

*10th December, 1987*

*Judge: -*

*The Hon. Carmel A. Agius B.A., LL.D.*

*The Police (Inspector John Mifsud)*

*versus*

*James Beauclerk Duncan*

***Exchange Control - Surrender of Gold or Foreign Currency  
- Dangerous Drugs - Possession other than for One's  
Personal Use - Punishment***

*According to subsection (5) of section 5 of the Exchange Control Act, in any proceedings, whether criminal or civil, in which any question arises as to whether any gold or foreign currency was offered for sale to an authorised dealer it shall be presumed, unless the contrary is proved, that the gold or currency in question was not offered for sale to an authorised dealer.*

*A court may acquit a person of the charge of drug trafficking and yet may not be satisfied that the offender is not a person who cultivates, produces, sells or otherwise deals in any drug or that the possession by him of the dangerous drug was for his own exclusive use.*

*The Court: –*

*Omissis;*

*Having seen the judgement of the Court of Magistrates of Judicial Police of the 6th August 1987 by which that same Court found accused not guilty of the charge of having sold or otherwise dealt in the whole or any portion of the plant cannabis and of the charge of having supplied or procured or offered to supply or procure heroin to other persons and acquitted him of said charges; but otherwise, found him guilty as charged, including of having procured heroin for himself and after having seen section 8(d) of Chapter 161; Regulation 8 of Government Notice 292/1939; Regulation 4 of Government Notice 292/1939; Section 22(1)(a)(2)(b)(ii) of Chapter 161; Sections 4(1)(2), 5(1), 8(a), 39, 41 and 42 of Act XLIX of 1972; Sections 5(1)(2)(d)(e)(f)(g), 6(1)(2), 9(1), 14(1)(2), and 23(a) of Act IX of 1970; Section 533 of the Criminal Code; and the proclamation by the President of the Republic of the 29th January 1987, condemned the accused to a total period of imprisonment of three years from which period is to be deducted the period spent in protective custody and to the payment of a fine (multa) of two thousand Maltese Liri (Lm2000); the first Court furthermore ordered the forfeiture of the foreign currency exhibited in these proceedings, i.e. the sums of U.S.\$3450, Stg£30, 15 Tunisian dinars and 1 Libyan dinar, in favour of the Government of Malta and ordered the forfeiture of the following documents as described in the report by the forensic expert (Doc. ABM); i.e. documents 86MD07, 86MD08,*

*86MD09, 86MD10, 86MD11, 86MD12, 86MD13, 86MD15, 86MD16, 86MD18, 86MD19, 86MD20, 86MD21 and 86MD23, and their destruction by Dr. Anthony J. Abela Medici whom the Court appointed for the purpose and authorised to withdraw said documents for said purpose;*

*Omissis;*

*Having seen the application of appeal of accused whereby he prayed this Court to reform the judgement appealed against by revoking that part of the judgement whereby he was found guilty of a violation of section 5(1) of Part II of Act XLIX of 1972 and acquit him of this charge and furthermore to condemn him to a lesser punishment in terms of law and confirm the judgement in so far as he was acquitted of certain charges;*

*Omissis;*

*That appellant in the first place feels aggrieved by that part of the judgement of the first Court whereby he was found guilty in terms of section 5(1) of Part II of Act XLIX of 1972 of having as a person who is not an authorised dealer who had in his possession or control any gold or foreign currency in Malta and as a person residing in Malta who had in his possession or his control any gold or foreign currency outside Malta, failed to offer the gold or foreign currency or cause them to be offered for sale to an authorised dealer in breach of the said section;*

*According to appellant he could not have been convicted of this offence since according to the said section as amended the contravention of this particular restriction is deemed to have taken place only after an order is issued by the Minister whereby*

*the Minister directs that the gold or foreign currency shall vest in him;*

*This submission however is untenable at law since nothing stated in section 5 or in any other section of the Exchange Control Act 1972 supports appellant's submission. Rather it is clear from subsection 5 of section 5 of the said Act that in any proceedings, whether criminal or civil, in which any question arises as to whether any gold or foreign currency was offered for sale to an authorised dealer it shall be presumed, unless the contrary is proved, that the gold or currency in question was not offered for sale to an authorised dealer. In addition to this the evidence tendered in this case in regard to the said crime is more than sufficient to establish beyond any shadow of doubt appellant's guilt in terms of section 5(1) of the said Act and, this Court considers appellant's submission as an inversion of what the correct position at law on the matter is;*

*The next ground of appeal brought forward refers to the applicability or otherwise of section 22(2) of the Dangerous Drugs Ordinance according to which where the Court is satisfied that the offender is not a person who cultivates, produces, sells or otherwise deals in any drug, and the offence consists only in the possession of a dangerous drug for the exclusive use of the offender, or of utensils for that purpose or consists in the taking of any drug then any such person shall not be tried before the Criminal Court and shall not be liable to imprisonment;*

*According to appellant the first Court itself declared that the accused was not a person who produces or sells and therefore he should not have been subjected to imprisonment in relation to these charges. More precisely appellant submitted that once*

*the first Court established that he was not guilty of having sold or in any way dealt in heroin or cannabis it cannot be claimed that the imprisonment was inflicted as the Magistrate was not satisfied that the offender was not a person "who cultivates, produces, sells or otherwise deals in any drug", as this would be equivalent to inflicting a punishment for a crime that appellant did not commit;*

*It is to be noted forthwith that appellant's assertion that he has been sentenced for a crime he did not commit is far from being correct. As a matter of fact the first Court did not impose a punishment for a crime appellant did not commit. The first Court imposed the punishment contemplated by the law for the crime that appellant did commit in contravention of section 8(d) of Chap. 161 and within the margins of discretion laid down by section 22(2)(b)(ii) of the same chapter. What the first Court obviously did was to inflict the punishment laid down by law after deciding that appellant was not a person who could benefit from the disposition of non-imprisonment provided for by the above-mentioned proviso;*

*Appellant seems to view such a way of reasoning as being contradictory in that he contends that the first Court acquitted him from the charge of trafficking and therefore could not at the same time be not satisfied that he was not a person who cultivates etc;*

*This way of reasoning however is not logical, in the sense that the two conclusions i.e. the acquittal from the charge of trafficking and the conviction of the Court that still however it was not satisfied that appellant was not a trafficker and that the drugs he had were not for his own exclusive use, are not*

*contradictory of each other but may be, and in the present case are in fact, complimentary of each other. That this is so is very obvious from some parts of the judgement appealed from and in particular in the part where the first Court obviously being convinced that though some charges were unproven appellant's case was not a mere case of possession of drugs for one's own exclusive use, recommended the introduction to the statute book of a legal presumption to the effect that a person found to be in possession of a substantial amount of a particular drug has it for the purpose of selling or dealing in it and that evidence to the contrary would have to be adduced by him;*

*This reasoning of the first Court is also in the opinion of this Court perfectly legal and in fact reflects what the legislator envisaged when introducing the proviso above-mentioned. In fact as already stated, the fact that a person is acquitted from the charge of trafficking merely amounts to a conclusion that actual trafficking has not been proven but certainly does not mean that the drugs found in possession of accused were meant for his own exclusive use. Infact it seems that section 22(2) proviso is no more than a criterion imposed by law to guide the Court in arriving to the punishment it ought to inflict. The very wording of this proviso shows that the Court can find a person guilty of possession of drugs and still not be satisfied that that possession was for his own exclusive use. In such an eventuality that court will have to inflict the punishment laid down by law and not refrain from giving an imprisonment sentence in terms of the said proviso;*

*This ground of appeal therefore is also unfounded;*

*The third and last ground of appeal regards the punishment*

*ut sic inflicted by the first Court. His first submission in this regard is that according to him the first Court failed to consider his submission that he had helped the police to apprehend the person or persons who supplied him with the drug. If this submission was in fact made, there is nothing in the judgement which shows that the first Court did not consider it. In fact the Court will consider all submissions made and only endorse those with which it is in agreement. The position as it obtains obviously is that the first Court having taken into consideration all facts and submissions came to the conclusion to inflict a certain measure of punishment which is within the limits imposed by the law and this Court is not prepared to disturb that conclusion. Appellant also made references to other judgements trying to make comparisons as far as punishments in these cases and in the present case are concerned. This Court however can find no legal justification for this submission apart from the fact that if comparisons are odious in normal life they are all the more so in Court cases where no two cases are the same in as far as objective and subjective consideration are concerned;*

*In view of all the above considerations therefore this court rejects the appeal and confirms in toto the judgements of the first Court;*

*Omissis.*

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