The Court of Criminal Appeal

Hon. Chief Justice Dr Mark Chetcuti LL.D

Madame Justice Dr Edwina Grima LL.D

Mr Justice Dr Giovanni Grixti LL.D.

Today the 22nd day of June 2022

Bill of Indictment No : 01/2011

The Republic of Malta

vs

Kofi Otule Friday

The Court :

1. Having seen the Bill of Indictment bearing number 1 of the year 2011 filed against appellant Kofi Otule Friday, wherein the Attorney General after having premised that:

In The First Count

That on the twenty sixth (26th) day of August of the year two thousand and nine (2009) and during the previous two years AUSTIN UCHE and KOFl

OTULE FRIDAY decided to start dealing, offering, supplying and distributing drugs illegally in the Maltese Islands in agreement with others.

In fact, on the dates above mentioned AUSTIN UCHE and KOFI OTULE FRIDAY conspired and agreed with a certain Tony Johnson to sell, supply and distribute to a third person in Malta an amount of the drug cocaine (approx. 1kg). In execution of this conspiracy the two accused agreed to provide all the necessary assistance and information for this illegal activity to take place, which activity causes untold harm to Maltese society and illegal financial gain to the accused, which financial gain was at the basis of this conspiracy.

In fact, AUSTIN UCHE informed Tony Johnson that he knew a person in Malta who wanted to buy a kilogram of cocaine and that he was ready to make all the necessary arrangements for this drug deal to take place. Moreover, Tony Johnson agreed with AUSTIN UCHE to get the kilogram of cocaine from the other accused KOFI OTULE FRIDAY.

In execution of these pre-concerted plans, on the 26th of August 2009 Tony Johnson went to the residence of KOFI OTULE FRIDAY at St. Paul's Bay, Malta and there KOFI OTULE FRIDAY supplied Tony Johnson with an amount of the dangerous drug cocaine. Later that day after his meeting with KOFI OTULE FRIDAY, Tony Johnson went to the Marsa Open Centre to meet the other accused AUSTIN UCHE. According to their plans, AUSTIN UCHE and Tony Johnson were then going to meet another person who agreed to buy the kilogram of cocaine for around twenty thousand euro (€20,000).

Fortunately, Police Officers from the Drug Squad, knowing that an illegal activity concerning drug trafficking will take place, were observing the area of Ghajn Dwieli, Paola and stopped and arrested both AUSTIN UCHE and Tony Johnson. When effecting this arrest Police Officers noticed a dark bag and this bag was taken for further analysis. In fact, it transpired that this bag contained a total of 949.13 grams of cocaine with its purity calculated at 33.7%.

The total street value of this amount of drugs as established by the Court appointed expert is of €72,134. This consignment of drugs was the subject matter of the abovementioned conspiracy.

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, AUSTIN UCHE and KOFI OTULE FRIDAY rendered themselves guilty of conspiracy to trafficking in the dangerous drug cocaine in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta or by promoting, constituting, organizing or financing such conspiracy.

The accusation:

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accused AUSTIN UCHE and KOFI OTULE FRIDAY of being guilty of having, on the twenty sixth (26th day of August of the year two thousand and ten (2009) and during the previous two years with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in drugs (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: -

and demanded that the two accused be proceeded against according to law, and that they 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 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 articles 2, 9, 10(1), 12, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22(A), 24A, and 26 of the Dangerous Drugs Ordinance and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilty of the two accused.

In The Second Count (preferred only and limitedly against the accused Kofi Otule Friday)

That on the twenty sixth (26th) day of August of the year two thousand and nine (2009) and during the previous two years, KOFI OTULE FRIDAY decided to start trafficking, supplying, procuring and distributing dangerous drugs (cocaine) to other persons in the Maltese Islands.

In fact on the 26th day of August 2009 Tony Johnson went to the residence of KOFI OTULE FRIDAY at St. Paul's Bay, Malta and there KOFI OTULE FRIDAY procured, supplied and gave Tony Johnson an amount of the dangerous drug cocaine. KOFI OTULE FRIDAY supplied Tony Johnson with this consignment of drugs to be trafficked and sold to third persons in Malta as described in the first count of this bill of indictment. KOFI OTULE FRIDAY was going to receive twenty thousand euro (€20,000) from this drug deal.

Fortunately, Police Officers from the Drug Squad, knowing that an illegal activity concerning drug trafficking will take place, were observing the area of Ghajn Dwieli, Paola and stopped and arrested both AUSTIN UCHE and Tony Johnson. When effecting this arrest Police Officers noticed a dark bag and this bag was taken for further analysis. In fact, it transpired that this bag contained a total of 949.13 grams of cocaine with its purity calculated at 33.7%.

The total street value of this amount of drugs as established by the Court appointed expert is of €72,134. This amount of the dangerous drug cocaine was supplied and procured by the accused KOFI OTULE FRIDAY.

KOFI OTULE FRIDAY supplied, distributed and procured the dangerous drug cocaine to other persons in Malta and in particular to a certain Pascal Okafor. In fact in the year two thousand and eight (2008) KOFI OTULE FRIDAY supplied Pascal Okafor with the dangerous drug cocaine with the intention to sell it to other persons.

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

The consequences:

By committing the abovementioned acts with criminal intent, KOFI OTULE FRIDAY rendered himself guilty of supplying or distributing, or offering to supply or distribute the dangerous drug (cocaine) in Malta 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, accused KOFI OTULE FRIDAY of being guilty of having, on the twenty sixth (26th) day of August of the year two thousand and nine (2009) and during the previous two years, with criminal intent, supplied or distributed or offered to supply or distribute the drug cocaine in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

The punishment:

And demanded that the accused be proceeded against according to law, and that he 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 in which the offence took place as described in the bill of indictment, as is stipulated and laid down in articles 2, 9, 10(1), 12, 22(1)(a)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22(A), 24A, and 26 of the Dangerous Drugs Ordinance and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilty of the accused.

2. Having seen the judgment of the Criminal Court of the 27th January 2022 wherein after having seen the verdict whereby the jury for:

The First Count

By seven (7) votes in favour and two (2) votes against found the accused guilty of the charge brought in the First Count of the Bill of Indictment.

The Second Count

By seven (7) votes in favour and two (2) votes against found the accused guilty of the charge brought in the Second Count of the Bill of Indictment.

The Court, declared Kofi Otule Friday, guilty:

1. Of having on the twenty sixth (26th) day of August two thousand and nine (2009) and in the two years prior to that date, rendered himself guilty of conspiracy to deal, offer, supply and distribute in dangerous drugs (cocaine) 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;

2. Of having on the twenty sixth (26th) day of August two thousand and nine (2009) and in the two years prior to that date supplied, distributed and procured or otherwise dealt in a dangerous drug (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.

And after having seen Articles 2, 9, 10(1), 12, 13, 14, 15, 15A, 16, 17, 18, 22(1)(a)(f)(1A)(1B)(2)(a)(i) the proviso (aa), (3A)(a)(b)(c)(d)(7), 22(A), 24A and 26 of Chapter 101 of the Laws of Malta as well as Regulations 2, 4, 9 u 16 of Subsidiary Legislation 101.02, and articles 17, 23, 23A, 23B, 23C, and 533 of the Criminal Code condemned the said Kofi Otule Friday to the punishment of imprisonment for thirteen years, as well as to a fine of thirty thousand euro (€30,000), together with the payment of one third of the costs incurred by the experts in their reports in this case amounting to the sum of eight hundred and forty three euro forty two cents (€843.42). Moreover the Court ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which Kofi Otule Friday had been found guilty and all other moveable and immovable property belonging to the said Kofi Otule Friday. In terms of article 22E of the Criminal Code, the Court ordered the destruction of the drugs exhibited in this case under the supervision of the Registrar.

3. Having seen the appeal application filed by accused Kofi Otule Friday on the 16th February 2022 wherein he requested this Court to:

i. In the first instance, declare the appellant not guilty of all counts of the Bill of Indictment.

ii. In the second instance and subordinately, should this Court find him guilty of the first Count, declare him not guilty of the Second Count.

iii. In the third instance, and subordinately, should this Court find him guilty on all Counts, condemn him to a lighter sentence more in line with the evidence as produced.

4. Having seen the reply of the Attorney General dated 3rd May 2022 wherein he submitted that the Court should dismiss the grievances put forward by appellant and confirm the judgment given by the Criminal Court of the 27th January 2022.

5. Having heard oral submissions by the parties.

6. Having seen all the acts of the case.

Considers :

7. The verdict reached by the jury in this case was based on a finding of guilt for the offences of conspiracy to deal in the dangerous drug Cocaine and the actual dealing of the same drug.

8. Appellant Kofi Otule Friday raises two main grievances directed towards the verdict reached by the jury and the judgment delivered by the Criminal Court, the first being that from the evidence brought forward, the jury should have never reached a verdict of guilt for the two Counts brought against him. Amongst others, he states that there is no forensic evidence linking him to the facts of the case and strongly lambasts the thesis brought forward by the Prosecution pointing towards guilt, which put considerable evidential weight on the pair of mismatched socks in which the drugs in question were found. Moreover, he states that there are a number of discrepancies in the testimonies tendered by Tony Johnson and Pascal Okafor as well as in those given by PS1038 Johann Micallef and Dr. Martin Bajada. According to appellant, all of the above lead to many unanswered

questions which in turn resulted in an unmerited verdict of guilt. Finally, appellant contends that the punishment inflicted upon him was an excessive one, and this in the light of the evidence produced .

Considers:

9. The primary grievance brought forward by appellant refers solely to the merits of the case when he laments that, from the evidence produced, he should have never been found guilty of the charges brought against him.

10. It is now an established principle in jurisprudence that a court of second instance 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. In one of the numerous judgements on this matter "**Ir-Repubblika vs Eleno sive Lino Bezzina"** (Crim App 10/1994 – 24.4.2003) oft-cited with approval by this Court to date, which in turn refers to numerous *dicta* in this regard[1], it was decided.

> **"Huwa appena necessarju li jigi rilevat illi hawn qeghdin 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'eżercizzju 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 ragonevolment 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, an excerpt from the *Eleno Bezzina* judgement 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**

[1] **Ir-Repubblika ta' Malta vs. Lawrence Asciak sive Axiak** (Crim App 23.01.2003), **Ir-Repubblika ta' Malta vs. Thomas sive 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).

setghetx liberament u serenament tigi emmnuta minghajr ma jigi vjolat il-principju li d-dubbju 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".

11. This Court will therefore endorse these principles outlined in local jurisprudence in determining this first grievance put forward by appellant by examining all the facts of the case at hand within the parameters outlined above.

Considers :

12. From the Acts of the Proceedings, it results that on the 26th of August 2009, the Executive Police received confidential information that a drug deal was to take place that very same day, which drug deal involved a certain Austin Uche as middleman and appellant Kofi Otule Friday being the supplier of the said drugs. Relying on this information, the Police started monitoring Austin Uche's movements, and a controlled delivery, was duly authorised in terms of law, in connection with this exchange of dangerous drugs. Assisted by an informer who had met earlier on with Austine Uche, the investigating officers apprehended Uche at Għajn Dwieli, Paola later that day, in a vehicle driven by the unknown informer of Maltese nationality. Together with Uche, in the same vehicle a certain Tony Johnson was also apprehended, who upon being approached by the police, disposed of a bag, which he threw out of the vehicle, which bag contained a pair of mismatched socks wherein a quantity of the dangerous drug cocaine was found.

13. Tony Johnson chose to cooperate with the Police and stated, upon interrogation, that the supplier of the said Cocaine was appellant Kofi Otule Friday, who had given him the drugs the day before and who had promised him a remuneration of two thousand Euro upon the completion of the drug deal. Johnson also stated that Austin Uche was the intermediary in this drug deal whilst he was the courier[2].

[2] Vide sworn statement exhibited in records at folio 31

14. On the basis of this police operation, and also following a text message that Tony Johnson, under police surveillance, sent to appellant, a raid was carried out at appellant's residence – 86, Triq Parades, Qawra – which raid yielded no drugs and no drug paraphernalia but only a pair of mismatched socks, identical to the ones containing the seized drugs, together with two mobile phones. When spoken to by the Executive Police, appellant Kofi Otule Friday denied any involvement in this drug deal.

15. Tony Johnson then reiterated the same version of facts when confirming his statement on oath before the Inquiring Magistrate. However, when the same Tony Johnson testified before the Court of Criminal Inquiry, he partially changed his version of events and pinned the entire blame on appellant whilst completely exonerating Austin Uche. In both versions, however, Johnson confirms that the drugs were supplied by appellant, although in his first version given before the Inquiring Magistrate he had declared that around 300 grammes of the cocaine were supplied by an unknown third party and the remaining 600 grammes were supplied by appellant.

16. The Executive Police were also approached by a certain Pascal Okafor who informed them that some time before, appellant had also supplied him with the drug cocaine and this for onward trafficking. Pascal Okafor confirmed his version of facts both in a statement on oath and also in his testimony before the Criminal Court.

Considers :

17. In the Bill of Indictment issued by the Attorney General appellant was charged with the crime of conspiracy to deal in drugs and also with the crime of trafficking, the jury finding guilt on both counts.

Conspiracy for the purpose of selling or dealing in drugs (Cocaine)

18. The crime of conspiracy for the purpose of selling or dealing in dangerous drugs is dealt with in article 22(1)(d)(f) and (1A) of Chapter 101 of the Laws of Malta, with the elements necessary for the commission of the offence being

essentially the involvement of at least two or more persons whether in Malta or abroad, having the intention of dealing in drugs, with a plan of action put in place thus necessitating the existence of an agreement on the mode of action. In fact, the crime is completed as soon as an agreement is made on the mode of execution, no actual trafficking needed for a finding of guilt, with the definition of dealing, encompassing a wide range of activities involving the transfer from person to person, in any manner and even without any monetary exchange, of a dangerous drug:

> "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.

19. It must be noted that the crime of conspiracy envisaged under Chapter 101 of the Laws of Malta is similar to that found in the Criminal Code under Article 48A of the same. In general, conspiracy with intent to commit a crime is different in nature to the attempt to commit a crime (Article 41 of the Criminal Code) or that of organized crime (Article 83A of the Criminal Code), and this because the crime of association can subsist independently of the commission of the actual, intended crime.

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

> 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.
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> ... 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.

21. Also, Archbold - Criminal Pleading, Evidence and Practice 2003 - deals with this issue as follows:

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.

22. Furthermore, with regards to the offence of conspiracy as contemplated under the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, it was decided:

"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 30 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[3]".

23. In his appeal application, appellant does not essentially contest the finding of guilt on legal grounds, except with regards to the legal standing of Johnson's testimony as a co-accused, but insists that the evidence produced is not strong enough, on the merits, to lead to a conviction. Appellant laments that no forensic evidence to substantiate the finding of guilt exists in the acts. Furthermore, he argues that the evidence tendered by Tony Johnson and Pascal Okafor is

[3]The Republic of Malta v. Steven John Caddick (Crim App 6.3.2003)

unreliable for a number of reasons as detailed in his appeal application. In fact appellant even goes a step further and argues that the position of witness Johnson is unclear at law, and this because, even though he was tried separately, he should still be considered on the same footing as a co-accused in the commission of the offence, and consequently an incompetent witness at law.

24. Now from an examination of the acts it results that the witness Tony Johnson tendered his evidence twice in these proceedings – in the first instance when he gave a statement on oath on the 10th of September 2009 before the Inquiring Magistrate and in the second instance when he testified *viva voce* in front of the Court of Criminal Inquiry on the 4th of August 2010. The Court also notes that during the appellant's trial by jury, the Prosecuting Officer declared that Tony Johnson could not be traced in order to testify and therefore the mechanism enshrined under Article 646(2) of the Criminal Code was triggered. Although the law requires that a witness testify *viva voce*, however, as in the majority of cases, one finds exceptions to the same rule – such as when that same witness is dead, absent from Malta or cannot be found to testify, as was the case in these proceedings. If these circumstances result, any prior testimony given by that particular witness according to law is read out to the jurors and is deemed to constitute admissible testimony. In these proceedings, as Tony Johnson could not be traced to tender evidence during the trial by jury, his prior testimonies were read out to the jurors. It is pertinent to note that during the trial by jury, the criminal proceedings brought against Tony Johnson had been concluded in a final and definitive manner and therefore, contrary to what appellant states in his grievance, Johnson cannot be considered as an accused person according to law but as a condemned person, judgment having been delivered against him which judgment is today *res judicata*. Consequently Johnson, although being an accomplice in the commission of the offence, thus necessitating a clear direction by the presiding Judge in his final address to approach the evidence of this witness with caution in terms of article 639(3) of the Criminal Code, however he cannot be considered as co-accused with appellant thus rendering his testimony admissible at law.

25. Appellant laments that the testimony tendered by Tony Johnson was unreliable since he was inconsistent throughout, did not bear conviction and that there was no corroboration with the proof found in the acts. He then goes on to provide a run-down into the testimony of the same Tony Johnson.

26. It is undisputed that the witness Tony Johnson gives two slightly different versions of facts, one in his statement on oath and the other in front of the Court of Criminal Inquiry, respectively. In his first version, he states that appellant had provided him with around 600 grams of cocaine whilst he had obtained the remaining 300 grams from a European friend of his. He also delves into the involvement of Austin Uche in the said drug deal. However when he tenders his evidence in front of the Court of Magistrates, he changes his version and states that it had been appellant who had provided him with the total amount of drugs found and that Austin Uche had nothing to do with the same.

27. Defence therefore places great weight on this discrepancy between the two versions, insisting that Johnson is an unreliable witness and therefore the jury should have never considered his testimony as credible and should have discarded it. As correctly directed by the presiding Judge in his final address the jury could have chosen either to believe the witness *in toto*, not to believe him at all or else to give weight only to a part of his testimony and discard other parts of the same. Now, as already pointed out, there is one constant fact in Johnson's testimony picturing appellant as a drug supplier. In fact it is evident that Johnson knew appellant as a drug supplier and acted as his courier for onward trafficking. He states initially that he had been approached by Austin Uche who was acting as a middleman, which fact he then denies in his testimony in Court. It is the Court's firm opinion that Johnson was trying to exonerate Uche from the deal, however in this case it was Friday who was being tried and not Uche. Uche's testimony itself tendered during the jury is not in fact credible, since although having been found guilty by a judgment of the Criminal Court in this case, and this upon his own admission of guilt, he then denies in his testimony his involvement in this deal, and states that he only admitted to the charges brought against him because he happened to have been in the same car some minutes before Johnson was

apprehended by the police in possession of the cocaine. For some reason, unknown to the Court, it is evident that the actual version of events were being twisted by these witnesses so as to exonerate Austin Uche, although the latter had already been tried and found guilty, as already stated upon his own admission of the crime. What the jury had before it, however, was a constant statement made by Johnson throughout this criminal saga that appellant supplied him with the drug cocaine although there is a discrepancy between the two versions regarding the exact amount.

28. There is also no doubt that 600 grammes of the drug was concealed in two mismatched socks, one black and one grey. Johnson states in his testimony that these were passed on to him by appellant himself. Upon a search being carried out by the Police at appellant's residence, in a drawer where various pairs of socks were stored, two socks being similar to the two mismatched socks containing the drugs were found. These were the only two mismatched socks which the police found in this drawer, the others all found neatly paired. PS1086 Johann Micallef states in his testimony:

> *"As I mentioned earlier the socks were in a sort of chest of drawers and all socks and even the clothes were neatly folded. Even the pairs of socks were all open there were all matching, and there was only this grey sock and a black sock which were not tightly folded or in pairs. All the other socks were all paired by colour.....*
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> *It was a big drawer, it was full of socks, pairs neatly folded. I think there were more than thirty pairs. I am just estimating now, recalling after twelve years, eleven years.....*
>
> *Yes, thirty pairs approximately because it was full of socks and I remember that we opened all pairs, we did a search for the capsules, and we opened all pairs, which as I said were all paired up, except for a black sock and a grey sock."*

Although, as defence rightly points, out this piece of circumstantial evidence on its own cannot point towards guilt, however, when considered together with all the evidence garnered, it clearly indicates that appellant was involved in the consignment of the drugs. Not only does Johnson repeatedly confirm that the drugs found in the socks were supplied by appellant, but he states that these had been so packed in the socks by appellant himself, with the police finding similar

mismatched socks in his apartment in a place where a quantity of socks were stored in a neatly fashion all similarly paired except for the two incriminating socks. Therefore, although it is true that a DNA analysis carried out by the Court appointed expert Dr. Marisa Cassar on the socks seized by the police yielded no concrete result, however the jury, and now this Court, cannot disregard its evidential weight corroborating the other proof found in the acts.

29. Closing in on appellant's guilt is also the text message sent by Johnson to appellant in the presence of Inspector Dennis Theuma, and under police surveillance, indicating that the drug exchange had been successful, although not in clear terms, for which text message appellant replies with the words, "Thanks God". Further corroboration is also found in the data extracted by court appointed expert Dr. Martin Bajada from mobile phones seized from appellant, Austin Uche and Tony Johnson, which clearly shows that these three persons were, in fact, in communication on the date of the incident at hand. The Court in fact has also examined Dr. Martin Bajada's report which consists in an extraction of data from four mobile phones, one belonging to Uche, the other to Johnson and two belonging to appellant, one of them however having a missing SIM card, and his testimony tendered during the trial, wherein a detailed explanation results of the manner his report was compiled, and finds that appellant's grievance with regard to a break in the chain of custody of these exhibits does not result. It is evident that both of appellant's mobile phones make Nokia, one black and one dark grey, were seized by PS1086 Johann Micallef from appellant's bedroom on the 27 August 2009. With regard to Tony Johnson's mobile phone, PS1089 confirmed that the handwriting on the tag of the document is in his handwriting so he confirms that the same was seized by him. Moreover, whilst in police custody, Johnson was asked to send a text message to appellant regarding the drug deal, as already pointed out, to which message appellant replied, thus confirming that the mobile phone used indeed belonged to Tony Johnson and not to any other person. Therefore, contrary to the arguments brought forward by appellant, this forensic evidence in fact corroborates the direct evidence found in the acts.

"L-prova indizzjarja trid tkun wahda assolutament univoka, li tipponta biss minghajr dubju dettat mir-raguni lejn fatt jew konkluzzjoni wahda. Ovvjament jekk fatt jew cirkostanzi jistghu ragjonevolment jinghataw aktar minn tifsira jew interpretazzjoni wahda, tkun li tkun, allura dik ma tkunx prova ndizzjarja tajba, skond il-ligi, sabiex in bazi taghha tista' tinstab htija. Kif tghid u titlob il-ligi, biex prova ndizzjarja tigi ammessa bhala prova valida fis-sens li wiehed jista' ragjonevolment jasal ghallkonkluzzjoni tieghu ta' htija in bazi taghha bla ebda dubju dettat mir-raguni, irid ikun moralment konvint minn dan ir-rekwizit ta' l-univocita' taghha, cioe' li dik il-prova tfisser biss u xejn aktar li l-akkuzat huwa hati ta' dak addebitat lilu w, allura, kull dubju ragjonevoli fir-rigward ghandu jmur favur l-akkuzat skond il-ligi.(Ir-Repubblika ta' Malta vs George Spiteri 05.07.2002)."

30. Finally giving strength to Johnson's testimony is that of Pascal Okafor, who states that appellant deals in drugs and had supplied him with the drug cocaine for the purpose of onward trafficking. Unlike the witness Tony Johnson, Pascal Okafor was largely consistent in his version of events both that given before the Inquiring Magistrate, as well as that tendered in Court, except for some minor discrepancies. Okafor was consistent in the main parts of his testimony, such as how the drug deal involving himself and appellant had taken place, with special regard to the *modus operandi* which was very similar to the one undertaken between Uche, Johnson and appellant. Both when testifying before the Inquiring Magistrate as well as when testifying before the Court of Criminal Inquiry, Okafor confirms repeatedly that the drugs, consisting of cocaine capsules, had been passed on to him by appellant. In his appeal application appellant tries to place doubt on Okafor's testimony implying that this testimony is not credible when he states that when appellant allegedly supplied him with the drugs he did not pay him any money for this supply. It is evident from Okafor's testimony that his role in the drug deal is that of a drug mule or courier. He states that appellant had engaged his services solely for selling the drugs to the buyer, promising him compensation upon carrying out this task, which compensation was never given to him by Friday. Okafor testifies as follows:

"He give it to me to sell it and when I sell he is going to compensate me ... When I sell it, I give money to him and then he has to compensate me from his money."

He states, in fact, further on in his testimony, that he knew he had to pass on the drugs to a Maltese person whose name he did not know. When he received the money for the drugs he passed it on to appellant but he was paid nothing for this exchange. And he repeats this same version of facts even upon cross-examination. In fact towards the end of his testimony Okafor states that appellant cheated and betrayed him and forced him to sell the drugs for him. He states that he was approached by Friday to sell the drugs promising compensation in exchange, which however never materialised.

31. Appellant also attacks the credibility of the testimony tendered by Johnson and Okafor alleging that they implicated appellant in the drug deal so as to benefit from a reduction in their punishment. It emerges from the Acts of the Proceedings that Tony Johnson did indeed avail himself of a diminution in punishment in terms of Section 29 of Chapter 101 of the Laws of Malta[4].

32. The application of Article 29 of Chapter 101 depends primarily on whether a person found guilty of an offence under the Ordinance provides sufficient information which helps the Police apprehend the person or persons who supplied him with the drug. The mechanism enshrined in Section 29 of Chapter 101 of the Laws of Malta was purposely adopted in order to help the Police with their fight against drug trafficking and other drug related offences. It is evident that information supplied during investigation and then put forward as evidence in a court of law is subject to all rules regarding evidentiary weight in criminal proceedings thus necessitating a finding of guilt beyond a reasonable doubt in order to sustain a conviction against the person accused of the commission of an offence. Therefore, the mere fact that a person benefits from a reduction in punishment granted to him by the law itself does not of itself render him/her any

[4] 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.

less credible in his rendition of the facts. A conviction can only be one beyond a reasonable doubt, any lesser degree of proof leading automatically to an acquittal. Thus, although Tony Johnson may have received a lighter sentence in view of his co-operation with the Police in this case, this does not automatically render such testimony unreliable (unless there is unrebuttable evidence to show the contrary) and therefore appellant's grievance on this point is completely unfounded. The law itself provides the necessary guarantees and safeguards in assessing such evidence in article 639(3) of the Criminal Code, as already pointed out, regulating the manner in which the jury should approach the testimony of any accomplice.

33. Thus having examined the evidence brought before the jurors during the trial, this Court is of the opinion that there is no valid reason at law as to merit a variation of the verdict reached by the jury, which evidence was enough to convince the jury beyond a reasonable doubt that there was a sufficient link between appellant, Tony Johnson and Austin Uche amounting to the crime of conspiracy to deal in drugs. This grievance is therefore being dismissed.

Considers :

Count 2: Dealing of Cocaine

34. The second Count with which appellant is charged is that of dealing in the dangerous drug Cocaine. "Dealing" is defined in Article 22(1) (1B) of Chapter 101 of the laws of Malta as including:

> **(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.**

35. With regards to the finding of guilt of the charge brought forward by the Attorney General in the Second Count to the Bill of Indictment, appellant puts forward the same grievances as he did with regards the First Count and therefore the considerations made by the Court in that regard apply in equal measure in

relation to the verdict reached on the Second Count. Thus, the evidence produced by the Prosecution indicates that appellant supplied more than one person with the drug cocaine, both Tony Johnson and Pascal Okafor confirming that they had been supplied with an amount of the drug cocaine by appellant and this for onward trafficking. This grievance is therefore being dismissed.

Considers :

36. The final grievance brought forward by appellant relates to the punishment imposed upon him by the Criminal Court. He laments that the punishment of thirteen years imprisonment together with the fine of €30,000 were excessive in the light of the evidence brought forward against him, but gives no other reason which would justify a mitigation in the punishment inflicted. Factors which would be taken into consideration when inflicting punishment would include:

- Whether the offender is a first-time or repeat offender.
- Whether the offender was an accessory or the main offender.
- Whether the offender committed the crime under great personal stress or duress.
- The potential harm caused by the offence.

It is undisputed that the punishment inflicted by the Criminal Court lies within the parameters of the law. Appellant has been found guilty both of the crime of conspiracy and drug trafficking and this in more than one occasion and to more than one person. The amounts which were trafficked were not negligible. From the evidence found in the acts it is evident that appellant was a regular supplier of drugs and the mastermind behind the commission of the offence, doing the same for financial gain. It is undisputed that all drug-related offences cause harm to a number of invisible victims, and therefore should receive a severe sanction by the law. The Court, therefore, finds no justifiable reason in fact and at law which would justify a mitigation in the punishment inflicted, and thus this final grievance is also being dismissed.

37. Consequently, for the above-mentioned reasons, the appeal filed by appellant Kofi Otule Friday is being dismissed and the verdict of the jury and the judgment of the Criminal Court confirmed in its entirety.

Hon. Chief Justice Dr Mark Chetcuti LL.D

Madame Justice Dr Edwina Grima LL.D

Mr Justice Dr Giovanni Grixti LL.D.