MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE

MICHAEL MALLIA

Sitting of the 2 nd October, 2014

Criminal Appeal Number. 332/2012

Appeal number 332, 336/2012

The Police

versus

Steven Charles Bertram

Today the 2nd of October 2014

The Court,

Having seen the charge brought against the appellant/defendant Steven Charles Bartram [holder of UK passport no. 034814977] before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 26th March 2007 in these islands

a. Imported of offered to import 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 Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of the 1985 as amended;

b. Also of having had in his possession psychotropic and restricted drugs (ecstasy) without a special authorization in writing by the Superintendent of the Public Health, in breach of the Provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of the 1985 as amended, under such circumstances that such possession was not intended for his personal use;

c. Also of having imported or caused to be imported, or took steps preparatory steps to importing or exporting any dangerous drugs (the whole or any portion of the plant cannabis), into Malta in breach of Section 15A of Chapter 101 of the Laws of Malta;

d. Also of having had in his possession the whole or any portion of the plant cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 14th June, 2012, by which, after that Court had seen articles 40A, 120A(1)(1B)(2)(b) Chapter 31 of the Laws of Malta, LN 22.1985, L.S. 31.18, Regulation 2, Articles 8(d), 15A, 22(1B), 22(2)(b) Chapter 101 of the Laws of Malta found accused guilty as charged and condemned him to a term of imprisonment of two and a half years and to a fine (multa) of €5,000.00.

Furthermore, ordered the destruction of the drugs exhibited bearing exhibit number KB 7.2008 by the Registrar of Court. Seen also Section 533 of Chapter 9 of the Laws of

Malta and condemned the accused to the payment of all expert expenses amount to €1056.15.

Having seen the application of appeal filed by appellant Steven Charles Bartram on the 26th June, 2012, wherein he requested this Court to reverse and vary the appealed judgement in the sense that whilst it confirms the judgement in so far as the accused was found guilty of the fourth charge, it varies the said judgement in so far as the accused was found guilty of the first, second and third charge and instead finds the accused guilty of importation/possession of ecstasy and cannabis for his personal use and/or varies the punishment inflicted.

Having seen the application of appeal filed by appellant Attorney General on the 2nd July, 2012, wherein he requested this Court to reform the judgement in the sense that it confirms that part whereby the accused person was found guilty of all the charges brought against him, confirming also the quantum of punishment concerning the term of imprisonment as well as the imposition of payment of expert fees, whilst revoking the final part of the judgement in that the forfeiture of the vehicle Honda Prelude bearing registration number K33LCB belonging to the accused person formally exhibited in Court, should also be ordered in accordance with Article 23 of the Criminal Code and this in accordance with Chapter 9 of the Laws of Malta.

Having seen the records of the case.

That the grounds of appeal of appellant Steven Charles Bartram are as follows:-

1) That the First Court, with all due respect, made a very grave error of law in that it based its judgement on what it claimed was a line of defence brought

forward by accused which line of defence, however, was not only never brought forward but is moreover totally irrelevant for the purposes of the charges brought against him. The relevant quote from the judgement of the First Court is the following:

"As premised, accused chose to take the stand and testify that the drugs imported were only for his personal use, intended to alleviate his ongoing depression. He gave a lengthy explanation of the reasons for his depression even verging on suicide.

This is a line of defence equated with what in common Law is the defence of "duress of circumstances" or "necessity"."

With all due respect applicant brought forward a very simple line of defence which has absolutely nothing to do with common law. Indeed within this context, common law notions are completely extraneous to Maltese Law. Consequently any references to common law, although perhaps of academic relevance, albeit largely incomplete, are totally irrelevant and superfluous for the purposes of deciding upon the charges brought against the accused in a Maltese Court.

Applicant was merely contending that the importation/possession was for his personal use sic et simpliciteur. This, and only this, was his line of defence and any other consideration on this point made by the first Court amount to nothing else but a mistake of law.

2) That the First Court made another grave mistake and interpretation of law when it opted to pass on to determine whether the importation/possession was indeed for the personal use of the accused. The relevant quote is the following:

"Both Articles 120A, Chapter 31, and 22(B), Chapter 101, leave the reason for the importation of the drugs to the scrutiny, discretion of the Court, to establish whether this was intended for personal use or not Defence therefore, up to the level of probability has to establish this to the satisfaction of the Court."

Here therefore the First Court is stating that there is a shift in the onus of proof and implies that it is the defence that has to prove on a basis of probability that the importation/possession was for the personal use of the accused.

Applicant refers to the judgement the Police vs. Carmel Degorgio decided on the 26th of August 1998, where the Court of Criminal Appeal stated verbatim the following:

"Din il-Qorti ezaminat il-provi kollha u qrat bir-reqqa anke s-Sentenza appellata. Ghandu jinghad mill-ewwel li f'ebda hin l-ewwel Qorti ma spustat l-oneru tal-prova fuq l-appellant, allura imputat, jew ghamlet xi espozizzjoni erronea tal-ligi. Il-pozizzjoni legali hi cara: il-Qorti trid tkun sodisfatta 'l hinn mill-kull dubju dettat mir-raguni u a bazi ta' provi li jingabu mill-prosekuzzjoni li l-pussess tad-droga in kwestjoni ma kienx ghall-uzu esklussiv (jigifleri ghall-uzu biss) tal-pussessur."

Appellant also makes reference to the judgement delivered by the Court of Criminal Appeal in the case the Police (Insp. Nezren Grixti) vs. Marius Magri per Judge Galea Debono decided on the 12th May 2005.

Indeed any further comment that the First Court has based its decision on a wrong application of the law and of case law, possibly on account of a bad synopsis made by the prosecution in its Note of Submissions, would be superfluous.

Suffice it to add that in its Note of Submissions the prosecution has even misled the first Court to apply Section 26 of Chapter 101 and Section 121A of Chapter 31 (vide pg. 12 of the Note of Submissions). It is a known fact, possibly not to the prosecution, that these Sections have been declared to be in violation of Articles 6(1) of the European Convention and 39(1) of the Constitution (The Police vs Susan Jane Molyneaux decided by the Constitutional Court on the 1st April 2005).

3) That the First Court has made a wrong application of the law in that whilst concluding, wrongly, that the ecstasy pills were not for the personal use of the accused, it equated this reasoning to charge (c).

Now, nowhere in its judgement are any considerations made regarding this third charge. Yet, nonetheless, applicant is also found guilty of importing cannabis in circumstances that have satisfied the First Court (how remains a mystery on account of no mention being made therein) that this cannabis was not for his personal use.

Moreover and to make confusion worse compounded, applicant is at the same time also found guilty of the fourth charge of simple possession of cannabis. This is yet another, with all due respect, wrong application of the law, for it is inconceivable for a Court to find a person guilty "as charged" when charges (c) and (d) are contradictory to one another and cannot, quite clearly, co-exist. Indeed, this misnomer is all a result of the wrong applications and interpretation of the law made by the First Court and which is

manifest all throughout the judgement.

4) That, even on account of the grievances brought forward in this appeal application, the First Court has made a wrong appreciation of the facts. In this case the prosecution had to prove beyond reasonable doubt that the pills and the cannabis imported/possessed by the accused were not for his exclusive personal use. The First Court seems to have been impressed by the amount of pills when it is a known fact that the amount may be a circumstance that on its own would suffice. However, this conclusion is not a foregone conclusion. To this effect applicant refers to the teachings of the Court of Criminal Appeal in the judgement the Police vs. Carmel Spiteri per Judge DeGaetano decided on 2nd September 1999.

What the Prosecution has proven is that amongst his personal belongings, all packed in his Honda Prelude, and whilst coming over to Malta for the reasons already mentioned, accused, who abused cannabis and ecstasy, was in possession of circa 126 ecstasy tablets and of cannabis seeds and leaves. These

were found together with his microwave, his TV, his computer, his vitamins, his working clothes, his casual clothes and indeed those of his partner in his own car.

The First Court relied exclusively on the fact that defendant had to prove they were for his personal use after arguing that no-one ought to prescribe his own medication for a depression [sic!!) and then arguing that defendant was contending that he could again import ecstasy when in a year's time he runs out of the lot imported on the 26th March 2007 [sic!!).

The First Court even deemed it fit to state that what "has always quizzed this Court is evidenced in the photos exhibited by PS 1336 that show the most haphazard way in which accused packed all his belongings in his car". What really quizzes applicant is what relevance the method of packing has to the determination of the charges proffered against him.

What also quizzes applicant is that the First Court did not realise that during his first stay in Malta his medical records show and from the acts of the proceedings it results that he was still being administered anti-depressants. Hence, the argument of the First Court regarding defendant knowing from where to purchase ecstasy is incomplete, incorrect and furthermore inaccurate.

It is also strange that the First Court failed to comment about the lack of other circumstances which show that the prosecution failed to prove that the importation/possession was not for the personal use of the defendant. To this effect defendant refers to the findings and conclusions found in the report of Mario Mifsud (folio 143 et seq) and of Martin Bajada (folio 127 et seq).

In so far as the former is concerned the first court was more interested in commenting upon whether ecstasy are used by the American forces in Afghanistan, Iraq and Vietnam and comparing the plight of these persons to those who are going through an acrimonious divorce!! Obviously this mistake in the appreciation of facts is a result of the fact that the First Court

erroneously concluded that applicant was bringing forward the defence of necessity. Applicant, in fact, merely asked this question to Mario Mifsud to show that ecstasy gives you a feel-good factor and therefore helps him to alleviate (and not cure!!) his depressive feelings.

5) That absolutely without prejudice to that premised above, the punishment inflicted is exaggerated. To this effect suffice it to state at this stage that the First Court makes no mention of Section 17, no mention of the reasons why, notwithstanding his ailments which it acknowledges are 'acute' and 'on-going', he is sentenced in such a manner.

6) Without prejudice applicant should not be made to pay for the expenses of Martin Bajada whose report has, at worst, been irrelevant for the purposes of his conviction.

That the grounds of appeal of appellant Attorney General are as follows:-

That without prejudice to the nature of this appeal and for all intents and purposes the appellant submits that this appeal is limited to the fact that the First Court failed to apply the confiscation or forfeiture of the vehicle Honda Prelude (registration number K33LCB) which was driven by the accused at the time of his interception and where drugs were also found, hence clearly constituting a salient part of the corpus delicti of these offences. The Attorney General will not be appealing with regards to the finding of guilt or the quantum of the punishment imposed.

That according to article 23 of the Criminal Code :

23. (1) The forfeiture of the corpus delicti, of the instruments used or intended to be used in the commission of any crime. and of anything obtained by such crime, is a consequence of the punishment for the crime as established by law, even though such forfeiture be not expressly stated in the Iaw, unless some person who has not participated in the crime, has a claim to such property.

(2) In case of contraventions, such forfeiture shall only take place in cases in which it is expressly stated in the law.

(3) In the case of things the manufacture, use, carrying, keeping of sale whereof constitutes an offence, the forfeiture thereof may be ordered by the Court even though there has not been a conviction and although such things do not belong to the accused

(4) Notwithstanding the provisions of sub articles (1) to (3), where the Attorney General communicates to a magistrate a request of an article obtained by criminal means for purposes of restitution to its rightful owner, the court may after hearing the parties and if it deems it proper so to act after taking into consideration all the circumstances of the case, order that the forfeiture of any such article shall not take place and that the article shall be returned to the requesting foreign authority.

That first and foremost, the vehicle forming the merit of this appeal was used to transport the appealed himself, who was driving same whilst carrying drugs on his person as welI as the cannabis which was effectively found in the vehicle in question. It is therefore evident that the definition above given applies perfectly with regards to the Honda Prelude at issue in that this vehicle was used in the commission of a crime as well as to carry the drugs which were illicit in nature and which were intended for an illicit purpose by the appealed.

That therefore it is clearly indicative from the above provision that the Court is duty-bound to order the confiscation of anything constituting the corpus delicti of an offence unless a third party independent from the case at issue has a claim to such a vehicle. This does not appear to be the case at issue in that the vehicle belonged to the accused.

There is no doubt either that the vehicle in question was in fact exhibited formally in court by Inspector Victor Aquilina as can be seen in the Court minute dated the 11th April 2OO7. Moreover at no point does the law stipulate that the prosecution must request for such confiscation to be rendered in order for it to be effective and hence

the application of article 23 of the Criminal Code is within the Court's remit and powers independently of any official request made.

Considers:

Appellant Steven Charles Bertram found employment in Malta as assistant manager at the Island Residence Club situated in Saint Paul's Bay after he had previously worked as a sales representative with Leisure Marketing Limited. On the twenty-sixth (26th) of March two thousand and six (2006) he came over to Malta in his own vehicle Honda Prelude bearing registration number K 33 LCB which was packed with his own personal belongings. On arrival he was stopped by the police and duly searched where cannabis leaves and seeds were found in the car whilst in the pocket of his trousers approximately a hundred and thirty ecstasy pills were found. On the basis of these findings appellant was arrested and interrogated and subsequently arraigned in Court under arrest and accused with the charges mentioned at the beginning of this judgement.

On the first day of the sitting, 28th March 2007, appellant on being asked how he pleaded to the charges, replied that he was guilty of all charges qualifying his guilt with reference to charges A, B, and C that the importation of the drug was for his personal use (fol 9). The Court then proceeded to hear evidence and by judgement of the 14th of June 2012 (fol 323) found appellant guilty as charged and condemned him to a prison term of two and a half years together with a fine of five thousand Euro (€5,000). Both the appellant and the Attorney General felt aggrieved by this judgement and two appeals were filed. The appeal of the Attorney General was limited to the fact that the first Court failed to apply the confiscation or forfeiture of the vehicle Honda Prelude K 33 LCB which was in possession of the accused at the time of his interception and where drugs were also found, clearly constituting a

salient part of the "corpus delicti" of these offences. Whilst the appellant claimed that the first Court entered into the defence of necessity that was never raised by the appellant that it made a wrong application of the law whilst concluding wrongly that the ecstasy pills were not for the personal use of appellant, that the punishment inflicted was exaggerated and also that appellant should not have been made to pay for the expenses of Martin Bajada whose report was irrelevant for the purposes of his conviction.

The Court will first consider the appeal of the Attorney General since it does not seem to be contested by the appellant.

Considers:

By note verbal entered on the 28th of November 2013 (fol 357) appellant declared that he had no particular interest in the appeal filed by the Attorney General for the confiscation of the vehicle that had been seized by the police in this case. The Court takes this to understand that the arguments brought by the Attorney General for the seizure of the vehicle mentioned were accepted by the appellant and therefore this Court will simply acceded to the request filed by the Attorney General and order the forfeiture or seizure of the vehicle Honda Prelude K 33 LCB to be referred to in the concluding paragraph of this judgement.

The Court will now consider the main appeal filed by appellant.

Considers:

In his application for appeal appellant made it quite clear that his main and only line of defence was that the importation/possession was for his exclusive personal use (fol 338). He argued that it was not up to the Defence to prove even on a basis of probability that this was case as it is always incumbent on the Prosecution to prove beyond a reasonable doubt that the pills found in the possession of accused were not for his personal use.

Considers:

There is no contesting the fact that accused was found in possession of about a hundred and thirty (130) tablets ecstasy which are scheduled under the Medical and Kindred Professions Ordinance (Chapter 31, section A) together with cannabis seeds and dried leaves of cannabis to a weight of seventeen point six two eight grammes (17.628 grs.) with fourteen point three percent (14.3%) tetrahydrocannabinol (THC) which according to the expert Mario Mifsud was considered to be of a high percentage. Applicant is claiming that after the death of his mother in 2002 and an acrimonious divorce he entered into a depressive state of mind that necessitated medication. Having experienced the effects of ecstasy before, decided to acquire a number of ecstasy pills for his own use during his stay in Malta claiming that at his age (50 years old) he would find it difficult to acquire ecstasy pills which he found very efficient in controlling and calming his depressive state of mind. It was of course up to the first Court to believe on a balance of probability that the version put forward by accused to justify his possession is indeed credible and safe to believe. This does not, however, shift the burden of the Prosecution to prove beyond a reasonable doubt that the drugs were not for the appellant's own personal use to that of appellant. The Court refers to the judgement given by the Court of Appeal on the 26th of August 1998 "Police versus Carmel Degiorgio" wherein it was stated that, "... the legal position is clear: the Court has to be satisfied beyond a reasonable doubt that on the basis of the evidence brought forward by the Prosecution that the

possession of the drugs were not for the exclusive of the person on whom the drugs were found."

In this case it resulted that almost a hundred and thirty (130) tablets ecstasy were found in the possession of the accused. Of that there is no doubt. This Court believes that this amount is far too excessive to justify any personal use. In the case "Police versus Carmel Spiteri" decided on the 2nd of September 1999, the Court held that, "when a substantial amount of drugs are found, this on its own can be enough to satisfy the Court that the possession of that drug was not for the exclusive use of the person concerned." This Court considers that besides the ecstasy, cannabis seeds and dried cannabis leaves together with weighing scales were also found in the possession of the accused. It is indeed difficult to believe how all these drugs could have been for the exclusive of the appellant when the Court considered that every drug has got a limited shelf life and if not consumed within a limited time frame they will lose their effect and might as well be thrown away unless of course they are disposed of in any other manner. It is not the competence of this Court to speculate on how this manner could be achieved. The important thing is that too many pills were found to justify anyone's personal use. In no matter what appellant's psychological condition or health was at the time there is no way he could help himself with self medication without seeking professional help from a psychologist or psychiatrist.

The first Court was right when it argued that if appellant had that psychological condition, he could have sought out the help of professional persons of which there are quite a few on the island. This Court therefore agrees with the assessment made by the first Court that the drug found in the possession of appellant clearly indicates that they were found "under such circumstances that the Court is satisfied that such importation was not for the exclusive use of the offender ...". Appellant also claimed

that the third and fourth charge of importing and possession of cannabis was not mentioned in the judgement of the first Court.

Considers:

As already stated, on the first day of his arraignment appellant pleaded guilty to all the charges proffered against him qualifying only charges A, B and C in the sense that the importation was for his personal use. This means therefore, that the other charges D and E were admitted to by the appellant in which case the Court had no reason to delve into the matter of the importation or possession of the drug cannabis. It was enough for the Court to state that it was finding the accused guilty of all the charges proffered against him, which the Court in fact did.

This Court therefore concludes that the first Court on the basis of the evidence brought before it was justified in reaching its conclusion and there is no particular reason as to why this Court should disturb the discretion of the first Court as regards the merits of this case.

As regards the punishment, the first Court meted out a punishment after considering all the circumstances of the case, the early guilty plea of appellant, the fact that he has a clean criminal record and awarded a punishment which was within the parameters allowed by law. Again, under such circumstances this Court does not normally disturb the discretion of the first Court unless there are very special circumstances which would allow the Court of Appeal to overturn the first Court's desertion. In this case no such circumstances exist.

For this reason the Court whilst rejecting the appeal filed by appellant, upholds the appeal of the Attorney General and whilst confirming the decision of the first Court as to the merits varies the punishment awarded in the sense that it confirms the prison term and fine but also orders the seizure and forfeiture of vehicle Honda Accord registration number K 33 LCB in favour of the Government of Malta.

< Final Judgement >

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