



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
MICHAEL MALLIA**

Sitting of the 16 th January, 2014

Criminal Appeal Number. 18/2013

**The Police
(Insp. Victor Aquilina)**

Vs

Ugo Marius Nwankwo

The Court,

Having seen the charges brought against the appellant Ugo Marius Nwankwo [holder of ID No. 36642A] before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 19 th March 2009 and during the previous time, in these islands,

a. had in his possession the drugs (cocaine) 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 import or an export authorisation issued by the Chief Government Medical Officer as per paragraphs 4 and 6 of the Ordinance, and when he was

not licensed or otherwise authorised to manufacture or supply the drugs, and was not otherwise licensed by the President of Malta or authorised by the Internal Control of 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 his personal use.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 18th January, 2013, by which, the Court, after having seen Part IV and VI and articles 22(1)(a) and 22(2)(b)(i) of Chapter 101 of the Laws of Malta, and regulations 4 and 9 of GN 292/1939 found the accused guilty as charged, and condemned him to three (3) years effective imprisonment, but one must deduct from this term of imprisonment any time prior to this judgement, during which, the person sentenced was being kept in prison under preventive arrest only in connection with the offences of which he has been found guilty today, and to a fine (multa) of two thousand Euro (€2000) which is to be paid immediately forthwith. If the person sentenced fails to pay the amount due as a fine, the fine will be converted into a period of imprisonment at the rate of one day imprisonment for every thirty five Euro (€35.00) due.

The person sentenced is also condemned to pay all the expenses incurred in the appointment of experts in terms of Section 533 (1) of Chapter 9 of the Laws of Malta within six (6) months from today, and if he fails to pay this amount, or if he fails to pay any balance of this amount within this time-limit, the amount or any balance of it will become immediately due and payable, and will be converted into a period of imprisonment at the rate of one day imprisonment for every eleven Euro and sixty-five cents (€11.65) due.

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The Court ordered that the drugs and any other object related to drugs exhibited is destroyed under the supervision of the Registrar.

The Court also ordered the confiscation of all the money exhibited in Court.

Having seen the application of appellant filed on the 28th January 2013, wherein he requested this Court to vary the judgement from which there is this appeal by reforming the same in the sense that instead of the declaration of guilt for aggravated possession, this is substituted by possession for personal use and consequently that it be reformed as to punishment including the revocation of the confiscation of the amount of money in his possession and at home which did not belong to him.

Having seen the records of the case.

Having heard Counsels' submissions during the hearing of the

Now therefore duly considers.

That the grounds of appeal of appellant, consist of the following:-

A. In the facts

The appellant is following the reasoning of the Court as appearing on page 4 of the judgement and replying thereto in the same order.

1. The Court considers that the appellant had consumed a sachet of cocaine and he had in his possession two other sachets weighing 1.43 grams and 1.59 grams respectfully. The Court also considers that the accused abused three or two times a week. It therefore concluded that as he had abused of cocaine on that day, there was no reason why he should have carried two other sachets with him in the bar. The appellant disagrees with this reasoning. It is abundantly clear that

persons who abuse drugs, especially cocaine which does not have the effect of heroine, may in actual fact pass through periods where they consume heavily and at other times they can withdraw from the habit. This is because cocaine is not habit-forming in the same way as heroine is. It is relevant to point out that there was disparity in the weight of the two sachets, one being 1.43 grams and the other 1.59 grams. This is relevant because at a later stage the Courts says that a dose of cocaine would be 0.5 grams when in actual fact the appellant would have been selling a triple dose at one go.

2. The fact that there were 6.2 grams in his car and no scales was available, it certainly indicated that he was not selling from those 6.22 grams. Otherwise he would have taken the scales with him so that he could distribute in amounts for convenient consumption. It must be understood that cocaine is an expensive commodity and one does not buy or sell by mere ocular calculation. The argument of the Court that it does not believe the accused because he did not want to let his wife know that he was abusing drugs is not convincing. A person may hide a certain amount because it is easy to hide while he may carry other doses with him because he feels the need for such consumptions. The final part of the argument that he left €770 in a wallet in his car is absolutely irrelevant. Here we are dealing with drugs and not with cash. There are many people who leave things in their car only to find out later that they cannot trust. But it doesn't mean that the possession of that money in the car connected to the sale of drugs. The position would have been different had the €770 been found in his possession while in the bar.

3. The Court accepts that the appellant needed digital scales to weigh the cocaine for his personal use. One must also add again that the scales were not found in the car in which case it would have been highly indicative of using the same scales for other purposes.

4. The Court makes an assumption that a typical dose of cocaine is 0.5 grams. The assertion of the accused was that he abused two grams of cocaine each time is not credible. Unfortunately this is not the case. It is an assumption that a typical dose of cocaine is 0.5 grams. According to the Court expert the purity was thirty per

cent. Consequently a 1.5 grams which he had in his possession would constitute 0.5 grams of pure cocaine. Nevertheless this is not by itself enough to imply guilt. There are several cases decided by the Court where abusers of cocaine admitted of consuming more than two grams on each occasion. It is a known fact that in drugs there is what is called the cutting agent. The cutting agent dilutes the purity of either cocaine or heroine and what the abuser seeks is not the cutting agent but the potency of the drug. Consequently the mathematics of the Court are fallacious as an argument.

5. The same criticism about the calculation made by the Court applies to the fifth argument on page 5 of the judgement. The Court however added that it saw no justifiable reason why the accused should have bought at one go two capsules of cocaine weighing roughly ten grams each. The Court did not mention anything about the purity of the cocaine. The undersigned lawyer finds this argument perplexing. As a pipe smoker, he sometimes finds it difficult to obtain a particular brand of tobacco and it may easily go out of stock. When he buys from the shop in Old Bakery Street, he doesn't buy one packet at a time but five packets or even ten packets at a time. During this period it so happens that the particular brand was out of stock and he had to go for the nearest substitute. Now it is known that cocaine is not available at the grocer's shop or at the chemist and if they run out of stock, they would just call the suppliers to send a new supply immediately. The final consideration of the Court when it states that there is lack of justification when one considers that the accused was married and had a baby daughter whom he obviously needed to maintain. From a social angle this is correct but unfortunately drug abusers do not even take themselves into consideration let alone others around them. This is applicable to those who smoke, who consume alcohol or even gambling. These are the social problems of our modern age. But it does not in any way imply or throw any light on the fact that the drug found in the possession of the appellant was not for his personal use.

B. As to punishment

The Court considered that the appellant had a clean criminal record. Moreover, it considered that the amount was not small. But again it must be stressed that the purity was only thirty per cent. Moreover, there was no indication that he was talking to anyone or in any way trying to pass on the drug to others and only a presumption of law made possible his conviction.

C. Confiscation of money

The applicant insists that all the money that was found belonged to his father in law with whom he resides. The €2,170 should in any case be returned to Rosario Spiteri, the lawful owner thereof.

Considers.

That there is no issue as to the main facts of this case. On the 19th of March 2009; the Police carried out a search in a bar in Marsascala and noticed two sachets containing white powder on the floor near the accused. They carried out a search in his car where they found a plastic bag between the seats near the hand brake that contained a capsule with white powder in it. They also found €770 in his wallet. The Police carried a search at his residence, where they found an electronic scale, a large sum of money (€24,590) and in a white box they found a capsule and a tissue covering another open capsule containing, in the words of the accused, cocaine. In his statement and in his evidence, the accused admitted that all the objects found were his, except for the money found in his residence that €22,420.00 of that money belonged to the accused's wife and to her father Rosario Spiteri and this was duly returned to them. €2,170 remained deposited and filed in Court. The Court appointed an expert, Godwin Sammut, who concluded that the total weights of the drugs in all the bags and capsules was 20.29g of cocaine and the purity was approximately 30%. He found traces of cocaine and heroin on the electronic scales. From his report exhibited as document GS 13, it results that the weight was divided as follows: the capsule

9.83grams, substance in the tissue 1.22 grams, the first bag 1.43 grams, the second bag 1.59 grams and another bag containing 6.22 grams.

By judgment given on the 18th of January 2013, the Courts of Magistrate found the accused guilty of aggravated possession of the drug cocaine in such circumstances that the drugs were not supplied to him for his personal use and condemned accused to three years imprisonment and to a fine of €2,000.

The accused felt aggrieved by this judgment and duly filed an appeal, claiming that there wasn't evidence enough to prove that the possession was aggravated and secondly, that the punishment inflicted was too harsh in his regard.

Considers.

To start with, the appellant is not disputing the voluntary possession of the drugs, which in total amounted in 20.29 grams of cocaine with a purity of approximately 30%. He is however stating that that amount was only meant for his personal use and that the first Court had concluded, through circumstantial evidence, that the appellant intended to traffic the drug, which meant that the amount found in his possession was not for his personal use. The appellant argued that the circumstantial evidence, mentioned by the Court, does not point to one direction but two different directions, which means therefore that it is not valid at Law. He claims that there were no pre prepared sachets for re sale found. The appellant admitted that he was in the habit and he was just taken a supply of drugs for himself and since the appellant is not bound to prove anything, it was up to the Prosecution to prove that the supply of drug he had in his possession was meant for third parties and not only for himself.

Considers.

That this Court does not agree with this argument. To start with, the amount of drugs found in the voluntary possession of the accused, could reasonably be divided

into 40 typical doses, too much for the consumption of only one person in such a short time because it is a well known fact that the drug has a shelf life beyond which, it is useless. What's more, the appellant gave no reasonable justification as to how he came into possession of so much drugs. The first Court, was very meticulous in its argument and its judgment listed 5 paragraphs that detailed the reasoning as to how it came to conclusion that the drugs found in the voluntary possession of the appellant were such that the circumstances denoted that it was not intended for his personal use. In his application, the appellant did not counter these arguments, but just made a generic statement, saying that all this were circumstantial evidence not pointing to one direction only.

This Court begs to differ. In fact, the arguments mentioned by the Court, are all circumstances pointing to one direction, that the drug found was not intended for appellant's personal use. There is no point in repeating the arguments of the first Court, which this Court finds very convincing and legally correct.

As far as the punishment is concerned, it is true that the accused has a clean criminal record but the first Court awarded a punishment that is within the parameters at Law. Now the rule is, that the Court of Appeal will not disturb the discretion of the lower Court, if the punishment awarded falls within the parameters at Law and will not review such a punishment, unless special circumstances arise, where such a review and change would be warranted. In this case, no such circumstances arise which means therefore that the discretion of the first Court, as regards the punishment, should also be respected. This Court therefore decides to dismiss the appeal and confirm the first judgment.

< Final Judgement >

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