MALTA

QORTI TA' L-APPELL KRIMINALI

S.T.O. PRIM IMHALLEF
SILVIO CAMILLERI

ONOR. IMHALLEF
DAVID SCICLUNA

ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON

Seduta tas-6 ta' Frar, 2014

Numru 40/2009

Bill of Indictment No. 40/2009

The Republic of Malta

v.

Aicha Mohamed

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 21st October 2009 wherein the said Aicha Mohamed was charged with having, (1) on the first (1st) day of November of the year two thousand and eight (2008) and in the preceding days, by means of several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, conspired to traffick in dangerous drugs (cocaine) in breach of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or promoted, constituted, organised or financed the conspiracy; (2) on the first (1st) day of November of the year two thousand and eight (2008) and in preceding months, by means of several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, meant to bring or caused to be brought into Malta in any manner whatsoever a dangerous drug (cocaine) in breach of the law; (3) on the first (1st) day of November of the year two thousand and eight (2008) and in the preceding days, by means of several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, had in her possession a dangerous drug (cocaine) in breach of the law, and with intent to supply same in that such possession was not for the exclusive use of the offender;

2. Having seen the judgement delivered on the 6th May 2011 whereby the Criminal Court, after having heard the said Aicha Mohamed's guilty plea to all counts of the Bill of Indictment, a plea she persisted in even after having been warned in the most solemn manner of the legal consequences of such plea and given her time to reconsider such plea, declared the said Aicha Mohamed guilty of all three counts of the Bill of Indictment, namely of having:-

(1) on the 1st November, 2008 and during the previous days in these islands and outside these islands of the Republic of Malta by means of several acts even though committed at different times but constituting a violation of

the same provisions of law and committed in pursuance of the same design, guilty of conspiracy to trafficking in dangerous drugs (cocaine) in breach of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or of promoting, constituting, organising or financing the conspiracy and this according to the First Count of the Bill of Indictment;

(2) on the 1st November, 2008 and during the preceding months, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, 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 Drugs Ordinance (Chapter 101 of the Laws of Malta), when she was not in possession of any valid and subsisting import authorisation granted in pursuance of the said law; and this according to the Second Count of the Bill of Indictment;

(3) on the 1st November, 2008 in the preceding days into Malta, by several acts even though committed at different times but constituting a violation of the same provisions of law and committed in pursuance of the same design, guilty of possession of a dangerous drug (cocaine), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when not in possession of any valid and subsisting import or possession authorization granted in pursuance of the said law, and with intent to supply same in that such possession was not for the exclusive use of the offender, and this according to the Third Count of the Bill of Indictment;

3. Having seen that by the said judgement the first Court, after having seen articles 2, 9, 10(1), 12, 14, 15A, 20, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d) and 26 of the Dangerous Drugs Ordinance and Regulation 4 and 9 of the 1939 regulations for the Internal Control of Dangerous

Drugs (Legal Notice 292/39) and in sections 17, 18, 20, 22, 23 and 533 of the Criminal Code, sentenced the said Aicha Mohamed to a term of imprisonment of eleven (11) years, and to the payment of a fine (multa) of twenty three thousand five hundred Euros (€23,500), which fine (multa) shall be converted into a further term of imprisonment of eighteen months according to Law, in default of payment. Furthermore the Criminal Court condemned her to pay the sum of one thousand and eighty two Euros and forty three cents (€1,082.43) being the sum total of the expenses incurred in the appointment of court experts in this case in terms of Section 533 of Chapter 9 of the Laws of Malta; ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which she has been found guilty and other moveable and immovable property belonging to the said Aicha Mohamed; and finally ordered the destruction of all the objects exhibited in Court, consisting of the dangerous drugs or objects related to the abuse of drugs, which destruction shall be carried out by the chemist Mario Mifsud, under the direct supervision of the Deputy Registrar of this Court who shall be bound to report in writing to this Court when such destruction has been completed, unless the Attorney General files a note within fifteen days declaring that said drugs are required in evidence against third parties;

4. Having seen that the first Court proceeded to pass sentence after having considered the guilty plea of the accused after that Court had explained to her in clear terms the consequences of her declaration;

5. Having seen the application of appeal of the said Aicha Mohamed filed on the 13th May 2011 wherein she requested that this Court, while confirming the declaration of guilt, modifies the punishment applicable in her case by giving a term of imprisonment which falls within the legal jurisdiction of the Courts of Magistrates and any other provision concerning punishment which would be more just in the particular circumstances of the case; having seen all the records of the case and the documents exhibited; having heard the submissions made by counsel

for appellant and counsel for the respondent Attorney General; considers:-

6. Appellant's grievance is in respect of the punishment awarded her which she deems excessive. She is basing her appeal on the following grounds:

"1. As is evident from the minute entered in the records of the proceedings, the claim made by the appellant that the Attorney General, a party to the suit, had decided to remit her to the Criminal Court rather than to the Court of Magistrates implied that he had a discretion in the decision on the amount of punishment applicable. As results from the judgement 'The Republic of Malta versus Stanley Chircop' a judge in the Criminal Court has no authority to go beyond the minimum established by law. On this matter even the law is clear in Article 22(9) of Chapter 101 that not even for exceptional circumstances may the Court go lower than the minimum.

"But also the maximum is in the hands of the Attorney General. Had she been committed for trial before the Magistrates' Court, the maximum punishment would have been ten years.

"This was a substantial consideration which is also being raised here. The applicant is fully aware of the repeated judgements of the Constitutional Court on this matter, but there are grounds to believe that the European Court of Human Rights may take a completely different attitude regarding the powers of the Attorney General under Chapter 101 of the Laws of Malta, in the not too distant future.

"2. The prosecuting counsel indicated to the Court a number of judgements. There were other judgements where the Court gave punishment in the region of nine years. In this particular case, as has been submitted to the first Court, there was poverty compounded on poverty. The jargon expression is that 'these are mules'. This situation is far worse. Generally, those who are living in European countries pick on immigrants from Africa who

need every single cent to make a living and they use them and abuse them. This is indeed worse than prostitution. The applicant recognizes that she could have even lost her life if the drugs had entered into her circulation. This is a matter of great relevance. There is no justice which doubts mercy.

"3. The applicant wanted to assist the police in giving identification of the person but the only contact that she had with him [*recte:* her] was through a mobile number. This mobile number disappeared from circulation in Spain as soon as she was caught. She could not give any help to the police to find the real culprit."

7. In respect of appellant's first observations, this Court wishes to point out that during the pendency of these proceedings the European Court of Human Rights in fact delivered a decision – to which defence counsel made reference in his oral submissions – on the 22nd January 2013 in the case **John Camilleri vs Malta** which found a breach of article 7 of the Convention in view of the Attorney General's discretion whether to remit a case for decision by the Magistrates' Court or by the Criminal Court. What that Court decided was as follows:

"44… [that article 120A(2) of Chapter 31 of the Laws of Malta] "failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7".

"….

"50. As to the applicant's request for his sentence to be reduced, the Court reiterates that it has no jurisdiction to alter sentences handed down by the domestic courts (see, *mutatis mutandis*, *Findlay v. the United Kingdom*, 25 February 1997, § 88, *Reports* 1997-I, and *Sannino v. Italy*, no. 30961/03, § 65, ECHR 2006-VI). Further, the Court cannot speculate as to the tribunal to which the applicant would have been committed for trial had the law satisfied the requirement of foreseeability. Indeed, the present

case does not concern the imposition of a heavier sentence than that which was applicable at the time of the commission of the criminal offence or the denial of the benefit of a provision prescribing a more lenient penalty which came into force after the commission of the offence (see, *inter alia*, *Alimuçaj v. Albania*, no. 20134/05, 7 February 2012; *Scoppola (no. 2)*, cited above, and *K v. Germany*, no. 61827/09, 7 June 2012) and therefore the Court does not consider it necessary to indicate any specific measure."

8. Although the **Camilleri** case dealt with article 120A(2) of Chapter 31 of the Laws of Malta, that article is practically identical to article 22(2) of Chapter 101 of the Laws of Malta. Now, this Court is aware that had the Attorney General in this case ordered that appellant be tried by the Magistrates' Courts, the applicable punishment would have been that of imprisonment for a period of not less than six months but not exceeding ten years and to a fine (multa) of not less than four hundred and sixtyfive euro and eighty-seven cents (€465.87) but not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (€11,646.87). Since the Attorney General had ordered that appellant be tried by the Criminal Court, the punishment was that of imprisonment for life, provided that: (aa) where the court is of the opinion that, when it takes into account the age of the offender, the previous conduct of the offender, the quantity of the drug and the nature and quantity of the equipment or materials, if any, involved in the offence and all other circumstances of the offence, the punishment of imprisonment for life would not be appropriate; or (bb) where the verdict of the jury is not unanimous, then the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (multa) of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) but not exceeding one hundred and sixteen thousand and

four hundred and sixtyeight euro and sixty-seven cents (€116,468.67).[1]

9. It must be pointed out that appellant first registered a guilty plea on arraignment before the Court of Magistrates as a Court of Criminal Inquiry, when the Attorney General had already ordered that appellant be tried by the Criminal Court. In other words, such plea was registered in the knowledge that the maximum punishment was that of life imprisonment but also that she stood to benefit from a reduction in the parameters of punishment in terms of article 492(1) of the Criminal Code which provides: "Where at any time before the constitution of the jury the accused declares himself guilty and for the fact admitted by the accused there is established the punishment of imprisonment for life, the court may, instead of the said punishment, impose the punishment of imprisonment for a term from eighteen to thirty years."

10. Before the Criminal Court, and after all the evidence had been compiled, appellant again registered a guilty plea. The punishment awarded shows that the Criminal Court did not deem the appropriate punishment to be that of life imprisonment and, furthermore, that paragraph (aa) of the proviso of article 22(2)(a)(i) was applicable, meaning that the parameters of the custodial punishment were of a minimum of four years imprisonment and a maximum of thirty years. These parameters, it is to be noted, in part overlap the punishment awardable by the Court of Magistrates where such cases are referred by the Attorney General to that Court.

11. Now, 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. 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 the law or in special circumstances

[1] In terms of the proviso of article 22(2)(a)(i) of Chapter 101 of the Laws of Malta.

where a revision of the punishment meted out is manifestly warranted.

12. Appellant states that there were cases where persons pleading guilty were awarded punishments of nine years imprisonment. It has often been said that comparisons are odious and one case may be similar to but not identical to another. The punishment awarded appellant was not the result of a sentence-bargaining agreement in terms of article 453A of the Criminal Code.[2] Nor was appellant able to benefit from a reduction in punishment in terms of article 29 of Chapter 101 of the Laws of Malta as she was unable to help the Police to apprehend the person or persons who supplied her with the drug.[3]

13. Appellant refers to a condition of poverty which allowed her to be used and abused by the traffickers. This contradicts what she had told the Police during interrogation when asked why she accepted to deliver the capsules. She stated: “I don’t know what caused me to do that. I don’t have any problem of money.” In her statement she also says that she had been to Malta two months previously with her boyfriend, but that she only carried drugs on the second occasion. It must be said that it is not unknown for drug couriers (referred to in the jargon as “mules”) to carry out trial runs or exploratory trips before actually carrying drugs to a country.

14. In her appeal, appellant is basically asking for mercy. She also says that she realises that she could even have lost her life had the drug entered into her circulation. But did she realise the untold harm that could have been caused had the drugs she brought into Malta been put into circulation in Malta? Or did she consider just the €1,000 she says she was going to be paid for this venture?

[2] See, viz., **Ir-Repubblika ta’ Malta v. Richard Andrews Perez Oberght**, Criminal Court, 15th October 2012.

[3] See, viz., **Ir-Repubblika ta’ Malta v. Alberto Alessandro Bafumi**, Court of Criminal Appeal, 23rd January 2014.

15. There are other factors which have to be considered. The drug involved (cocaine) was a dangerous drug. The amount was certainly not an inconsequential one (622.67 grams). Its purity was 48%. Appellant knew precisely what she had been asked to carry, and yet she accepted to do so. The offences she committed are serious offences and punishments imposed for such offences must necessarily reflect their seriousness. Indeed, as was held in **Ir-Repubblika ta' Malta v. Basam Mohamed Gaballa Ben Khial**, decided by this Court differently composed on the 19th February 2004, **"fejn si tratta ta' traffikar tad-droga (inkluza 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 (ara f'dan is-sens is-sentenza ta' din il-Qorti tas-16 ta' Ottubru, 2003 fl-ismijiet *Ir-Repubblika ta' Malta v. Thafer Idris Gaballah Salem*)."** Indeed, in **Ir-Repubblika ta' Malta v. Thafer Idris Gaballah Salem**, it was held: **"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."**

16. Finally, and this seems to have been overlooked by appellant, she admitted to the accusations brought against her as a continuous offence and, in terms of article 18 of the Criminal Code – to which the Criminal Court referred in its judgement – the Court may increase the punishment by one or two degrees.

17. Consequently, when considering all these factors, including the manner in which the Attorney General exercised his discretion in this particular case, this Court is of the opinion 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.

18. As to the fine that has been imposed, this Court notes that the Criminal Court has ordered that in default of payment of the fine (multa) of twenty three thousand five hundred Euros (€23,500), it is to be converted into a further term of imprisonment of eighteen months according to law. However, in terms of the proviso of article 11(3) of the Criminal Code, imprisonment in substitution of a fine (*multa*) shall not exceed one year if the fine is not higher than thirty thousand euro (30,000). The appealed judgement is thus to be reformed accordingly.

19. For these reasons this Court varies the appealed judgement in the sense that it revokes it in so far as it ordered that the fine (multa) be converted into a further term of imprisonment of eighteen months according to law in default of payment, and instead orders that the fine (multa) be converted into a further term of imprisonment of one year in default of payment, but confirms the rest of the judgement.

< Sentenza Finali >

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