COURT OF CRIMINAL APPEAL

His Honour Chief Justice Joseph Azzopardi – President
Hon. Madam Justice Abigail Lofaro
Hon. Mr. Justice Joseph Zammit McKeon

This day, Wednesday 12th June 2019

Bill of Indictment No. 1/2017

The Republic of Malta

v.

Ikechukwu Stephen Egbo

The Court :

I. The bill of indictment

1. Having seen the bill of indictment brought against the accused, Ikechukwu Stephen Egbo, where the Attorney General declared :-

FIRST AND ONLY COUNT

That on the twenty seventh (27) day November two thousand and ten (2010), and during the preceding months, decided to start dealing, offering, supplying and importing drugs illegally into the Maltese Islands in agreement with others.

*In fact on the dates abovementioned, the accused **Ikechukwu Stephen Egbo** conspired and agreed with another person or persons to illegally deal in, import and receive from the Netherlands to the Maltese Islands a quantity of the drug cocaine.*

An agreement was reached in relation to the mode of action as to how this drug consignment was to reach Malta and eventually how it was to be dealt with in Malta following its arrival. This drug consignment was to be exported from the Netherlands and imported into Malta by a man, Attila Somlyai, who was to travel from Dusseldorf to Malta by air, and once in Malta, Somlyai had to meet the accused and deliver to him the drug consignment.

In execution of the said plan, on the twenty sixth (26) day of November two thousand and ten (2010), Somylai boarded the Air Malta flight KM353 leaving from Dusseldorf, Germany destination Malta, carrying inside his body a total of sixty (60) capsules filled with the drug cocaine in order to eventually deliver the said drug to the accused. However, the Malta Customs Officials and the Malta Police Force managed to intervene in due time before this amount of drug cocaine reached its intended final destination in the Maltese Islands to the respective consignee.

The Customs Officials and the Police apprehended Somlyai following his arrival in Malta at the Malta International Airport. After that he was conducted to Mater Dei Hospital, it transpired that Somlyai had ingested sixty (60) capsules containing five hundred eighty two point forty six (582.46) grams of the drug cocaine with a purity of circa 38% as determined later by the Court appointed expert. The street value of this drug as determined by the same expert is that of forty four thousand two hundred and sixty six euro and ninety six euro cents (€44,266.96).

*Somlyai decided to cooperate with the Police and informed them that he was sent to Malta by another person in this conspiracy referred to as the "chief", in order to carry this drug consignment. Somylai also stated that he was given instructions to book a room at the Roma Hotel in Sliema and wait for further instructions in relation to the delivery of the drug consignment. Somylai agreed to collaborate with the Police and he agreed to take part in a controlled drug delivery, which eventually led to the arrest of the accused. In fact, on the twenty seventh (27) day of November two thousand and ten (2010), the accused **Ikechukwu Stephen Egbo** was apprehended by the police when he went to collect the drug consignment. When the accused realised that there were Police*

officers he tried to escape, only to be apprehended by the Police some distance away.

*Somylai also recognized the accused **Ikechukwu Stephen Egbo** as the same person who had collected another drug consignment from the same hotel in October two thousand and ten (2010), when he had brought to Malta twenty four (24) cocaine filled capsules upon instructions received from the same person referred to as the "chief".*

The drug cocaine is scheduled as per Part 1 of the First Schedule of the Dangerous Drugs Ordinance.

The consequences :

*By committing the abovementioned acts with criminal intent, the accused **Ikechukwu Stephen Egbo** rendered himself guilty of conspiracy to deal in dangerous drugs (cocaine) in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.*

The accusation :

*Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accuses **Ikechukwu Stephen Egbo** of being guilty of having, on the twenty seventh (27) day of November of the year two thousand and ten (2010) and during the preceding 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 (cocaine) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or by promoting, constituting, organizing or financing such conspiracy.*

The punishment demanded :

that the accused be … sentenced to the punishment of imprisonment for life and to a fine 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 four hundred and

sixty-eight euro and sixty-seven cents (€116,468.67) and the forfeiture in favour of the Government of Malta of the entire immovable and movable property of the accused, as is stipulated and laid down in articles 2, 9, 10(1), 12, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22A, 24A, and 26 of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code, Chapter 9 of the Laws of Malta or to any other punishment applicable according to law to the declaration of guilt of the accused.

II. The verdict

2. Having seen the verdict given on the 22nd July 2017, where the jury, by seven (7) votes in favour and two (2) against, found the accused Ikechukwu Stephen Egbo guilty of the charges brought against him in the first and only count of the bill of indictment.

III. The judgement

A. The conviction

3. Having seen that on the same day of the verdict, and on the strength of that verdict, the Criminal Court declared Ikechukwu Stephen Egbo guilty :

1. Of having, on the twenty seventh (27) day of November of the year two thousand and ten (2010) and during the preceding 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 (cocaine) in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or by promoting, constituting, organizing or financing such conspiracy.

B. The punishment

4. Having seen that following the declaration of guilt, the Criminal Court, after having seen the acts of the proceedings, including the compilation of evidence tendered before the Court of Magistrates, after having seen the updated conduct sheet, after having seen sections 2, 9, 10(1), 12, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22A, 24A, and

26 of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, and sections 17, 23, 23A, 23B, 23C and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, condemned the said Ikechukwu Stephen Egbo to a term of imprisonment of thirteen (13) years, and to the payment of a fine (multa) of thirty thousand euro (€30,000) which fine (multa) shall be converted into one year of imprisonment according to Law, in default of payment. Furthermore the Criminal Court condemned the said Ikechukwu Stephen Egbo to pay within fifteen (15) days from the date of the judgement the sum of two thousand, eight hundred and fourteen Euros and nineteen cents (€2,814.19) being the sum total of the expenses incurred in the appointment of court experts in the case. Furthermore the Criminal Court ordered the forfeiture in favour of the Government of Malta of all the property involved in the crimes of which he was found guilty and other moveable and immovable property belonging to the said Ikechukwu Stephen Egbo. Finally having noted that there were other pending cases concerning third parties, not connected with the case, the Criminal Court did not order the destruction of the objects exhibited in Court.

5. Having seen that the Criminal Court justified the quantum of punishment as follows :

a) Due to the fact that the verdict of guilt was almost unanimous. This lead the Court not to inflict a term of imprisonment in its minimum. The quantum of punishment had to reflect the verdict.

b) Due to the amount of drugs involved in this case.

c) Due to the fact that the accused was involved in a drug trafficking organization. The accused had successfully together with others managed to deal in drugs in October 2010 and then conspired to repeat the offence once again in November 2010. Had the illicit activities not been intercepted by the police, then the involvement of the accused in the dealing and importation of drugs into Malta would have persisted.

IV. <u>The application of appeal</u>

Having seen the application of appeal filed by Ikechukwu Stephen Egbo on the 10th August 2017.

A. The demand

6. For reasons therein stated, he requested this Court :

to revoke the judgement as given by the Court of First Instance on the 22nd of July 2017 wherein the appellant was declared guilty of the One Count in the Bill of Indictment and in its stead declare the Appellant not guilty of the One Count brought against him and consequently declare him free of all charges and prison sentence.

7. The appellant did not enter any plea regarding punishment.

B. The ground for appeal

8. The appeal is basically founded on one grievance, namely that :-

21. … that all the evidence tendered points to the fact that the appellant had no involvement in any drug conspiracy and that it is only Somylai who indicates the appellant`s involvement. Put simply – it is only through Somylai`s testimony that the jurors could have found a guilty verdict.

22. Somylai`s evidence is tainted with so many inaccuracies, incorrect statements and lies that his whole testimony cannot be trusted. It is to be kept in mind that Somylai`s testimony led to him being given a lesser prison sentence.

9. Having seen the acts of the proceedings in their entirety.

10. Having heard oral submissions.

V. Initial considerations

11. The reasons that sustain appellant`s grievance are defined in the application of appeal. Appellant goes into further detail in his oral submissions before this Court. However the Court also notes that in

these submissions, the appellant refers to matters that were not identified as a grievance in the application of appeal. The Court is referring in particular to criticism levelled at the address of the judge presiding the trial to the jurors with regard to the benefit that Attila Somlyai ("**Somlyai**") obtained when Sec 29 of Chapter 101 was applied in his favour. It is to be remarked that although in his grievance as detailed in the application of appeal, the appellant did point out the benefit obtained by Somlyai as a primary reason for rejecting his version, the appellant in the application of appeal did not mention as a grievance the legality of the manner how the presiding judge addressed this matter.

12. This issue merits a direction from this Court.

13. In **article 505(1)**, the Criminal Code directs the appellant from a judgement by the Criminal Court as to the contents of the application. The provision states that :- *Besides the indications common to judicial acts, the application shall contain a brief but clear statement of the facts of the case, the grounds of the appeal and the relief sought.*

The issue that is being addressed by this Court is the extent of the meaning of the term : *the grounds of the appeal.*

The Court refers to a similar, though not identical, provision that regulates appeals from judgements of the Court of Magistrates as a Court of Criminal Judicature, that is, **article 419(1**) of the Criminal Code which states :- *Besides the indications common to judicial acts, the application shall, under pain of nullity, contain : (a) a brief statement of the facts ; (b) the grounds of the appeal ; (c) a demand that the judgement of the inferior court be reversed or varied.*

Through an exercise of "compare and contrast" between the two provisions, one finds a common denominator, namely *the grounds of the appeal.*

With regard to the significance of the term *the grounds of the appeal,* there are judgements on the matter given by this Court in its Inferior Jurisdiction.

In a judgement given on the 3rd September 2001 in re "**Il-Pulizija vs Darren Attard**" the following was stated :-

Hija gurisprudenza kostanti li galadarba tigi specifikata r-raguni, jew jigu specifikati r-ragunijiet, ta` l-appell, l-appellant ikun marbut b`dik ir-raguni jew dawk ir-ragunijiet, fis-sens li tkun biss dik ir-raguni jew dawk ir-ragunijiet li jistghu jigu kkunsidrati minn din il-Qorti, salv, naturalment aggravju jew aggravji li jistghu jitqiesu li huma komprizi u nvoluti fl-aggravju jew aggravji kif specifikati.

This jurisprudential direction, valid for the inferior courts, is applicable, without reserve, *mutatis mutandis* to this court as well, essentially because the two provisions of appeal insofar as relates to the grounds of appeal are identical. Therefore there is no reason at law which precludes the application of what was decided with regard to the courts of inferior jurisdiction to this court once the issue in question is identical. This Court endorses this position and will therefore limit its considerations on the ground of appeal stated in the application and to matters related and involved.

VI. "*The basic facts of the case*"

14. In the application of appeal, the appellant gives an account of what he describes as *the basic facts of the case.* He states as follows :-

Attila Somylai, a Romanian national was intercepted on the 26th of November 2010 at Luqa Airport with a consignment of capsules containing cocaine in his stomach. After being spoken to by the relevant police authorities Mr. Somylai consented to take part in a controlled delivery in order to attempt to apprehend his accomplices in Malta.

Consequently Mr. Somylai allegedly contacted his superiors abroad (allegedly Holland) and was booked into the Roma Hotel (Sliema) by the police authorities.

In order to ascertain the controlled delivery, a number of police officers were stationed in the vicinity of the hotel, some were on the benches on the Sliema front whilst others were further up the road.

Following further alleged contact he emerged onto the street at 6 pm (according to police officers whereas Attila states it was around 2pm) and followed the accused who passed by him in front of Roma Hotel and

entered into Tower Supermarket some 100 metres away. Somylai followed the appellant into the supermarket.

The appellant emerged from the supermarket and was arrested some 100 metres away round the corner from the supermarket.

The appellant was followed by police officers from the moment he got up from a bench he was sitting on at the Sliema Front.

No contact was ever made between Somylai and the appellant either telephonically or in any other manner and in fact in front of the hotel the appellant walked on past Somylai without acknowledging him.

The appellant denied any involvement in drug trafficking and denied knowing Somylai.

Somylai positively identified the appellant from photos he was shown by the police authorities. He stated that he could identify him due to the fact that a few weeks previously in October he had brought cocaine into Malta in the same manner and had handed them over to the appellant who was with another individual.

VII. <u>The evidence</u>

15. In the application of appeal, the appellant refers to the testimony given by prosecution witnesses, namely members of the Police, and court expert Dr Martin Bajada.

16. He states as follows :-

***<u>Police Assistant Commissioner Dennis Theuma</u>**, a police Inspector at the time, gave a general overview of what had occurred starting with Somylai's arrest through to the controlled delivery. He explained the manner in which the controlled delivery was organized and further explained that there was a sense of immediacy to the proceedings due to the 48 hour rule with regard to Somylai.*

Superintendent Theuma confirmed that in the crucial period in the hours before 6 pm on the 27th of November 2010 Somylai was using a police phone to contact his superiors abroad. This phone and its call logs were never exhibited in the proceedings. There was never any contact between Somylai and the appellant and there are no common numbers on the call logs of the phones and SIM cards seized from them.

He also confirmed that no recordings of any calls were made.

WPS Geraldine Buttigieg and PS 364 David Borg *took part in the search in the appellant's residence – no drug paraphernalia or substantial amounts of money were found.*

PC 777 *was one of the officers who arrested Somylai. He was with Somylai in Hotel Roma when Somylai was waiting for instructions from abroad. This witness stated that Somylai was contacted at 5.06 pm from Holland and was instructed to go into the road where someone was waiting to collect the drugs. He confirmed that Somylai at no time informed the Police as to the identity of whom he was going to meet. When Somylai went out of the Hotel PC 777 remained in the Hotel.*

WPS 237 Antonella Vella *was the police officer who booked the room in the Hotel and was a plain clothes observer outside the hotel. She was sitting down on a bench on the Sliema front and observed the appellant crossing the road towards the hotel. She saw no contact between the appellant and Somylai and did not observe any sign made by the appellant to Somylai. She noted that the appellant who was sitting close by on the Sliema front only had a mobile in his hand. She also stated that she was informed telephonically that Somylai was emerging from the hotel. She also stated that it was dark. It was her who elevated the mobile from the possession of the appellant after his arrest and this was between 15 and 20 minutes from when the appellant crossed the road.*

PS 323 Cedric Buhagiar *was on the bench with WPS 237. He stated that the appellant made frequent calls with his cell phone and that the appellant at one point crossed the road towards the Hotel. He got the impression that the appellant made a gesture to Somylai. He was one of*

the police officers who took part in the arrest of the appellant. He did not follow the appellant.

As to the contact he was under the impression that there was visual interaction by body language.

PS 1174 Sciberras *was near the Hotel when Somylai emerged. He followed him to the supermarket and then participated in the eventual arrest of the appellant. He did not notice the appellant in the street walking near Somylai. The whole procedure took about 10 minutes. Appellant never made contact with Somylai.*

Dr. Martin Bajada (emphasis by this Court) *confirmed his report and further documents. He confirmed that the mobiles and SIM card exhibited indicate that there was no contact between Somylai and the appellant. Further he confirmed that there were no common numbers in the relative phones. He also examined the CCTV footage which again confirms no contact.*

PC 1220 Baldacchino *confirmed that whilst in the hotel Somylai made contact a number of times in the afternoon of the 27th with his superior in Holland and at one point had to switch and use the mobile phone of the police. A phone call came from Holland telling Somylai that the guy was outside. The police officer stated that he saw the appellant on the left hand side of the road and he was on the phone. The appellant crossed the road, walked on and Somylai followed. The police officer followed at a distance but walked on when he was under the impression that the appellant had noticed him. Somylai informed him that the appellant was the same person who picked up the drugs in October. According to this police officer between appellant and Somylai all there was was eye contact.*

PC 1086 *saw the appellant under a lamppost in Tower Road whilst appellant was on his phone sitting on a bench. Somylai at this point was also on the phone. According to this witness appellant motioned with his hand to Somylai to follow him. According to this witness appellant and Somylai stood looking at one another in the supermarket for 15/20 seconds. On a direct question by the defence as to how he knew the*

person on the bench was a Nigerian he stated that to us (the police) all blacks are Nigerian.

Attila Somylai confirmed that he had come to Malta to pass on drugs to third parties. He was stopped at customs and after being arrested he was informed that if he would help the police with a controlled delivery he would receive a lesser sentence in Court. Following his statements he went to Hotel Roma to await instructions.

Whilst in the Hotel he received instructions to go outside because his contact was waiting for him. It was about 2 pm! He saw appellant cross the road and whilst he was standing on the pavement next to the Hotel the appellant, on the pavement on the other side of the road, kept walking up. According to Somylai appellant made a sign to him with his head and Somylai followed him up the road and into the supermarket. No contact was ever made between them. He stated that appellant then ran out of the supermarket.

He also confirmed that at one point he used a police phone to make contact abroad. He further stated that in October he had met appellant and another individual in a car and that he had been paid there and then. Appellant never came out of the car.

He stated that he recognized appellant from his hair and because he was tall. He only stated that he recognized him from his face when asked by the defence. He also stated that in October the meeting was very fast just 5 to 10 seconds.

VIII. The appellant

A. His position during the trial

17. In the trial before the Criminal Court, the appellant availed himself of the right to remain silent. He therefore chose not to testify. Nor did produce any witnesses.

B. His arguments for a complete acquittal

18. Appellant is pleading that he should be acquitted from the charge and completely freed from punishment. Central in the appellant`s arguments is his claim that Somylai is a liar and therefore the evidence given by that person against him - from start to finish - should be completely rejected by this Court. He further argues that the evidence given members of the Police who were involved in the controlled delivery is flawed in essential detail and unreliable to determine the truth of the matter, that is, that the appellant had no involvement whatsoever in the alleged conspiracy.

19. In the application of appeal, the appellant describes as *inaccuracies, incorrect statements and lies* evidence given by Somylai.

He states *verbatim* :

*i. First and foremost his identification of the appellant is at worst wrong recognition and at best a **clear falsehood**. When asked how he recognized the appellant (in front of the Hotel) he stated that he did this from his hair and because he was tall. This is clearly a falsehood. The appellant's hair at the time of the controlled delivery was **normal curly hair**. It was only at the time of his testimony in front of the jurors that the appellant had changed his hairstyle to **braided locks.** This lie was intended to confirm that he could identify the appellant easily because of his hair. This **could not have been so** and logically therefore it was a false statement. This is a point worth repeating: the appellant did not have a recognizable distinct hairstyle until jury date !*

*ii. He also stated that he recognized appellant because he was tall. When the alleged drug delivery occurred in October, the delivery took place in a car and at no time did appellant emerge from the car. So, logically, how could he recognize him from his height ! This again is a falsehood intended to fortify his recognition of appellant after the event. Somylai **could only have noticed that appellant was tall when he saw him in Court**. Thus a clear falsehood.*

*iii. En passant, **and only en passant**, Somylai mentions that he recognized the appellant from his face. However this was done only upon a direct question made by the defence. One would have imagined that the first thing that would be mentioned would be the face. This requires explanation based upon two other crucial factors.*

iv. The first meeting held in October was, according to Somylai, a 5 to 10 second meeting in a car and in the dark. So Somylai had little if any real time to remember appellant's face. The impression Somylai gave on the witness stand was that his recognition of the appellant was based upon factors that happened after the event. That is, Somylai made the assumption that it was the appellant when this was not true. Unfortunately for Somylai, he had to assume that is was the appellant because of his agreement with the police. The point has to be made clear – what was important for Somylai was that he identifies someone – anyone would do. We have therefore a clear situation of ***mistaken recognition.***

v. As often happens with a falsehood, once commenced, then it must be maintained even if this results in other falsehoods. This is why Somylai created the fiction of the hair and the height. He then had to create the further fiction of facial recognition.

vi. This then carried onto another fiction – tied in precisely with the recognition factor. Somylai stated that all this occurred at 2pm, and thus in broad daylight. This was not so. It all occurred at 6pm in the dark as confirmed by the police officers. Somylai, having said he recognized appellant could not have said that this all occurred at 6 pm because it was dark at the time since it was November.

vii. Somylai then creates another falsehood. Apparently minor but effectively of importance. He states that appellant ***ran out of the supermarket*** *– intended to give the jurors the impression that appellant noticed he had been recognized. This is a blatant untruth and was necessary in order to give the impression that the appellant was the person whom he was going to meet. It is to be kept in mind that all the police officers stated that Appellant* ***walked out*** *of the supermarket. This was not, as may be interpreted, a mistake. This was a blatant lie. In fact, the CCTV does not show appellant running out.*

viii. So here we have Attila saying that the appellant ran out. This is done for a reason - because by indicating that the appellant ran, the reasonable conclusion is that he ran for a reason – the reason being that he must have realized something was going on so he ran away. By having appellant simply walking out of the supermarket and walking away we have an individual – the appellant – who is not feeling any guilt or

*pressure. But Somylai **MUST** make us believe that the appellant knew something was going on otherwise his whole story falls through.*

ix. Then there is another untruth, inaccuracy or mistake which again appears minor but is in keeping with the vast majority of falsehoods he relates. This is with regard to how the appellant passed by him in front of the hotel. It is important because it belies what Somylai is trying to indicate. Somylai, during the on-site sitting held by the Honourable Criminal Court stated that he was on the pavement next to the Hotel and the appellant walked up the road on the other side of the road, a distance of a number of metres. All the police officers stated the complete opposite, that the appellant passed by next to Somylai. Why is this lie important ? It is important because if, as Somylai would have us believe, the appellant knew Somylai the appellant would have stopped there and then next to Somylai. Instead he kept walking up the road.

x. This might seem like a small detail but it is not. We are to remember that Somylai is expecting a person he met before and who has been informed by someone in Holland that Somylai is waiting in front of the Hotel. So, why did the appellant walk on ? He walked on because he was not the person Somylai was supposed to meet. This other person was clearly somebody else.

xi. We are to keep in mind what we have already stated with regard to the issue of recognition of the appellant. So if the appellant was the man Somylai was supposed to meet why was there no contact made ? Somylai again tries to induce us to believe that this happened simply because the appellant was on the other side of the road and nodded with his head to Somylai to follow him.

x. That this is a lie is confirmed by all the police officers who saw appellant pass by Somylai. So once more the police officers confirm that Somylai is lying.

xi. Why the sudden change from walking past each other, to passing each other on different pavements at a distance ? The answer is really quite simple and similar to the running out of the supermarket issue. If Somylai and the appellant knew one another and they passed close to one another why did they not stop there and then and do the

deal ? Why did they not exchange money and drugs there and then ? This does not make sense. It only makes sense if the appellant was not the person Somylai was supposed to meet.

xii. Then we have another untruth. Somylai said that he used his own phone to contact his boss in Holland. In fact he used a police phone. So why this mistake ? Somylai was ***assuming*** *that his boss in Holland would be contacting the same person in Malta that had been contacted in October. This would have meant that there would be common numbers on his phone and the phone of his contact. Had he stated that the phone he used was the police phone then there would have been a problem with the contact numbers as stored in his phone and in the phone of his contact in Malta.*

xiii. This apart from the fact that there are no common numbers on any of the phones used by Somylai and the appellant – confirmed by expert witness Dr Martin Bajada and Assistant Commissioner Dennis Theuma.

20. In the said application of appeal, reference is also made to what are described as *facts pointing away from the appellant.*

21. He states *verbatim* as follows :-

i. Fact number 1. Somylai knew that he would receive a lighter sentence by assisting the police. This is a fact which cannot be ignored. As stated above Somylai had to identify/recognize someone otherwise his assistance would have counted as a failure with a direct potential influence on the length of his prison sentence.

ii. Fact number 2. The appellant did not have ***any money*** *to pay Somylai on his person. Nor did he have any money in his residence. Somylai stated that on the previous delivery he was paid directly on delivery. How was appellant going to pay Somylai if he had no money on him ? This points to the appellant not being Somylai's contact.*

iii. Fact number 3. Appellant was sitting on the bench alone for some time. This is confirmed by all the police officers who so him. So

there was an obvious change in the modus operandi from October. There seems to be no logical reason why this was so. Except for one – that appellant was not the contact person at all.

iv. Fact number 4. The police phone allegedly used by Somylai was never exhibited in Court and we therefore only have Somylai's word as to what was said.

v. Fact number 5. No recordings were made of Somylai's conversation when the Police had ample time to organize this. So again we only have Somylai's word.

vi. Fact number 6 (in keeping with fact number 4 and fact number 5). Somylai spoke on the phone to his contact abroad in Hungarian and there was no Hungarian translator present. Apart from this being a massive defect in the controlled delivery once again we must believe Somylai as to what was said.

vii. Fact number 7. The appellant did not have a particular hairstyle at the time of the controlled delivery. It is only NOW that he has a particular hairstyle.

viii. Fact number 8. The appellant did not come out of the car (allegedly in October – the defence states that appellant was never there) so Somylai could not know that appellant was tall.

ix. Fact number 9. No verbal contact was ever made between Somylai and the appellant – individuals who, according to Somylai, knew each other.

x. Fact number 10. The CCTV shows only the appellant. Somylai is never shown in the CCTV which CCTV is clearly intended merely to show that appellant was in the supermarket. There is thus no evidence of contact in the supermarket.

xi. Fact number 11. There is discrepancy in the alleged sign that appellant is said to have made to Somylai. One police officer said he used his hand, another said he got the impression there was a sign, others said

there were no signs, another said there was eye contact and Somylai stated that appellant nodded with his head.

xii. Fact number 12. All the call logs show no contact ever having been made between Somylai and the appellant.

xiii. Fact number 13. All the call logs show that there are no common numbers between Somylai and the appellant.

xiv. Fact number 14. The appellant received no calls or messages from Holland in the hour before 6 pm when it is alleged that he received instructions at that time from the Dutch drug dealer. ***THIS IS A CRUCIAL FACT SINCE IT NEGATIVES ALL SOMYLAI'S STATEMENTS****.*

IX. Considerations of this Court

22. Appellant was charged with the crime of conspiracy. This Court differently composed, in its judgement of the 2nd November 2009 in the re "**The Republic of Malta v. Steven John Lewis Marsden**" said :

> ***"11.*** *In the Godfrey Ellul case*[1] *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 of the agreement: O'Connell v. R. (1844) 5 St.Tr.(N.S.) 1.***
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> ***....***
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> ***'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***

[1] **Ir-Repubblika ta' Malta v. Godfrey Ellul**, decided by this Court on the 17th March 2005.

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 in Mulcahy v. R. (1868) L.R. 3 H.L. 306 at 317.'

"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*[2]*. 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*** [3]

[2] 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 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."

[3] OUP, p. 99, para. A6.24.

"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*** [4] *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 done to further it", adding that, indeed, this is the very essence of conspiracy*[5]*."*

23. The grievance on which the appeal is based revolves on the question of appreciation of evidence made by the jurors. For the reasons, and because of the circumstances, explained above, appellant states that there was no credible evidence to link him in any manner whatsoever to his accuser. Appellant insists of his innocence and argues that the evidence of the person who implicated him should be discarded as not credible because it has been proven that he is a liar. According to appellant, an unsafe and unsatisfactory verdict was pronounced against him as there was insufficient evidence to prove his guilt beyond reasonable doubt.

24. The Attorney General rejects this grievance by stating that although appellant insisted on his innocence, nonetheless did not manage to refute the evidence brought forth against him on a balance of probabilities as he did not produce any evidence to disprove that of the prosecution. He did not testify during the trial. Nor did he produce any witness in his defence, not even his wife of the time. Nor did he produce any alibi. The Attorney General insists on his part that the evidence of Somylai has been corroborated by the evidence of the police officers who were involved in the investigation of the crime, including those who were engaged on the controlled delivery. Furthermore appellant`s claim that Somylai fabricated appellant`s involvement because he was granted the benefit of Sec 29 of Chapter 101 of the Laws of Malta is without any basis at law and on fact.

[4] W. Green & Son Ltd. (Edinburgh), 1978, p. 203.

[5] See also the judgement of this Court of the 23 October 2008 in the names **The Republic of Malta v. John Steven Lewis Marsden**.

25. Numerous have been the occasions where this Court (even when differently composed) consistently affirmed the principle that when faced with a grievance related to the appreciation of evidence, the Court acts with caution not to disturb the appreciation made by the jurors because these had the advantage of not only hearing the testimony of the witnesses but also to evaluate the behaviour of the persons who testified in front of them.

26. In its judgement of the 1st December 1994 in re "**Ir-Repubblika ta` Malta vs Ivan Gatt**" this Court differently composed stated as follows :-

Fi kliem iehor, l-ezercizzju ta` din il-Qorti fil-kaz prezenti u f`kull kaz iehor fejn l-appell ikun bazat fuq apprezzament tal-provi huwa li tezamina l-provi dedotti f`dan il-kaz, tara jekk, anke jekk kien hemm verzjonijiet kontradittorji – kif normalment ikun hemm – xi wahda minnhom setghetx liberament u serenament tigi emmnuta minghajr ma jigi vjolat il-principju li d-dubju ghandu jmur favur l-akkuzat, u jekk tali verzjoni setghetx tigi emmnuta, u evidentement giet emmnuta, il-funzjoni anzi d-dover ta` din il-Qorti huwa li tirrispetta dik id-diskrezzjoni u dak l-apprezzament.

27. It has also been stated that :

'Hawn naturalment qeghdin fil-kamp ta' l-apprezzament tal-provi. Issa, din il-Qorti hi Qorti ta' revizjoni u, in ezekuzzjoni ta' din il-funzjoni taghha, hi ezaminat dettaljatament l-atti processwali, id-dokumenti esibiti u l-indirizz ta' l-Imhallef li ppresjeda l-guri, u dan biex tara jekk a bazi tal-provi li kien hemm f'dawn il-proceduri, ilgurati, ben indirizzati mill-Imhallef, setghux legittimament u ragjonevolment jaslu ghall-konkluzjoni li fil-fatt waslu ghaliha dwar il-htija ta' l-appellant ta' l-akkuza migjuba kontra tieghu fl-att ta' akkuza skond il-verdett minnhom moghti. Anke jekk mill-apprezzament tal-provi li taghmel din il-Qorti hi tasal ghal xi konkluzjoni diversa minn dik milhuqa mill-gurati, hi ma tiddisturbax dik id-diskrezzjoni ezercitata mill-gurati fl-apprezzament tal-provi u tirrimpjazzaha b'taghha kemm-il darba jkun evidenti ghaliha li l-gurati ma kinux ghamlu apprezzament manifestament hazin tal-provi, u setghu, ghalhekk, legittimament u ragjonevolment jaslu ghall-konkluzjoni li jkunu waslu ghaliha in bazi tal-provi li kellhom quddiemhom. Effettivament, kif dejjem inghad, din il-Qorti ma tinvadix it-territorju li l-ligi tirrizerva ghall-gurati hlief meta l-verdett minnhom milhuq ikun manifestament zbaljat fis-sens li ebda gurija ma setghet legittimament u ragjonevolment tasal ghalih. Jigifieri jrid ikun in kontradizzjoni manifesta ghal dak kollu li

jirrizulta mill-process b'mod illi ma hemmx mod iehor hlief li l-verdett milhuq jigi eskluz bhala infondat.

(vide : judgements of this Court : ir-Repubblika ta` Malta vs Rida Salem Suleiman Shoaib decided on the 15/01/2009 ; ir-Repubblika ta` Malta vs Paul Hili decided on the 19/06/2008 ; ir-Repubblika ta' Malta vs John Camilleri decided on the 24/04/2008 ; Ir-Repubblika ta' Malta v. Etienne Carter decided on the 14/04/2004 ; Ir-Repubblika ta' Malta v. Domenic Briffa decided on the 16/10/2003 ; Ir-Repubblika ta' Malta v. Eleno sive Lino Bezzina decided on the 24/04/2003 ; Ir-Repubblika ta' Malta v. Lawrence Asciak sive Axiak decided on the 23/01/2003 ; Ir-Repubblika ta' Malta v. Mustafa Ali Larbed decided on the 5/07/2002 ; Ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino decided on the 7/03/2000 ; Ir-Repubblika ta' Malta vs George Azzopardi decided on the 14/02/1989)

28. In his submissions, appellant gives his reasons why the evidence of Somylai should be rejected as unreliable it being founded on a series of lies and why the evidence of other prosecution witnesses is unsatisfactory to ground proof of the charge beyond reasonable doubt.

29. The nature of the grievance necessitates a reappraisal of the facts of the case. There is no doubt whatsoever that all evidence was placed for the jury`s consideration. The jurors were directed by the judge presiding the trial to evaluate all the evidence produced and decide on the established facts. What this Court is now called upon to do is to determine is whether the jurors, duly directed by the presiding judge according to law, could have legitimately and reasonably reached the verdict which they gave.

30. This Court has thoroughly examined the records so as to determine whether, on the basis of the evidence, the jurors could have reached their verdict in a legitimate and reasonable manner, taking into account the arguments which were raised by appellant, both in his application of appeal, and through oral submissions by learned counsel.

31. On the basis of the verdict, it is evident that the jurors accepted Somylai`s account that appellant was directly involved in the conspiracy to import drugs into Malta and therefore rejected appellant's denial. This Court reiterates the fact that the jurors had the obvious advantage of seeing and hearing the witnesses. They could also determine the demeanour and conduct of Somylai. They could also evaluate issues of probability and consistency.

32. Appellant denounces Somylai as a liar and unreliable witness because he claims that the latter had an interest to involve him in the conspiracy after he had been made aware of article 29 of Chapter 101 of the Laws of Malta. Appellant maintains the point that he had no involvement whatsoever in the conspiracy.

33. **Article 29 of Chapter 101** provides as follows :

> *"Where in respect of a person found guilty of an offence against this Ordinance, the prosecution declares in the records of the proceedings that such person has helped the Police to apprehend the person or persons who supplied him with the drug, or the person found guilty as aforesaid proves to the satisfaction of the court that he has so helped the Police, the punishment shall be diminished, as regards imprisonment by one or two degrees, and as regards any pecuniary penalty by one-third or one-half."*

34. In re **The Republic of Malta v. Kamil Kurucu** decided by this Court (differently composed) on the 14th June 2007 it was held that :

> *"So that a person may benefit from the reduction in punishment contemplated in section 29, it is therefore not enough that he mentions the supplier. It has to result that, through such information, the accused has effectively helped the Police to apprehend the supplier. If, notwithstanding such information, the Police did not have sufficient evidence to charge the person mentioned in Court, or if the person mentioned had already been apprehended by the Police before the accused mentioned him, it cannot then be said that the accused helped the Police to apprehend the supplier. Otherwise one could envisage situations where, in order that a person may benefit from a reduction in punishment, he might mention the names of persons who might be innocent, or the names of persons he might know to have already been apprehended in connection with dealing in drugs, or provide false or erroneous indications."*[6]

35. This Court examined the summing-up of the presiding judge to the jurors, with particular reference to the question of article 29 of Chapter 101. It finds that the explanation given by the presiding

[6] See also Criminal Appeals **Ir-Repubblika ta' Malta v. Antoine Debattista**, 19th January 2006; **Il-Pulizija v. Dennis Cuschieri**, 7th January 1999; **Il-Pulizija v. Sandro Mifsud**, 2nd August 1999; **Il-Pulizija v. Philippa sive Filippa Chircop**, 2 ta' Marzu 2007.

judge was fair and according to law. The jurors, as the judges of fact, had enough insight to carry out their analysis.

36. Also on the question of article 29 of Chapter 101, this Court refers to what it said in a judgement (when differently composed) delivered on the 9th May 2013 in the re **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."*

37. This Court examined the evidence given by Assistant Commissioner of Police Dennis Theuma on this matter and finds that the requirements of law were observed.

38. Somylai testified that appellant was the same person to whom he had delivered drugs on a previous occasion in October 2010. He describes how and why he could identify appellant as being the same consignee in the two incidents, namely the actual delivery of October 2010 and the controlled delivery of November 2010. The defence tried to demolish Somylai`s details of identification of appellant. It is evident that the features described by witness and rejected by the defence were accepted as conclusive by the jurors. In actual fact the various features indicated by witness could be assessed by the jurors *de visu* themselves, including the issue of the change in hairstyle, on which emphasis was made by the defence.

39. The jurors must have reasonably considered it unlikely that Somylai would have simply fabricated a story implicating no one else but appellant

in order to benefit under article 29 of Chapter 101. 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 cocaine was intended for appellant, Somylai was co-operating by indicating the person to whom the drug was meant to be delivered, and had appellant not been involved, he would not have implicated him in the controlled delivery.

40. Both in the application, and in the oral submissions, appellant dealt at length to convince the Court that all the pieces of puzzle did point out through guilt for conspiracy beyond reasonable doubt. Apart from hightling a certain disparity in facts which appellant considers as sustainting his stance, at the same time the Court notes that appellant did not give due regard to circumstantial evidence. It is established by doctrine and court judgements that at times circumstantial evidence in criminal proceedings could be far more important than direct evidence itself. Naturally this type of evidence has to be given proper scrutiny.

41. The principles that govern this class of evidence have been explained in Pg. 2279-2280. Para. F1.16 of ***Blackstone's Criminal Practice 2008*** in following manner :

> *"Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. Circumstantial evidence is evidence of relevant facts, i.e. facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.*
>
> *"Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities' (DPP v. Kilbourne [1973] AC 729 per Lord Simond at p. 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said :*
>
> *'One strand of the cord might be insufficient to sustain the weight, but three stranded together may be of sufficient strength. Thus it*

may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.' (Exall (1866) 4 F & F 922 at p. 929)

"However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that: 'It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference' (Teper v. The Queen [1952] AC 480, per Lord Normand at p. 489). Nontheless, there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (McGreevy v. DPP [1973] 1 WLR 276)."

42. Appellant submits that when the Police searched his place of residence neither drugs nor drug paraphernalia were found. This fact is however besides the point because, even if nothing had been done in furtherance of the conspiracy, a conspiracy according to law would have taken place just the same. In this case, it has been proven that Somylai brought into Malta inside his body a total of sixty (60) capsules each containing cocaine.

43. It is evident that the jurors rejected appellant`s claim that he was an innocent bystander who happened to be in the wrong place at the wrong time when the controlled delivery was carried out, a procedure in which a considerable number of police officers was involved. Furthermore the jurors had also the opportunity to evaluate logistics during the on-site inquiry during the trial before the Criminal Court.

44. The jurors could not have failed to notice what appellant wished them to believe were mere coincidences. Even though appellant endeavoured to highlight detail in apparent inconsistencies so as to disprove the evidence, the fact remains that the whole controlled delivery operation was prepared and executed with care and caution. Everything was carried out under the attentive observations of a number of police officers, apart from Somylai himself. It is untenable for appellant to state

that he was not the intended consignee in the controlled delivery and went sofar allege that Somylai picked at him as if at randon from the people who were in the vicinity. Facts and circumstances that form part of the evidence are unsustainable.

45. The inconsistencies pointed out by appellant relating to absence of guilt on his part were evidently not strong enough for the jurors to overrule the combination of established facts and circumstances that lead them to determine by a vote of seven against two proof of guilt of the accused beyond reasonable doubt and discarding them as satisfactory as proof on a balance of probabilities which is the criterion that rests on the accused.

46. This Court holds that the jurors legitimately and reasonably concluded that appellant was involved in a conspiracy to import and deal in cocaine with Somylai and others.

For the reasons above, this Court dismisses the appeal and confirms the judgement delivered by the Criminal Court on the 22nd July 2017 in *re The Republic of Malta v. Ikechukwu Stephen Egbo*, save that the fifteen day period for the payment of the court experts' expenses shall start to run with effect from today.

Hon. Chief Justice Joseph Azzopardi – President

Hon. Madam Justice Abigail Lofaro

Hon. Mr. Justice Joseph Zammit McKeon