COURT OF CRIMINAL APPEAL

His Honour Chief Justice Joseph Azzopardi – President

Hon. Mr. Justice Joseph Zammit McKeon

Hon. Mr. Justice Giovanni M Grixti

Bill of Indictment 4/2015

The Republic of Malta

Vs

Kingsley Wilcox

Sitting of the 22nd January, 2020

The Court,

Having seen the bill of indictment numbered 4 of the year 2015 brought against the accused **Kingsley Wilcox**, holder of Maltese

Identity Card number 34954(A), whereby the Attorney General accused Kingsley Wilcox with the following counts:

The First Count:

With having on the second (2) October of the year two thousand and twelve (2012) and in the months prior to that date, of rendering himself guilty of conspiracy to traffic in dangerous drugs in breach of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or of promoting, constituting, organising or financing the conspiracy; demands that the accused be proceeded against according to law, and that he is sentenced to the punishment of imprisonment for life and to fine of not less than two thousand three hundred and thirty Euro (€2330) and not more than one hundred sixteen thousand and five hundred Euro (€116,500) and to the forfeiture in favour of the Government of Malta of the entire immovable and movable property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in sections 9, 10(1), 12, 14, 15(A), 20, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d), 22A and 26 of the Dangerous Drugs Ordinance and regulation 4 and 9 of the 1939 Regulations for the Internal Control of Dangerous Drugs (Legal Notice 292/39), and in sections 23 and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilty of the accused.

The Second Count:

With having on the second (2) October of the year two thousand and twelve (2012) and during the days and months preceding that date sold or otherwise dealt in an illegal substance (cocaine), without a license by the Minister responsible for Health or without being authorised by these Rules or by authority granted by the Minister responsible for Health to

supply the drug mentioned (cocaine), or without being in possession of an import or export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of Part IV and Part VI of the Ordinance, and without being licensed or otherwise authorised to manufacture the drug or without a license to procure the same; demands that the accused be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to fine of not less than two thousand three hundred and thirty Euro (€2330) and not more than one hundred sixteen thousand and five hundred Euro (€116,500) and to the forfeiture in favour of the Government of Malta of the entire immovable and movable property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in sections 9, 10(1), 12, 14, 15(A), 20, 22(1)(a)(2)(a)(i)(1B)(3A)(a)(b)(c)(d), 22A and 26 of the Dangerous Drugs Ordinance and regulation 4 of the 1939 Regulations for the Internal control of Dangerous Drugs (Legal Notice 292/39), and in sections 23 and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilty of the accused.

Judgement of the Criminal Court:

Having seen the judgement of the Criminal Court of the 8th. April, 2017 whereby the Court condemned the said Kingsley Wilcox to a term of imprisonment of fifteen (15) years, and to the payment of a fine (multa) of thirty thousand Euros (€30000) which fine (multa) shall be converted into one year of imprisonment according to Law, in default of payment;

Furthermore condemned him to pay the sum of three thousand, two hundred and twenty six Euros and thirty seven cents

(€3,226.37) 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 today ;

Furthermore, ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which he has been found guilty and other moveable and immovable property belonging to the said Kingsley Wilcox.

And finally in view of the fact that there are other pending cases concerning third parties that are connected to this case, the Criminal Court ordered that the objects exhibited in Court be not destroyed;

Appeal entered by defendant:

Having seen the application of appeal of Kingsley Wilcox filed in the registry of this court on the 2nd of May 2017 where appellant requested the court "*to quash the verdict and the sentence pronounced against him as well as in so far as it condemned him to a term of imprisonment of 15 years, to the payment of a fine of €30,000 which fine shall be converted into one year of imprisonment in default of payment, to the payment of €3226.37 for court experts, and in so far as it ordered the forfeiture in favour of the Government of Malta of all the property moveable and immovable belonging to accused, and instead that it declares him not guilty on both charges brought against him*";

Reply of the Attorney General:

Having seen the reply of the Attorney General filed in the registry of this court on the 11 September 2018 requesting that the court dismiss all the grievances brought forward by the

accused and thus dismiss his appeal and subsequently affirm the judgment of the first court in its entirety;

Having heard oral submissions by the parties;

Having seen all the records of the case;

Considered that:

Grievances of appellant:

Appellant's grievances brought forward for consideration by this court are the following:

A. Irregularities during the proceedings, namely: (1) the production of evidence not indicated in the Bill of Indictment; (2) non observance of the rule of best evidence with regard to the data extrapolated or retrieved from mobile phones; and (3) that a court expert called as a witness of the prosecution was unfit to assume the role of court expert.

B. Wrong conviction on the facts of the case namely: (1) that with regard to the first charge the evidence was neither sufficient, nor safe nor satisfactory; and (2 there was no evidence whatsoever with regard to the second charge.

C. Aggrieved by the sentence, being a subordinate grievience namely: (1) regarding the term of imprisonment and the fine imposted; and (2) the order for payment of court experts' fees;

Preliminary:

1. Prior to dealing *seriatim* with the above grievenances, what follows is a decision about a request made by appellant's learned counsel during his oral submissions and which must therefore be determined prior to the appeal application;

2. During the hearing of the 12th of June, 2019, appellant's counsel made it known to this court that he was not counsel to accused during the trial by jury and not the one to sign the application of appeal and had further grievances to put forward. Learned counsel to the Republic raised an objection as this is not allowed by law. In order to economise on any further postponements, appellant was allowed to make his submissions both on his alleged right to introduce new grievance and the new grievances themselves. The Attorney General made counter submissions both on the law governing such practice and on the new grievances, were these to be allowed by this Court;

3. Now, prior to dealing with this procedural matter, it is also necessary to consider an issue which is somewhat of a *leit motif* in this appeal, namely that appellant was not assisted by an advocate during the trial by jury as he chose to undertake his own defence and seems to imply that he should not be held responsible for certain issues during the trial and also that he be allowed to go beyond the rules governing appeals before this court;

4. From the records of these proceedings it results that applicant contends that he was constrained to conduct his own defence during the trial by jury because he was not comfortable with the lawyer that was appointed in his defence as that same lawyer was also representing a third party connected to his case. Dr. Leslie Cuschieri had assisted the accused as his legal counsel until the hearing of the 23rd of February 2017 before the Criminal Court, which was a preliminary hearing in anticipation for the trial date, for which he did not attend but on that same day accused informed the court that he wanted to

contest the case and did not want to be assisted by a lawyer and the case was adjourned for the 2 of March 2017;

5. During the next hearing, accused again appeared before the Court without legal counsel and he **insisted** on not needing the assistance of a lawyer. The Court then appointed the case for trial by jury for the 3rd April, 2017. In the interim, the Court issued a decree dated 16 March 2017 which is being reproduced as follows:

> "Having heard the request of the accused that he does not wish to be assisted by an advocate during the hearing of the trial by jury.
>
> Since it is in the best interest of justice that the accused is assisted by an advocate in order that he may be directed as to the legal aspects of the procedure adopted during the trial. The Court is appointing Dr. Simon Micallef Stafrace as legal aid lawyer in order to assist the accused during the hearing of the said trial.
>
> Moreover, the Court also appointes a preliminary sitting for the 29th March, 2017 at 09.00 hours and orders that this decree is served upon the accused, the Attorney General and Dr. Simon Micallef Stafrace.

6. During the preliminary hearing of the 29th March 2017 Dr. Micallef Stafrace was present in order "*to assist the accused*" as instructed. Accused registered his no objection to the Attorney General's request to exempt him from producing the witnesses therein indicated and the Court adjourned the case for trial for the 3rd of April, 2017; Dr. Micallef Stafrace was

again present on the day set for the trial in order to assist the accused. The records show that the accused had conducted his own defence from the first day of the trial by jury but had otherwise always been duly assisted even during the preliminary hearings before the trial. Accused also registered a no objection to the prosecution's request for copies of documents to be made available to the jurors and also cross-examined witnesses himself. Accused presented his own defence during the sitting of the 6th of April 2017 and addressed the jurors on the 7th of April and made his own submissions regarding the penalty on the 8th of April after delivery of verdict by the jury;

7. The application of appeal under examination was signed by the same lawyer who assisted the accused until the last preliminary hearing as aforesaid, namely Dr. Leslie Cuschieri;

8. The Court considered that there is no prohibition under the Criminal Code for an accused to represent oneself without the assistance of a lawyer. Article 445 imposes on the court the duty to inform an accused of the right to be assisted by a lawyer and Article 519 then states that it shall be the duty of the courts of criminal justice to see to the adequeate defence of the parties charged or accused. As is evident from the decree cited above, the Criminal Court complied fully with these provisions by appointing a state funded lawyer to stand by the accused notwithstanding his refusal to be so assisted and from the records it is evident that the Court acted in the most appropriate manner in instructing appellant on how to conduct himself when, for example, making his rejoinder before the jury and to refer to facts only mentioned during the trial. Frankly, the first court showed extreme patience with the conduct of the accused as is evident from the transcripts where he had to be corrected on inumberable occasions by the presiding judge;

9. The accused's decision to forfeit his right to legal representation was a choice of his own making and this carries with it the obvious consequences of not being able to bring forward this fact in his defence;

10. In **Archbold – Criminal Pleading, Evidence and Practice** – Sweet & Maxwell 2014 Edition, [4-69] it is held that:

> **Subject to certain statutory restrictions on cross examination by defendants in person (post SS8-225 *et seq.*), a defendant has the right to conduct his own defence, with or without the services of a solicitor: *R. v. Woodward* [1944] K.B. 118, 29 Cr. App.R. 159, CCA (and see *R. v. De. Courcy*, 48 Cr. App.R.323, CCA).....However, the exercises of that right may bring advantages and disadvantages; a person who chooses to exercise the right cannot pray in the ordinary and anticipated disadvantages of his choice (lack of knowledge of the law, lack of experience of the trial process and lack of forensic skills) in support of an argument that there was such inequality of arms at trial as to render his conviction unsafe; where such a defendant, being one of several defendants in a long trial, made an application for the jury to be discharged in his case or, was no longer able to defend himself properly, the judge had been entitled to have regard to his own observation of the manner in which the defendant had conducted his case to that point, further, to the extent that various errors or ommissions in the conduct of the defence were relied on as indicating that he had not in fact been in a fit state, the court was entitled to take the view that this illustrated not disability as a result of ill**

health, but the normal disadvantage associated with being unrepresented: *R .v. Walton* [2001] 8 Archbold News 2,CA.

13. In the case at hand and as already stated, the Criminal Court went beyond cautioning the accused and provided legal assistance nonetheless, probably also anticipating a situation where the accused would have become exhausted in dealing with his own defence or having the need to consult with a lawyer at some stage or other of the proceedings. His decision to plough ahead with his own defence can not have any bearing on these appeal proceedings in his attempt to allow a relaxation of provisions of the law which bind this Court and the procedure that must be followed at this stage of appeal;

Grievances not included in the application of appeal:

14. This issue formed the subject of many decisions by our courts and conscious of the fact that each case must be decided on its own merits, yet this court feels that there is no impelling reason why it should depart from what is considered to be a long prevailing view of our courts. In **Il-Pulizija vs Charles Bugeja** (Crim App 15.05.2008), it was held: "*hu pacifiku fil-gurisprudenza li mhux permessibbli li mal-aggravji kontenutio fir-rikors tal-appell jizdiedu aggravji godda li ma kienux issemmew fir-rikors tal-appell".* That court had also cited a number of judgments on the same lines. This principle was also confirmed in a more recent judgement **Il-Pulizija vs Gaetan Gatt** (Crim App 16.01.2013). [..... similarities betwen article in inf crt and sup crt""] This does not prohibit an appellant from bringing forward arguments such as developments with regard to his grievances as long as they are directly connected and do not prove to be completely new grievances;

15. The matter of additional grievences, apart from departing from the rigour of the law has the additional effect of putting the other party at a disadvantage such as in this case where the written reply of the Attorney General has been filed in response to the grievances outlined in the application of appeal and appellant would submit new grievences during oral submissions. Where such new grievences are such that would prompt the court *ex officio* to raise a plea *marte proprio* due to the issue being one of public policy, then that would amount to an exception for further consideration. The same would apply to questions which are related and involved to the grievenace;

16. The point under discussion was also dealt with in detail by this Court in a more recent case **The Republic of Malta v. Ikechukwu Stephen Egbo** (Bill of Indct 1/2017 –Crt Crim App 12.06.2019) where the court, having cited case law and drawn comparisons between article 505(1) and 419(1) of the Criminal Code held that it will "*limit its consideration on the ground of appeal stated in the application and to matters related and involved*).

17. The first additional grievance that appellant requested to bring forward during oral submissions before this court concerns the statement of the accused done without the assistance of lawyer. This request was made during the hearing of the 12 June 2019 after various hearings before this court dealing with applications connected with this appeal. The appeal application itself was filed on the 2 May 2017 without any mention of this grievence when the Grand Chamber of European Court of Human Rights had delivered its judgement declaring such practice to be a violation of the right to a fair hearing in **Borg v. Malta** (app. 37537/13) on the 12 of January

2016 prevailing and followed by our courts at the time. Since then, the matter has been revised by the First Chamber of the European Court of Human Rights in **Farrugia v. Malta** (app 63041/13) on the 4 June 2019;

18. The **second** grievance that appellant requested be included in his appeal concerns an alleged wrong application of the law applied in regard to the controlled delivery which led to the apprehension of the accused in that this should have been executed in terms of article 435E of the Criminal Code and not 30B (1) and (2) of the Dangerous Drugs Ordinance;

19. The court is of the firm opinion that these grievences are independent of those listed in the application of appeal and not strictly connected thereto and consequently refrains from taking further cognisance therof;

The grievances in the appeal application:

Evidence not listed in the Bill of Indictment presented during the trial:

20. Under the heading "Unlisted evidence produced", appellant alleges:

> *"That when in March 2015 the prosecution filed the relative Bill of Indictment against Kingelsy Wilcox, it exhibited the list of Witness, Documents and Objects that had to be taken as evidence by the Attorney General. NO objects or exhibits had been listed. Yet the evidence against exponent was mainly based on the information allegedly retrieved from mobile phones taken from the possession of exponent. These mobile phones have not been listed as exhibits (actually no exhibits were indicated). Now Section 40 of the Criminal Code states that:*
> *(3) No witness, document or exhibit, which is not indicated in the lists or filed as provided in article 438, may be produced at the trial, without special leave of the court.*

(4) Leave shall only be granted if the evidence is considered to be relevant, and the Attorney General or the party accused shall not have been prejudiced by the ommission from the said list or by the default of filing within the term specified in article 438.

Expert Martin Bajada testified upon his findings from mobile phones, but his testimony could not make reference to these mobile phones, once they dont form part of the evidence of the procesuction, as listed with the Bill of Indictment.

Moreover, Martin Bajada came to testify in the trial by jury exhibiting new documents not listed with the bill of indictment, particularly what he terms as the call profile for international number 3463293271. This evidence had a heavy bearing on the case and the fact that it was not listed with the bill of indictment prejudiced the accused as he was not in a position to declare evidence in defence or rebut such evidence of the prosecution";

21. The Bill of Indictment contains a list of witnesses, documents and objects presented by the Attorney General. That part of the list headed "Documents", reads as follows:

1. The records of the Inquiry and the compilation of all evidence against the accused;
2. The testimony of all the witnesses found in the said records of the Inquiry and compilation proceedings, should the need arise for such testimony to be produced according to Law;
3. All the documents that are mentioned in the said records of the proceddings,
4. The examination and answers of the accused.

22. In his reply to this grievance, the Attorney General explained that appellant is correct in stating that the 12 mobile phones mentioned by Dr. Martin Bajada were not indicated as exhibits in the Bill of Indictment against the accused. However, the same mobile phones had been exhibited in a related case The Police vs Jose' D. Benito in which Dr. Martin Bajada had

compiled his expert report and a true copy of this report was then inserted in the Acts of Proceedings against Kinglsey Wilcox thus becoming an integral part of the evidence for and/or against him. The Attorney General further replied that through an applicaton dated the 29th of March 2017 in terms of article 440 of the Criminal Code, he requested the Criminal Court to authorise that these mobile phones be made physically available to the jurors during the trial by jury against the accused should the need arise during the trial. The Attorney General further states that although the said mobile phones were not physically exhibited in the proceedings against the accused, these were duly examined and the information therein was incorporated in the report of the court-appointed expert which *ab initio* formed part of the acts of proceedings against the accused ;

23. This court notes that folio 48 of the records contains an application by the Attorney General dated 29 of March, 2017 requesting the Criminal Court to physically make available for the jurors, should the need arise during the trial, all 12 mobile phones examined by court expert Dr. Martin Bajada. A report on the analysis of these phones was presented to the court in the proceedings against Mr. Jose D. Benito and a copy of that report was also exhibited in the compilation of evidence before the Magistrates' Court against Kingsley Wilcox;

24. The Criminal Court acceded to this request by a decree of the 30th March 2017. For the sake of clarity, the Attorney General had filed two applications before the Criminal Court, one of which was filed in the registry of the court, and the application under discussion contains the necessary rubber stamps to evidence this. Another application which precedes the latter in folio 46 and which was not filed in the registry is with regard to the making physically available to the jurors the drugs examined by Pharmacist Mario Mifsud. This application

seems to have been presented during the preliminary hearing of the 29 March 2017 where the records show that "In view of the application presented by the Attorney General today, the accused does not object and the Court grants the request". That concession during the hearing can only refer to the application regarding the physical availability of the drugs to the jurors if the need arises. The other application regarding the mobile phones was decreed separately on the same day. According to article 440 of the Criminal Code, no witnesses, documents or exhibit not indicated in the bill of indictment as provided in article 438 may be produced at the trial without special leave of the court. That leave was duly obtained through the above cited decree;

25. From an examination of the records of case before the Court of Magistrates as a Court of Criminal Inquiry, it is evident that Dr. Martin Bajada gave evidence on the 8 of November 2013 and exhibited a document marked as MB (folio 272 of the compilatory proceedings). This document is a true copy of a report of the same Dr. Martin Bajada exhibited in the case Police vs Jose Manuel Domingo Benito following an analysis of 12 mobile phones, 3 of which were said to have been seized from the possession of Kingsley Wilcox. Dr Martin Bajada then presented an additional report of analysis of sim cards said to have been lifted from the possession of the accused and which document is marked as MBA at fol. 361 *et seq* of the compilatory proceedings;

26. Appellant's argument that Dr. Bajada could not make reference to these mobile phones since they were not part of the evidence of the prosecution is therefore unfounded since Dr. Bajada's report formed part of the records of the compilatory proceedings and that these are included in "The records of the

Inquiry and the compilation of all evidence against the accused" – under the heading of Documents in the Bill of Indictment;

27. Within this first alleged irregularity, appellant also states that during the trial Dr Martin Bajada exhibited a new document not previously indicated in the bill of indictment when speaking about the call profile for international number 34632983721. The records show that during the trial and on the day of 5th April, 2017, Dr Martin Bajada testified under oath and the prosecution requested that a copy of his reports Documents MB and MBA be presented to the jury. The defendant registered his no objection and the Court acceded to the request. (folio 107). The phone number indicated by appellant in his grievance appears in the expert's report exhibited as aforesaid during the compilatory stage of the proceedings. During the hearing of the 11th January, 2013 the Court hearing the compilation proceedings confirmed the appointment of all experts nominated in the inquiry number 1024/12 a copy of which was exhibited in the proceedings regarding a finding of drugs in the Tropicana Hotel, Ball Street, Paceville on the 2 of October 2012. Dr. Martin Bajada was one of the court appointed experts and his report identified and analysed the phone number indicated by appellant in this grievance. Appellant's contention that this amounts to a new document is therefore completely unfounded and this grievance is being turned down;

Best evidence rule.

28. Appellant is also of the opinion that another irregularity took place during the proceedings in the non observance of the rule on best evidence:

> "*Expert Martin Bajada produced testimony and documents related to information retrieved from mobile phones. When it*

comes to calls made or received and messages sent or received, the best evidence is the Network Service Providor, in this case Melita plc, Vodafone or any other server. Dates and times of calls depend on how the mobile in question is set, rather than real dates and times. Actually according to one particular document exhibited by Dr Martin Bajada, Wilcox allegedly kept making phone calls and receiving phone calls even in the evening of the 2nd of October 2012, whilst accused had been arrested in the morning and deprived of his mobile. All this emphasises the necessity that the rule of best evidence be upheld and adhered to vehemently. All evidence tendered in respect of mobile calls should, by the upholding of this rule, be quashed, or at least discarded. This was not the case during the trial by jury, and this has prejudiced the accused and his defence;.

29. Appellant is here referring to article 638 (1) of the Criminal Code which states:

> **638. (1**). In general, care must be taken to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness".

30. Dr Martin Bajada was appointed as court expert by the Inquiring Magistrate following a find of an amount of drugs in room 630 of Tropicana Hotel in Triq Ball, Paceville on the 2 of October 2012. Dr Bajada was appointed as technical expert for the purpose of analysing all data of the mobile phones lifted from the arrested persons. From an examination of the relevant *process verbal*, (a copy exhibited at folio 135 *et seq* of the compilatory proceedings) the arrested persons were Jose Manuel Domingo Benito, Kingsley Wilcox and Charles Christopher Majimor, Angelo Bilocca and Priscilla Cassar . On

the 10th October 2012, the Commissioner of Police filed an application to extend Dr Bajada's appointment as court expert to seek and be given all the necessary assistance by cellular telephone providers with regard to the documents therein indicated. The Inquiring Magistrate acceded to this request by a decree dated 15 October 2012;

31. Dr Martin Bajada's report, duly confirmed under oath, includes all information which he was authorised to seek from the service providers. In his note of the 23rd March 2015 made in terms of article 448(2) of the Criminal Code, accused raised one preliminary plea with regard to the narrative in the first count, further stating that he was indicating as his witnesses all witnesses listed by the prosecution and that he has no documents to exhibit. Since the accused failed to raise any pleas with regard to the report of Dr Martin Bajada during the preliminary stages, he has no standing in raising such pleas connecting with the admissibility of evidence at this stage and therefore concludes that there was no irregularity in this regard during the trial ;

Court Expert (Dr. Martin Bajada)

32. Appellant also raised the following grievance under the heading of Irregularities during the proceedings:

> *"That Court Expert Martin Bajada played a central role in the evidence of the prosecution. Martin Bajada has been declared by the Maltese Court of Appeal as unfit to assume the role of court expert, given that he has been found guilty of fraud in the past. As already pointed out above, evidence related to calls made and received from or to mobile phones could have*

easily been produced by representatives of the service providers, and the testimony of Martin Bajada in this trial by jury was not just 'not the best evidence' but rather inappropriate and not fit to be regarded as "evidence by a court expert". This fact was not even brought to the attention of jurors during the final address to the jurors."

33. This court is in complete disagreement with accused's argument that the presiding judge failed to bring to the attention of the jurors the above observations made in the application of appeal. This contention is frivolous and does not merit any further consideration. Furthermore, as stated above, accused failed to bring forward the relevant plea of inadmissibility of evidence in accordance with article 438(2) of the Criminal code and has no standing in bringing forward such a plea at this stage of the proceedings.

34. Moreover, and without in any manner accepting that such a plea can be raised at this stage, it must be stated that the Attorney General is correct in countering that the judgement regarding the status of Dr Martin Bajada was the merits of proceedings before the civil courts and that in criminal matters the issue is resolved by judgement of this court in **The Republic of Malta v. Janis Boruss** (23 February 2017) which held as follows:

"Nonetheless, this Court cannot fail to observe that the situation in the abovementioned case [Joseph Chetcuti Bonavita vs Av. Beppe Fenech Adami (Court of Appeal, 29th April 2016)] before the Court of Appeal in its Civil Jurisdiction was markedly different

from the situation in this case. In that case, the expertise was a calligraphic opinion to an alleged forgery. In the present case, what was required was the extrapolation of data from a mobile phone and sim cards; this essentially constitutes a determination of facts". In the present case under review, Dr Bajada's expertise consisted in extrapolating data from 12 mobile phones and no opinion was ever expressed by him either in any of his reports or during his testimony before the jury;

Wrong Conviction on the facts of the case.

35. Appellant contends that there is no conclusive evidence that connects him to the conspiracy alleged in the first count and to the second count in the bill of indictment relating to dealing in drugs. In the same grievance, appellant alleges that the presiding judge failed to explain in detail to the jury the elements of the crime of conspiracy and that it was for the prosecution to prove that the accused and somebody else planned or agreed a specific mode of action. "*Had this been well explained to the jury, the jury could have never been satisfied that the elements of conspiracy subsisted in respect of Kingsley Wilcox*". This grievance actually partakes of two separate pleas, one relating to a wrong conviction on the facts and the other to an irregularity during the proceedings due to a misdirection to the jury by the presiding judge. The second limb of this grievance will be dealt with *in primis*;

36. This court stands in disbelief with appellant's allegation that the presiding judge failed to properly address the jury on the elements of the crime of conspiracy and that it was the duty of the prosecution to prove that there was a specific mode of

action agreed between the accused and a third party. The transcript of the judge's summing up clearly shows that presiding judge explained in clear terms all the elements of the crime of conspiracy under the Dangerous Drugs Ordinance being a crime particular to this Act and introduced as of recent into our legislation apart from its presence also in the Criminal Code;

37. The same judge described in detail all the material and formal elements of the crime with clear examples in order to facilitate a full understanding of it by the jurors and this court does not consider it necessary to examine further this grievance except that the judge's summing up on this aspect is legally and accademically correct, objective and impartial and fulfils the obligation to place the jurors in a situation where they can understand the law governing the crime and decide on the facts accordingly in an objective manner;

38. The same consideration applies to the second part of appellant's allegation that the presiding judge failed to explain to the jury that it was for the prosecution to prove that the accused and somebody else planned or agreed a specific mode of action.

Wrongful decision on the facts:

39. Now, as aforestated, the first part of this grievance concerns an alleged wrongful decision on the facts. It is now an established principle of this court that it will not substitute a verdict of the jury with its own decision on the facts unless it can be shown that the jury could not have arrived at their conclusion in a legal and reasonable manner. This court refers to one of the numerous judgements on this matter in **Ir-**

Repubblika vs Eleno sive Lino Bezzina (Crim App 10/1994 – 24.4.2003) cited with approval by this court to date which in turn made reference to **Ir-Repubblika ta' Malta vs. Lawrence Asciak sive Axiak** (Crim App 23.01.2003), **Ir-Repubblika ta' Malta vs. Thomas sice Tommy Baldacchino** (Crim App 7.3.2000), **Ir-Repubblika ta' Malta vs. Mustafa Ali Larbed** (Crim App 5.7.2002) and **Ir-Repubblika ta' Malta vs Ivan Gatt** (Crim App 1.12.1994). In the Lawrence Axiak case, it was held that:

> "Huwa appena necessarju li jigi rilevat illi hawn qieghdin f'kamp delikat peress li, trattandosi ta' apprezzament tal-provi – ezercizzju li l-ligi tirrizerva ghall-gurati fil-kors tal-guri – din il-Qorti ma tistax tiddisturba l-apprezzament li huma ghamlu, anke jekk huma setghu legittimament u ragonevolment jaslu ghall-verdett li jkunu waslu ghalih. Jigifieri l-funzjoni ta' din il-Qorti ma tirrizolvix ruhha f'exzercizzju ta' x'konkluzjoni kienet tasal ghalih hi kieku kellha tevalwa l-provi migbura fi prim'isanza, imma li tara jekk il-verdett milhuq mill-gurati, inkwadrat fil-provi prodotti, setax jigi ragonevolmnet u legittimament milhuq minnhom. Jekk il-verdett taghhom huwa regolari f'dan is-sens, din il-Qorti ma tiddisturbahx"

The Court also cites with approval, that part of the Eleno Bezzina judgement (cited above) which concludes as follows on the issue at hand:

> "Illi fi kliem iehor, l-ezercizzju ta' din il-Qorti fil-kaz prezenti u f'kull kaz iehor fejn l-appell ikun bazat fuq apprezzament ta' provi, huwa li tezamina il-provi dedotti f'dan il-kaz, tara jekk, anki jekk kien hemm – xi wahda minnhom setghetx liberament u serenament tigi emmnuta minghajr ma jigi jholat il-principju li d-dibbju ghandu jmur favur l-akkuzat, u jekk tali verzjoni setghet tigi emmnuta w evidentement giet emmnuta mill-guri, il-funzjoni, anzi d-dover ta' din il-Qorti huwa li tirrispetta dik id-diskrezzjoni u dak l-apprezzament. Biex din il-Qorti – kif *del resto* gieli ghamlet – tiddisturba l-gudizzju tal-gurati, trid tkun konvinta li l-istess ma setghux, taht ebda cirkostanza ragjonevoli, jaghtu affidament lill-verzjoni minnhom emmnuta".

40. This Court does not deem it necessary to depart from the principles outlined in the above judgement and will therefore

proceed by examining all the facts of the case at hand within the parameters outlined above;

Summary of the facts in general:

41. On the 2nd October 2012, Customs Officials at the Malta International Airport stopped and searched an incoming passenger on flight from Spain, Paul Ogocuku Offor, on suspicion that he was carrying drugs. No drugs were found on this person but a search on his mobile phone unveiled an sms detailing the name of a hotel in Paceville. It was then suspected that this person was shadowing a drug courier and the police acceded to the hotel, asked whether there were any "walk-in" guests and on an affirmation acceded to a room just allocated to a Spanish national, Jose' Manuel Domingo Benito. A search of his room yielded a luggage with two hidden compartments and two packets of a substance suspected to be cocaine;

42. Whilst under arrest, Benito was receiving phone calls on his mobile phone and he informed the police that a person of African origin wearing a black cap was waiting down at the hotel to pick up the luggage. A person allegedly fitting that description was arrested and found to be the accused Kingsley Wilcox who collaborated with the police and said that he had been communicating with a person called Innocent from Spain and that he [Wilcox] had to meet another African person in Msida and they would take the drugs to Siggiewi and hand them over to a certain Angelo. Wilcox agreed to participate in a controlled delivery subsequent to which Charles Christopher Majimor was also arrested in Msida. The two agreed to collaborate in a further controlled delivery and the alleged drugs were delivered to a farmhouse in Siggiewi under the supervision of the Police who proceeded with the arrest of all the occupants;

Particular facts of relevance:

- A flight manifest shows that Offor and Benito travelled on the same flight from Valencia on the 2 October 2012;
- On arrival at Malta International Airport, Offor had no money on him except a credit card and did not have a reservation for lodging;
- Offor's mobile phone contained the following messages: "Tropicana Hotel", and "I'm ok, and got your message too. Till morning I will call you as he moves".
- The substance seized from the possession of Benito resulted in cocaine having a weight of 1085.2 grams
- The prosecution exhibited a *proces verbal* being a statement of the accused confirmed on oath before the Inquiring Magistrate. This *proces verbal* includes a document said to be the statement of the accused released at the Police Headquarters but not signed by him. Accused stated before the Inquiring Magistrate under oath that he did not release that statement and that he was very tired and sleepy when talking to the Police. Accused, however, subsequently confirmed all the contents of his statement and added further details which he had not divulged in the original unsigned statement. Of particular note is that after stating that he does not remember releasing a statement, when confirming same under oath after it being read out to him line by line, he stated that he never remembered saying: "Yes, but up till now whatever I read, you said it is ok". That was a question put forward by the Inquiring Magistrate, but accused thought it had been his reply to a question made by the investigating police officer;
- The amount of €2700 were found on the person of the accused when arrested near the hotel, €700 of which were

returned to his wife after confirming that they belonged to her;

- According to the statement confirmed under oath, accused had first met with Innocent in a bar in Bugibba and he provided the police inspector with the latter's phone number. For the occasion merits of the case he was asked by Innocent over the phone to pick up a package in front of the hotel and to hand it over to John (who later results in being Charles Christopher Majimor);
- During the confirmation of his statement under oath, accused provided the Inquiring Magistrate with details as to how he himself and John would take the package to Siggiewi and for the drugs to be tested by the receiver in his farmhouse requesting the receiver's wife to provide him with amonia up until the arrest took place. Accused also recounted the manner of delivery which he alleged was stated to him by John who informed him that he was into cocaine;
- The statement confirmed on oath also contains a declaration that accused convinced John to go ahead together with the second controlled delivery and that on three other occasions he saw John handing over packages containing white powder to the resident of the farmhouse who tested the said powder.
- Accused does not know Innocent's surname but he provided the police with his numbers from the directories of 2 of his mobile phones;
- Accused chose to take the witness stand and testified that on the day when he was intercepted by the Police he had won the sum of €3000 at a Quickino lottery and went to Paceville with the intention of buying some clothes, so he put apart €700 in order not to take out the whole batch of money when making payment. He was not in the same

street of the hotel when the arrest took place even though he was wearing a black cap;

- Accused denied whatever he had said previously in the statement confirmed on oath stating that he does not remember what he told the Magistrate and that some of the answers were invented by the Police. Accused testified that he had nothing to do with the situation but that the Police forced him into accepting to make a controlled delivery against a person whom he knew previously when he was introduced to him by John who took him there to buy a rabbit but was kind enough to give him two instead of one. He describes this man as a good and hard working person;
- Accused stated that the Police decided to let him have €700 of the €2700 found in his possession and when his wife acceded to the Police Headquarters following his phone call she could not understand why she was being given the amount.
- Accused recounted that when the Police made the interception at the farmhouse, there was no cocaine powder on the table; he had given the packet to the wife and not to the male occupant of the farmhouse and the police searched the premises for three hours;
- Accused stated that the only reason why he was charged in court is that on the day he was wearing a black cap and in the vicinity of the hotel . He knew Innocent Oga as a spiritual healing man and never spoke to him about drugs. On this matter he concludes that the report of the court expert are 'fake' because he never made the calls to Innocent because at that time he was engaged in the controlled delivery with John in Msida;
- Accused insisted that this was a conspiracy and that whatever he said in his statement and to the Inquiring

Magistrate was as instructed by the Police and that he had instructed his lawyer of choice and told him about the witnesses he wanted to produce and still failed to do so;

"Ist Charge: evidence neither sufficient, nor safe nor satisfactory"

43. In this grievance, appellant argues that the prosecution had to prove that there was the so called "meeting of the minds" of two or more people on the intention of dealing in drugs and that this should refer to a specific agreement on the method of such dealing. Appellant further argues that the presiding judge was bound to explain that it was for the prosecution to prove that the accused and somebody else planned or agreed a specific mode of action. Were this not to be proved then the case would be based on conjecture and had this been well explained to the jury it could never have been convinced of the elements of conspiracy;

44. Article 22(1) (d, (f) and (1A) of Chapter 101 deal with the crime of conspiracy envisaged in the first count the elements of which, according to settled case law, consists in (a) the time of commission; (b) the existence of at least any another person involved whether in Malta or abroad; (c) with the intention of dealing in drugs; and (d) the existence of an agreement on the mode of action. The crime is deemed to have taken place as soon as an agreement is made on the mode of execution of the intended dealing. Reference must also be made to the definition of dealing: "*It-traffikar ghandu definizzjoni wiesa' u din tinkludi mhux tfisser kwalsiasi moviment ta' droga minn id ghal id kemm versu korrispettiv kif ukoll b'mod gratuwitu*" – **Ir-Repubblika ta' Malta vs. Simon Xuereb -** Crim App 05.1.2004;

45. The crime of conspiracy envisaged under Chapter 101 is similar to that found in the Criminal Code under Article 48A. In general, conspiracy with intent to commit a crime is different in nature to attempt to commit a crime, article 41 of the Criminal Code or that of organized crime under article 83A of the same code. The crime of association, is one of the preparatory acts of the crime, attempted or consumed, and can therefore subsist independently of the intended crime;

46. Reference is made to **Kenny's OUTLINES OF CRIMINAL LAW** –Ninth Ed, 1966 who opines:

> **Pg. 101: But so far as the law of the present day is concerned the House of Lords has declared (a) that the gist of conspiracy is the agreement, whether or not the object is attained; and (b) that the purpose of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of attempt, and (c) that is all part and parcel of the preservation of the Queen's peace within the realm.**
>
> **Pg 431: As to the evidence admissible, the principles are just the same for conspiracy as for other crimes. But owing to two precularities in the circumstances to which those principles are here applied, it often seems as if there were an unusual laxity in the modes of giving proof of an accusation of conspiracy. For (a) it rarely happens that the actual fact of the consipiring can be proved by direct evidence, since such agreements are usually entered into both swiftly and secretly. Hence they ordinarily can be proved only by an inference from the subsequent conduct of the parties, in committing some overt act which tend so obviously toward the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about. Upon each of several isolated**

doings a conjectural interpretation is put; and from the aggregate of these interpretations an inference is drawn.

Archbold – Criminal Pleading, Evidence and Practice 2003 on this issue, then states:

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 .... Nothing may be done in pursuit of the agreement ...The agreement may be proved in the usual way or by proving circumstance from which the jury may presume it. ...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.

47. With regard to conspiracy from the perspective of the Dangerous Drugs Ordinance, Chapter 101, the court now makes reference to the judgement **The Republic of Malta v. Steven John Caddick** (Crim App 6.3.2003) which held:

"*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 an 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”*;*

48. The court examined the records of the case, including the testimony of Jose' Benito, all the police officers and the expert reports, including those of the court expert nominated to extract all information from the mobile phones of all the persons mentioned in the facts above, and sequenced all the cross matching of phone numbers and phone calls made and received, including messages, on all phones seized by the Police, together with all the documents. Having gone through this process, this Court is of the opinion that there is no legally valid reason within the parameters expressed *supra* as to merit a variation of the verdict reached by the jury. The evidence presented by the prosecution, if believed by the jury, was sufficient to warrant the decision arrived by the jury through its verdict which was convinced beyond reasonable doubt that there was a sufficient link between the accused, Innocent, Offor, Majimor and Angelo Bilocca to lead them to be convinced of the conspiracy to deal in drugs, which fact forms the first count;

49. The presiding judge explained in clear language all elements of the crime of conspiracy under article 22(1) (d, (f) and (1A) of Chapter 101, and finds no irregularity in this respect;

50. It is evident that the jury’s verdict was such that it was convinced beyond reasonable doubt that the facts as presented to it by the prosecution were sufficiently proven and that there was therefore no evidence to direct it to decide that there was a

reasonable doubt in favour of the accused. This grievance is therefore being dismissed;

"2nd Charge – no evidence whatsoever"

51. Appellant brings forward the argument that the conviction on this charge was based on conjectures related to a conspiracy and that "*somehow the jury concluded that there was trafficking as well, when no evidence points in that direction. It is irrelevant whether accused was credible or not in his version of facts at this point. Should a juror consider the accused not credible, still that is not enough to find guilt. At most, his testimony can be discarded; surely it cannot be deemed as "proof" of the crimes he is charged with. Court Expert Joseph Mallia confirmed in his report that the drug found was in no way linked to accused, as far as finger-prints are concerned. The law specifically lists those acts that tantamount to trafficking/dealing. In this present case it was never indicated how accused "dealt" with drugs: there was no importation, no exportation, no production, no cultivation, no manufacturing, no distribution, no possession – absolutely nothing.*

"*Again, had the elements of drug trafficking been well explained to the jury, and had it been well explained that it was up to the prosecution (irrespective of what the accused testified) to prove that such elements subsisted, the jury could never have arrive[d] to the conclusion that Kingsley Wilcox dealt in drugs. The only two occasions that Kingsley Wilcox did act of the sort were when he cooperated with police investigations and obliged with two controlled deliveries against two-third parties. Still these 2 controlled deliveries took place after the 2nd October 2012, and so they don't fall within the parameters of the charges*".

52. Appellant's allegation that the [presiding judge] did not explain well to the jury the elements of the charge of drug trafficking and that it was for the prosecution to prove the existence of such elements is frivolous. Having examined the transcript of the judge's address to the jury, the court is satisfied that the presiding judge repeatedly and on various occasions reminded the jurors that it rests with the prosecution to prove its case beyond reasonable doubt and this after having carefully explained the principles of proof;

The crime of Dealing in drugs ("trafficking"):

53. "Dealing" is defined in Article 22(1) (1B) of Chapter 101 of the laws of Malta as <u>including:</u>

> **(1B) For the purposes of this Ordinance the word "dealing" with its grammatical variations and cognate expressions) with reference to dealing in a drug, includes cultivation, importation in such circumstances that the Court is satisfied that such importation was not for the exclusive use of the offender, manufacture, exportation, distribution, production, administration, supply, the offer to do any of these acts, and the giving of information intended to lead to the purchase of such a drug contrary to the provisions of this Ordinance**.

54. Appellant's argument that there was absolutely no activity on his part that falls within the definition of the law is based on a selective reading of the above provision where he fails to make reference to the key phrase: "the offer to do any of these acts". This is evident when he makes reference to the lack of any of his fingerprints linking him to the packages. The evidence produced by the prosecution to demonstrate the existence of the crime of conspiracy was equally valid to demonstrate the crime of dealing in the drug since the drug found its way into Malta and the jury was convinced that it was

Mr. Wilcox that made the necessary arrangements for the drug to be brought over to Malta. By undertaking such an enterprise, the jury could have legally and reasonably concluded that Mr. Wilcox was also guilty of the crime of dealing in drugs by offering to do any of the following, namely, cultivate, import, manufacture, export, distribute, produce, administer or supply the drug.

55. This grievance is therefore being declined;

C. Aggrieved by the sentence – subordinately.

56. The last grievance of appellant refers to the punishment imposed by the Criminal Court and the order for payment of court expert's fees. In the first of these grievances, appellant states as follows:

57. *This sixth grievance is being raised without prejudice to previous grievances. Accused defended himself, without being represented by a lawyer, and it seems that after he was found guilty, it was not brought to the attention of the court that in the enquiry stage, the prosecution had declared for the purposes of Section 29 of Chapter 101 of the laws of Malta that accused had helped the police extensively, even helping them with the arrest of third parties. This help was confirmed by inspector Herman Mula in the jury. By law this requires that the imprisonment be reduced from one to two degrees and the fine be reduced from one third to one half. The Court of First Instance made no reference to this section 29, has not applied it and in view of the extensive help Wilcox afforded to the police, risking his own life and safety, the reduction should be of two degrees";*

58. From a reading of the judgement of the Criminal Court, appellant is correct in stating that there is no mention of Article 29 or any consideration with regard to a reduction of punishment by one or two degrees. The question that needs to be asked is whether the first court should have applied Article 29 of Chapter 101 in this particular case where appellant is on the one hand, through the appeal stating that he collaborated with the police by participating in two controlled deliveries and on the other, both through his testimony and in his appeal application, stating that he was forced to "collaborate" and that nothing that he related under oath to the Inquiring Magistrate was true and that he knows the recipient of the drug to be a good hard working person and this to convince the jury that this was all a conspiracy to get to the end receiver of the drug;

59. Article 29 of chapter 101 provides as follows:

> **29. 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 one-third or one half.**

60. The Court refers to the submissions made by the accused with regard to the punishment to be meted out by the first Court. The Attorney General submitted that the jury decided by eight votes in favour and one vote against on the guilt of the accused and that Jose Benito was imprisoned for a term of ten years and that it was requesting a term of not less than fifteen years with regard to the accused. The presiding judge explained to the accused that he had a right to make submissions with

regard to the punishment who in turn asked for directions on how to do that but the presiding judge rightly pointed out that she could not accede to that request and proceeded by repeating what the Attorney General was requesting and that he has a right to make submissions regarding the penalty;

61. The accused submitted that he was not guilty of the crimes and that Benito had made a deal, referring to a plea bargain, yet he had made no such "deal" and then ended his submissions, which frankly repeated his contention that there was no proof beyond reasonable doubt for him to be found guilty, with the following sentence: "see what you believe in your heart", directed to the presiding judge;

62. The application of Article 29 of Chapter 101 depends primarily on whether an accused provided sufficient information for the successful apprehension of a third party and whether the accused requested that it be applied in his regard. This court is guided by the considerations made in **Repubblika ta' Malta vs. Anna Spiteri** (Crim App 9/2010 – 10.4.2014) namely that:

> "**Huwa ovvju li hawnhekk il-ligi qed tipprospetta zewg possibilitajiet: l-ewwel wahda meta l-prosekuzzjoni stess tiddikjara fil-process illi dik il-persuna li tkun qed titlob l-applikazzjoni tal-artikolu 29 tkun ghenet lill-pulizija biex taqbad lill-persuna jew lill-persuni li jkunu pprovdewlha l-medicina, t-tieni kaz, fl-assenza ta' tali dikjarazzjoni, l-istess persuna misjuba hatja, tipprova ghas-sodisfazzjon tal-Qorti li tkun ghenet lill-pulizija".**

63. The same judgement made reference to **Il-Pulizija vs Sandro Mifsud** (Crim App 2.8.1999) when it stated that:

"Kif din il-Qorti diga kellha l-opportunita' li tfisser f'sentenzi ohra, biex persuna tibbenefika mir-riduzzjoni ta' grad jew tnejn ta' piena (u riduzzjoni ta' terz jew nofs fil-piena perkunjarja) skond l-imsemmi Artikolu 29 mhux bizzejjed li dak li jkun <u>isemmi</u> persuna minghand min xtara d-droga; irid jirrizulta li b'dik l-informazzjoni l-akkuzat ikun effettivament <u>ghen lill-pulizija sabiex taqbad lil persuna</u>. Jekk minkejja dik l-ghajnuna, il-pulizija ma jkollhiex provi bizzejjed biex tressaq lill-persuna indikata l-qorti, jew jekk dik il-persuna indikata tkun diga nqabdet mill-pulizija qabel ma tissemma mill-akkuzat, ma jkunx jista' jinghad li l-akkuzat ikun ghen lill-pulizija sabiex taqbad lil dik il-persuna. Altrimenti facilment jigri li, biex persuna tnaqqas mill-piena taghha, tibda ssemmi ismijiet ta' nies li jistghu ikunu innocenti, jew l-ismijiet ta' nies li tkun taf li <u>diga' nqabbdu in konnessjoni mal-bejgh ta' droga lilha</u>".

64. It is the first part of this latter citation which is relevant to the case under examination. The records of the proceedings show that the accused had given information under oath to the Inquiring Magistrate and also participated in a controlled delivery which led to the apprehension of third parties who, as the court understands, have been duly charged in court. The accused, however, never made a request to the court to consider a reduction in punishment based on his collaboration with the police. On the other hand, both in his testimony and in his submissions before the jury he consistently alleged that he was forced by the police to give information to the Inquiring Magistrate and subsequently denied all that he stated to the Inquiring Magistrate because this was part of conspiracy

against him and that he knew the receiver of the drugs to be a good hard working person;

65. This has created an anomaly and a contradiction in the application of appeal. Accused is now appealing against the non application of article 29 by the first court when his line of defence and his appeal is based on the allegation that his "collaboration" was only a set-up and a conspiracy for the police to net a particular person. In these circumstances the first court was correct in not considering the application of article 29 and it has to be reiterated again that accused's decision to represent himself in his trial cannot, now, be used by him as an excuse for not requesting the application of the said article. This grievance is therefore not being upheld;

66. The last grievance in this application concerns the order of the first court for appellant to pay for the costs of fees of court experts and this on two counts. In the first place he should not be made to pay for the total costs incurred when he is one of four persons undergoing proceedings on the same facts. Appellant is also contesting the fees of Dr Martin Bajada on the same basis and is also critical of the fees due to Mr. Joseph Mallia since no fingerprints matching his own were found on the packaging of the drug found in room 630 of the Tropicana Hotel;

67. Article 533 of the Criminal Code does not provide for all situations such as those alleged by appellant. Nonetheless, it is an established principle that a person found guilty of an offence should only be made to pay those costs which were directly or indirectly relevant to the finding of guilt. The report of fingerprint expert Mr. Joseph Mallia at a cost of €764.94 had no such bearing and will therefore be deducted from the cost payable by appellant. All expert reports in the present case

were relevant to the finding of guilt. The report filed by Dr. John Seychell Navarro at a cost of €1,133.35 is pertinent solely to the searches regarding accused's moveable and immovable assets having been ordered by the Court of Criminal Inquiry;

68. Appellant's argument that since he is one of four persons standing trial on the same facts, albeit in separate proceedings, he should therefore not bear the costs of fees in those other trials can not be upheld by this Court. Appellant is making reference to an unknown and uncertain situation of costs in trials against third parties which are still *sub judice* and where it is not even known which expert reports will, if at all be exhibited.

69. For all the above reasons this Court concludes by varying the judgement of the first court by revoking that part by which accused was ordered to pay within fifteen days of the judgement the sum of €3,226.37 being the sum total of the expenses incurred in the appointment of court experts and instead condemns the appellant to pay the sum of €2461.43 within fifteen days, and otherwise confirms the rest of the judgement of the first court in its entirety.

Hon. Dr Joseph Azzopardi

Hon. Dr Joseph Zammit McKeon

Hon. Dr Giovanni M. Grixti