issued by the Chief Government Medical Officer as per section 4 and 6 of the same Ordinance and when he was not in any way licensed or authorized to manufacture or supply the drug and when he was not in any other way authorized by the President of Malta in line with the 1939 Regulations regarding the control of Dangerous Drugs (GN 292/1939) to have the same drug in his possession and when he failed to prove that the cocaine in his possession had been acquired by him through a lawful prescription as laid down in the regulations published in 1939 for the Internal Control of Dangerous Drugs (GN 292/1939) as subsequently amended and this in violation of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta **under such circumstances that such possession was not intended for personal use.**¹ (See fol.20)

e) for having on the 27th May 2006 had in his possession psychotropic and restricted drugs (ecstasy) without a special authorization in writing by the Superintendent of Public Health in breach of the provisions of the Medical and Kindred Profession Ordinance, Chapter 31 of the Laws of Malta and the Drug Control Regulations Legal Notice 22 of 1985 as **amended under such**

¹ As amended on the 8th June 2006 after submissions made by the Prosecutor.

circumstances that such possession was not intended for his personal use.

f) for having in these Islands prior to the 27th May 2006 and during the last five months had in his possession the resin obtained from the plant Cannabis or any other preparations of which such resin formed the base in breach of section 8(a) of Chapter 101 of the Laws of Malta.

The Court was also requested to apply section 533 of Chapter 9 should the defendant be found guilty.

2. The Court has seen all the evidence, records, and documents of the file including the orders of the Attorney General dated 27th May 2006, the 'Not Guilty' plea filed by the accused on the 28th May 2006, the authorization to amend the charge marked as (d), the envelopes marked NC and NC1 (with bank statements), the two statements made by the accused, the confirmation of the appointments of experts made during the course of the Inquiry, (fol.20), the authorization of the Court by which Mr.Charles Henry Cockayne was allowed to withdraw the cheque and the bank statements after copies were made of the originals, the Proces Verbal made by Magistrate Dr.Michael Mallia on the 25th May 2006 regarding the finding of a substance suspected to be a drug in an envelope sent from the UK, the reports of Mr.Godwin Sammut and PS 159 Jeffrey Hughes, the translations made by Ms Juliana Scerri Ferrante after she had been appointed by the Court to translate the relevant material, document SA exhibited by PS 36 Sergio Azzopardi and the recorded version of the submissions made by the Prosecution and the Defence.

3. Having heard the witnesses on oath.

4. Having heard the submissions made by the Prosecution and the Defence.

Has considered

5. The facts of the case are as follows. The Drug Squad suspected that the defendant was going to import drugs into Malta. Inspector Grech intercepted a parcel at the Post Office after having been authorized to do by the Magistrate in accordance with article 30 of Chapter 101 of the Laws of Malta. Then Flat 8 Doris Court Triq il-Port Ruman Qawra was kept under police surveillance. Meanwhile another envelope had been intercepted but this did not contain any illegal substance.

6. A post-woman affected the delivery of the two parcels. Eventually an elderly gentleman and a younger person approached the letter box and retrieved the contents.

7. Both persons were searched. The defendant was found in possession of an envelope which was hidden in his pants. The envelop was addressed Mr.Button Flat 8 Doris Court Triq il-Port Ruman Qawra, Malta.

Statements made by the Defendant.

8. In his first statement, the defendant stated that he had arrived in Malta in December 2005. He had asked a friend to send him a package from the UK and he had asked Mr.Cockayne whether he could use the latter's address as the defendant did not want the parcel to be mailed to the bar run by his aunt. The parcel contained cocaine and the defendant had paid about 225 pounds sterling for it. He added that this was the first time that he ahd imported drugs into Malta and that this was a small amount. The cocaine was menat for his personal use. He had requested 5 grammes.

9. The defendant stated that a few weeks before he had smoked cannabis resin.

10. He confirmed that the envelope the police showed him was the one meant for him. In the Uk he had been convicted for possession of firearms and Class A drugs.

11. In his second statement, the defendant stated that he had imported the cocaine because the drug locally available was 'rubbish' and he did not want to throw his money away.

12. As to the substance MDMA the defendant had no knowledge of the substance.

Other Witnesses for the Prosecution

13. Inspector Pierre Grech testified that he had been authorized by the Duty Magistrate to substitute any illegal substance found in the suspicious looking envelope with a legal substance and that he could then forward the envelope by post. The envelope had two sachets – one had a certain amount of white powder while the other one had a limited amount of a grayish substance. The envelope containing the suspicious powder was addressed to Mr.Button Flat 8 Doris Court Triq il-Port Ruman Qawra SPB 08 Malta. The other envelope was addressed to Mr.Cockayne.

14. Mr.Cockayne testified that on the 27th May 2006 he was going to collect the mail. The defendant walked with him. The witness noticed the envelope with the bank statement but he also became aware of another packet which the defendant had picked up. The witness saw part of his address but it was addressed to somebody else. He recognized the envelope in court.

15. Inspector John Charles Ellul testified that he had been appointed by the Duty Magistrate to assist in the investigation. When he examined one particular envelope he found two substances – one with white powder and the other had some crystalline substance. These were replaced with similar contents while the original contents were passed on to Mr.Godwin Sammut.

16. Inspector Ciappara presented the mobile phone and a substance that the defendant used to take for his asthma.

17. The analyst Godwin Sammit confirmed on oath the version of the events given by Inspector John Charles Ellul. (See par.15). He concluded that the substance in 385 06 01 was cocaine, the weight was 4.5 grams and it had a purity of 10%. On the other hand the substance in 385 06 02 was MDMA and there was a total weight of 0.3 grams. (See English translation on pages 114 et).

18. PS 1086 Johan Micallef frisked the defendant as soon as the letter had retrieved the envelope and he found a brown envelope addressed to Mr. Button Flat 8 Doris Court Triq il-Port Ruman Qawra concealed in the front of defendant's trousers. This testimony was backed by the testimony of PS 1044 Gordon Calleja. (fol.76)

19. PS 579 Antoine Micallef testified that he had been detailed to search the post coming from the UK addressed to 8, Doris Court, Triq il-Port Ruman, Qawra. The parcel was handed to Inspector Pierre Grech. This testimony was supported by that given by PS 1355 Cleon Purshouse. (fol.74).

20. PC 1348 Joseph Campbell testified that he had been instructed to observe all the movements at Doris Flats, Triq il-Port Ruman Qawra. He saw an elderly gentleman open the letter box and the defendant also took something from the same letter box. The witness notified the others that the defendant was on site. (fol.80). This testimony is backed by that of WPC 86 Diane Fenech and that of PC 13113 Carlos Axisa (fol.83) who also added that he had arrested the defendant. (fol.84).

21. PS 659 Jeffrey Hughes testified that he had examined three documents for fingerprints but the impression were not good enough for purposes of comparison.

22. Legal Procurator Juliana Scerri Ferrante presented the translation of the proceedings into English on the 2nd July 2007.

23. PS 36 Sergio Azzopardi presented his report with a number of photographs.

Witness for the Prosecution

24. The defendant testified on the 3rd December 2007. He said that the drugs were for his own personal use. He considered the quantity to be small. He had told the Police that it was intended for himself. (fol.135). He confirmed on oath the contents of the confession he had made to the Police. During the cross examination, the defendant said that he had had a drug habit during the two or three months he had been in Malta and that he had acquired drugs. Then he decided to obtain some from the UK.

Submissions.

25. The Prosecution submitted that the defendant had been charged with the importation of drugs. The Court has to decide whether the amount involved and the hassle of importation were sufficient to prove that the defendant should be found guilty of possession with intent.

26. The defence argued that the Prosecution had to prove possession with intent beyond reasonable doubt. The defendant had confirmed on oath that he had imported the drugs for his personal use. No trafficking has been proved. The defendant had admitted using drugs. The defendant has a problem and a spell in jail would not help matters.

Considerations of the Court.

30. The Court is going to consider the six charges seriatim.

The Charge of Conspiracy. 22(1)(f) of Chapter 101 and 120A(1)(f) of Chapter 31.

31. As to the best case about this point, the Court is referring to a case decided by the Court of Criminal Appeal on the 5th March 2003 'The Republic of Malta versus Steven Caddick and Philip Walker.' In that case the Court had held::

'Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed from the moment in which any mode of action whatsoever is planned or agreed upon between two or more persons (Section 22(1A) (Chapter 101). Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person concerned may be charged both with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement.

The First Court correctly stated that the three elements that had to be proved for the crime of conspiracy to result were:

- (i) The agreement between two or more persons
- (ii) the intention to deal in drugs
- (iii) The agreed plan of action.

It is irrelevant whether that agreement was ever put into practice.'²

² Court of Criminal Appeal 6th March, 2003 'The Republic versus Steven John Caddick et pages 22 and 23

32. The Court is also referring to the case 'Ir-Repubblika versus Godfrey Ellul' decided on the 17th March 2005³. The Court, quoting Archbold held:

'The essence of conspiracy is the agreement. When two or more agree to carry out their criminal intent, the very plot is criminal act itself. *Mulcahy v R* (1868) L.R. 3 H.L. 306 at 317; *T v Warburton* (1870) L.R. 1 C.C.R 274; *R v Tibbits and Windust* (1902) 1 .K.B. 77 at 89; *R v Meyrick and Ribuffi* 21 Cr.App. R 94 CCA Nothing need be done in pursuit of the agreement *O'Connell versus R.* (1844) 5 St.Tr.(N.S.) 1.'

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

33. The Court notes that there is no shred of evidence of a 'concerted plan of action' between the defendant and some other person to distribute drugs. **At least, one of the elements of conspiracy is missing and hence the Court is discharging the defendant from the first charge made against him.**

The Charge of importation of Cocaine 22(1)(a) 22(1B) and proviso 22(2)(b)(i)(ii)of Chapter 101

34. According to section 2 of Chapter 101, 'import' means

'to bring or cause to brought into Malta in any manner whatsoever.'

³ Qorti ta' l-Appell Kriminali 10/2001 pagini 29 u 30

'Dealing' according to section 22(1B) of Chapter 101 included importation when the Court is satisfied that such importation was not for the exclusive use of the offender.

35. An analysis of the evidence, in particular, of the statement made by the defendant and of the testimony of the witnesses who took part in the investigation, reveals without any doubt that the defendant imported cocaine into Malta, at least within the meaning of section 2 of Chapter 101.

36. Maltese Law takes importation very seriously. In fact, even if the importation is for the exclusive use of the individual the Court is debarred from applying the provisions of the Probation of Offenders Act and article 21 of the Criminal Code. [See the proviso to section 22(1B) of Chapter 101].

37. Hence the Court is finding the defendant guilty of the second charge marked as (b).

Importation of Psychotropic and Restricted Drugs. (Regulation 3(1) of LN 22 of 1985 and sections 40A, 120A(1)(a), 120A(2)(b)(i)(ii), 120A(1B) of Chapter 31.

38. Along with the presence of cocaine in the parcel sent to the defendant, the expert also established the presence of 0.3 grams of MDMA. (page 58). The defendant disclaimed all knowledge of the presence of this substance (see page 30).

39. Chapter 31 follows the same lines as Chapter 101 in its definition of 'import' and 'trafficking' and in prohibiting the Court from applying Chapter 446 or section 21 of Chapter 9 of the Criminal Code. Hence, the remarks made in paragraph 36 apply **mutatis mutandis**.

40. However, considering the negligible amount involved and the lack of any evidence that the defendant was a habitual user of this drug, the Court gives the defendant the benefit of the doubt considering that he immediately denied knowledge of the presence of 0.3 grams of MDMA.

Hence the Court is discharging the defendant from the third charge.

Possession with intent of cocaine.

41. Once the Court has considered all the evidence provided by the Prosecution and the defence, the Court has no doubt that the defendant committed the crime of possession of a dangerous drug. As to possession with intent the Court is taking into consideration these factors: (a) the presence of 4.5 grams of cocaine; (b) the importation.

42. The defendant said that he had imported the drug from the UK because the local version of cocaine was in his view 'rubbish'. The expert established a 10% purity in the imported drug. This purity percentage is not superior to the variety which is available in Malta from time to time. In fact, persons have been arraigned with a higher percentage of purity. Hence, the importation of the drug cocaine because the type obtained in the UK is 'better', seems to be a lame excuse.

43. As to the amount involved, the Court is making it clear that 4.5 grams of cocaine are a 'serious' amount. According to local case law, even a small amount may amount to possession with intent. On the 26th August 1998, the Court of Criminal Appeal held:

'The legal position is clear: the Court must be satisfied beyond reasonable doubt and on the evidence presented by the Prosecution that the drug in question was not meant for the exclusive use of the possessor. One circumstance in this regard can be enough. The case involved 10.0102 of cannabis resin and yet the Court decided that this was a case of possession with intent.'⁴

⁴ See The Police versus Carmel Degiorgio – 26th August 1998 per Mr. Justice Vincent Degaetano.

44. The Court is also referring to the case 'The Police versus Carmel Spiteri'⁵ which involved 179.8 grams of cannabis resin. The Court held that :

'It is quite true that when the amount of the drug is a considerable one, this circumstance on its own can be enough to satisfy the Court that the possession was not intended for the use of the defendant only.'

45. However, in this case the Court considered that the defendant had told the Police that he had obtained the resin about three months before it was found by the Police and that he had been using some of it on a daily basis – a version which he confirmed on oath. The Court felt that it could accept the explanation by the defendant but went on to condemn him for a term of imprisonment and to the payment of a fine as the amount involved could be considered as a danger to third parties.

46. In this case the Court considers the amount of 4.5 grams of cocaine **as a very serious one** and the punishment should reflect this fact. However, it still has a lurking doubt about the charge of possession with intent. The Court considers that the defendant told the Police that the drug was for his personal use whilst making his statement. He also confirmed this on oath. Of course, the Court may feel that the defendant made up the excuse during the statement and confirmed it while taking the witness stand. It has, in fact, taken this line in other cases. But these cases have to be decided on a case by case basis. **The Court is not finding the defendant guilty of the charge of possession with intent but of possession, a crime which is involved in the charge marked as (d) (Section 467(4) of Chapter 9 applied to the Court of Magistrates as Court of Criminal Judicature.).**

Possession with intent of Psychotropic and restricted drugs.

⁵ See The Police versus Carmel Spiteri – 2nd Septemebr 1999 Appeal Number 327/98 2nd September 1999

47. In view of the limited amount involved – just 0.3 grams of MDMA and considering the reaction of the defendant in his second statement to the Police (see page 30), **the Court is discharging the defendant of this charge.**

Possession of Cannabis Resin

48. This charge has been proved by the Prosecution because in the first statement to the Police, the defendant admitted having smoked cannabis within the time frame of the charge. **Hence the Court is finding the defendant guilty of this charge.**

Conclusion.

49. The Court, having seen sections 8(a), 22(1)(a), 22(1)(f), 22(1B), 22(2)(b)(i)(ii) of Chapter 101, regulation 9 of GN 292.1939, regulation 3(1) of LN 22 of 1985, sections 40A, 120A(1)(a), 120A(2)(b)(i)(ii), 120A(1B) 120A(1)(f) of Chapter 31 of the Laws of Malta finds the defendant guilty of charges (b), (f) and (d) but in the last case of possession only, a crime which is involved in charge (d) and is discharging him from charges (a), (c) and (e).

50. As to the punishment, the Court is considering (a) that the defendant has a clean record sheet in Malta; (b) that the amount of cocaine – considered as a very dangerous drug – was considerable (4.5 grams) and (c) that the case also involved the importation of the drug.

51. The Court is following established case law, (see amongst others 'Il-Pulizija versus Carmel Spiteri' cited above) and is condemning the defendant to a period of imprisonment of five months, from which the period spent under arrest should be deducted and to the payment of a fine (multa) of five hundred euros (E500). The fine (multa) may be paid in monthly instalments of 100 Euros with the first payment is to be affected within 4 weeks from today. If any

instalment is not honoured, the balance will be due forthwith. If any part of the fine (multa) is not paid, this is converted to a term of imprisonment at the rate of one day for every 11.65 Euros not paid.

52. In accordance with section 533(1) of Chapter 9 the Court is condemning the defendant to pay all the fees of the experts including those incurred during the inquiry as this was held after the 16th January 2006. These amount as follows: Lm104.73 (analyst's fees); Lm28.00 (report by PC 659); Lm34.50 (Doc.SA). [Total: Lm167.23 (389.53 Euros).] Failure to honour the payment of these expenses may lead to the conversion of the amount into days of imprisonment at the rate of 1 day imprisonment for every 11.65 Euros not paid. (33 days). There are no charges for translation fees in accordance with Article 6 of the ECHR.

53. The Court orders the destruction of the drugs under the control of the Registrar.

< Sentenza Finali >

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