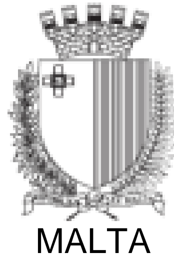

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE -- ACTING PRESIDENT
ABIGAIL LOFARO

THE HON. MR. JUSTICE
DAVID SCICLUNA

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 12 th July, 2013

Number 35/2009

Bill of Indictment No. 35/2009

The Republic of Malta

v.

Augustine Elechukwu Onochukwu

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 6th October 2009 wherein the said Augustine Elechukwu Onochukwu was charged with having, (1) on the night between the twentieth (20th) and twenty first (21st) day of April of the year two thousand and eight (2008) and during the previous days, weeks and months, with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug (heroin) 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 night between the twentieth (20th) and twenty-first (21st) day of April of the year two thousand and eight (2008), (and for the reasons stated above in the preceding days and weeks), with criminal intent, rendered himself an accomplice with Efosa Efionayi in the act of importation or exportation, or in the causing of importation or exportation, or in the act of taking any steps preparatory to importing or exporting, any dangerous drug (heroin) into or from Malta in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta by in any way whatsoever knowingly aiding or abetting the perpetrator of the crime (Efosa Efionayi) in the acts by means of which the crime is prepared or completed and by inciting or strengthening the determination of another (Efosa Efionayi) to commit a crime (illegal importation of the dangerous drug heroin into Malta) or by promising to give assistance, aid or reward after the fact, or in the taking of any steps preparatory to the importation of a dangerous drug (heroin) into Malta;

2. Having seen the judgement delivered on the 12th June 2011 whereby the Criminal Court, after having seen the verdict whereby the jury by seven votes in favour and two votes against found the accused guilty of both counts of the bill of indictment, declared the said Augustine Elechukwu Onochukwu guilty of having:

1. on the night between the 20th and 21st April, 2008, and during the previous days, weeks and months, with

criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug (heroin) 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 night between the 20th and 21st April, 2008, with criminal intent, rendered himself an accomplice with Efosa Efionayi in the act of importation or exportation, or in the causing of importation or exportation, or in the act of taking any steps preparatory to importing or exporting, any dangerous drug (heroin) into or from Malta in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta by in any way whatsoever knowingly aiding or abetting the perpetrator of the crime (Efosa Efionayi) in the acts by means of which the crime is prepared or completed and by inciting or strengthening the determination of another (Efosa Efionayi) to commit a crime (illegal importation of the dangerous drug heroin into Malta) or by promising to give assistance, aid or reward after the fact, or in the taking of any steps preparatory to the importation of a dangerous drug (heroin) into Malta and this according to the Second 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, 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, 42(c)(d)(e), 43, 46 and 533 of the Criminal Code, sentenced the said Augustine Elechukwu Onochukwu to a term of imprisonment of fifteen (15) years, and to the payment of a fine (*multa*) of seventy thousand Euros (€70,000), which fine (*multa*) shall be converted into a further term of imprisonment of eighteen months according to Law, in default of payment. That Court furthermore condemned him to pay the sum of one thousand, six hundred and ninety seven Euros and fifty four Euro cents (€1697.54) 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, within fifteen (15) days from the day of the appealed judgement. The Criminal Court also 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 Augustine Elechukwu Onuchukwu; 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 Godwin Sammut, under the direct supervision of the Deputy Registrar of that 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 reached its decision after having considered the following:

“Having considered ALL submissions made by defence counsel and the prosecution which are duly recorded.

“Having seen that accused has a clean criminal record.

“Having considered the gravity of the case.

“Having considered that for purposes of punishment, the First Count of the Bill of Indictment regarding the crimes of conspiracy, should be absorbed in the offence of complicity in the importation of drugs contemplated in the Second Count of the Bill of Indictment. Accordingly it is being made expressly clear that no punishment is being awarded for the offence included in the First Count of the Bill of Indictment.”

5. Having seen the application of appeal of the said Augustine Elechukwu Onuchukwu filed on the 1st July

2011 wherein he requested that this Court cancel and revoke the majority guilty verdict returned by the jury against him and the decision of the Criminal Court of the 12th June 2011 against him thereby ordering that a “Not Guilty” verdict be registered in this case and subordinately, in the eventuality that this Court refuses his appeal against guilt, that it reforms the punishment inflicted upon him by the Criminal Court ensuring that a more appropriate one is inflicted in the circumstances of the case and that at any rate it cancels the order regarding the payment of the Court experts’ fees; 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 grievances are as follows: (1) that during the trial before the Criminal Court there was a wrong interpretation and/or wrong application of the law which could have had a bearing on the jury’s verdict; (2) that the jury returned an incorrect majority verdict of guilt with regards to the First and Second Counts of the Bill of Indictment because appellant was wrongly convicted on the facts of the case; (3) that, without prejudice and subordinately to the abovementioned two principal grounds of appeal, the prison term and the fine (*multa*) inflicted upon appellant are excessive in the circumstances of the case and the order to pay for the experts’ fees is not one according to law. This Court will be dealing with each grievance *seriatim*.

7. As regards the first grievance, appellant says that, apart from the fact that the summing-up of the trial judge as to the state of the law was very basic, a number of errors were made as to the interpretation and/or application of the relevant law and these could have had a bearing on the verdict. These are being dealt with *seriatim*:

8. Appellant states in the first place that the trial judge explained to the jury that in the case of conspiracy related

to dangerous drugs there is no need for the prosecution to prove any *mens rea* at all.

9. This Court must point out that, contrary to what appellant states, at no point in his summing-up did the trial judge state that in the case of conspiracy no *mens rea* need be proved. What the trial judge said was: **"… we have heard more than once that in crimes there must subsist two basic elements – the intentional and the material. The intentional is the intent, the wish to commit a crime and the material is the actual committing of the crime. These two have to be together. You do not commit a crime if there are circumstances which show that you never intended to do so. And with just an intention you do not commit a crime, <u>except in the case of conspiracy</u>."**[1] He then went on to identify the elements of the crime of conspiracy as necessitating a time frame, the agreement between two or more persons, the intention to deal in drugs, and an agreed plan of action. Consequently appellant's first complaint is dismissed.

10. Appellant next complains that the trial judge failed to explain to the jury that in order that the crime of complicity may subsist, both the pre-concerted plan and any of the material acts (*actus reus*), whether physical or moral, as mentioned by law in article 42 of the Criminal Code and in the bill of indictment, with the requisite accompanying *mens rea*, must have been consummated within Maltese territory, even if in this particular case Maltese territory included the Air Malta aeroplane. Appellant believes that this explanation should have been given since he was also being accused under the First Count of the Bill of Indictment of the crime of conspiracy related to dangerous drugs which may be committed both in Malta and abroad, whilst the crime of importation of dangerous drugs into Malta, and therefore also the crime of complicity in the same crime, may only be committed within Maltese territory.

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[1] Fol. 109 of the transcription of the summing-up.

11. Now, from the transcription of the trial judge's summing-up it is clear that the trial judge did not go into detail in explaining the concept of complicity, and he basically indicated means by which a person may become guilty of complicity in a criminal offence. Of course, as has been pointed out several times[2], quoting Lord Hailsham, L.C. in *R. v. Lawrence* [1982] A.C. 510 at 519, H.L. (**Archbold**, *op. cit.*, para. 4-368, p. 460): **"The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case…. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case."** Also, from the evidence, there is no doubt that the importation of a dangerous drug into Malta did take place as a considerable amount of heroin was in fact seized. And the accusation in the bill of indictment is self-explanatory. However, whether or not a lack of reference by the trial judge to the committing of the offence contained in the Second Bill of Indictment on Maltese territory had any bearing on the verdict will be determined when this Court comes to examine the evidence.

12. Appellant complains also that the trial judge failed to explain to the jury that the *actus reus* mentioned in article 42(d) of the Criminal Code only applies in case that the accused is not deemed to be one of the persons mentioned in sub-articles (a), (b) and (c) of the same article. In actual fact the jury found applicant guilty under both sub-article (c) and (d) of article 42 as also mentioned in the judgement delivered by the Criminal Court. This, says appellant, shows that the jury were confused and did not fully grasp the concept of complicity.

13. It is true that the trial judge did not refer to paragraph (d) of article 42 as being an alternative means of being an

[2] See, viz. **Ir-Repubblika ta' Malta v. Meinrad Calleja**, 26 ta' Mejju 2005.

accomplice to the means mentioned in paragraphs (a), (b) and (c) of article 42. But whether or not the jurors fully grasped the concept of complicity is a moot point and requires, as previously stated, an examination of the evidence produced during the trial by jury.

14. Appellant further states that in his summing-up the trial judge explained that in so far as the written statement of Efosa Efionayi to the Police is concerned, since such statement was confirmed on oath before the Inquiring Magistrate and during the compilation of evidence against appellant, it could be taken as proof of its contents against appellant even if prior to such statement a promise or suggestion of favour was made to Efosa Efionayi, since such a promise or suggestion of favour did not render such statement illicit in so far as third parties are concerned as it was in line with the provisions of article 29 of Chapter 101 of the Laws of Malta. Appellant points out that article 30A of Chapter 101 stipulates that such a statement may be used against the person charged "provided it appears that such statement or evidence was made or given voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour". He submits that even if a promise or suggestion of favour is made in line with what the law stipulates in article 29, such a promise or suggestion of favour still renders the statement made by a witness null and void at least in so far as a third party, including appellant, is concerned. He argues that if the law wanted to exclude any such "promise or suggestion of favour" made in line with the provisions of article 29 it would have explicitly said so in article 30A.

15. In the present case, it results[3] that Superintendent Norbert Ciappara, when giving evidence during the trial by jury, said:

"I informed him [Efosa Efionayi] that if he co-operates with the police – at that point what I had in mind was to try and continue to explain a controlled delivery –

[3] Page 48 of the transcription of evidence.

that if he co-operates the police would then inform the Court of his co-operation and the law states – and not what I am promising because I cannot promise anything, but what the law states – that the Court may give him a reduced sentence."

16. On this matter, this Court refers to what it said in its judgement delivered on the 9th May 2013 in the names **Ir-Repubblika ta' Malta v. Ismail Tirso**:

"… din il-Qorti hi tal-fehma illi m'hemm xejn irregolari illi persuna investigata tkun infurmata dwar il-beneficcju li jipprovdi l-artikolu 29 tal-Kap. 101 tal-Ligijiet ta' Malta, purche` l-informazzjoni li tinghata tkun konsona ma' dak li jghid l-imsemmi artikolu, bhalma gara fil-kaz odjern. Kien il-legislatur stess li, permezz ta' dak l-artikolu, ried jaghti forma ta' promessa jew twebbil ta' vantagg bl-iskop li jinqabdu t-traffikanti tad-droga. Naturalment l-ufficjal investigattiv huwa mbaghad obbligat jinforma lill-Qorti jekk l-imputat/akkuzat ikunx ikkoopera, dwar in-natura ta' dik il-kooperazzjoni, jekk l-informazzjoni li l-imputat/akkuzat ikun ta kellhiex ezitu pozittiv, ecc. Fil-fehma ta' din il-Qorti, pero`, f'cirkostanzi bhal dawn, huwa ghaqli li jkun hemm mizura ta' *caution* fis-sens li min ghandu jiggudika fuq il-fatti ghandu joqghod ferm attent dwar il-volontarjeta` tal-istqarrija u l-veracita` tal-kontenut taghha.[4]"

17. In his summing-up the trial judge correctly stated[5] that what the investigating officer informed Efionayi of could not be interpreted as a promise or bribe which would nullify Efionayi's statement. It is true that at this particularly point he did not caution the jurors, but only seconds before he had cautioned the jurors as to the evidence by an accomplice (in terms of article 693 of the Criminal Code); and the sworn statement to which reference is being made is the statement made by an

[4] *Caution* fil-kaz ta' gurati, *self-caution* fil-kaz ta' Imhallef jew Magistrat wahdu.
[5] Page 112 of the transcriptions.

accomplice. Consequently this Court does not consider there to have been any irregularity.

18. Appellant then complains that when the trial judge was explaining to the jury that article 639(3) of the Criminal Code imposed an obligation on the trial judge to direct the jurors that in the case of any offence where the only witness against accused in a trial by jury is an accomplice, the jurors had to approach the evidence given by the accomplice with caution, and that this did not mean more than simply with normal caution, meaning the same caution to be used in approaching the evidence given by any other witness. Appellant states that in any trial by jury the law imposes on jurors the duty to approach the evidence given by any witness with caution, so much so that article 637 of the Criminal Code provides those who have to judge upon the facts with several parameters as to how to approach such evidence. In the case of an accomplice, the legislator decided to go a step further. Otherwise, why does the law specifically instruct the judge to give such a direction to the jury? Appellant thus insists that consequently the evidence given by an accomplice had to be approached by the jury with even more caution than the normal caution in approaching the evidence of any other witness.

19. Subarticle (3) of article 639 of the Criminal Code provides: **"Where the only witness against the accused for any offence in any trial by jury is an accomplice, the Court shall give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused."** In his summing-up the trial judge read out to the jurors this particular provision of the law, and, when uttering the word "caution", commented: "not extreme caution, and here I beg to differ from the defence because at one stage he did mention the word 'extreme'". The trial judge was perfectly correct. Article 637 lays down the guidelines that should be used to assist the jurors in determining the credibility of a witness. Article 639(3) specifically demands that they treat the evidence of an accomplice "with caution". Had the legislator wanted the jurors to deal with

such evidence with "extreme" caution, he would have said so. Consequently this complaint is dismissed.

20. During a sitting held on the 15th January 2013, defence counsel made a further submission with reference to paragraph 2(xii) in his application of appeal wherein he argued that in their deliberations the jurors did not see whether the prosecution had proved its case beyond reasonable doubt but had used their gut feeling as the trial judge had directed them to do during his summing-up. Defence counsel referred to a judgement delivered by this Court differently composed on the 5th December 2012 in the names **Ir-Repubblika ta' Malta v. Jose` Edgar Pena** wherein it had deemed such a direction to be a misdirection.

21. This Court wishes to point out, in the first instance, what Lord Alverstone, C.J. said in re R. v. Stoddart (1909) 2 Cr.App.R. 217 (**Archbold Criminal Pleading Evidence and Practice 2003**, para. 7-53 p. 936): **"This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."**

22. Moreover, contrary to the **Pena** case, in his summing-up in the present case the trial judge did not lay undue emphasis on the concept of "gut feeling". Indeed in this case he lay emphasis on the fact that the jurors had to decide beyond reasonable doubt. Indeed, while explaining this to the jurors, he said, *inter alia*: "The level required in that stage would be that level that after using your good sense coupled with the common sense you come to the conclusion that you don't feel that there is anything left to be said, you don't feel, the gut feeling you get is that that version is more correct, or rather let me put it the other way round, that you morally feel that the version is

correct."[6] From this excerpt it would appear that the trial judge used the phrase *en passant* and seems to have corrected himself. It is true that towards the end of his summing-up he again uses this phrase, but in the following context: "You will decide upon the evidence brought by the prosecution and the evidence brought by the defence, according to your conscience and intimate conviction – dak il-buon sens, the good sense, the gut feeling, with the impartiality and firmness that becomes honest and free men."

23. In **Ir-Repubbklika ta' Malta v. Godfrey Ellul** decided by this Court differently composed on the 17th March 2005, it was stated:

"Din il-Qorti tqis l-uzu ta' l-espressjoni *'a gut feeling'* bhala uzu xejn felici. Huwa probabbli li dak li kellha f'mohha l-ewwel Qorti kien il-konvinciment morali li jrid ikollhom il-gurati sabiex ikunu jistghu jaslu ghall-htija ta' l-akkuzat. Difatti fil-paragrafu sussegwenti tirreferi ghall-grad ta' prova li trid tilhaq id-difiza biex iddahhal f'mohh il-gurati d-dubju ragjonevoli. L-ezercizzju li jridu jaghmlu l-gurati huwa li jevalwaw u jiflu l-provi kollha u jirragunaw dwar is-sinjifikat taghhom u sa fejn iwasslu, u b'hekk jifformaw l-opinjoni taghhom unikament fuq il-provi li jitressqu fil-Qorti waqt il-guri, u mhux jaslu ghal xi konkluzjoni skond dak li jhossu fil-*'gut'*. Ghalhekk il-gurati m'ghandhom qatt jigu indirizzati bil-frasjologija li minnha gustament jilmenta l-appellant."

24. This Court as presently composed agrees fully with what was decided in the **Ellul** and the **Pena** cases and again points out that jurors should not be addressed using such phraseology. However, in the light of what has been said above as to the manner in which the phrase in question was in this particular case used, an examination of the evidence produced during the trial is necessary.

[6] Page 107 of the transcriptions.

25. This Court will now turn to consider appellant's second grievance whereby he maintains that, "also probably due to the manner in which it had been improperly directed by the trial judge", the jury's verdict was an illegitimate and unreasonable one. In his application of appeal, appellant makes several submissions primarily to show that the prosecution's main witness, Efosa Efionayi, is not credible. He states as follows:

"i) The main witness of the Prosecution against applicant at his trial was Efosa Efionayi, held by the Prosecution to have been the principal in the crime of dangerous drugs importation into Malta and in which crime applicant was charged of having been an accomplice under Count II of the Bill of Indictment and of which crime applicant was actually punished. Furthermore, the testimony of the said witness is also the only direct uncorroborated evidence produced by the Prosecution in so far as the crime of conspiracy related to dangerous drugs against applicant under Count I of the Bill of Indictment is concerned.

"ii) As has been already stated Efosa Efionayi made a verbal statement to Inspector Ciappara on the night of the 20th/21st April 2008 at the Police Headquarters implicating applicant after that according to Inspector Ciappara he was informed of the advantages accruing to him in accordance with the provisions of Section 29 of Chapter 101 of the Laws of Malta. Then in the early afternoon of the 21st April 2008 he made a written statement to Inspector Ciappara in which, amongst others, he declared to have made such statement voluntarily, without any promises, threats or intimidation, and after having read the statement himself he declared that it is the true content of his statement and did not wish to add or remove anything from it and chose to sign it.

"iii) On the 22nd April 2008 Efosa Efionayi confirmed his written statement on oath before the Inquiring Magistrate after Inspector Ciappara read out to him the written statement he had previously made. Before ending his testimony he was asked by Inspector Ciappara several questions. He did not change anything in so far as

applicant is concerned. However, he admitted that he had in fact swallowed 76 capsules and not 50 as he had told the Police when they interviewed him the first time.

“iv) On the 18th June 2008 Efosa Efionayi was asked to give his testimony in the compilation of evidence against accused. He refused to do so because his own case was still pending.

“v) On the 5th February 2009, after taking advice from his lawyer, even if at that stage his own case was still pending, Efosa Efionayi decided to testify in the compilation of evidence against applicant. In so far as applicant is concerned, with reference to the meeting he claimed to have had with applicant at Brussels Airport on the 20th April he stated that, ‘When I meet Augustine at the Brussels Airport, I greeted him and I was asking that he is having drugs and he told me we will discuss when we get home like this is airport’. Contrary to what he had stated in his written statement as to what had happened on the night of the 13th/14th April at the house where Ali took him to from the Refugees’ Centre in Marsa, he stated that, ‘….When we get home, Ali and Augustine tell me the same that I should not be afraid. That was 1.00 am. on Sunday’. Then he confirmed once again on oath the written statement he had made to the police and which he had already confirmed on oath before the Inquiring Magistrate. During the same testimony he also stated that the girl accompanying applicant was present on both flights he had taken to Malta (which is not true since Ms. Grady travelled to Malta only on the 20thApril 2008) and that she was white because she was not black. He had also stated that it was on Sunday morning (20th April) that he was told that, ‘Augustine is coming to Malta with his girlfriend with the business’. He also stated that, ‘On Tuesday, Ali take me to the house where I met Ali’s brother (who during the trial he claimed was Sam). Ali told me that those two boys have did business with him and I should not be afraid of anything and there is not going to be a problem. Then Ali told me that next week Augustine would be coming with his girlfriend. So Ali asked me to go to Spain and then next week I would be coming with the

drugs.' (During the trial he stated that it was him who asked Ali to go to Spain to see his family and that Ali paid for his air-ticket). He had also stated that, 'All told me that his brother is living in Rotterdam (although he knew that Sam was living in Rotterdam since he had actually met Sam in Rotterdam) and that I should pick my ticket from Madrid airport and go to Amsterdam. So Ali's brother shut me in the hotel. So it was on Sunday morning about 11.00 a.m., he come with the fat boy and he tell me his name is Sam, Ali's brother that is what he told me. (In actual fact he had previously claimed that the first of all the persons mentioned by him to have met was Sam, that it was Sam who mentioned Ali and who told him that Ali was his brother and this was before the first time he travelled to Malta on the 13th April). He told me that I am not the person that is going but the fat man will be coming to Malta with his girlfriend and with drugs. When it was 1.00 p.m., Sam come to the hotel room. He gave me the soup'. Then he had said that, '.... So when I get to Brussels, Ali told me that I should not be afraid that I am not the only person who is coming with drugs. He said that his brother is coming and the fat boy and his girlfriend is coming. When I get to the airport, I met All's brother and I met the fat boy with his girlfriend. So I greeted them and we stayed together'.

"vi) At the trial by jury, in so far as applicant is concerned, Efosa Efionayi stated that on the 13th April Ali had told him that he will meet fat boy at the airport. He didn't tell him anything about him except that he is a black boy. When he was at the gate he saw applicant. He didn't know anything about him. He was the only black person. He also claimed that when he arrived at the airport he met applicant and he told him whether he knew All and he said yes. He sat with him and was discussing with him. Applicant told him that they had to stop the discussion. He did not speak to applicant neither on the plane nor after they landed. However, he asked another passenger on the same flight to help him to get out of the airport. After he took a taxi to the Marsa refugees' Centre Ali picked him up and took him to a house which he did not know where it is even if he had stayed there between the 14th

and the 16th April. This was around midnight. Ali left him alone. Then Ali came with applicant and they discussed how to come to Malta with drugs. Ali told him that next week he has to come with drugs and the fat boy will come with him. Applicant told him that he was coming to Malta with drugs with his girlfriend. Then he agreed to bring drugs. Then Ali told him to stay in the house and he left with applicant. On Monday the 14th April he stayed at the house and Ali used to come and go. On Tuesday the 15th Ali took him to another house and there was Sam, Ali's brother, and another person he doesn't know who he is. On Wednesday the 16th April he left to Madrid. In his first version (before the Court adjourned for the following day whilst the witness was still in the witness-box) he said that he went to Brussels, then he took a train to Amsterdam and then he took a plane to Spain. On the following morning when the witness continued to give his evidence, he gave another version and said that he had actually travelled directly to Amsterdam and then by plane to Madrid. It must be here noted that just prior to the start of the testimony of Efosa Efionayi defence Counsel had asked witness Mr. Alphonse Cauchi to provide the Court with the travel details of Efosa Efionayi on Wednesday 16th April. After the end of Efosa Efionayi's testimony Mr. Cauchi confirmed that Efosa Efionayi had travelled with an Airmalta flight directly to Amsterdam. When Efosa Efionayi was in Madrid Ali told him to go to Rotterdam with a ticket he would pick up at Madrid Airport. At first he said that he was picked up by Sam who took him to a Rotterdam hotel where he spent the night and where Sam and applicant had visited him on Sunday and where Sam gave him the air-ticket to Malta and the drugs. Later on he changed this version and stated that the hotel where Sam took him and where he spent the night of Saturday and where Sam and applicant visited him on Sunday was in fact in Amsterdam. He also stated that when he arrived at Brussels Airport he was nervous and shaking. Ali told him to relax and not to be nervous and that applicant and his brother (who during the trial he identified as Ameh Amosa) were also carrying drugs. He didn't mention any discussion with applicant or that any words were said between them. He also said that Ali had told him that if he

were to be asked where he will be staying in Malta he should say, ‘Hotel Karena’. He also stated that he had a Spanish sim-card on one of his two mobile phones and a Maltese sim-card, which Ali had bought him the week before whilst in Malta, on the other. He also said that he had a Dutch sim-card (but no such sim-card was found on him). When he was asked to identify several persons on film (taken from two different cameras at the arrivals corridor at the Malta International Airport), besides Ameh Amosa, he identified applicant and the lady accompanying him and whom this time he described as being black as she appeared on film.

“vii) There is no doubt that the testimony of Efosa Efionayi should be considered in the light of a most interested person in the case of applicant first of all because until he gave his testimony in the compilation of evidence against applicant on the 5th February 2009 he was still hoping to personally benefit under the provisions of Section 29 of Chapter 101. In actual fact, in its judgement against Efosa Efionayi delivered on the 4th February 2010, after he admitted to the charges preferred against him, the Criminal Court stated the following:

“‘Having heard the evidence of Assistant Commissioner Neil Harrison, produced by the defence, who stated, that after examining the police case files, it results that accused had given valuable information against Augustin Eluchukwu and even made a statement under oath before a Magistrate implicating this person. As a result of this information Criminal proceedings were initiated against another person and the accused also testified against him in the compilation of evidence. Accordingly in the prosecution’s view, the accused deserved to benefit from section 29 of Chapter 101 of the Laws of Malta”.

“Secondly, during applicant’s trial, it transpired that Efosa Efionayi was still awaiting the result of his request to spend the rest of his prison term in Spain instead of in Malta, and which request also depended on the approval of such request by the local Police authorities.

“viii) It is being humbly submitted that, even if during his summing-up of the facts the Trial Judge revised only the testimony of the witnesses, including Efosa Efionayi, during their examination, but not during their cross-examination, except in the case of applicant, if one were to approach, not necessarily with utter caution, but only with the ordinary caution that the testimony of any witness who is not interested in the issue is to be approached, one should easily arrive at the conclusion that the testimony which Efosa Efionayi, (who in a comment by the Trial Judge during his summing-up was justified as one difficult to understand implicating that his evidence during the compilation of evidence against accused may not have been properly transcribed when in actual fact the transcription of evidence in such a case is what the Magistrate dictates) gave during the trial and on other occasions, in so far as applicant’s guilt is concerned, is not only uncorroborated, but it is highly inconsistent, improbable, contradictory and untruthful and this both on the basis of the different versions given by himself as well as on the basis of other proved facts, and this for the following reasons:

“a) It is highly improbable that if it were true that Efosa Efionayi had met and spoken to applicant on six (6) different occasions that he didn’t know at least applicant’s first name, even if it could later transpire that it is not the real one. He claimed that Ali had told him that in drugs business everybody should call each other ‘brother’. But this is a contradiction since Ali himself gave him his name and Sam also gave him his name. Efosa Efionayi was so sure that these were their real names and not invented that on his mobile phonebook, whilst ‘Ali’ was indicated as Alely’, Sam’s name was indicated as ‘John’. On the other hand applicant had nothing to hide and on his mobile phone the name ‘Ali’ was written ‘Ali’.

“b) It is highly improbable that Efosa Efionayi, who had claimed to have met and discussed with applicant at Brussels Airport and so he came to know that both of them were working for the same master and who claimed that on the 13th April wasn’t carrying any drugs, would not

have asked applicant for any help when he arrived in Malta. In fact, whilst he felt the need to ask for help, he sought the help of someone else he didn't know. Furthermore, it was proved that Efosa Efionayi got out of the Malta International Airport prior to applicant and at no point in time was he in the vicinity of applicant.

"c) How come that Efosa Efionayi, who claimed to have at Brussels Airport on the 20th April seen and sat with applicant and the lady accompanying him and with whom he boarded the flight, to have described her as "white meaning she is not black" when in actual fact she is black. Not only at did he claim that he is colour-blind but he claimed to have recognised applicant on the 13th April because he was the only black person at Brussels Airport.

"d) How is it possible that applicant, on the 20th April 2008 at 11 .00 a.m. was in a hotel room in Rotterdam or Amsterdam, depending which one of the two versions given by Efosa Efionayi to be believed, when not only according to applicant, but also according to the time shown on the train tickets exhibited in the records of the case, he and the lady accompanying him had left Amsterdam at around 9.30 a.m.? Don't the train tickets corroborate applicant in what he stated whilst these contradict Efosa Efionayl beyond reasonable doubt, when a balance of probabilities is sufficient in the case of applicant?

"e) Which of the several versions of what had happened during the meeting claimed by Efosa Efionayi to have taken place during the night of the 13th/14th April is the correct one? The one he mentioned in his written statement, the one he gave during the compilation of evidence of applicant or the one he testified upon during applicant's trial? Or rather the jury chose the one most unfavourable to applicant whilst wholly excluding the denial of applicant that such a meeting had ever taken place with him present?

"f) Which of the several versions given by Efosa Efionayi about how he came to know that 'applicant was to be

carrying drugs on the 20th together with his alleged girlfriend' is the correct one? The one he mentioned in his written statement, the one he gave during the compilation of evidence of applicant or the one he testified upon during applicant's trial? Or rather the jury chose the one most unfavourable to applicant whilst wholly excluding the denial of applicant that he never dealt in dangerous drugs?

"g) Or is it that Efosa Efionayi, without giving away Ali, whom he had met several times, and therefore he could easily have described, and without giving away where the houses where he had been to are situated, had decided, at the instance of being promised help in terms of Section 29 of Chapter 101 of the Laws of Malta, to name applicant, whose stature and colour anybody may notice even from a certain distance?

"ix) It is a fact that Ali knew that applicant was travelling to Malta from Brussels on the 20th April. Ali knew the stature and colour of applicant since he had met him the previous Monday. So it could have happened that in order to encourage Efosa Efionayi to bring drugs into Malta he told him that applicant was carrying drugs, a claim which had resulted to be untrue and which at any rate cannot implicate applicant in any wrongdoing.

"x) But whatever may have happened, besides the inconsistencies, improbabilities, contradictions and untruths in Efosa Efionayi's different versions in the different testimonies he gave, the jury had also to consider the testimony of applicant at least in the same way and manner applied to any other witness as established by Section 634 (2) of the Criminal Code. It is obvious that the jury did not do so even if applicant has not been contradicted by anybody, except by Efosa Efionayi, or by anything, but had been corroborated in several aspects of his testimony. It is however apparent that the jury based their verdict on the different contradictory, inconsistent, improbable and untruthful versions of Efosa Efionayi's testimony and on a few other facts and coincidences, which applicant fully explained

during his testimony, whilst totally excluding applicant's testimony and apparently without observing the rules regarding the proper evaluation of circumstantial evidence.

"xi) In actual fact it seems that in considering the circumstantial evidence in this case the jury didn't observe the rules as to how circumstantial evidence must be examined, namely that first of all this has to be narrowly examined and secondly that in order to give weight to a circumstance or to a number of circumstances it or these must be unambiguous or unequivocal meaning that these must be definite or unmistakable or clearly pointing out to only one conclusion and thirdly that the weight of circumstantial evidence must be such as to lead to inference of guilt beyond reasonable doubt.

"xii) It is clear that in their deliberations in order to arrive at their verdict the jury didn't base their conclusions on the totality of the evidence by fully weighting all the evidence produced during the trial so as to see whether the Prosecution had proved its case against applicant beyond reasonable doubt but had used their gut-feeling, as they were instructed by the Trial Judge to do during his summing-up whilst explaining the concept of reasonable doubt, by substituting for facts their imagination.

"xiii) Even if one were to come to the conclusion that Efosa Efionayi is a trustworthy witness in whatever he says, although it is very difficult if not outright impossible to say which of the versions to accept in the case of the different contrasting versions where it matters, what proof has been provided by him to conclude that applicant is beyond reasonable doubt guilty of the charges preferred against him?

"xiv) In so far as the charge preferred under Count I of the Bill of Indictment is concerned, no proof whatsoever has been made of the commission of the actus reus by applicant, never mind the accompanying requisite mens rea. There is no proof whatsoever that applicant had with another one or more persons, in Malta or outside Malta,

conspired, that is to say that he had planned or agreed with such other person or persons, any mode of action whatsoever, for the purpose of selling or dealing in a drug in these islands against the provisions of Chapter 101 of the Laws of Malta, or had promoted, constituted, organised or financed such conspiracy. Here proof beyond reasonable doubt and not imagination is needed. Who is the other person or persons with whom applicant had conspired?

"In Count I of the Bill of Indictment the Prosecution had claimed that on the night of the 20th and the 21st April 2008 and during the previous days weeks and months applicant decided to start dealing, offering, supplying and exporting drugs illegally into the Maltese Islands in agreement with others. It then affirms that these persons were a certain Ali, Sam, Efosa Efionayi and 'others'.

"Efosa Efionayi at no point contended that applicant had ever in any way agreed anything with him which may amount to a conspiracy.

"In so far as Ali is concerned, Efosa Efionayi mentions two incidents implicating applicant and Ali. The first one is when according to him he greeted applicant at Brussels Airport on the 13th April 2008 when applicant shut him down and told him they will discuss in Malta. 'Discussion' implies that nothing has as yet been agreed upon. The second one is the alleged meeting which took place in Malta on the night between the 13th/14th April 2008. Apart from the fact that Efosa Efionayi gave three different versions of what had happened during this meeting, no mention of any agreement between Ali and applicant was made. If one were to believe Efosa Efionayi that this meeting took place and that during this meeting drugs business was discussed in the way as described by him, there is no proof beyond reasonable doubt that applicant had entered into a conspiracy with Ali. One may argue that the fact that there were three persons discussing one may infer that a conspiracy was made. Could such an inference be based on one's imagination or rather hard

facts are needed? Will such an inference pass the test of moral certainty that a conspiracy was made?

“In so far as Sam is concerned, Efosa Efionayi links Sam to applicant only with the meeting at the Hotel room in Rotterdam or Amsterdam on Sunday 20th April 2008 at 11 .00 am. Apart from the fact that this alleged meeting is disproved by independent hard evidence (the train tickets Amsterdam/Brussels), is there any proof whatsoever that applicant had conspired with Sam?

“Who are the other persons mentioned in the Bill of Indictment? If we don’t even know whether such other persons exist or not, how could a conspiracy between them be proved beyond reasonable doubt?

“xv) In so far as the charge preferred under Count II of the Bill of Indictment is concerned, no proof whatsoever has been made of the actus reus, never mind the mens rea, committed by applicant within Maltese territory and therefore there is no proof whatsoever that applicant had become accomplice with Efosa Efionayi in the crime of the importation of dangerous drugs into Malta.

“In Count II of the Bill of Indictment the Prosecution claimed that on the 13th April 2008 applicant and Efosa Efionayi flew to Malta on board flight KM421 and they passed regularly through security check and out of the Malta International Airport. This helped Efosa Efionayi to gain more confidence and develop a better insight on the prospected drug deal. Apart from the fact that applicant and Efosa Efionayi did not sit together on the flight and apart from the fact that each one of them went out of the Malta International Airport on his own without not even being near to each other, can any of the facts described by the Prosecution amount to proof beyond reasonable doubt of any of the acts mentioned in Section 42 of the Criminal Code?

“The Bill of Indictment continues by claiming that on the 14th April 2008, while in Malta, applicant and Ali met in a house and spoke about the deal of smuggling drugs into

Malta. Does this fact, even if proved, amount to proof beyond reasonable doubt of the commission of any of the acts mentioned in Section 42 of the Criminal Code?

"The Bill of Indictment also claims that applicant and Ali incited and strengthened the determination of Efosa Efionayi to engage in this drug deal and promised Efosa Efionayi both assistance and reward after the fact of importation of drugs into Malta. Efosa Efionayi was offered the sum of €3000 each time he imported drugs into Malta. Is there any proof beyond reasonable doubt that applicant did any of these acts?

"What need there was for applicant to incite and/or strengthen the determination of Efosa Efionayi to import drugs into Malta on the 20th April 2008 after he had already travelled to Malta on the 13th April 2008 to check for himself how safe it was to travel to Malta with drugs and go out of the Malta International Airport without any assistance whatsoever from applicant who according to him, was supposed to have been carrying drugs himself for Ali? If one is determined to commit a crime is there no limit of how much the strengthening of one's determination can there be? Or is the sky the limit? Is this the word of the law? Is there any further need to strengthen the determination of someone who is already determined to commit a crime to earn €3000?

"It is humbly submitted that in actual fact if one were to duly consider all the evidence brought during the trial there one may not come to the conclusion that the jury could have legitimately and reasonably been satisfied beyond reasonable doubt of the guilt of applicant on any of the two counts of the Bill of Indictment. This renders the jury's verdict not safe and sound and therefore should be quashed."

26. These matters, which are clearly matters necessitating a reappraisal of the facts of the case, were also put to the consideration of the jury which was free, and was directed in like sense by the judge presiding over the trial, to

evaluate all the evidence produced and decide on those facts. What this Court is called upon to do is to determine whether the jurors, in the light of what has been said about the summing-up, could have legitimately and reasonably reached the verdict which they eventually gave.

27. This Court has accordingly thoroughly examined all the records so as to determine whether, on the basis of the evidence brought before it, the jurors could have reached their verdict in a legitimate and reasonable manner, bearing in mind the arguments raised by appellant both in his application of appeal and through oral submissions by learned counsel.

28. From the verdict reached, it is evident that the jurors accepted Efosa Efionayi's implication of appellant and rejected appellant's denial. There are several reasons which may have led them to believe Efionayi rather than appellant:

(i) First and foremost, the jurors had the obvious advantage of seeing and hearing the witnesses. This clearly made it possible for them to have regard to the demeanour, conduct, and character of both Efionayi and appellant, and to the probability, consistency, and other features of their statements, as stipulated in article 637 of the Criminal Code. Moreover, in terms of the same article, and as indicated by the presiding judge, the jurors were to consider the corroboration which could have been forthcoming from other testimony, and all the circumstances of the case.

(ii) Appellant insists that Efionayi had an interest in implicating him as he had been made aware of article 29 of Chapter 101 of the Laws of Malta. The jurors could have evidently believed that the possibility of a lesser punishment for co-operating was not sufficient as to warrant lying about the involvement of appellant. After all, they may have argued, if the heroin was intended for "Ali", Efionayi was co-operating by mentioning the person to whom the heroin was meant to be delivered, and had

appellant not been involved, he would not have mentioned him. When giving evidence, Efionayi stated[7] categorically that he never had problems with appellant. As to the fact that Efionayi was awaiting the result of a request to spend the rest of his prison term in Spain, which request depended on the approval by the local Police, this did not appear to leave too much of an impression on the jurors as Efionayi had already been convicted and
sentenced and there was no evidence to suggest that the approval of such a request did in fact depend on approval by the Police. The prosecution did indicate that the police had objected to the request. Nonetheless, the final approval of such request does not depend on the police but on the Minister responsible.

(iii) Efionayi said that on his first visit to Malta, he met appellant on the night of his arrival in Ali's house. He subsequently had another meeting with Ali and Ali's brother in another house. If Efionayi was lying, why did he exclude appellant from this second meeting? If he was implicating appellant just for the sake of doing so, what prevented him from mentioning him again even for the second meeting? Moreover, the jurors could have reasonably considered it unlikely that Efionayi would have simply concocted a story implicating appellant in such a short time following his arrest. It is therefore this Court's opinion that these factors assisted the jurors in lending credibility to Efionayi.

(iv) The jurors could not have failed to notice what appellant wished them to believe were mere coincidences. Thus, the evidence shows that appellant and Efionayi both came to Malta on the same days and on the same flights – on the 13th April 2008 and then again on the 20th April 2008. Both of them had the same contact locally, namely "Ali". Was it also a coincidence that Amosa Emeh, whom Efionayi described as Ali's brother, had appellant's Maltese mobile phone number listed on his mobile?[8] The jurors probably thought these facts to be too

[7] Page 118, of the transcription of evidence of Efosa Efionayi.
[8] See page 42 of the transcription of Superintendent Norbert Ciappara's testimony.

much of a coincidence to believe that appellant had nothing to do with the importation of drugs.

(v) Appellant refers to a number of inconsistencies stemming from the several times that Efionayi gave his version of events – his statement to the Police, his evidence before the inquiring magistrate, his evidence during the compilation of evidence and his evidence during the trial by jury – viz. as to the quantity of capsules he had swallowed, whether Ms Grady had travelled once or twice to Malta, whether she was white or black, as to the manner in which he travelled to Spain when he left Malta on the 16th April 2008, as to whether he did have a Dutch sim-card since none was found. Such inconsistencies clearly did not detract from the main point at issue, i.e. whether appellant was involved or not.

(vi) Appellant says that it is highly improbable that if it were true that Efionayi had met him on six different occasions, that he did not know at least applicant's name. There is nothing improbable about this, given that appellant appears to have been referred to as "The Fat Boy".

(vii) Appellant also says that it is highly improbable that Efionayi did not ask appellant for any help when they arrived in Malta. Again here there is nothing improbable as, according to Efionayi's version, he had been given specific instructions by Ali and he did not exit the terminal with appellant so there was nothing strange in his asking another fellow passenger as to where he could get a taxi from. Moreover, the encounter with appellant at Brussels airport was his first encounter with appellant and was brief.

(viii) Appellant says that the train tickets contradict Efionayi beyond reasonable doubt as they show that appellant and Ms Grady had left Amsterdam at around 9.30 a.m. and therefore appellant could not have been in a hotel room in Rotterdam or Amsterdam at 11.00 a.m. This Court has viewed said tickets and it would appear that they were validated on the 20th April as evidenced by

the digits “20.04.”. Next to these digits are the digits “09240”. Appellant maintains that this is an indication of the time. The prosecution has pointed out that, as stated by the court expert Martin Bajada, international time is portrayed in either four digits or six digits or nine digits. In the present case there are five digits. Moreover, if the digits “09240” purport to represent the time, as appellant maintains, with the last digit supposedly representing seconds, it is rather strange that both tickets carry the same digits when they evidently could not have been validated at precisely the same moment in time.

(ix) The jurors could not have failed to note that, whereas appellant had indicated that his first contact with a person in Malta was around December 2007, one sim card which was in his possession showed evidence of 3 smses he had received from a Maltese number on the 26th and 27th September 2007.[9] Another sim card had among its phone book contents the number of someone described as “DaddyMalta”. His explanations that “sometimes in Holland where we lived, people used our phone to make calls” and that “somebody else must have inputted the number [of Daddy Malta] at my home in Holland” were clearly not considered credible by the jurors.

(x) One of the mobiles which appellant was using was a Nokia 1110i with number 31643494800. Ali was using a Maltese mobile number 99439887. There were a number of smeses and calls between these two numbers between the 17th and 19th April 2008. There appears nothing suspect about these contacts. Now, if, as appellant maintained his contact with Ali was for the purpose of seeking someone appellant could do business with in Malta, i.e. that Ali’s role was solely that of an intermediary, the jurors could have legitimately and reasonably concluded that the calls made by Ali to appellant on the 21st April 2008 at 01:29:35 and 02:33:20 gave the lie to appellant’s version.[10] If Ali wanted to contact appellant for

[9] Folio 36 of Volume I of Martin Bajada’s report.
[10] Folio 44 of Volume II of Martin Bajada’s report.

the *bona fide* business appellant spoke about, in ordinary life one would not expect such calls to be made at such times of the night.

(xi) Appellant when giving evidence said that the second time he came to Malta a friend of his paid for his airline ticket. In fact it results that on the 17th April 2008 he sent an sms with his details to number 66867846043. So why did he send his details also on the 12th April 2008, i.e. before he came to Malta the first time, to the same number and this by means of two separate smses?[11]

29. For these reasons this Court is of the opinion that the jurors could have legitimately and reasonably concluded that appellant was involved with Efosa Efionayi and Ali. It remains to be seen whether they could have just as legitimately and reasonably found him guilty of the accusations brought against him.

30. In terms of the First Count of the Bill of Indictment, appellant was charged with the crime of conspiracy. This Court differently composed, in its judgement of the 2nd November 2009 in the names **The Republic of Malta v. Steven John Lewis Marsden**, said:

"11. In the Godfrey Ellul case[12] mentioned by appellant, this Court had referred to what is said in **Archbold's Criminal Pleading, Evidence and Practice 2003** in respect of conspiracy**:**

'The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: *Mulcahy v. R*. (1868) L.R. 3 H.L. 306 at 317; *R. v. Warburton* (1870) L.R. 1 C.C.R. 274; *R. v. Tibbits and Windust* [1902] 1 K.B. 77 at 89; *R. v. Meyrick and Ribuffi*, 21 Cr.App.R. 94, CCA. Nothing need be done in pursuit

[11] Folio 52 of Volume I of Martin Bajada's report.
[12] **Ir-Repubblika ta' Malta v. Godfrey Ellul**, decided by this Court on the 17th March 2005.

of the agreement: *O'Connell v. R.* (1844) 5 St.Tr.(N.S.) 1. [13]

….

'The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it: *R. v. Parsons* (1763) 1 W.Bl. 392; *R. v. Murphy* (1837) 8 C. & P. 297. Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': *R. v. Brisac* (1803) 4 East 164 at 171, cited with approval i*n Mulcahy v. R.* (1868) L.R. 3 H.L. 306 at 317.' [14]

"**12.** In the Godfrey Ellul case this Court had not stated that this is the position under Maltese law. However it is in agreement with what is stated therein as it is quite clear from the said quotation that evidence of a conspiracy is not necessarily or only derived by inferring it from criminal acts of the parties involved. Indeed, a conspiracy may exist even though there is no subsequent criminal activity, that is to say even though the agreement to deal in any manner in a controlled substance is not followed by some commencement of execution of the activity agreed upon[15].

[13] See para. 33-4, page 2690.

[14] *Op. cit.* Para. 33-11, page 2692.

[15] See also **The Republic of Malta v. Steven John Caddick et** decided by this Court on the 6th March 2003 wherein it was stated: "… although it is true that for the crime of conspiracy to subsist it does not have to be proved that the agreement was put into practice, the converse is not true, that is that evidence of dealing does not necessarily point to a conspiracy. Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed "from the moment in which any mode of action whatsoever is planned or agreed upon between" two or more persons (section 22(1A) Chapter 101). Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of the mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person or persons concerned may be charged both

In such circumstances it is obvious that no inference can be drawn from criminal acts because there are no criminal acts subsequent to the conspiracy itself. Indeed the quotation from Archbold clearly states that a conspiracy may also be proved 'in the usual way' – so by means of direct evidence and/or circumstantial evidence which must be univocal, that is to say, that cannot but be interpreted as pointing towards the existence of a conspiracy. Unfortunately defence counsel misinterpreted that quotation and wrongly submitted that proof of the existence of a conspiracy has to be deduced or inferred from the criminal acts of the parties, and even seems to have led the first Court to understand that that was the conclusion to be derived from the Godfrey Ellul case. This is clearly incorrect. As one finds stated in the 2008 Edition of **Blackstone's Criminal Practice** [16]

"There are no special evidential rules peculiar to conspiracy. In *Murphy* (1837) C C & P 297, proof of conspiracy was said to be generally 'a matter of inference deduced from certain criminal acts of the parties accused', but there is no actual need for any such acts, and conspiracies may also be proved, *inter alia*, by direct testimony, secret recordings or confessions…".

"13. This appears to be also the position in Scots law. Professor Gerald Gordon, in his standard text **The Criminal Law of Scotland** [17] makes reference to the dictum of Lord Avonside in ***Milnes and Others*** (Glasgow High Court, January 1971, unreported) to the effect that "you can have a criminal conspiracy even if nothing is

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with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming (for the purpose of the attempted or consummated offence) co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason, namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement."

[16] OUP, p. 99, para. A6.24.
[17] W. Green & Son Ltd. (Edinburgh), 1978, p. 203.

done to further it", adding that, indeed, this is the very essence of conspiracy[18]."

31. In the present case, Efosa Efionayi referred to a meeting held in Malta on the night between the 13th and the 14th April 2008 in Ali's flat to which Ali had brought appellant. According to Efionayi, during this meeting Ali said that the following week both Efionayi and appellant were to return to Malta with drugs and that appellant would be with his girlfriend. Efionayi said that appellant himself confirmed that he would be coming to Malta with his girlfriend and that he would be bringing drugs. Efionayi said that he (i.e. Efionayi) agreed.[19] Efionayi also said that on the morning of the 20th April, Sam (another of Ali's brothers) and appellant went to his hotel room in Amsterdam and appellant told him that he was still coming to Malta with his girlfriend, that he would be carrying drugs, and that they would meet at Brussels airport.[20] Under cross-examination Efionayi confirmed that during the meeting at Ali's flat the three of them discussed "about the drugs".[21]

32. From this it transpires that Ali, Efionayi and appellant specifically discussed the importation of drugs into Malta, and determined the date when such importation was to take place. It was also agreed that appellant was to come to Malta as well. A mode of action was thus agreed upon. The fact that no drugs were found in the possession of appellant is besides the point because, even if nothing had been done in furtherance of the conspiracy, a conspiracy had indeed taken place. However, in this case drugs <u>were</u> imported. Indeed Efionayi brought in 76 capsules which he had swallowed; these contained heroin. This act was clearly in furtherance of the agreement had been reached in Malta. Thus the jurors were entitled to legitimately and reasonably reach their guilty verdict in respect of the First Count.

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[18] See also the judgement of this Court of the 23 October 2008 in the names **The Republic of Malta v. John Steven Lewis Marsden**.
[19] See pages 44 – 46 of the transcribed evidence of Efosa Efionayi.
[20] See pages 66 - 70 *ibidem*.
[21] See page 256 *ibidem*.

33. By means of the Second Count of the Bill of Indictment appellant was accused of being an accomplice in the importation of the heroin. Considering that during the Malta meeting appellant made it clear to Efionayi that he too would be coming to Malta with drugs and that, as had been agreed, he in fact came to Malta on the same flight as Efionayi, there is no doubt that appellant's actions were intended to strengthen the resolution of Efionayi to commit the offence. Consequently, here too, the jurors were entitled to legitimately and reasonably reach a guilty verdict in respect of the Second Count.

34. Appellant's final grievance is in respect of the punishment awarded as he believes this to be excessive. In so far as the prison term and the fine (multa) inflicted upon him are concerned, appellant says that the sentence in this case must necessarily be considered in the light of the prison term and fine (multa) inflicted upon Efosa Efionayi who was sentenced to eleven years imprisonment and to a fine (multa) of thirty thousand euro (€30,000). He says that it is true that Efosa Efionayi had admitted to the charges preferred against him and had benefitted from the provisions of Section 29 of Chapter 101 of the Laws of Malta. However, he maintains, it is also true that, in the words of the Prosecution during the sentencing pleas stage, Efosa Efionayi, "could do very little else as he had been caught red-handed". Furthermore, whilst he was charged with and admitted guilt to the three (3) crimes preferred against him namely, conspiracy related to dangerous drugs, importation of dangerous drugs and possession of dangerous drugs, appellant was found guilty of only two crimes preferred against him namely, conspiracy related to dangerous drugs and complicity in dangerous drugs importation with the same Efosa Efionayi and in which case such complicity was, at best, very minimal. In this respect appellant also submitted that he had every right to stand trial since in accordance with our criminal law justice system it is up to the Prosecution to prove its allegations against accused beyond reasonable doubt and not vice-

versa. So this is not a case of odious comparisons but a case of considering like with like.

35. Appellant subsequently also referred to the decision given by the European Court of Human Rights 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."

36. 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).

37. In the present case, the verdict of the jury was not unanimous. Hence the latter parameters were applicable which, it must be noted, in part overlap the punishment awardable by the Magistrates' Courts.

38. It must also be pointed out that in respect of Efosa Efionayi, the Attorney General had <u>also</u> ordered that his case be decided by the Criminal Court. In other words the parameters of punishment were identical to those applicable to appellant. The fact that he obtained a lesser punishment is due to the fact that he admitted the accusations brought against him as well as due the fact that article 29 of Chapter 101 was applied in his case. So appellant was not penalized for contesting the case;

rather he was unable to benefit from any reduction in terms of law.

39. It is true that Efionayi was convicted for three offences while appellant for two. Nonetheless in both cases article 17(h) of the Criminal Code was applicable meaning that they were both awarded punishment for one offence.

40. In the present case, the heroin imported into Malta consisted of almost one kilo[22] of heroin of approximately 30% purity with a value of between €45,445 and €70,062[23].

41. Heroin is a dangerous drug which is known to cause overdoses that are sometimes fatal. The Criminal Court was thus correct in referring to “the gravity of the case” in its considerations.

42. 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 a fit and proper one, and finds no reason to disturb the Criminal Court’s discretion in determining the quantum.

43. Appellant also complains about the experts’ fees in the amount of one thousand six hundred and ninety-seven euro and fifty-four cents (€1697.54) and says that these expenses, or most of them, had already been the object of an order on Efosa Efionayi to pay since he was ordered to pay the sum of three thousand and forty-one euro and fifty-one cents (€3041.52) being the sum total of expenses incurred in the appointment of Court experts’ fees in his case and which reports were also exhibited in Court in the case of applicant. He says that as has already been decided by this Court, court experts’ fees cannot be charged more than once as otherwise the State will be making a gain on court experts’ fees.

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[22] According to report Doc. GS by Godwin Sammut, 946.79 grams.

[23] According to report Doc. GS1 by Godwin Sammut.

44. This Court has examined the records of the compilation proceedings and the fees which Efosa Efionayi was condemned to pay and finds that those due by appellant are only the ones for the first report presented by court expert Martin Bajada, namely €801.83, together with the sum of €47.67 for a copy ofa report presented in the Efosa Efionayi case, thus totalling €849.50.

45. For these reasons the judgement delivered by the Criminal Court on the 12th June 2011 in the names **The Republic of Malta v. Augustine Elechukwu Onochukwu** is being reformed in the sense that that part whereby appellant was ordered to pay the sum of one thousand, six hundred and ninety seven Euros and fifty four Euro cents (€1697.54) being the court experts' fees incurred in this case is being hereby revoked and instead, in terms of Section 533 of the Criminal Code, appellant is being condemned to pay the Court experts' fees as aforesaid amounting to eight hundred and fortynine euros and fifty cents (€849.50), while the remainder of the judgement is being confirmed, save that the time for the payment of the Court experts' fees, as well as the time within which the Attorney General is to inform the Court whether he requires the drugs to be preserved for the purpose of other criminal proceedings, is to start running from today.

< Final Judgement >

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