

COURT OF CRIMINAL APPEAL

Judges:

His Honour the Chief Justice Noel V. Arrigo LL.D. -- President
The Hon. Mr Justice Joseph A. Filletti B.A., LL.D., A.R.Hist.S.
The Hon. Mr Justice Vincent A. De Gaetano LL.D.

To-day, Tuesday 30 April, 2002

Bill of Indictment no. 15/2001

The Republic of Malta

v.

-- omissis --

Steven Peter Cushnahan

The Court,

Having seen Bill of Indictment no. 15 of the year 2001 whereby **Steven Peter Cushnahan** was charged in the **second count**, together with Steven John Caddick and Philip Walker, with having been in possession of cocaine in violation of the law, with the aggravating circumstance that such possession was not for the exclusive use of the offenders; and in the **third count** the said **Cushnahan** was also charged, together with the aforementioned two persons, with conspiracy for the purpose of importing or dealing in cocaine;

Having seen the verdict of the jury, delivered on the 4 March, 2002, whereby, with regard to the second count, the said Steven Peter Cushnahan was found **guilty** by six votes in favour and three votes against, but without the aggravating circumstance above mentioned; and, with regard to the charge in the third count, he was found **not guilty** by six votes in favour and three votes against;

Having seen the sentence passed by the Criminal Court on the 5 March, 2002, whereby that Court, after declaring Steven Peter Cushnahan guilty of the offence of "simple" possession of cocaine and not guilty of the offence of conspiracy to import or deal in cocaine, after hearing submissions by defence and prosecuting counsel, and after having considered all the circumstances of the case, sentenced the said Steven Peter Cushnahan (1) to

two years imprisonment from which period was to be deducted the time he had already spent in preventive custody, (2) to the payment of a fine (*multa*) of six thousand liri (Lm6,000), convertible into an additional six months imprisonment if not paid according to law, and (3) further ordered him to pay to the Registrar within fifteen days the sum of fifty liri (Lm50) representing his share of court experts' fees incurred in the course of the proceedings; that Court further ordered (4) "*the forfeiture in favour of the Government of Malta of the entire immovable and movable property of each of the three persons found and declared guilty in which the offence took place as described in the Bill of Indictment*"; finally the Criminal Court (5) also declared Steven Peter Cushnahan to be a prohibited immigrant under Section 5(1)(d) of the Immigration Act, and ordered that a removal order be made against him, which removal order is to become operative only and as soon as the said Cushnahan shall have served his prison sentence;

Having seen the application of appeal filed by the same said Steven Peter Cushnahan on the 22 March, 2002, whereby appellant requested this Court to vary the punishment inflicted by the first Court;

Having heard submissions by learned counsel for appellant, Dr. Jose` Herrera and by learned counsel for the prosecution, Senior Counsel for the Republic Dr. Mark Said, on the 16 April, 2002; having taken into consideration all the relevant circumstances; considers:

This is an appeal against sentence, that is against the punishment awarded by the first Court. Appellant, in his appeal application, states that the punishment was "overtly excessive", by which expression appellant presumably means "manifestly excessive" and not "deliberately excessive".

It should, perhaps, be pointed at the outset that before the Criminal Court the punishment for "simple" possession of a dangerous drug ranges, as far as imprisonment is concerned, from a minimum of twelve months to a maximum of ten years, and a fine (*multa*) ranging from a minimum of two hundred liri to a maximum of ten thousand liri (Section 22(2)(a)(ii), Cap. 101). The custodial punishment awarded by the first Court is clearly very close to the minimum. Although appellant states, in his appeal application, that only "traces" of cocaine were found in his possession, this is not quite correct. According to the evidence of the court appointed expert Mario Mifsud, the amount of cocaine found in exhibit 01 AOF 302A (found in appellant's hotel room) was of 0.803 grams. Moreover appellant also admitted, in his statement to the police, that on the day prior to the police search he had bought one gram of cocaine for the price of Lm30. Consequently, one is definitely not talking of "traces", as appellant would have this Court believe. The Court has also examined, as suggested by prosecuting counsel, the evidence of Dr. Richard Portelli given in the course of the trial by jury; but from the evidence of this medical practitioner the Court cannot conclude, as the prosecution would have it conclude, that appellant had a "long" history of drug addiction –

all that can be said with certainty is that appellant had, previously to his arrest, experimented with cocaine and with cannabis, and that he therefore qualifies as a drug abuser.

In his application of appeal, appellant mentions, as circumstances which militate for a reduction of the punishment, the fact that the jury was not unanimous in its verdict, the fact that he is a foreigner, his medical history and history of heart problems, his clean criminal record (at least in Malta – this Court has no idea of whether appellant was ever convicted in his home country, or elsewhere for that matter), and the small amount of drug involved. All these facts, however, were duly considered by the Criminal Court before handing down the sentence. Consequently, this Court finds no valid reason to vary the term of imprisonment inflicted by the first Court. However, just as the term of imprisonment awarded leans towards the minimum, so also should the pecuniary fine lean towards the minimum rather than the maximum. For this reason, and for this reason only, this Court is of the view that the fine (*multa*) should be reduced from six thousand liri to two thousand four hundred liri.

There is one final point which, although not specifically raised in the appeal application or in the course of oral submissions, this Court feels that it should raise *ex officio*. This refers to the forfeiture of appellant's "entire immovable and movable property", as ordered by the first Court. The forfeitures provided for in sub-section (3A) of Section 22 of Cap. 101 do not apply in the case of "simple" possession. The order of forfeiture, as far as appellant is concerned, was clearly an oversight on the part of the Criminal Court.

For these reasons this Court varies the sentence of the first court in the following manner:

1. it revokes that part of the sentence whereby appellant was sentenced to the payment of a fine (*multa*) of six thousand liri, and instead sentences him to the payment of a fine (*multa*) of two thousand four hundred liri (Lm2,400), convertible into an additional six months imprisonment if not paid according to law;
2. it revokes that part of the sentence whereby the court ordered the forfeiture of appellant's "entire immovable and moveable property"; and
3. confirms the rest of the sentence in so far as it refers to appellant, that is to Steven Peter Cushnahan.

The fifteen days for the payment of the court experts' fees commence to run as from to-day.

Joseph Sammut Deputy Registrar

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