MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE -- ACTING PRESIDENT

DAVID SCICLUNA

THE HON. MADAM JUSTICE

ABIGAIL LOFARO

THE HON. MR. JUSTICE

JOSEPH ZAMMIT MC KEON

Sitting of the 23 rd October, 2014

Number 58/2010

The Republic of Malta

v.

Tony Johnson

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 16th November 2010 wherein the said Tony Johnson was accused of having (1) on the 26th August 2009 and during the previous weeks with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in drugs (cocaine) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), or by promoting, constituting, organizing or financing such conspiracy; (2) on the 26th August 2009, with criminal intent, supplied or distributed or offered to supply or distribute the drug cocaine in breach of the Dangerous Drugs ordinance (Chapter 101 of the Laws of Malta); (3) with criminal intent, been in possession of a dangerous drug (cocaine) against the law and under circumstances denoting that it was not intended for his personal use;

2. Having seen the judgement delivered on the 30th January 2013 whereby the Criminal Court, following the said Tony Johnson's guilty plea and after having heard evidence and submissions on the admissibility or otherwise of article 29 of Chapter 101 to the benefit of the accused, declared the said Tony Johnson guilty of all three counts of the Bill of Indictment, namely of having:

1. on the 26th August 2009 and during the previous weeks, with criminal intent, with one or more persons in Malta, or outside Malta, conspired for the purposes of selling or dealing in drugs (cocaine) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), or by promoting, constituting, organizing or financing such conspiracy and this according to the First Count of the Bill of Indictment;

2. on the 26th August 2009, with criminal intent, supplied or distributed or offered to supply or distribute the drug cocaine in breach of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and this according to the Second Count of the Bill of Indictment;

3. with criminal intent been in possession of a dangerous drug (cocaine) as 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 export authorization issued by the Chief Government Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance and when he was not licensed or otherwise authorized to manufacture or supply the mentioned drugs and was not otherwise licensed by the President of Malta or authorized by the internal control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to him for his personal use according to a medical prescription as provided in the said regulation and this in breach of the 1939 regulations on the Internal Control of Dangerous Drugs as subsequently amended by the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) and which drug was found under circumstances denoting that it was not intended for his

personal use, 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, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22(a), 24A, and 26 of the Dangerous Drugs Ordinance and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code, having also seen that the first two charges served as a means whereby the accused was in possession of the dangerous drug (cocaine) as specified in the third charge; that the accused entered a guilty plea during the initial stages of the arraignment against him; and that the accused should benefit from section 29 of Chapter 101, but only to one degree, sentenced the said Tony Johnson to a term of imprisonment of nine (9) years, and to the payment of a fine (multa) of thirty thousand euros (€30,000), which fine (multa) is to be converted into a further term of imprisonment

according to law if not paid within fifteen days of the appealed judgement; further condemned him to pay the sum of one thousand one hundred and ninety-nine euros and twenty-seven cents (€1,199.27) 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, which expenses are to be converted into a term of imprisonment according to law if not paid within fifteen days from the appealed judgement; furthermore, ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which he has been found guilty and other moveable and immovable property belonging to the said Tony Johnson; and finally ordered the destruction of all the drugs seized in this case under the direction and supervision of the Registrar of the Criminal Court, unless the Attorney General files a note within fifteen days from the date of the judgement requesting that the drugs be used as evidence in another case pending before the courts. This after the Criminal Court had also considered:

"That on the twenty-sixth (26th) of August two thousand and nine (2009) during a Drug Squad operation, accused Tony Johnson was arrested at a crime scene. Investigations initially concerned Austin Uche only. After his arrest, accused Tony Johnson assisted the police and it was through him that charges could be levied against Austin Uche and Kofi Friday, another person involved in the alleged trafficking of drugs.

"Initially the police requested that the accused should benefit from section 29 of Chapter 101 but later during compilatory proceedings, accused Tony Johnson changed his version and put all the blame on Koffi Friday, exonerating Austin Uche completely. It was then that the police decided to withdraw the benefit. However, it was through the efforts of Tony Johnson that the police arraigned Tony Uche and later Kofi Friday. Inspector Ronald Theuma told the Court that it was through the efforts of Tony Johnson that the police arraigned Austin Uche and without the co-operation of the accused the police would not have had enough evidence to arraign Uche. During the search at Koffi Friday's residence a sock was found similar to the one found on Tony Johnson during his arrest, which sock contained drugs.

"The accused voluntarily gave his evidence. If he didn't, the police would have fallen on the sworn statement of the accused which the police believed to be the truth since it tallied with the information the police had had beforehand.

"It is to be said that the police had no information whatsoever on the accused Tony Johnson and Koffi Friday and the operation was intended to arrest only Austin Uche. When the accused was found to be in the company of Uche, he was also arrested and it was through the accused that the police came to know of the part Koffi Friday was playing in this traffic organization.

"The accused gave his evidence before the Court and stated that he confirmed the evidence on oath given before Magistrate Edwina Grima. During that session the accused gave further information but admitted that later during compiliatory proceedings he retracted. No satisfactory explanation was given as to why the accused changed his version. He claims that he was not feeling well whilst releasing the statement and claims that the statement was dictated to by the inspector and it was not true that Austin Uche was his friend.

"Considers:

"That during the submissions on punishment the Defence argued that the accused had entered a guilty plea immediately. He co-operated with the police who arraigned Koffi Friday exclusively on what the accused had told them. Therefore section 29 should apply because accused never changed his version as regards Koffi Friday. The accused did what he could but did not want to give false evidence against another person. He claims that he did not have the assistance of a lawyer during the early stage of his arrest and was not feeling well. Whatever the case, the accused entered a guilty plea during arraignment, which was the earliest stage at which a guilty plea could possibly be entered. When the law speaks of "helping the police," it refers to exactly what the accused did, in which case, on a balance of probability, he had helped the police in at least arraigning Koffi Friday.

"The Attorney General on the other hand argued that during the early stages of the investigation the accused co-operated with the police and they did recognize that he should benefit from the application of section 29. However, this was before the accused gave evidence in Court when he retracted and gave a completely different version. This means that the accused credibility is now tainted and this could have a very serious effect on the outcome of proceedings both against Austin Uche and against Koffi Friday.

"Considers:

"On the basis of this evidence the Court is satisfied that during the initial stages of the proceedings the accused was instrumental in the arraignment of Koffi Friday and Austin Uche. The police only had information on the latter and could only arraign Koffi Friday and Austin Uche on the evidence and information supplied by the accused. It is not without good reason, therefore, that at that stage the police had requested that the accused benefit from section 29. However, during compilatory proceedings, when evidence was given under oath, the accused retracted his position as regards Austin Uche but kept it as originally tendered with regards to Koffi Friday.

"Inspectors Ronald Theuma and Johann Fenech made it quite clear that without the co-operation and information given by the accused, the police would not have been able to arraign Austin Uche and Koffi Friday, the latter, being totally unknown to the police.

"This Court feels, therefore, that even though the accused retracted part of the evidence and may have compromised the proceedings with regard to Austin Uche, he did not do so with regard to Koffi Friday, who still faces proceedings where the accused is expected to continue giving his evidence. In this case, therefore, this Court feels that accused should benefit from section 29 of Chapter 101, but only to one degree and not take the full benefit of two degrees."

4. Having seen the application of appeal of the said Tony Johnson filed on the 18th February 2013 wherein he requested that this Court, after considering his first grievance on the basis of the judgement of the European Court of Human Rights in the case **Camilleri vs Malta** decided on the 22nd January 2013, give all the necessary directions and/or directives and/or decisions as regards the legality or otherwise of the trial, conviction and sentence in this case as decided on the 30th January 2013, and which on the basis of the principles enunciated by the European Court of the 22nd January 2013 are in breach of Article 7 of the European Convention on Human Rights and this either by ruling on the issue itself or by sending back the records of the case to the Criminal Court to investigate this grievance of appellant according to law or by directly referring the matter to the Civil Court in its Constitutional jurisdiction for a decision and remedy to appellant; and failing all this, but only alternatively, to reform the judgement of the Criminal Court of the 30th January 2013 in this

case in the abovementioned Bill of Indictment by confirming the guilt of appellant and by cancelling the penalty (imprisonment term and fine (multa)) imposed upon appellant by the Criminal Court and substitute it with another penalty which is more just in all the circumstances of the case and which tallies with the punishment inflicted in similar cases decided by the Criminal Court and by this Court; having seen the Attorney General's reply; 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:-

5. This Court will first consider appellant's first grievance according to which he maintains that the Criminal Court made an error of judgement when it failed to consider the note which appellant filed previously to the pronouncement of the appealed judgement. Appellant submits:

> "When appellant had pleaded guilty, both on arraignment and before the Criminal Court, the decision **Camilleri vs Malta** had not yet been delivered. This decision was however brought to the attention of the Criminal Court almost immediately that appellant became aware of it.
>
> "The importance of this grievance is in the fact that on the basis of the abovementioned judgement of the European Court of Human Rights, article 22(2) of Chapter 101 of the Laws of Malta should be considered to be in breach of Article 7 of the European Convention on Human Rights. This could mean that appellant should not have been put on trial and sentenced by the Criminal Court and/or may be any other Court.
>
> "In actual fact, under Chapter 101 of the Laws of Malta, there is a huge difference in the punishment envisaged for the same offence. This difference is decided upon solely by the Attorney General depending in which Court he decides to send an accused for trial, that is either before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court. Had appellant been sent to trial before the Court of Magistrates as a Court of Criminal Judicature, the term of imprisonment to which appellant could be subjected to would have been a minimum term of six (6) months and a maximum term of ten (10) years. With a reduction of one degree this maximum term of imprisonment would result in six (6) years whilst with a reduction of two degrees this maximum would result in five (5) years.

> "In this regard appellant is humbly praying this Honourable Court to thoroughly investigate this grievance, which appellant humbly submits is a serious one since it may conceivably lead to a decision that, in his regard, Article 7 of the European Convention on human Rights had been breached with all the consequences that such a decision in a pending case may bring about his trial, conviction and sentence.
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> "Appellant humbly submits that in case that if this Honourable Court deems that it cannot itself deal with this matter to either send the case back to the Criminal Court to investigate this alleged breach of human rights or refer the matter to the Civil Court in its Constitutional jurisdiction for a decision on the breach and for an effective remedy to appellant."

6. Now, this Court is not competent to decide if there has been a breach of human rights but it is certainly competent to decide whether the matter raised is at this juncture of the proceedings frivolous or vexatious.

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 the decision to which defence counsel made reference, i.e. **John Camilleri vs Malta**, on the 22nd January 2013 – a mere eight days before the decision in this case by the Criminal Court. In that case the European Court of Human Rights 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. The matter raised before this Court has to a certain extent already been dealt with in constitutional proceedings. In **Joseph Camilleri vs Avukat Generali** decided by the Constitutional Court on the 1st July 2013, applicant Camilleri had sought an interim measure pending the decision of the case he had instituted whereby he was seeking a declaration that the discretion accorded to the Attorney General by article 22(2) of Chapter 101 was in breach of his fundamental rights as guaranteed by article 7 of the European Convention on Human Rights. The interim measure he was seeking was the suspension of the trial by jury pending a final decision by the competent Court/s of his application. The Constitutional Court, in revoking the first Court's decision which had granted such interim measure, stated:

> **"Ghalhekk il-process tas-smiegh tal-guri mhux per se jmur kontra d-drittijiet tal-bniedem, anke taht ic-cirkostanzi lamentati mir-rikorrent, dejjem jekk jitmexxa b'mod gust u jaghti lill-akkuzat smiegh xieraq. Ir-rimedju f'kaz ta' sejbien ta' ksur mhux it-twaqqif jew it-thassir tal-process kriminali, cioe`, ta' dak li jkun sar bl-ezercizzju taddiskrezzjoni tal-Avukat Generali, u kwindi l-guri f'dan il-kaz m'ghandux jitwaqqaf. Il-Qorti Ewropeja ghamlitha cara illi dak li sabet kien biss nuqqas ta' forseeability prevvist mill-Artikolu 7 tal-Konvenzjoni Ewropeja, liema nuqqas certament ma jfissirx li l-process kriminali ghandu jieqaf u ma ghandux iservi sabiex igib bhala konsegwenza l-paralizi tas-sistema gudizzjarja. Il-fatt li, skont il-Qorti Ewropeja (b'dissenting opinion tal-Imhallef Malti), l-akkuzat li allegatament wettaq ir-reat seta' ma kienx jaf il-massimu tal-piena li seta' jkun soggett ghalih jekk jinqabad u jinstab hati, ma ghandux izomm is-smiegh innifsu tal-kaz, li hija haga indipendenti mill-prevedibbilita` o meno tal-piena. Il-piena hi dik stabbilita fil-ligi fil-mument li allegatament twettaq ir-reat, u**

n-nuqqas ta' *forseeability* jista' jaghti lok ghal xi rimedju iehor, izda mhux li jitwaqqaf il-process gudizzjarju fil-konfront tal-persuna implikata."

9. Subsequently, in the case **Mario Camilleri vs Avukat Generali** decided by the First Hall of the Civil Court in its constitutional jurisdiction, wherein applicant was seeking the annulment of the Bill of Indictment brought against him, that Court referred to the **Joseph Camilleri** case and dismissed applicant's request.

10. This Court must also point out that the Attorney General's order for a case to be tried by the Court of Magistrates or by the Criminal Court does not in any way effect the guilt of the accused. It prescinds all deliberations or considerations at trial that would lead to the guilt or acquittal of the accused.

11. Now, although the **John 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. 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 fortysix 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]

12. 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 appellant 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."

13. Before the Criminal Court, and therefore after all the evidence had been compiled and a Bill of Indictment served, 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.

14. In the meantime, by means of article 88 of Act XXIV/2014 subarticle (2B) was added to article 22 of Chapter 101 of the Laws of Malta which provides as follows:

> **"Where, upon conviction by the Criminal Court as provided in sub-article (2)(a), after considering all the circumstances of the case including the amount and nature of the**

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

> **drug involved, the character of the person concerned, the number and nature of any previous convictions, including convictions in respect of which an order was made under the Probation Act and the provisions of the Fourth Schedule, the court is of the opinion that the punishment provided for in sub-article (2)(a) would be disproportionate it may, giving reasons, apply the punishment provided in sub-article (2)(b)."**

This subarticle is fully applicable even at this stage of the proceedings.

15. Also by means of Act XXIV/2014 a Fourth Schedule was added[2] to Chapter 101 consisting of Guidelines to be used by the Attorney General in the exercise of his discretion in terms of article 22 of said Chapter 101. This Court has seen these Guidelines and it is evident that they are based on years of experience which the Attorney General has had in determining whether to send a person for trial before the Court of Magistrates or before the Criminal Court.

16. Thus, the drug involved in this case was cocaine and, according to the Guidelines, an amount less than 100 grams can be taken as indicative that a person should not be referred for trial before the Criminal Court. The amount involved in this case was 949.13 grams with an average purity of 33.7%, with a retail value according to the 2007 National Report to the EMCDDA by the Reitox National Focal Point of around €72,134. From the evidence produced during the compilation proceedings, it is evident that appellant's participation was motivated by the prospect of financial advantage. In these combined circumstances this Court is of the opinion that there was no misuse of the Attorney General's discretion when he decided that appellant should be tried before the Criminal Court.

17. Consequently, while this Court fails to see how it can rule that appellant's trial, conviction and sentence could be deemed null and void, it deems that the constitutional issue raised is vexatious in terms of article 46(3) of the

[2] By article 90 of Act XXIV/2014.

Constitution and consequently dismisses appellant's requests on which the first grievance is based.

18. This Court will now proceed to consider appellant's second grievance which is related to the *quantum* of punishment which he deems too high. Appellant mentions three principal factors which will be dealt with *seriatim*:

19. Appellant first points out that he had pleaded guilty at the very first opportunity that he had, namely on arraignment. He says: "There are very few cases when a person charged, in case that the Attorney General would have decided to order that a case is to be tried by the Criminal Court, pleads guilty on arraignment."

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

21. Furthermore, as was retained in **"Ir-Repubblika ta' Malta vs. Mario Camilleri**" decided by this Court differently composed on the 5th July 2002, "l-ammissjoni bikrija mhux bilfors jew dejjem, jew b'xi forma ta' dritt jew awtomatikament, tissarraf f'riduzzjoni fil-piena".

22. In this case the first Court clearly took into consideration the fact that appellant had lodged a guilty plea on his arraignment.

23. The principles which have been considered to guide these Courts when there is a guilty plea have been described by the Criminal Court in its preliminary judgement **Ir-Repubblika ta' Malta v. Nicholas Azzopardi** decided on the 24th February 1997 and the judgement of the Court of Criminal Appeal (inferior jurisdiction) in its judgement **Il-Pulizija vs. Emmanuel Testa** decided on the 17th July 2002. In the latter case reference was made to an excerpt from Blackstone's Criminal Practice, 2001, para. E1.18, p.1789[3]:

> **'"Although this principle [that the length of a prison sentence is normally reduced in the light of a plea of guilty] is very well established, the extent of the appropriate 'discount' has never been fixed. In *Buffery* (1992) 14 Cr App R (S) 511 Lord Taylor CJ indicated that 'something in the order of one-third would very often be an appropriate discount', but much depends on the facts of the case and the timeliness of the plea. In determining the extent of the discount, the court may have regard to the strength of the case against the offender. An offender who voluntarily surrenders to the police and admits a crime which could not otherwise be proved may be entitled to more than the usual discount (*Hoult* (1990) 12 Cr App R (S) 180; *Claydon* (1993) 15 Cr App R (S) 526) and so may an offender who, as well as pleading guilty himself, has given evidence against a co-accused (*Wood*[1997] 1 Cr App R (S) 347) and/or given significant help to the authorities (*Guy* [1999] 2 Cr App R (S) 24). Where an offender has been caught red-handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris (1988) 10 Cr App R (S) 216; *Landy* (1995) 16 Cr App R (S) 908)). Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage (*Hollington* (1985) 82 Cr App R (S) 281; *Okee* [1998] 2 Cr App R (S) 199)). Similarly, some or all of the discount may be lost where the offender pleads guilty but adduces a version of facts at odds with that put forward by the prosecution, requiring the court to conduct an enquiry into the facts (*Williams* (1990) 12 Cr App R (S) 415). The leading case in this area is *Costen* (1989) 11 Cr App R (S) 182, where the Court of Appeal confirmed that the discount might be lost in any of the following circumstances: (i) where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, be passed; (ii) cases of 'tactical plea', where the offender delayed his plea until the final moment in a case where he could not hope to put up much of a defence, and (iii) where the offender had been caught red-handed and a plea of guilty was practically certain. It was also established in *Costen* that the discount may be reduced where the accused pleads guilty to specimen counts." (Blackstone's Criminal Practice, 2001, para. E1.18, p.1789).**

[3] Today in the United Kingdom, guidelines have been issued by the Sentencing Guidelines Council.

24. In the present case, appellant was caught "red-handed" with the cocaine in his possession. Consequently, taking into consideration the fact that the first Court did consider appellant's early guilty plea, this Court fails to see how any further discount could be made because of appellant's early guilty plea.

25. The second point raised refers to the application of article 29 of Chapter 101 of the Laws of Malta. Appellant says: "In its judgement the Criminal Court considered that appellant should benefit under the provisions of section 29 of Chapter 101 of the Laws of Malta but only to the extent of one degree and not two degrees on the basis that whilst initially appellant had implicated two persons in the concerned drugs operation he later retracted his wrongful allegations in the case of one of them. Appellant humbly submits that such reasoning is very dangerous because whilst the provisions of section 29 already pose a danger vis-a-vis innocent persons who may be wrongly implicated in dangerous drugs, such reasoning may give the impression that a timely retraction of an untrue allegation implicating an innocent person in dangerous drugs should be the object of a condemnation rather than being laudable and commendable."

26. Article 29 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, as regards imprisonment by one or two degrees, and as regards any pecuniary penalty by one-third or one-half."**

27. The meaning of this article is clear. A reduction in punishment takes place when the person found guilty in terms of Chapter 101 **"has helped the Police <u>to apprehend</u> the person or persons who <u>supplied</u> him with the drug"** (emphasis by the Court). This meaning cannot be extended to include a

situation where such person helps the Police apprehend the person for whom the drugs were destined or the person who may have acted as an intermediary – although such assistance may be taken into consideration by the Court in determining the appropriate punishment.

28. As was held in **The Republic of Malta v. Kamil Kurucu** decided by this Court (differently composed) on the 14th June 2007:

> **"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."**[4]

29. Consequently in the present case whether or not Austin Uche was involved in the conspiracy, at no stage of the proceedings was appellant entitled to benefit from article 29 in so far as Uche was concerned because, according to the evidence tendered by appellant, it was not Uche who supplied the cocaine.

30. Appellant finally complains about the disparity between the punishment imposed on him and that imposed in other cases, including where the accused did not benefit from article 29. Appellant says: "In actual fact, considering other judgements of the Criminal Court, the prison term and fine (multa)

[4] See also 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.

imposed upon appellant are even more onerous than those meted out in other cases even when no benefit under section 29 was granted and when the circumstances for the concerned accused were worse than those in the case of appellant. For example in the case **Republic of Malta v Henrique Nunes Correia**, decided by the Criminal Court on the 18th February 2011, which with regards to the penalty to be inflicted made reference to other recent judgements in similar cases, and in which case the charges were similar to those in the present case; the conduct sheet of accused was clean as in the present case; the amount of drugs involved was nearly the same as in this case, that is 948.44 grams of cocaine with a purity of 35% (in the present case the amount of drugs involved is 949.13 grams of cocaine with a purity of 33.7%); where the accused only pleaded guilty just before a jury was formed and which guilty plea was not considered by the Court to be an early one since it was not entered on arraignment or during the compilation of evidence (in the present case appellant pleaded guilty on arraignment); and in which case no benefit under section 29 of Chapter 101 of the Laws of Malta was granted (in the present case a reduction of one degree was granted), accused was sentenced to a term of eight (8) years imprisonment and to a fine (multa) of twenty-three thousand euros (€23,000)."

31. Appellant admits that "comparisons are odious to make." However, he adds, "it is a principle of criminal law that justice should be meted out justly, evenly and fairly. Thus, although in principle this Honourable Court does not disturb the discretion of the Criminal Court, appellant humbly submits that in this case there are just reasons which favour a change in the punishment inflicted upon appellant."

32. English Courts have dealt with similar situations and created a number of guidelines which have been concurred with by our Courts.[5] In *Blackstone's Criminal Practice*, 2008 (para. D25.45 a fol. 1971) we read:

[5] See, viz., Criminal Appeal **Ir-Repubblika ta' Malta v. Brian Godfrey Bartolo**, 14 ta' Novembru 2002.

"There has been some inconsistency in the approach taken by the Court of Appeal to the question of the circumstances in which a difference in sentence between co-accused can form a ground of appeal against sentence. In *Stroud* (1977) 65 Cr App R 150, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal. Instead, the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. Decisions in the same vein include *Brown* [1975] Crim LR 177, *Hair* [1978] Crim LR 698 and *Weekes* (1980) 74 Cr App R 161.

"By contrast, in *Fawcett* (1983) 5 Cr App R (S) 158, the Court of Appeal held that where an offender had received a sentence which in and of itself was not objectionable but, for no apparent good reason, was more severe than that of his co-accused, the court could intervene if the disparity was serious. Lawton LJ said that the question to be asked is:

"'would right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?'

"(See also *Wood* (1983) 5 Cr App R (S) 381 and *Sigston* [2004] EWCA Crim 1595.)

"In more recent cases the Court of Appeal have followed the approach in *Fawcett* (but see *Tate* (2006) 150 SJ 1192, for a recent example of a case following the line of reasoning in *Stroud*).

"The fact that offenders who are sentenced at roughly the same time as an appellant in the same Crown Court have received more lenient sentences for comparable offences can never be relied on as a ground of appeal. The court will not allow such comparisons to be made (*Large* (1981) 3 Cr App R (S) 80)."

33. Archbold, in *Criminal Pleading, Evidence and Practice*, 2009 (para. 5-106, p. 635) comments thus:

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. It has been said that the court would interfere where 'right-thinking members of the public, with full knowledge of the relevant facts and circumstances, [would] consider that something had gone wrong with the administration of justice' (per Lawton L.J. in *R. v. Fawcett*, 5 Cr. App.R.(S) 158 C.A.); but this was rejected, as providing little guidance as to those cases in which the court's sense of injustice would be so offended that it would interfere, in *R. v. Coleman and Petch*, unreported, October 10, 2007, CA ([2007] EWCA Crim. 2318), where it was said that there was no identifiable principle on which the court would intervene on this ground. Certainly, there are cases where the court has refused to interfere with proper sentences by reference to the good fortune of another offender, where that other offender has received a lenient sentence for no apparent reason (*R. v. Tate* (2006) 150 S.J. 1192, CA) or, despite having been alleged to have been more deeply involved than the appellant, has been convicted of a lesser offence for lack of evidence (*Coleman and Petch ante*).

"The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see *R. v. Large*, 3 Cr.App.R.(S) 80, C.A.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see *R. v. Stroud*, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as *R. v. Wood,* 5 Cr.App.R.(S) 381. C.A., *Fawcett*, *ante*, and *Broadbridge*, *ante*. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in *Fawcett* is satisfied."

34. As appellant rightly states, "comparisons are odious". The case cited by appellant, **Republic of Malta v Henrique Nunes Correia**, is completely unrelated to the present one. This Court will therefore not delve into the circumstances which led the Criminal Court to give the punishment it did in the **Nunes Correia** case. Each case has to be decided on its own particular merits.

35. The punishment awarded is well within the parameters set out by law, the custodial sentence being even within the parameters of punishment falling

within the Court of Magistrates' jurisdiction. Moreover, 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 (inkluża 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*)."** In fact in **Ir-Repubblika ta' Malta v. Thafer Idris Gaballah Salem**, it was said: **"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."**

36. In the light of all these considerations, this Court believes the punishment that was awarded by the Criminal Court was proportionate to the circumstances and finds that there is no reason to disturb that Court's decision as to the q*uantum* awarded.

37. For these reasons this Court dismisses the appeal and confirms the judgement delivered by the Criminal Court on the 30th January 2013 in the Names **The Republic of Malta v. Tony Johnson**, saving that the fifteen day period for the payment of the Court experts' expenses shall start running from today. Furthermore, as the Attorney General had filed in the records of the Criminal Court on the 31st January 2013 a note stating that the drugs exhibited in this case are needed as evidence in another case pending before the Courts, namely **The Republic of Malta v. Kofi Otule Friday and Austin Uche**, the order for destruction is suspended.

< Final Judgement >

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