THE COURT OF CRIMINAL APPEAL

Hon. Mr. Justice Dr. Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Appeal number: 1020/2012/1

The Police
vs.
Paul Ugochukwu OFFOR

Sitting of the 13th September 2022

The Court:

1. Having seen that this is an appeal lodged by Paul Ugochukwu OFFOR from a judgment delivered by the Court of Magistrates (Malta) on the 14th December 2020 against holder of Nigerian Passport Number A 1789726 who was charged with having on the 2nd October 2012 and during the preceding months in the Maltese Islands:

    i. Conspired with another one or more persons on these Islands or outside of Malta for the purpose of selling or dealing on these Islands the dangerous drug cocaine in breach of The Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta or promoted, constituted, organised or financed such conspiracy for the importation of the dangerous drugs cocaine in breach of the aforementioned law and;
    ii. Committed acts of money laundering by :-
        a) Converting or transferring property knowing or suspecting that such property is derived directly or indirectly from or the proceeds of criminal activity, for the purpose of or purposes of concealing or

disguising the origin of the property or of assisting any person or persons involved or concerned in criminal activityl

b) Concealing or disguising the true nature, source, location, disposition, movement, rights with respect of, in or over or ownership of property, knowing or suspecting that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;
c) Acquiring, possessing or using property, knowing or suspecting that the same was derived or originated directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;
d) Retaining without reasonable excuse of property, knowing or suspecting that the same was derived or originating directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;
e) Attempting any of the matters or activities defined in the above foregoing sub-paragraphs (i), (ii), (iii) and (iv) within the meaning of Article 41 of the Criminal Code;
f) Acting as an accomplice within the meaning of Article 42 of the Criminal Code in respect of any of the matters or activities defined in the above foregoing sub-paragraphs (i), (ii), (iii), (iv) and (v) within the meaning of Article 41 of the Criminal Code.

2. By means of the said judgment, the Court of Magistrates (Malta), after having seen the charges brought against the accused, while finding the defendant OFFOR not guilty of the second charged proferred against him and acquitting him therefrom, after having seen Parts 4 and 6, Articles 22(1)(a)(f) and 22(2)(b)(i) of Chapter 101 of the Laws of Malta and Regulation 9 of Legal Notice 292 of the year 1939, found the defendant guilty of the first charge brought against him and condemned him to eight years imprisonment and a fine of eight thousand Euros. Furthermore, by application of section 533 of Chapter 9 of the Laws of Malta, the Court ordered that the defendant OFFOR pays the Registrar the sum of one thousand two hundred and fifty one Euro and nine cents representing the expenses incurred in the appointment of experts.

3. Paul OFFOR filed an appeal wherein he requested this Court to confirm the judgment of the Court of Magistrates (Malta) where he was not found guilty of the second charge proferred against him and to declare the appellant not guilty of the first charge proferred against him and to acquit him of this charge and of any penalty and order imposed upon him because of this finding of guilt and in the case that the appellant is not acquitted and is found guilty of the first charge proferred against him to impose a different penalty than that decided by the Court of Magistrates including the order regarding

the payment of the court expenses and which sentence will be more consonant with the facts and the circumstances of the case and with the personal circumstances of the appellant. The appellant, in brief, argued as follows:

i. Whereas the Court of First Instance had well expounded the law relevant to the issues involved in the case at hand, with all due respect, it failed to apply procedural law correctly and had arrived at its conclusion of guilt on the first charge proferred against the appellant not on proved facts according to law but on suspicions and hearsay evidence which certainly do not prove appellant is guilty beyond reasonable doubt as required by law for a conviction. Thus the decision of the First Court to find him guilty is not a safe and sound one;
ii. Even in the case that it is found that the appellant was correctly found guilty of the first charged proferred against him, the penalty of eight years of imprisonment and the fine of eight thousand Euros imposed upon him is not reasonable and proportionate to the circumstances of the case;
iii. Even in the case that it is found that the appellant was correctly found guilty of the first charge proferred against him, he should not have been condemned to pay any expenses connected with experts' fees.

Considers the following:

4. First of all this is an appellate Court tasked with the revision of the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature. This Court does not change the findings of fact, legal conclusions and the decisions made by the Court of Magistrates when it appears to it that the Court of Magistrates was legally and reasonably correct. In the judgment delivered by the Court of Criminal Appeal in its Superior Jurisdiction in the case **Ir-Repubblika ta' Malta vs Emanuel Zammit**[1] it was held that this

[1] 21st April 2005. See also, inter alia, **Ir-Repubblika ta' Malta vs Domenic Briffa**, 16 th October 2003; **Ir-Repubblika ta' Malta vs Godfrey Lopez** and **Ir-Repubblika ta' Malta v. Eleno sive Lino Bezzina**, 24th April 2003, **Ir-Repubblika ta' Malta vs Lawrence Asciak sive Axiak** 23rd January 2003, **Ir-Repubblika ta' Malta vs Mustafa Ali Larbed**; **Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino**, 7th March 2000, **Ir-Repubblika ta' Malta vs Ivan Gatt**, 1st December 1994; **Ir-Repubblika ta' Malta vs George Azzopardi**, 14th February 1989; **Il-Pulizija vs Andrew George Stone**, 12th May 2004, **Il-Pulizija vs Anthony Bartolo**, 6th May 2004; **Il-Pulizija vs Maurice Saliba**, 30th April 2004; **Il-Pulizija vs Saviour Cutajar**, 30th March 2004; **Il-Pulizija vs Seifeddine Mohamed Marshan** et, 21st October 1996; **Il-Pulizija vs Raymond Psaila** et, 12th May 1994; **Il-Pulizija vs Simon Paris**, 15th July 1996; **Il-Pulizija vs Carmel sive Chalmer Pace**, 31st May 1991; **Il-Pulizija vs Anthony Zammit**, 31st May 1991.

In **Ir-Repubblika ta' Malta vs Domenic Briffa** it was further stated:

Kif gie ritenut diversi drabi, hawn qieghdin fil-kamp ta' l- apprezzament tal-fatti, apprezzament li l-ligi tirrizerva fl- ewwel lok lill-gurati fil-kors tal-guri, u li din il-Qorti ma tiddisturbahx, anke jekk ma tkunx necessarjament taqbel mija fil-mija mieghu, jekk il-gurati setghu legittimament u ragonevolment jaslu

Court makes its own detailed analysis of the record of the proceedings held before the Court of first instance in order to see whether that Court was reasonable in its conclusions. If as a result of this detailed analysis this Court finds that the Court of first instance could not reasonably and legally arrive at the conclusion reached by it, then this Court would have a valid, if not impelling reason, to vary the discretion exercised by the Court of first instance and even change its conclusions and decisions.

5. In the ordinary course of its functions, this Court does not act as a court of retrial, in that it does not rehear the case and decide it afresh; but it intervenes when it sees that the Court of Magistrates, would have mistakenly assessed the evidence or wrongly interpreted the Law - thus rendering its decision unsafe and unsatisfactory. In that case this Court has the power, and indeed, the duty to change the findings and decisions of the Court of Magistrates or those parts of its decisions that result to be wrong or that do not reflect a correct interpretation of the Law.

6. Two very important articles of Maltese **Law of Evidence** are articles 637 and 638 of the Criminal Code. According to article 637 of the Criminal Code:

> 637. Any objection from any of the causes referred to in articles 630, 633 and 636, shall affect only the credibility of the witness, as to which the decision shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may beforthcoming from other testimony, and to all the circumstances of the case: Provided that particular care must be taken to ensure that evidence relating to the sexual history and conduct of the victim shall not be permitted unless it is relevant and necessary.

7. Furthermore, article 638 of the Criminal Code states that:

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ghall-verdett li jkunu waslu ghalih. Jigifieri l-funzjoni ta' din il-Qorti ma tirrizolvix ruhha f'ezercizzju ta' x'konkluzjoni kienet tasal ghaliha hi kieku kellha tevalwa l-provi migbura fi prim'istanza, imma li tara jekk il-verdett milhuq mill-gurija li tkun giet "properly directed", u nkwadrat 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 (ara per ezempju Ir-Repubblika ta' Malta v. Godfrey Lopez u r-Repubblika ta' Malta v. Eleno sive Lino Bezzina decizi minn din il-Qorti fl-24 ta' April 2003, Ir-Repubblika ta' Malta v. Lawrence Asciak sive Axiak deciza minn din il-Qorti fit-23 ta' Jannar 2003, Ir-Repubblika ta' Malta v. Mustafa Ali Larbed deciza minn din il-Qorti fil-5 ta' Lulju 2002, ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino deciza minn din il-Qorti fis-7 ta' Marzu 2000, u r-Repubblika ta' Malta v. Ivan Gatt deciza minn din il-Qorti fl-1 ta' Dicembru 1994).

(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.
(2) Nevertheless, in all cases, the testimony of one witness if believed by those who have to judge of the fact shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses.

8. These principles have been confirmed, time and again in various judgments delivered by this Court[2] Moreover as it was held in **Il-Pulizija vs Joseph Thorne:**[3]

> mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghall-liberazzjoni tal-persuna akkuzata. Imma l- Qorti, f' kaz ta' konflitt fil-provi, trid tevalwa l-provi skond il-kriterji enuncjati fl-artikolu 637 tal-Kodici Kriminali w tasal ghall-konkluzzjoni dwar lil min trid temmen u f'hix ser temmnu jew ma temmnux'.

9. This jurisprudence shows also that the main challenge faced by Courts of Criminal Jurisdiction is the discovery of the truth, historical truth, behind every notitia criminis. Courts of Criminal Jurisdiction are legally bound to decide cases on the basis of direct and indirect evidence brought before them. But evidence and testimony produced in criminal trials do not necessarily lead the Court to the discovery of the historical truth. A witness may be truthful in his assertions as much as he may be deceitful. Unlike a mortal witness, circumstantial evidence cannot lie. But if this evidence is not univocal, it may easily deceive a Court of Criminal Jurisdiction thus leading it to wrong conclusions.

10. A Court of Criminal Jurisdiction can only convict an accused if it is sure that the accused committed the facts constituting the criminal offence with which he stands charged, and this on the basis that the Prosecution would have proven their case on a level of sufficiency of evidence of proof beyond a reasonable doubt. Courts of Criminal Jurisdiction need only to be sure of an accused's guilty; they do not need to be absolutely sure of his guilt. But if a Court of

[2] **Il-Pulizija vs Joseph Bonavia** per Judge Joseph Galea Debono dated 6 ta' November 2002; **Il-Pulizija vs Antoine Cutajar** per Judge Patrick Vella, decided on the 16th March 2001; **Il-Pulizija vs Carmel Spiteri** per Judge David Scicluna, decided on the 9th November 2011; **Ir-Repubblika ta' Malta vs Martin Dimech**, Court of Criminal Appeal (Superior Jurisdiction), decided on the 24th September 2004. 3 Decided on the 9th July 2003 by the Court of Criminal Appeal presided by Mr. Justice Joseph Galea Debono.

[3] Decided on the 9th July 2003 by the Court of Criminal Appeal presided by Mr. Justice Joseph Galea Debono.

Criminal Jurisdiction is sure[4] of an accused's guilt, then it is obliged to convict and mete out punishment in terms of Law. These principles relating to the level of sufficiency of evidence also reflect the standard adopted by the English Courts of Criminal Justice and they were also expressed by Mr. Justice William Harding as applicable to the Maltese Courts of Criminal Jurisdiction in the appeal proceedings **Il-Pulizija vs Joseph Peralta** decided on the 25th April 1957 as being at the basis of a conviction reached by a Maltese Court of Criminal Jurisdiction.

11. However, if Defence Counsel manage to propound sound factual and legal arguments such that, on a balance of probabilities, manage to create a reasonable doubt in the mind of the Court as to the guilt of the accused, then the Court of Criminal Jurisdiction is obliged to acquit the accused.

12. Maltese Law entrusts the Court of First Instance with the exercise of analysis and assessment of the evidence of the case. The Court of Magistrates is one such Court. That Court is normally best placed to make a thorough assessment of the evidence brought before it as it would have, most of the time, physically lived through those proceedings, and also being able to make a proper assessment of the witnesses who would have testified before it, thus making full use of the criteria mentioned in articles 637 and 638 of the Criminal Code.

13. But even where, for some reason, the Court of Magistrates would not itself have heard the witnesses, the law still entrusts that Court with the primary analysis and assessment of the facts of a case as well as the eventual decision on the guilt or innocence of the accused. On the other hand, the Court of Criminal Appeal is a court of second instance, entrusted with the analysis of whether, on the basis of the evidence and legal arguments submitted, the Court of Magistrates could legally and reasonably arrive at the conclusions reached in its judgment.

14. The Court of Criminal Appeal does not disturb the conclusions reached by the Court of Magistrates lightly or capriciously. In the case **Il-Pulizija vs Lorenzo Baldacchino** decided by the Criminal Court on the 30th March 1963 by Mr. Justice William Harding it was held as follows:

[4] **R v Majid**, 2009, EWCA Crim 2563, CA at 2.

> Ma hemmx bżonn jinghad li l-komportament tax-xhud (demeanour) hu fattur importanti ta' kredibilita (ara Powell, On Evidence, p. 505), u kien, ghalhekk, li inghad mill-Qrati Ingliżi segwiti anki mill-Qrati taghna, illi "great weight should be attached to the finding of fact at which the judge of first instance has arrived" (idem, p. 700), appuntu ghaliex "he has had an opportunity of testing their credit by their demeanour under examination".

15. To recapitulate, in **Il-Pulizija vs. Vincent Calleja** decided by this Court on the 7th March 2002, the Court of Criminal Appeal, as a court of revision of the sentence of the Court of Magistrates does not pass a new judgment on the facts of the case but makes its own independent evaluation and assessment of the facts of the case in order to see whether the decisions reached by the Court of Magistrates were “unsafe and unsatisfactory”. This Court does not substitute the decision of the Court of Magistrates unless that decision is deemed “unsafe and unsatisfactory”. If this Court finds that on the basis of the evidence and legal arguments submitted to it the Court of Magistrates could legally and reasonably arrive at its conclusions mentioned in its judgment, then this Court does not vary the conclusions reached by that Court : – even if this Court, as a Court of Criminal Appeal could have arrived at a different conclusion to that reached by the Court of Magistrates had it been tasked with the same role.

16. In **Ir-Republika ta’ Malta vs. Ivan Gatt** delivered by the Court of Criminal Appeal on the 1st. December, 1994, it was held that where an appeal was based on the evaluation of the evidence the exercise to be carried out by this Court was to examine thoroughly the evidence and see if there are contradictory versions tendered by witnesses. If it results to the Court that there were contradictory versions – as in most cases there would be – this Court has to assess whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in accused ’s favour. If the said version could have been believed by the Court of First Instance, the duty of this Court was to respect that discretion and that evaluation of the evidence even if in the evaluation conducted by this Court, this same Court came to a conclusion different from the one reached by the jury. This assessment made by the Court of First Instance will not be disturbed and replaced by the assessment of this Court unless it was evident that the Court of First Instance would have made a manifestly wrong assessment and evaluation of the evidence and

consequently that they could not have reasonably and legally have reached that conclusion.[5]

Considers further:

17. That on the 2nd October 2012, Customs Officers at the Malta International Airport stopped a passenger with the name of Paul Ugochukwu OFFOR who had just landed in Malta with Ryanair Flight FR 7798 coming from Valencia, Spain which flight had departed as scheduled from Spain at 07.30hrs and arrived in Malta at 09.45hrs. Paul Ugochukwu OFFOR was stopped for a randomn spot check in relation to a suspicion that he might be carrying drugs. His hand-lugguage was passed through the X-ray scanning machine but this test yieleded a negative result as did a body search on the person of OFFOR. Paul OFFOR was also escorted to an ATM machine outside Malta International Airport in order for Customs Officials as assisted by the Police to investigate if he did have money in his account. Paul OFFOR told the Customs Officials that he came to Malta for a visit but on seeing that the ATM gave a credit limit of fifty Euro only and on witnessing what the Customs Officials considered to be suspiciously aggressive behaviour on the part of OFFOR, the Drug Squad Police were summoned to assist the investigation.

18. At first the Police were suspecting that Paul OFFOR was carrying drugs inside his body and so he was escorted to Mater Dei hospital for a check up and body scanning. He was also found to be in possession of two mobile phones, a Samsung and a Nokia: which were seized by the Police.

19. On their way to hospital, PS 1174 who was escorting the suspect in the police car together with PC 10 Trevor Cassar Mallia, observed that Paul OFFOR had two suspicious text messages on his Nokia phone:

(a) One read: 'Tropicana. Hotel. St. Julian. Malta' which was received from a mobile phone bearing the number +346 3239 9209; and
(b) another text message which read: 'Am ok n got ur mesage too,till morning i will call u as he moves' which message was in turn received from mobile number +602177979.
(c) To this last message Paul OFFOR was seen to have replied 'Ok goodnight'.

[5]See **Ir-Republika ta' Malta vs. Mustafa Ali Larbed** decided by the Court of Criminal Appeal on the 5th July, 2002.

20. Following hospital checks, the police escorted Paul OFFOR to Police Headquarters and the same, together with WPS 272 Rhianne Spiteri, went down to the Tropicana Hotel in St. Julians. The Police were informed by the desk personnel at the hotel that although there were no bookings under the name of Paul OFFOR, there had just been a walk-in reservation by a Spanish national that same morning whose name was Jose Manuel Domingo Benito. On suspicion that this walk-in could be related to Paul OFFOR's arrest, the Police went into the room and on searching all the bags that Benito had in his possession, they found more than a kilogram of a white substance suspected to be the dangerous drug cocaine in hidden compartments of a black suitcase. Jose Manuel Domingo Benito was arrested and escorted to Police Headquarters for interrogation purposes where while he was being held up, and until such time as an interpreter to translate into the Spanish language was found, his phone started ringing. The Police offers signalled to him that he could take the phone call. When Benito hung up he informed the Police that 'a black man in black cap' was down in front of the Tropicana Hotel waiting for the package (suspected to be the dangerous drug cocaine) to be handed over to him according to the instructions which Benito was given by the Spanish contact who called him when he was at the Police Headquarters.

21. The Police again went to the Tropicana Hotel. In front of the hotel there was a person matching the description given to them by Jose Manuel Domingo Benito. The Police apprehended this man who later turned out to be Kingsley Wilcox, a Nigerian national who lived in Malta. After a search on his person, the Police seized different mobile phones and the sum of two thousand seven hundred Euros, held in separate pockets. Kingsley Wilcox too was taken to the Police Headquarters. Wilcox co-operated with the Police and gave them information which, in the following days, led to two controlled deliveries. The Police managed to arrest Charles Christopher Majimor, Angelo Bilocca and Priscilla Cassar who resulted to the Police as being involved in this drug ring.

22. In the meantime the Police searched through the phone books of all the mobile phones of the appellant. They found that the number +346 323099209 was saved four times on Paul OFFOR's mobile phone as Oga Ino Leyica, Oga Ino/M, Oga Ino/ M and Oga Ino Leyica 2. This number was also found to be saved on a sim card

(bearing ICC details 8935 6770 1233 0189 974) that belonged to Kingsley Wilcox as well as on a Nokia phone that also belonged to Kingsley Wilcox where this number was saved under the names of Oga and OgaInn respectively.

23. That Jose Manuel Domingo Benito and Kingsley Wilcox proceeded to swear on oath before the Inquiring Magistrate now Judge Miriam Hayman, the respective statements which they had released with the police after being administered their right to legal assistance as statutorily prescribed at law at the time of the release of any such statements.

24. All suspects were arraigned before the Court of Magistrates separately, each charged with conspiring to traffic drugs (the dangerous drug cocaine) in breach of Chapter 101 of the Laws of Malta. Paul OFFOR was arraigned on the 4th October 2012 before the Court of Magistrates (Malta) as a Court of Criminal Inquiry and following a counter order issued by the Attorney General in terms of Articles 22(2) and 31 of Chapter 101 of the Laws of Malta and another order issued by the same in terms of Article 3(2A)(a) of Chapter 373 of the Laws of Malta, the case was decided by the Court of Magistrates as a Court of Criminal Judicature on the 14th December 2020 as aforementioned.

Legal analysis in relation to the first charge proferred against the appellant OFFOR – The Offence of Conspiracy for the purpose of dealing in the dangerous drug cocaine, Article 22(1)(f) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

25. That the first grievance put forward by the appellant attacks the finding of guilt by the Court of Magistrates (Malta) for the first charge. This is the crime of conspiring with other persons inside and outside of Malta for the purpose of dealing in the dangerous drug cocaine and this in breach of Articles 22(1)(a)(f) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta which read as follows:

> Any person who:
> a) who acts in contravention of, or fails to comply with, any provision of this Ordinance; or

f) with another one or more persons in Malta or outside Malta conspires for the purposes of selling or dealing in a drug in these Islands against the provisions of this Ordinance or who promotes, constitutes, organises or finances the conspiracy, shall be guilty of an offence against this Ordinance.

26. Article 22(1)(A) and (1B) then read as follows:

(1A) The conspiracy referred to in paragraphs (d) and (f) of the preceding sub-article shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons.

(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 in such circumstances that the court is satisfied that such cultivation was not for the exclusive use of the offender, 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:

27. The constitutive elements of the offence of conspiracy in terms of Article 22(1)(f) of Chapter 101 of the Laws of Malta were summarised by the Court of Criminal Appeal in the judgment **Il-Pulizija vs. Alfred Bugeja** decided on the 20th March 2019 to be the following:

1. the temporal parameters when the offence was committed;
2. that there are at least two persons, who were in Malta or abroad, who were involved,
3. and who agree to deal in drugs; and
4. also on how these drugs will be trafficked – bearing in mind that trafficking is broadly defined to include any passage of a drug from hand to hand both for profit or gratuitously.

28. For there to be a conspiracy there needs to be **an agreement**, a pre-agreed concrete plan of action, about how this dealing would be taking place between the persons involved in the agreement. In the absence of proof beyond reasonable doubt of the existence of an agreement between two or more persons, the offence of consipiracy cannot subsist. It therefore follows that this crime is committed as soon as two or more persons, in Malta or outside Malta, get together to agree on a plan of action to deal in a dangerous drug in these Islands as regulated by Chapter 101 of the

Laws of Malta. The agreement or plan on the mode of action to deal in drugs does not constitute the commencement of execution of the crime but consists in the actual consummation of the crime itself. Therefore, even if the plan of action agreed upon does not materialise or the plan is not executed or if the persons who had planned the conspiracy withdraw from the agreement, the offence would still be considered to have been committed.

29. A landmark judgment in this regard (also cited by the Court of Magistrates in this case) is **The Republic of Malta vs. Steven John Caddick et** decided on the 6th March 2003 where the Court of Criminal Appeal maintained the following:

> Although it is true that for the crime of conspiracy to subsist it does not have to be proved that the agreement was put into practice, the converse is not true, that is that evidence of dealing does not necessarily point to a conspiracy.
>
> Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed "from the moment in which any mode of action whatsoever is planned or agreed upon between" two or more persons (section 22(1A) Chapter 101). Mere intention is not enough. **It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design**.[6] If instead of the mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person or persons concerned may be charged both with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming (for the purpose of the attempted or consummated offence) co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason, namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement.

30. The requirement of the existence of an agreement between two or more persons on the mode of action to deal in dangerous drugs was also explored to great depths in the judgment **Ir-Repubblika ta' Malta vs. Jean Pierre Abdilla** decided on the 19th September 2013, where the Court of Criminal Appeal (Superior Jurisdiction) also made reference to English jurisprudence on the matter, and concluded that the conspiracy shall subsist from the moment in which **any** mode of action whatsoever is planned or

[6] Emphasis of this Court.

agreed upon between such persons. This Court made reference to the prior criminal appeal decided on the 2nd November 2009 in the names **The Republic of Malta v. Steven John Lewis Marsden**:

> In the Godfrey Ellul case mentioned by appellant, this Court had referred to what is said in Archbold's Criminal Pleading, Evidence and Practice 2003 in respect of conspiracy:
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> 'The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: Mulcahy v. R. (1868) L.R. 3 H.L. 306 at 317; R. v. Warburton (1870) L.R. 1 C.C.R. 274; R. v. Tibbits and Windust [1902] 1 K.B. 77 at 89; R. v. Meyrick and Ribuffi, 21 Cr.App.R. 94, CCA. Nothing need be done in pursuit of the agreement: **O'Connell v. R**. (1844) 5 St.Tr.(N.S.) 1. 6 …. 'The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it**: R. v. Parsons** (1763) 1 W.Bl. 392; **R. v. Murphy** (1837) 8 C. & P. 297. Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': **R. v. Brisac** (1803) 4 East 164 at 171, cited with approval in **Mulcahy v. R.** (1868) L.R. 3 H.L. 306 at 317.'

31. In most cases proof of this agreement can be deduced **from the circumstances of the case** which circumstances constitute indirect evidence or what is known as circumstantial evidence. That is why proof of the existence of such a conspiracy is generally a matter of inference that is deduced from certain acts made by the parties involved in pursuance of the criminal purpose agreed between them. And this is logical given that the basis of the agreement lies in an activity that is illegal – such as dealing in illegal substances; and also in the common knowledge of the persons involved in the conspiracy that any overtly conspicuous acts would not go unnoticed by law enforcement.

32. In these cases, direct evidence - in the form of a witness who is extraneous to the agreement to deal in drugs, and who sees or over hears anything in relation thereto – is very difficult to obtain. Hence, the arduous task of the Prosecution to gather and present different pieces of indirect evidence that together as a whole point to the unequivocal involvement of the accused in the crime of conspiracy beyond a reasonable doubt. Reference is made to Kenny's **OUTLINES OF CRIMINAL LAW:**[7]

[7] Ninth Edition, 1966.

> 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.
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> 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.

33. The Court of Criminal Appeal (Superior jurisdiction) in the **Abdilla** judgment indeed opined as follows (with reference also to the judgment **The Republic of Malta vs. Steven John Lewis Marsden** decided on the 2nd November 2009 by the Court of Criminal Appeal):

> In the Godfrey Ellul case this Court had not stated that this is the position under Maltese law. However it is in agreement with what is stated therein as it is quite clear from the said quotation that evidence of a conspiracy is not necessarily or only derived by inferring it from criminal acts of the parties involved. Indeed, a conspiracy may exist even though there is no subsequent criminal activity, that is to say even though the agreement to deal in any manner in a controlled substance is not followed by some commencement of execution of the activity agreed upon.
>
> In such circumstances it is obvious that no inference can be drawn from criminal acts because there are no criminal acts subsequent to the conspiracy itself. Indeed the quotation from Archbold clearly states that a conspiracy may also be proved 'in the usual way' – so by means of direct evidence and/or circumstantial evidence which must be univocal, that is to say, that cannot but be interpreted as pointing towards the existence of a conspiracy…. As one finds stated in the 2008 Edition of Blackstone's Criminal Practice 9 'There are no special evidential rules peculiar to conspiracy. **In Murphy (1837) C C & P 297, proof of conspiracy was said to be generally 'a matter of inference deduced from certain criminal acts of the parties accused', but there is no actual need for any such**

acts, and conspiracies may also be proved, inter alia, by direct testimony, secret recordings or confessions…'.[8]

This appears to be also the position in Scots law. Professor Gerald Gordon, in his standard text The Criminal Law of Scotland 10 makes reference to the dictum of Lord Avonside in Milnes and Others (Glasgow High Court, January 1971, unreported) to the effect that "you can have a criminal conspiracy even if nothing is done to further it", adding that, indeed, this is the very essence of conspiracy.

34. Now, insofar as the **mens rea** of the offence of conspiracy is concerned, this too can be deduced from an analysis of the circumstances **particular to the moment of consummation of the offence.** According to established case law of the Maltese Courts and doctrine as expounded by renowned jurists, what matters is the intention of the accused to deal in drugs in these Islands at the moment when the agreement or plan of action is formed with another person or persons. In the **Alfred Bugeja** judgment quoted above, this Court held as follows:

Illi allura l-fatt wahdu li l-appellant accetta li jkun parti minn din il-kongura kriminali, ghalkemm ma kellux l-intenzjoni igib il-pjan miftiehem fis-sehh huwa wahdu bizzejjed sabiex r-reat ikun ikkunsmat.[9]

L-Antolisei difatti ighid hekk:

"Trattandosi di un reato tipicamente permanente, la consumazione si protrae fino alla cessazione dello stato antiguridico, e cioe' fino a quando si verifica lo scoglimento dell'associazione." L-accettazzjoni minn naha ta' l-appellant li jaghmel parti minn dan il-ftehim kriminuz fejn gie imfassal sahansitra il-modus operandi ghat-twettiq tar-reat, wassal ghal konsumazzjoni tad-delitt bid-delitt jibqa' fis-sehh sal-mument illi jigi xjolt il-ftehim ghal xi raguni jew ohra.

Ikompli ighid hekk il-gurista Antolisei: "Il dolo consiste nella volonta di entrare a far parte di un'associazione, avendo lo scopo di commettere delitti .... una volta fatto ingresso nell'associazione, pero', il reato e' consumato anche per il partecipe che poi se ne dissoci, recidendo i legami con il resto del sodalizio.

Illi is-sentenza li dahlet funditus fl-elementi tar-reat ta'l-assozjazzjoni hija Ir-Repubblika ta' Malta vs Godfrey Ellul, l-Qorti, ikkowtat awturi u gurisprudenza meta sahhqet illi l-prova tal-ftehim tista' tirrizulta minn inferenzi li johorgu mill-attivita kriminali li ssegwi dan il-patt kriminuz. Izda mhux biss, ghaliex jistghu jipprezentaw rwiehom kazijiet fejn dak pattwit ma

[8] Emphasis of this Court.
[9] Emphasis of this Court.

jkunx gie attwat ghal xi raguni kemm indipendenti mill-volonta tal-malviventi, kif ukoll ghal motivi ohra li jistghu iwassluhom biex jiddesistu mill-agir kriminali b'mod volontarju. F'dawn il-kazijiet ir-reat ta' l-assocjazzjoni xorta wahda jissussisti bl-att materjali allura jkun il-ftehim milhuq bejn tnejn jew aktar:

35. Under Maltese law, the Prosecution is also equipped with other legal instruments and mechanisms which together with the indirect evidence adduced from an analysis of the circumstances of the case, can serve to corraborate and prove its case.[10] Sections **30A**[11] and **30B**[12] of Chapter 101 of the Laws of Malta are cases in point. By means of Section 30A of Chapter 101 of the Laws of Malta, the Police can make use of the evidence given by an accomplice of the accused in the proceedings against the accused where this evidence takes the form of a statement confirmed on oath before an Inquiring Magistrate as prescribed at law and any such person is also a competent and compellable witness in these same proceedings. Indeed, as this Court will explore later on in this judgment, where a person has sworn on oath before the Inquiring Magistrate any declarations/statements given to the Police and has in this way implicated even third persons among which the accused, he must then take the witness stand and testify 'viva voce' in the proceedings against the accused in order for the accused to be able to challenge his accomplice's declarations.

36. The legal mechanism laid out in section 30A of Chapter 101 of the Laws of Malta is therefore an exception to the rule contained in Article 661 of the Criminal Code in that any such declarations or confessions made by an accomplice to the accused is admissible as evidence against the accused as said but is not an exception to the rules of procedure laid out in Articles 636(b) and 646(1) of the Criminal Code. It also goes to follow that where the authorities have initiated criminal proceedings against all the persons which were

[10] It is to be noted that the only instance where Chapter 101 of the Laws of Malta does not require corraboration is in terms of **Article 30(1)** of the Ordinance wherein it is laid out how evidence given by a person who has purchased the drugs or otherwise obtained the drugs contrary to the provisions of the Ordinance given in the proceedings against the person from whom he had obtained such drugs does not require to be corraborated by other circumstances.

[11] Notwithstanding the provisions of article 661 of the Criminal Code, where a person is involved in any offence against this Ordinance, any statement made by such person and confirmed on oath before a magistrate and any evidence given by such person before any court may be received in evidence against any other person charged with an offence against the said Ordinance, provided it appears that such statement or evidence was made or given voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour.

[12] Notwithstanding anything contained in any other law, it shall be lawful for the Executive Police and, where appropriate, the Customs Authorities to allow, with the consent of the Attorney General or of a magistrate, a controlled delivery to take place.

arrested in relation to drug deals – as with the case at hand – there may be instances where an accomplice to the accused who has made declarations in terms of Section 30A of Chapter 101, although a competent witness, cannot be compelled to testify against the accused in the proceedings taken against the accused pending such time as proceedings against him become res judicata (in accordance with the provisions of Article 636(b) of the Criminal Code interpreted a contrario senso).

37. In this sense, the appellant contested the Court of Magistrates' decision to consider as admissible evidence the statements sworn viva voce before the Inquiring Magistrate now Madame Justice Miriam Hayman, of Jose Manuel Domingo Benito and Kingsley Wilcox respectively given that none of them gave evidence viva voce in the proceedings against Paul Offor. Consequently, the appellant went on to argue that all references which the investigating officers who testified in these proceedings made to what Jose Manuel Domingo Benito and Kingsley Wilcox said amounted to hearsay.

38. In this regard the Court makes reference to the ruling given by the Court of Criminal Appeal in **The Republic of Malta vs. Charles Paul Muscat** on the 6th July 2016 where the Court was faced with a preliminary plea of inadmissibility of the evidence on oath given by two accomplices to the accused Brian Godfrey Bartolo and Marlon Apap given that these had not taken to the witness stand during the stages of compilation of evidence before the Court of Magistrates as Court of Criminal Inquiry. The Prosecution had however indicated both Apap and Bartolo on the list of witnesses that were to take the witness stand at the trial by jury. Here, the Court of Criminal Appeal while recognising that Section 30A is not an exception to Articles 636(b) and 646(1) of the Criminal Code (in line with the Pierre Gravina case) made reference to judgments of the European Court of Human Rights wherein it was recognised that there might be instances where competent Prosecution witnesses who had given their evidence against the accused in accordance with the law, cannot testify at the inquiry stage of the proceedings against the accused. **And, the general principle upheld in these ECHR decisions was such as to move away from an a-priori exclusion of any such evidence taken in accordance with the law, provided that the fact that the accomplice did not tender his evidence viva voce did not amount to an infringement of the accused's right to a fair administration of justice.**

39. And, in the analysis of whether the admissibility of such evidence would be tantamount to an infringement of the accused's rights, regard must be had to whether the adjudicating authority has relied on those statements (in this case taken in accordance with Section 30A of Chapter 101 and not confirmed on oath in the case against the appellant) exclusively in the finding of guilt. Where the declarations given by accomplices in terms of Section 30A of Chapter 101 of the Laws of Malta are also corraborated with other (circumstantial) evidence, then the statement given would not remain the sole and exclusive evidence on which the conviction against the accused would be based:

> Dan ghaliex kif gie deciz fil-kaz Luca v Italy [(2003) 36 EHRR 46], inghad mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem:
>
> "As the court has stated on a number of occasions . . . it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular where the witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3(d). The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that had been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."
>
> Dan ifisser allura illi hemm erba kriterji li iridu jigu ikkunsidrati:
> 1. Illi x-xhieda bhala regola trid tinghata viva voce fil-qorti fejn l-akkuzat ikollu kull opportunita li jikkontrolla dak li ighid ix-xhud.
> 2. il-fatt illi x-xhieda ma jixhdux madanakollu ma ghandux iwassal ghall-inammissibilita ta' l-istqarrija minnhom rilaxxjata fl-istadju tal-investigazzjonijiet jew fil-pre-trial stage u dan ghaliex irid jittiehed in konsiderazzjoni l-fatturi kollha tal-kaz, bhal per ezempju fil-kaz meta xhud ma jistax jingieb jixhed ghax ikun miet.
> 3. L-affidabbilita ta' dik l-istqarrija u tax-xhud li ikun irrilaxxjaha.
> **4.Finalment jekk dik ix-xhieda guramentata wahedha hijiex l-unika prova inkriminati u decisiva fil-konfront tal-persuna akkuzata**.[13]
>
> Illi fil-kawza Saidi v France (1993 - 17 EHRR 251) inghad :- "The court reiterates that the taking of evidence is governed primarily by the rules of domestic law, and that it is in principle for the national courts to assess the evidence before them. The court's task under the Convention is to ascertain whether the proceedings in their entirety, including the way in which

[13] Emphasis of this Court.

evidence was taken, were fair. All the evidence must normally be produced in the presence of the accused at a public hearing, with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police enquiry and judicial investigation is not in itself inconsistent with Article 6(3)(d) and (1) provided that the right to the defence had been respected.." (sottolinjar tal-Qorti).

Dan ifisser allura illi tali prova ma tista' qatt titqies li hija inammissibbli semplicement ghaliex ix-xhieda li ikunu offrew dik l-istqarrija fl-istadju tal-investigazzjonijiet ma ikunux xehdu quddiem il-Qorti viva voce ghaliex din wahedha ma tistax twassal ghal inammissibilita ta' prova li l-ligi tqies bhala wahda legalment valida. Madanakollu min hu imsejjah biex jiggudika irid jimxi b'kawtela kbira sabiex jigi zgurat illi d-dritt sagrosant sancit mill-Kostituzzjoni u il-Konvenzjoni ghal smiegh xieraq f'kull process penali ma jigiex mittiefes.[14]

40. Then there is also Section 30B which lays down a technique which the Police employ to oversee and 'control' as the name implies, a consignment of drugs between those persons involved in the conspiracy, which consignment **would still have gone underway even without the intervention and oversight of the police authorities**.[15] In connection with the subject matter of this case, the Police apprehended Kingsley Wilcox, Charles Christopher Majimore, Priscilla Cassar and Angelo Bilocca through different controlled deliveries carried out in accordance with the provisions of Section 30B of Chapter 101 of the Laws of Malta.

Considers further:

41. Now in application of the legal principles expounded by the Court of Criminal Appeal in the judgment **The Republic of Malta vs. Charles Paul Muscat** (which in turn made reference to two European Court of Human Rights judgments **Luca vs. Italy** and **Saidi vs. France),** this Court, like the Court of Magistrates (Malta) before it, considers the declarations and statements made on oath by Jose Manuel Domingo Benito and Kingsley Wilcox, (even though they could be deemed to be co-principals or accomplices to the appellant), as admissible in these proceedings on account of the fact that:

[14] Emphasis of this Court.
[15] See **The Police vs. Ronald Psalia** decided on the 8th January 2002 by the Court of Criminal Appeal.

(a) These sworn declarations and statements **do not constitute the sole incriminating and decisive evidence** against the appellant in this case;
(b) These sworn declarations were made in accordance with section 30A of Chapter 101 of the Laws of Malta;
(c) These declarations and statements were found **to be corraborated by unequivocal circumstantial evidence** which the Court of Magistrates (Malta) made reference to in its judgment and which circumstantial evidence Defence Counsel to the appellant had every right and opportunity to attack, contest and counter-examine;
(d) The proceedings against Jose Manuel Domingo Benito were decided by a judgment of the Criminal Court of the 6th January 2016. No appeal was lodged from that judgment. The proceedings against Kingsley Wilcox were decided by the Court of Criminal Appeal by a judgment delivered on the 22nd January 2020. Therefore, after that the cases of Domingo Benito and Wilcox became res iudicata, the accused had the right to summon them at the appropriate stage of the proceedings and question them about their respective sworn declarations and statements that were presented by the Prosecution as evidence in this case and to rebut, confute or contradict their statements if need be. But the accused did not avail himself of this possibility of challenging these sworn declarations and statements in due time by the means open to him according to Law.

42. But there again, the sworn declarations and statements of Domingo Benito and Wilcox were just part of the body of evidence produced by the Prosecution in this case. From an analysis of the whole body of evidence presented, the Court of Magistrates (Malta) as a Court of Criminal Judicature could legally and reasonably conclude that the Prosecution proved beyond a reasonable doubt that:

(i) On the 2nd October 2012, the Police arrived to bust a drug deal involving some 1085.2 kilograms of cocaine with a mean purity of 36.8% at the Tropicana Hotel, St. Julians which were hidden in a suitcase which a Spanish national with the name of Jose Manuel Domingo Benito was carrying on a Ryanair flight FR 7798 which departed from Valencia in Spain at 7.30am and was scheduled for arrival

to Malta at 9.45am. Jose Manuel Domingo Benito was not stopped at the Malta International Airport and his package was not intercepted by airport security. What led the Police to apprehend Jose Manuel Domingo Benito was **a text message** which PS 1147 Adrian Sciberras found on one of the appellant's mobile phones, a Nokia with MISDN number 346 3213 7150 (the appellant was found to be carrying two mobile phones – a Nokia and a Samsung) which message read **'Tropicana. Hotel. St. Julian. Malta'**. This text message raised a reasonable suspicion among the Drug Squad police officers of an illegal activity and a decision was taken to head to the Tropicana Hotel in St. Julians Malta for further investigation following Paul OFFOR's arrest.

(ii) This text message 'Tropicana. Hotel. St. Julian. Malta' was sent to the appellant at **10:54:03pm on the 1st October 2012** from mobile number **+34632399209** which on OFFOR's Nokia was registered four times under the names of **Oga Ino Leyica**, **Oga Ino/M**, **Oga Ino/M** and **Oga Ino Leyica 2**. This same mobile number then features in a Nokia 3G mobile phone – registered as **Oga** - that was seized by the police from the person of **Kingsley Wilcox** on the 2nd October 2012 when he was arrested in front of the Tropicana Hotel in St. Julians, Malta. The police also found a Sony Ericsson in his possession and in the phone book of this mobile phone there was another mobile number - + 34632983271 - registered under the name of **OgaInn** which Wilcox himself, when releasing a statement with the police and which he later confirmed on oath before the Inquiring Magistrate, identified as belonging to Innocent, that same person who was saved on his Nokia 3G phone as **Oga**.

(iii) When the Police asked Kingsley Wilcox about Innocent he responded that Innocent was a Nigerian man who lived in Spain and who he had met in an African bar in Buġibba where they had exchanged mobile numbers. He also added that he had received instructions from **Innocent** that on the 2nd October 2012 he was to go to the Tropicana Hotel to collect a package that was coming to Malta. Wilcox confirmed the following:[16]

[16] At fol. 33 of the records of the proceedings.

One day, last week, a Nigerian guy called Innocent who lives in Spain called me on my mobile phone 77912222 and told me that a package was coming in Malta, referring for yesterday and told me to go at the Tropicana Hotel and wait for instructions till he phoned again... He told me to give the person at the hotel one thousand five hundred Euros (1,500) and take the package... He told me that the package I should give to my friend known as John so then he will give to a Maltese person from Siggiewi called Angelo. My friend known as John, is the person who is arrested here in the next room, but he is called Charles Christopher. I know this because the Inspector tole me his real name... I think it was Monday and Innocent phoned me to remind me. Yesterday I went to Tropicana Hotel in the afternoon, Innocent called me and told me that somebody is going to come out and meet me outside of the hotel... Nobody came out to meet me so I decided to go back home. As I was going back, the four (4) policemen surrounded me and said that I am under arrest for conspiracy of drugs...

Court: So, how do you know Innocent?

A: He lives in Spain, I do not know where. I have seen him in Malta in two (2) occasions in African Bar in Bugibba. I met him as I meet other African people and we spoke. We exchanged our phone numbers. He phoned me and say hi, but he never spoke about any drug or something bad. Innocent phone me and proposed me that thing about yesterday's package last week.

Court: What is or are his contact numbers?

A: They are written one in my white 3G mobile phone as Oga +34632399209 and the other in my black Sony Ericsson as OgaInn +34632983271.

Court: Who is the Nigerian Paul Offor:

A: I do not know him.

Q: Did you ever meet him?

A: No.

..../....

Q: Am I right to say that you knew that the contents of the packate that Innocent sent you to pick up from the guy at the Tropicana Hotel yesterday were in fact illegal drugs?

....

A: No, at that stage, no... I believe it might be – but at that moment I do not know yet... I just believe they might be pills..

..../....

Pros: This Innocent, it was the first time that he gave you, he asked you to pick a packet for him?

Witness: Yes.

....

Pros: Ok. What did you say exactly? You suspected what?

Witness: I suspected that he might be a drug dealer. But I was not sure because he does not discuss anything about drugs on the phone.

Pros: Ok. What made you think, what made you suspect the he, Innocent might be a drug dealer Kingsley?

Witness: Because of John.

Pros: Because of John. Because of John. And what made you suspect about the package?

Witness: As I said, it is because of John because of John.

Pros: So what did you suspect about the package because of John?

Witness: No, no. The package at first I suspected it might be pills or it might be – I just feel it might be something not right.

..../....

Pros: You said that you suspected that Innocent might be dealing in drugs because of John, your friend John. Why?

Witness: Because John, I know John do these things.

Pros: What things?

Witness: This business he is talking about.

Pros: What business?

Witness: He said that he is into cocaine business. That is what he said.

(iv) Kingsley Wilcox never retracted this version of facts in that he always insisted that it was **Innocent** who instructed him to go and collect a package from the Tropicana Hotel. From Wilcox's words, Innocent had informed him that the **'package was coming to Malta'** and that Wilcox had to go to collect the package from the **Tropicana Hotel** and that

the package was going to be passed on to him by **‘a person at the hotel’.**

(v) As a matter of fact when the Police went to the Tropicana Hotel, after they saw the text message on OFFOR’s mobile phone “Tropicana. Hotel. St. Julian. Malta” they indeed found a walk-in customer, who happened to be travelling on the same flight with OFFOR, and who was Jose Manuel Domingo Benito. The latter was found to be in possession of over a kilogram of cocaine hidden in suitcase which he embarked from Valencia to Malta.

(vi) Jose Manuel Domingo Benito released two statements: one on the 2nd October 2012 at 5:20pm and another one on the 3rd October 2012 at 11:00am. He later confirmed on oath both statements before the Inquiring Magistrate on the 3rd October 2012 at 12:45. In his statement **Jose Manuel Domingo** stated how he was receiving phone calls from Spain – from a certain Michael, a Nigerian national – who instructed him to pass on the substance that he had carried to Malta in his suitcase and which the Police found in his room (later confirmed to be the dangerous drug cocaine) to a **‘black person wearing a black cap**’ that was to wait for him in front of the Tropicana Hotel.

(vii) This part of Jose Manuel Domingo Benito’s statement was confirmed by Drug Squad Police Officers PS 1174 Adrian Sciberras and PC 10 Trevor Cassar Mallia - who were present at the Police Headquarters when he was receiving these calls. On page 197 of his testimony, PC 10 states the following:

> While we were at the office with Jose Manuel Domingo Benito he received a telephone call where we let him answer the phone, as soon as he ended the phone he told us that there was a black person downstairs at the reception area with a black cap waiting to pick up the luggage, the brief case. To that effect we drove to the Tropicana Hotel immediately; we were there in less than five minutes, as soon as we arrived at the Tropicana Hotel we noticed a **black person and wearing a black cap** and he was stopped. He turned out to be Kingsley Wilcox...

On page 144 of his deposition, PS 1174 Adrian Sciberras confirmed PC 10 Trevor Cassar Mallia’s version of facts:

> Again me together with PC 10 and various other members of the drug squad went immediately to the hotel and again to the Tropicana Hotel and when we arrived we saw a person fitting that description exactly, a black man with a black hat in front of the main entrance of the Tropicana Hotel. We arrested that person who resulted to be Wilcox Kingsley...

(viii) Indeed, through the evidence given by PC 10 and PS 1174 this Court, like the Court of Magistrates (Malta) before it, arrives to the undoubted conclusion that :

- the package which Innocent mentioned to Wilcox that had to arrive to Malta and that had to be collected by the latter from a person who was staying at the Tropicana Hotel, was the dangerous drug cocaine in the amount of over one kilogram that Jose Manuel Domingo Benito imported into Malta;
- that the person who was staying in the hotel and had to pass on this package of drugs to Wilcox was in fact Jose Manuel Domingo Benito;
- that the black person wearing the black cap who had to collect the drugs was in fact Kingsley Wilcox.

(ix) This probatory scenario creates a complete chain of unequivocal evidence which indicates that:

- Jose Manuel Domingo Benito and OFFOR travelled on the same flight from Valencia to Malta on the same date;
- OFFOR knew a certain Innocent, he described him as a friend, and his relationship with Innocent was 'not good nor bad'.
- Innocent was one of the Nigerians persons who from Spain were directing the drug cocaine importation in Malta deal that the Police busted after their raid at the Tropicana Hotel on the 2nd October 2012;
- Irrespective of any other business in which Innocent/Ino/OgaIno might have been involved in, his dealings on the 2nd October 2012 between Spain and Malta were undoubtedly related to drug cocaine importation in Malta;
- Innocent happened to be a common acquaintance of both OFFOR and Kingsley Wilcox.

- Both OFFOR and Wilcox had contact details of Innocent, and both OFFOR and Wilcox made contact with Innocent both before and on the 2nd October 2012.
- It was Innocent who gave OFFOR the name of the hotel through his text message received by OFFOR **on the 1st October 2012** at 10.45pm "Tropicana. Hotel. St. Julian. Malta" less than nine hours before OFFOR's trip to Malta.
- **On the same day that is on the 1st October 2012**, Innocent communicated with both Wilcox and OFFOR respectively albeit at different times and the **Tropicana Hotel in St. Julians Malta being every time central to the conversation.** Wilcox says to have received a phone call from Innocent a day before (that is on the 1st October 2012) with instructions to go to the Tropicana Hotel to collect a package.
- OFFOR said that while he had told Innocent that he wanted to visit Malta: "I did not tell him the day I was going to come to Malta". Yet, Innocent sent OFFOR the address of the hotel wherein to stay – the Tropicana Hotel - just a few hours before OFFOR had to travel to Malta.
- OFFOR called Innocent some three times after he received the message 'Tropicana Hotel St. Julian Malta', phone calls which this Court notes, OFFOR never explained not even when he testified on oath. In fact on the evening/night before OFFOR's arrival to Malta, there were some nine phone calls between OFFOR and Innocent. Neither did OFFOR explain why sometime around the landing - straight thereafter - of the flight from Valencia destination Malta, at 10.22am a call was placed from his black Nokia to Innocent on mobile number +34632399209 who in turn called him right back at 10.26am. The accused did not explain why Innocent - who according to OFFOR did not know of the date of the latter's visit to Malta - send him first a text message a day before his arrival to Malta and then communicate with him on the day he arrived to Malta and right about the time of landing. Contrary to what the accused said, the communication between him

and Innocent did not simply stop at a text message suggesting the name Tropicana Hotel. In fact the communication between Innocent and OFFOR **did not stop** before his arrival to Malta but continued also thereafter. Ino was even seen to have called OFFOR on the 3rd October 2012 at 11.14 am when OFFOR was already under Police custody.

- OFFOR even says that he was meant to stay at the Tropicana Hotel, had the Police not arrested him. That also would have placed him in the same hotel where Jose Manuel Domingo Benito was lodging during his stay in Malta. This too is another indicator that OFFOR was indeed acting to shadow Domingo Benito closely.
- Domingo Benito said that while in Valencia on board the taxi with Michael, the latter told him that they were going to meet two days later. This means that Domingo Benito was due to return back to Spain on the 4th October 2012. This is also confirmed from the testimony of Joseph Bugeja at fol 97 where he states that Domingo Benito was booked to return to Valencia via Ryan Air on the 4th October 2012. As a matter of fact, from the testimony of the same Joseph Bugeja at fol. 96, it transpires that from the return ticket of OFFOR it resulted that he was due to return back to Spain, this time landing in Madrid, exactly on the 4th October 2012 as well.

(x) The message 'Tropicana. Hotel. St. Julian. Malta' that was sent by Innocent via mobile number +34 6 3239 9209 was then also forwarded by the appellant to someone else bearing mobile number 6 0217 7979 to which this same number replied **'Am ok n got ur message too, till morning i will call u as he moves'**.

(xi) There were also some ten phone calls between OFFOR and the mobile number 6 0217 7979, the first call being made at 11.31.14pm on the night of the 1st October 2012 **exactly after** OFFOR had forwarded the message 'Tropicana Hotel' to this number **and which text message he had just received from Innocent**. The other phone calls were made very close to each other sometime between 5.02am and 7.08am on the morning of the 2nd

October 2012. OFFOR explains that this person was the owner of the taxi which had to come and pick him up from the hotel **in Valencia** to take him to the airport the morning of the 2nd October 2012 for him to catch the flight to Malta. He also said that the message 'Am ok n got ur message too till morning, I will call you as he moves' was the indication which the owner of the taxi (Luca) had to give him for him to know when the taxi approaches the hotel because OFFOR says that he did not know the taxi driver personally. Also, the message 'Tropicana Hotel' was some kind of identification which Arum Mumba, the taxi driver, had to use to identify OFFOR as the person who had sent out for the taxi. Here the Court also makes reference to OFFOR's testimony viva voce when examined by Defence Counsel and where it was Defence Counsel himself who questioned the number of insistent phone calls that passed between OFFOR and mobile number +34 6 0217 7979:

> Dr.J.Mifsud: And then when he arrived there are still some calls it seems here
> P.Offor: There are still some calls?
> Dr.J. Mifsud: Yes
> P.Offor:Yeah.
> Dr.J.Mifsud: Explain.
> P.Offor: when he arrived and took me with the taxi he need to call me to confirm 'Are you the one?' I say: 'Yes I am going with him'. And even when I get to the airport I still call him back: ''Thank you very much. I appreciate'.

This Court finds it hard to believe how booking a taxi service required some ten phone calls to be made; or that one even required to call the taxi service to 'show gratitude' after one arrived to destination. It also cannot be logically perceived how the name of a hotel **in Malta** could serve as a means for a taxi driver in Valencia to identify the person requiring that service in Valencia! It would have made more sense to book a taxi service under one's own name and to use one's own name as identification instead of 'Tropicana. Hotel. St. Julian. Malta' Also, if OFFOR's story was true, the communication between him and this number would stop after the last call which he said to have made to show gratitude that he had arrived at the airpoirt : seeing that the service would have stopped there. Yet from what OFFOR stated to the police when asked about the amount of money

he was carrying when stopped in Malta it also appears that he had used some money to pay for the hotel and taxi service in Valencia before coming to Malta. Therefore, it does not appear that there was any unfinished business between OFFOR and the number which he is claiming to be related to a taxi service in Valencia.

If OFFOR's version were true, it did not make sense for this same number to keep calling OFFOR **even on the 4th October 2012** (fol. 49 of Dok MBa), in the same way as Innocent appears to have continued calling OFFOR on this same day (but when OFFOR was already under police custody and these calls were therefore never answered). OFFOR never offered any plausible explanation with regards to these last phone calls.

(xii) In these circumstances, this Court can understand why the explanation given by OFFOR for the message **'Am ok n got ur message too till morning I will call you as he moves'** could not convince the Court of Magistrates (Malta). His explanation for this text message – along with the long list of calls to OFFOR's number, does not make sense. On the other hand, it fits into the bigger picture portrayed by the evidence brought forth by the Prosecution: This text message was sent to OFFOR from number +34 6 0217 7979 **after** OFFOR sent the address of the hotel that was relayed to him by Innocent a few minutes before - 'Tropicana Hotel St Julian Malta' - to this same number. The address was supplied via a text message sent to OFFOR almost half an hour before by Innocent from mobile number +34 6 3239 9209 which mobile number Innocent also used on the same day (the 1st October 2012) to communicate with Wilcox (as explained by Wilcox in his statement and as seen above) to instruct him to go down to the Tropicana Hotel for the purpose of collecting a package which was arriving to Malta from a person staying at the hotel (Jose Manuel Domingo Benito) and which latter person declared that he had to pass on this same package (later found to contain the dangerous drug cocaine) to a 'black man wearing a black cap' which description matched the person of Kingsley Wilcox.

(xiii) In this context therefore '..I will call u as he moves' taken in this context can safely be taken to refer to movement within this plan of action as conspired and the (unknown) person at the other end on mobile number +34 6 0217 7979 had to call no one but the appellant OFFOR as soon as 'he moves'. Once again there was no reason given why OFFOR had to be informed when this unknown male : "he" was to move. This too shows that OFFOR needed to be informed by the unknown caller about the movement of a male person the following morning.

(xiv) Who OFFOR had to inform about this movement is not known. Who the person behind mobile number +34 6 0217 7979 was is also not known. And why should OFFOR be informed about the movement of this male person unless OFFOR was meant to know the whereabouts, doings and ongoings of this male person? Once again this is circumstantial evidence pointing towards the role of OFFOR acting as a shadower for another person, in this case, specifically, Domingo Benito. This circumstantial evidence indicates a circle of persons - some known and apprehended while others not – who conspired to deal in the dangerous drug cocaine on the 2nd October 2012 in Malta. Each one of these persons involved in this conspiracy had different roles to play in this conspiracy. OFFOR too results to have played his part in this plan by shadowing Domingo Benito upon the instructions of Innocent.

(xv) It also goes to follow that the Court of Magistrates (Malta) was correct in considering as non-coincidental OFFOR's arrival to Malta on the same plane as that of Jose Manuel Domingo Benito on the date when the consignment of drugs had to arrive to Malta with destination Tropicana Hotel St Julians Malta.

43. But apart from these various elements of direct and indirect evidence, like the Court of Magistrates before it, this Court also notes that the explanations given by the appellant about his purpose of his visit(s) to Malta were unconvincing. The Court of Magistrates (Malta) was legally and reasonably correct in considering the appellant's testimony as lacking credibility. The accused even tried to undermine certain facts that contradicted his version by objective

documentary evidence. Of course, any such contradictions on their own do not prove beyond a reasonable doubt the appellant's participation in a drug conspiracy. But they surely have the effect of undermining his line of defence, especially when read also together with the other evidence mentioned earlier on in the analysis of this case.

44. For example, OFFOR claimed that he had never been to Malta before his trip of the 2nd October 2012. Hence, he denied the evidence presented by the Prosecution showing him being present in Malta in April 2012. In this regard the evidence given at folio 247 by Joseph Bugeja, ground handling representative, confirmed that both the October 2012 bookings and the April 2012 bookings made in the name of Paul OFFOR were bearing the same travel documentation number this being X5638552X which number corresponded to his residence permit found in folio 74 of the acts of these proceedings. The document number X5638552X was confirmed as belonging to OFFOR PAUL UGOCHUKWU having his residence at "Calle Calatorao Num 0002 08 2-A, Zaragoza" bearing the "codigo postal" number 50003, as can be seen from documents at fol 493 et seq.

45. Indeed in Dr. Martin Bajada's report MBa at fol 54 thereof, there is a text message sent on the 23rd July 2012 at 1:24:48PM by OFFOR to Oga Ino Leyica – who was confirmed to be the same "Innocent" wherein OFFOR sends him his home address as being: "CL/CALATORAO,2,8,2,50003 -ZARAGOZA". Thanks to the documents received through letters rogatory from the Spanish Authorities, the Court of Magistrates could confirm that this same document number and address matched those of OFFOR as duly acknowledged by him as aforesaid. Even if the appellant claimed to have lost his personal identification document way back on 2009 and presented a police report in the records of these proceedings to prove this, he also confirmed, a fol of 647 that he had **another** identification document issued in his name **bearing the same number as the lost one**.

46. The appellant suggested that irrespective of Ryanair records, it could have been anyone travelling using his personal documents. True. Yet another piece of objective and documentary evidence also placed him in Malta in April 2012. From the report of Dr. Martin Bajada it transpired that between the 24th April 2012 and the 28th April 2012 the mobile phone number (MSISDN) + 34 6 3213 7150

(that was found to be used by OFFOR on the mobile phone Nokia model 6300 which seized from OFFOR on the 2nd October 2012) was used from Paceville, Malta and communicated directly twenty times with mobile number +34 6 3239 9209, the number that was used by Innocent. This was also circumstantial evidence that showed that the appellant, who was proved to be the normal user of (MSISDN) + 34 6 3213 7150 was also making calls from Malta in April 2012; lest the appellant wished also to contend that apart from his identification document number, even his mobile phone number was stolen or made use of by third parties without his consent in connection with and during a Malta visit in April 2012. But this contention did not result.

47. The appellant was also asked by his Defence Lawyer to give an explation in relation to text messages that were exchanged between OFFOR and Innocent on the 9th September 2012. From Dr. Martin Bajada's report (folio 55 of the Dok MBa)it results that on the 12th September 2012 at 3:39:49PM, Innocent using MSISDN +34 6 3239 9209 sent a text message to OFFOR's + 34 6 3213 7150 containing a bank account number "21004144412100170995 LaCaixa". At fol 638 Defence Lawyer asked OFFOR to explain the reason why the latter had received this account number and whether it was meant for OFFOR to send him money. OFFOR replied:

> Yes. The fact is that while I have the account, he sent me the account is for example just he give me, he put money on my account to buy a car for the person and the person paid for example one thousand Euro or one thousand and five or two thousand or three thousand sometimes .... so after buying the car I may have two hundred, three hundred or four hundred benefit on mine. So, what do I do? Him that give you the business at least you pay fifty Euro a hundred Euro on him for his coffee so that next time he will do again, he will give you a business. That's why I have the account.

48. This may seem to be a plausible explanation. Only that the appellant failed to give **particular details** about specific car sales or deliveries carried out between him and Innocent during the periods of time in question. He also failed to produce any other document or evidence supporting his claim that he did car dealership or transportation services. As much as he did not explain what the text message sent seven minutes later to Innocent (Oga Ino Leyica) giving him the details of Rodriguez Dias Armanda Maria, a date "08.11.1961", as well as DNI number (that is the Spanish identity card number) 35292639J together with a (then) future date (date of expiry?) "21.06.2014". He did not state whether this information

related to a customer who wished to purchase a car or have a car registered for her by Innocent, or a car transported to her residence. Or whether it was meant for something else..

49. Defence Lawyer asked the appellant also to explain another text message sent to appellant by Innocent on the 21st September 2012 at 3:26:39PM, simply stating: "47M1AP Iberia". Defence Lawyer drew attention to the appellant that during the release of his statement to the Police the appellant had replied that:

> As regards the sms with the flight name, is not mine. I think it's a mistake because I have nothing to do with that.

50. A closer look at the report of Dr. Martin Bajada shows that this was not the only text message exchanged in connection with this "47M1AP Iberia". First of all it was the Police that suggested that this was a flight number. And the appellant did not contest that this was indeed a flight number. Still the most important aspect relating to this sms is the fact that appellant declared that it was sent to him **by mistake**. Yet despite that according to him this was a mistake as he had nothing to do with it, twenty three minutes later he forwarded this code "47M1AP Iberia" to a mobile phone number +55 21 8046 3340. A judicial notice with inquiry led this Court to find that this number was held by a person registered in Brasil (+55) and in the Greater Rio de Janeiro District (21). From the same judicial notice with inquiry it resulted that the airline company IBERIA do fly to Brazil and Rio de Janeiro in particular. However it could not be established with certainty what exactly this code meant.

51. In any case, what is really telling in this case is the fact that the appellant – despite the fact that he claimed that the flight name was not his and he thought it was a mistake as he had nothing to do with it – he still forwarded that code **and also added other information** to the Brazil Greater Rio telephone number. At 3:49:13PM of the 21st September 2012 the appellant sent this following message to the said +55 21 8046 3340:

> 47M1AP. Iberia .24/09/2012 . 15:35 salida .san pabulo madrid y madrid valencia

52. This too is very interesting indirect evidence in as much as the appellant, instead of disregarding the allegedly mistaken text, he instead opted to act upon it and forwarded it to that specific number,

including other details, which indicate a specific date, time and place, indicative of a rendez-vous point. This behaviour did not tally with the position of a person who claimed not to have anything to do with it and that it was sent to him by mistake. The fact that the appellant not only forwarded this message to third parties in Brazil, but also added some more information of his own showed that his assertion that he received that message by mistake and that he had nothing to do with it was not true.

53. Not only that. This message seemed also to be important as the appellant wanted to make sure over and over again that the recipient of his forwarded message would receive this message. In fact the appellant re-sent this same identical message to the same Brazilian number at least twice: at 6:05:27PM and also at 7:31:19PM. This indicated that the appellant felt the importance behind the recipient receiving these precise details.

54. Other text messages were sent by the appellant to the Brazilian number but these other texts were deleted by him so the Court of Magistrates was not privy to them. Still communication with the Brazilian number predated and postdated these text messages. In fact a text message from this Brazilian number was received by the appellant a day before he forwarded this text message to that Brazilian number. On the 20th September 2012 at 2:12:32PM the appellant received a text message from this Brazilian number in French : “je te demande du pardon et je me sent bien un grosse bisou” which in English means “I ask your forgiveness and feel like a big kiss”. The following day, on the 22nd September 2012 at 9:57:51AM the same Brazilian number sent another text message to OFFOR asking him to “llamame porfavor”, in English, “call me please”. Some three hours later, at 1:11:31 **this same number communicated further with OFFOR** and even asked him ‘Puedo romper el otro billette de avion q tengo?’ in English ‘Can I ‘break’ (sic! tear) the other plane ticket that I have in hand? After which OFFOR was seen to have sent the other two messages to this mobile number mentioned above, which were however deleted as aforesaid.

55. In these circumstances it is reasonable to question that if this was yet another transaction related to his car business, why did the appellant claim it to be a mistake on the part of Innocent to have sent him this flight number? And also why did the appellant participate fully in the context of the exchange that followed on the same subject

matter of this allegedly mistaken text? And this more so given the context of the other text messages exchanged between Innocent and the appellant wherein not only banking details were exchanged by also the particulars and identification documents and details of another person were specifically sent. It is difficult to believe how a mistaken flight number or code could generated so much communication between OFFOR and this Brazilian number thereby making it hard for OFFOR's version of facts to be taken as being a true version. More so given that there seem to have been other contacts between the appellant and this Brazilian number, with the last contact in Dr. Bajada's report being made on 22nd September 2012 at 6:12:57PM, being a text message that however is not recorded in this report. And why did OFFOR cancel those two text messages in reply if it was simply an innocent car dealership or transportation business communication?

56. It is in no way being implied that there is proof of this communication being illegal or that it had something to do with the drug business; but these inconsistencies dent further OFFOR's credibility. The very fact that OFFOR attempted to dissassociate himself from this communication (which communication once more started on instructions spelt out by Innocent/Ino) by claiming it was sent to him by mistake made it all the more fall in line with the Prosecution's circumstantial evidence and its version that OFFOR was acting together with Innocent in furtherance of the latter's drugs business; as buttressed by the lack of other evidence corroborating OFFOR's version that he and Innocent conducted innocent car trading business.

57. This Court agrees with the Court of Magistrates (Malta) that

(a) Paul OFFOR was not a credible witness and that
(b) the evidence of the Prosecution presented a clear and unequivocal picture of his involvement in a conspiracy to deal in the dangerous drug cocaine in Malta orchestrated through third parties in Spain;
(c) with Innocent not being so innocent given his central role in giving out instructions to different key players in the drug ring;
(d) OFFOR was a party to this agreement as has been seen through the various phone calls and text messages that were registered on his mobile phone in the period of time preceding the arrival of the package in the Maltese Islands through Jose Manuel Domingo Benito who was staying at the Tropicana Hotel. Kingsley Wilcox knew the exact place where 'the person staying at the hotel' was

through instructions which Innocent had given him **before** Benito's arrival in Malta.

(e) And as has already been shown, the fact that the drugs being in the possession of Benito had to be passed on to Wilcox is undoubted through the instructions received by the former to give them to the 'black man wearing the black cap' which matched the description given to Benito by the Spanish counterparts calling him on the 2nd October 2012 while in police custody. As has been seen from the testimony of Kingsley Wilcox, the destination of these drugs was a farm in Siggiewi beloning to Angelo Bilocca who the Police then intercepted through other two controlled deliveries that took place after the apprehension of Kingsley Wilcox in terms of Article 30B of Chapter 101 of the Laws of Malta.

58. Kingsley Wilcox confirmed that Innocent not only instructed him to go down to the Tropicana Hotel to collect the package (containing drugs) from a person staying at the mentioned hotel (Jose Manuel Domingo Benito) but he also instructed him to hand these drugs to **John** who the police established to be Charles Christopher Majimore, another Nigerian national who worked in the farm with Angelo Bilocca, the person to whom according to Kingsley Wilcox these drugs were destined. Indeed, in the words of Inspector Herman Mula (folio 87 of the acts of the proceedings), when testifying about the controlled deliveries executed in terms of Article 30B of Chapter 101 of the Laws of Malta:

> Subsequently this operation carried on, we made a controlled delivery where we arrested the other African guy who had to meet Kingsley Wilcox and go to Siggiewi with the drugs, another controlled delivery was done the following day **where we arrested the Maltese guy who had to receive eventually the drugs and basically it all started from that SMS which had Tropicana Hotel written in it, it all started from there**.[17] Basically that is all I have to say.

59. The above mentioned direct and indirect evidence portrays what local and foreign case law consider hallmarks of the crime of conspiracy. As Archbold's Criminal Pleading, Evidence and Practice say:

> Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': **R.**

[17] Emphasis of this Court.

v. Brisac (1803) 4 East 164 at 171, cited with approval in **Mulcahy v. R.** (1868) L.R. 3 H.L. 306 at 317.'

60. This legal reasoning finds itself at the very basis of the considerations made by the Court of Magistrates (Malta) during its assessment of the evidence. And on the evidence expounded above, the Court of Magistrates (Malta) could reasonably and legally arrive at the conclusions reached in its judgment.

61. Consequently, this first grievance of the appellant is therefore being rejected.

Considers further:

62. That the second grievance of the appellant relates to the punishment imposed that being of eight years imprisonment and a fine of eight thousand Euros. Now in this regard this Court makes reference to the Court of Criminal Appeal judgment of **The Republic of Malta vs. Kandemir Meryem Nilgum and Kucuk Melek** decided on the 25th August 2005:

> It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is **neither wrong in principle nor manifestly excessive**[18], even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in Blackstone's Criminal Practice 2004 (supra):
> "The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will...be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '...that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle." Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in

[18] Emphasis of this Court.

question, as opposed to being merely more than the Court of Appeal itself would have passed."2
This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.

63. The principle in **Kandemir** was also embraced by the Court of Criminal Appeal in **Ir-Repubblika ta' Malta vs. Marco Zarb**, decided on the 15th December 2005 that being that, a Court of Criminal Appeal does not overturn a judgment given by the Court of Magistrates by reason of the fact that the punishment as inflicted by the latter is greater in quantum than that which would have been imposed by the former. For a judgment of the Court of Magistrates to be overturned, the appellant must prove that the punishment handed down by the First Court was either wrong in principle or was manifestly excessive.

64. Now as the Attorney General correctly argued in her submissions, the punishment handed down by the Court of Magistrates was not only within the parameters imposed at law but was neither manifestly excessive or wrong in principle. This Court observes how OFFOR tries to downplay his role in this conspiracy by arguing that his role was not 'useful' because the dangerous drug was imported into Malta without his intervention and the drug deal was still conducted successfully albeit under police surveillance. This Court disagrees with the appellant's interpretation of his role in the drug deal: the appellant had an active role in this conspiracy as can be seen through the numerous phone calls made and text messages received and forwarded as instructed by Innocent who this Court has seen to occupy a prominent leading role in the handing out of instructions as to how the consignment of drugs at the Tropicana Hotel had to take place. OFFOR was not coincidental to this plan of action but rather he served as a medium of communication between Innocent and some other unidentified third party who had to call OFFOR 'as he moves'.

65. As the Attorney General also pointed out, the offence with which OFFOR was charged and accused is to be considered of a serious nature given the quantity of drugs being trafficked and the number of persons involved in the conspiracy.

66. In this regard the Court also makes reference to the judgment of the Criminal Court **The Republic of Malta vs. Jose Manuel**

Domingo Benito[19] were upon the registration of a guilty plea, Jose Manuel Domingo Benito was condemned to a sentence of ten years imprisonment and a fine (multa) of Euro 23,000. Here the Court also makes reference to the Court of Criminal Appeal judgment (Superior Jurisdiction)[20] **The Republic of Malta vs. Kingsley Wilcox** where the sentence of fifteen years imprisonment given by the Criminal Court as a result of a guilty verdict in the result of eight against one, was confirmed.

67. Finally, in the words of the Court of Criminal Appeal (Superior Jurisdiction) in the judgment **The Republic of Malta vs. Kofi Otule Friday** decided on the 22nd June 2022:

> 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.

68. This being said, this Court considers that the Court of Magistrates (Malta) could also reasonably and legally impose the punishment of imprisonment of eight years and the fine of eight thousand Euro (E8,000) given that there is nothing which is wrong in principle or manifestly excessive in this punishment as applied to the facts of this case.

69. Consequently, this second grievance is also being rejected.

Considers further:

70. In his third grievance, the appellant contends the fees paid to the experts in terms of Article 533 of the Criminal Code with reference to those paid to Dr. John Seychell Navarro, to Dr. Martin Bajada, PS 122 Arthur Borg and PS 465 Daniel Abela. This same grievance was also lamented by the accused **Kingsley Wilcox** in the appeal made from the decision of the Criminal Court dated 8th April 2016. Here the Court of Criminal Appeal ruled as follows:

> 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

[19] 6th January 2016
[20] Decided on the 22nd January 2020.

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;

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 cannot 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.

71. Apart from this, it also transpires that in the case of Jose Manuel Domingo Benito the Criminal Court had condemned the accused to the payment of <u>all</u> the costs in that case to the tune of three thousand five hundred thirty-one euro forty-five cents. (E3531.45).

72. In this case, the Court of Magistrates (Malta) did not order the appellant to pay for **<u>all</u>** expenses incurred. Instead, it ordered him to pay the entire fees of Dr. John Seychell Navarro and one fifth share of the fees paid to Dr. Martin Bajada, PS122 Arthur Borg and PS465 Daniel Abela. As far as Dr. John Seychell Navarro is concerned he executed his duties specifically tasked during the criminal inquiry in connection with this case. As the Court of Criminal Appeal in the case of Kingsley Wilcox said this expense "is pertinent solely to the searches regarding accused's moveable and immovable assets having been ordered by the Court of Criminal Inquiry" and therefore Wilcox was ordered to pay for those expenses that were pertinent to his particular case. As far as these fees are concerned there is nothing to induce this Court to change this conclusion also in this case.

73. On the other hand, it is true that the expenses of Martin Bajada, Arthur Borg and Daniel Abela were covered in full in the judgments delivered against Benito and Wilcox. However, this does not mean that the appellant should not shoulder **<u>his share</u>** of these expenses. His responsibility to pay for the share of these expenses stems as a consequence of his finding of guilt and therefore the Court of Magistrates (Malta) had to order him to pay for these expenses.

74. It is then up to the interested third parties to take any legal action they deem fit and proper should they feel that they were made to pay more than due in their respective case.

DECIDE

Consequently, the Court is hereby rejecting the appeal and confirming the judgment delivered by the Court of Magistrates (Malta).

Aaron M. Bugeja
Judge