Court of Criminal Appeal

Onor. Imħallef Consuelo Scerri Herrera, LL.D., Ph.D.

Appeal Number: 1307/2010

The Police

vs

Anya Uchena

Today, 5th September, 2024

The Court,

Having seen the charges brought against the appealed, Anya Uchena, born in Aba State Nigeria on the 12th January,1982, residing in Malta at ' Ersilia Court', Block A, Flat 2, Triq Salvu Busuttil, San Gwann, holder of Identity Card Number 46248A.

That the appellant was charged with having on the 3rd of November 2010 and during the preceding three years in the Maltese Islands:

1. Conspired with another one or more persons on these Islands or outside Malta for the purpose of selling or dealing on these Islands the dangerous drug (cocaine) in breach of the Dangerous Drugs Ordinance Chap 101 of the Laws of Malta or promoted, constituted, organised or financed such conspiracy for the importation of the dangerous drug (cocaine) in breach of the Dangerous Drugs Ordinance Chap. 101 of the Laws of Malta

2. Imported or caused to be imported or took steps preparatory to import the dangerous drug (cocaine) in Malta, in breach of the Dangerous Drugs Ordinance Cap 101 of the Laws of Malta.

3. Had in his possession the drug (cocaine) specified in the First Schedule of the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, when he was not in possession of an import or an export authorisation issued by the Chief Government Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance, and when he was not licensed or otherwise authorised to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorised by the Internal Control of Dangerous Drugs Regulations (GN.292/1939) be in possession of the mentioned drugs, and failed to prove that the mentioned drugs was supplied to him for his personal use, according to a medical prescription as provided in the said regulations, and this in breach of the 1939 Regulations, of the Internal Control of Dangerous Drug (GN 292/1939) as subsequently amended by the Dangerous Drugs Ordinance Chapter 101, of the Laws of Malia which drug was found in circumstances denoting that it was not for his personal use.

4. Been in possession of the whole or any portion of the plant cannabis in terms of Section 8 (d) of the Chapter 101 of the Laws of Malta;

5. Committed an act of money laundering by:

a. converting or transferring property knowing that such property is derived directly or indirectly from, or the proceeds of criminal activity, or from an act or acts of participation in 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 activity;
b. concealing or disguising the true nature, source, location, disposition, movement, rights with respect of, in or over, or ownership of property,

knowing that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity;

c. acquiring property, knowing 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 that the same was derived or originating directly, or indirectly, from criminal activity, or from an act or acts or participation in criminal activity;
e. attempting any of the matters or activities defined in the above foregoing sub-paragraphs (i), (ii). (i), 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;

Having seen the judgment of The Court of Magistrates (Malta) as Court of Criminal Judicature of the 16th of March 2021,found the accused not guilty of the third (3rd) and the fourth (4th) charges brought against him (i.e. of aggravated possession of cocaine and of simple possession of cannabis) and hence acquitted him from the said charges, found the accused guilty of the remaining charges, i.e. of the first (1st)(2nd), and fifth (5th) charge sbrought against him (i.e. conspiracy, importation/caused to be imported, and money laundering) and condemns him to a period of nine (9) years imprisonment and to the payment of a fine (multa) of ten thousand euros (€10,000).

The Court also condemned the accused to pay the amount of one thousand, seven hundred and sixty-three Euros and eleven cents (€1763.11) within a period of three (3) months from today which amount represents the costs incurred solely in connection with the employment of experts in this case.

The Court also ordered the destruction of all the objects exhibited in Court, consisting of the dangerous drugs or objects related to the abuse of drugs, which destruction shall be carried out as soon as possible under the direct supervision of the Court Registrar who shall be bound to report in writing to this Court when such destruction has been completed, unless the Attorney General files a note within fifteen days declaring that the said drugs are required in evidence against third parties.

Finally, the Court ordered the forfeiture in favour of the Government of Malta of all the property involved in the said crimes of which the accused has been found guilty and other moveable and immovable property belonging to the said Uchena Anya.

Having seen the application of Uchena Anya whereby the applicant is asking that this Honourable Court **reforms** the judgment proffered against the accused in these proceedings by:

- Varying the appealed judgment as regard to the merits of the case whereby whilst confirming that the appellant is not guilty of the third (3) and fourth (4) charges brought against him, revokes and reverses the finding of guilt in the first (1), second (2) and fifth (5) charges brought against him and consequently acquits him of them; alternatively varies the appealed judgement as regards to the punishment inflicted and instead applies a lesser and more appropriate punishment in the circumstances.

REASONS FOR AND GROUNDS APPEAL

On the 26th November 2010 a Romanian national Attila Somylai - a drug mule arrived in Malta for a second time carrying in his stomach a total of 60 cocaine filled capsules with a net weight of 582.6 grams and pon a direct flight from Dusseldorf Germany - was intercepted by the Police and immediately chose to assist the police in a controlled delivery. Eventually on the 27th of November 2010 a Nigerian national namely

Stephen Igecukwu Egbo was arrested in Sliema following the conclusion of the afore mentioned controlled delivery.

Both Attila Somylai (the courier) and Ikecukwu Stephen Egbo were arraigned separately under arrest in connection with the cocaine seizure at MIA. In his statement released to the statement Attila Somylai stated with the Police that he had been to Malta already on another occasion in late October 2010 whereby he met two African persons and gave them a number of capsules.

In one of the sittings during the compilation of evidence WPC 127 Gauci observed something suspicious according to her involving the appellant who at the time she did not know, she informed the then Inspector Dennis Theuma, who ordered the arrest of Uchena Anya the appellant for further investigations. Attila Somylai subsequently told the police that appellant was one of two persons who he had met during the October 2010 visit, the other person being Stephen Egbo, to whom he had given some 24 capsules in the presence of Uchena Anya who on that particular date was driving in the car.

Uchena Anya was spoken to by the Police and he immediately any involvement in the deed and was subsequently arraigned under arrest on the 9th December 2010.

That the grievances are manifestly clear and consist in the following:

A. Wrong appreciation of the facts and evidence and wrong application of the law with regard to the finding of guilt of the first two charges and the fifth charge brought against him;

That the appellant was accused with five charges whereby he was found guilty of the first two charges and the fifth charge and acquitted from the third and fourth charge.

(1) The Magistrate presiding over the case which delivered judgment did not have the opportunity to hear viva voce the main witness Attila Somylai and the bulk of the other witnesses thus was not in a position to appreciate his testimony as required by law in Article 637 of the Criminal Code

At some stage during the compilation of evidence the Magistrate that was presiding the case and had heard the bulk of witnesses of this case was elevated to judge and a new magistrate started presiding over the case. In fact, the Magistrate presiding over the case which delivered judgment did not have the opportunity to hear viva voce the main witness Attila Somylai, thus was not in a position to appreciate his testimony and that of a number of other witnesses as required by law in Article 637 of the Criminal Code especially the three important aspects of **demeanour, conduct and character of the witness.**

The appellant refers to **The Police vs Yilmaz Azlan** decided on the 18th June 2019 wherein the Court of Criminal Appeal stated that:

"the court has to conduct a certain exercise when assessing a witness to see whether he is saying the truth or otherwise and follows the above guidelines. However, these guidelines are not exhaustive. The law leaves such matters of discretion in the hands of the Judge who has to analyse such evidence in seeing whether for example a witness is credible or not, sees whether he has an ulterior motive to testify in the manner he did, to examine his behaviour and how he acted whilst on the witness stand and how he answered the questions put forward to him. In carrying out such an examination the court will be in a position to judge whether such witness is saying the truth, whether such evidence is consistent with what was said by the same witness earlier on if for example he himself is makes contradictions in his own testimony or whether there are other facts which disapprove what is being said by the witness.

Reference is also made to Il**-Pulizija vs Lorenzo Baldacchino** decided by the Court of Criminal Appeal on the 30th March 1963 whereby it was held: -

Lanqas hu traskurabili l-fatt li l-ewwel Qorti kienet impressjonata bil-mod serju u sod li bih xehdet din Consiglia kif hemm rikordat fis-sentenza stess. Ma hemmx bzonn 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 Inglizi 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".

Furthermore, reference is also made to the case **II-Pulizija vs Jean Paul Ellul** decided by the Court of Magistrates (Malta) on the 25th of February 2021:

Biss, kif intqal aktar il-fuq, hija l-Ligi stess li, qabel xejn, tafda dan l- ezercizzju f'idejn il-Qorti tal-Magistrati, u dan peress li l-Qorti tal- Magistrati tkun fl-aħjar qaghda tqis il-provi kollha ghax tkun ghexet personalment il-process quddiemha. Hija setghet tara u tisma' lix- xiehda jixhdu quddiemha. Dan l-ezercizzju ta' analizi tax-xiehda huwa mholli principalment f'idejn il-Qorti tal-Magistrati li tkun rat u semghet dawn ix- xiehda quddiemha u għalhekk 1-eżerċizzju tal-analizi u apprezzament tal- provi mill-Qorti tal-Magistrati stess huwa ezercizzju importanzi hafna u ghandu jinghata l-piz li jixraqlu.

Thus, in the current case the prosecution is basing its case primarily on the evidence given by Attila Somylai which gave various versions and testified more than once and his testimonies are conflicting in themselves and also conflicting with what the appellant had said itself.

Now in this case, neither the First Court nor the appellate Court will have the opportunity to examine the witness viva voce Attila Somylai on which testimony the prosecution is heavily basing its case since the witness had testified in front of a different Magistrate then the one who subsequently delivered judgment. This renders a finding of guilt unsafe and unsatisfactory since besides the testimony of Attila Somylai being contradicted and insufficient to prove guilt, the requisites of Article 637

of the Criminal Code were not satisfied in the present case. Furthermore, this considerably weakens the First Court's statement that:

In addition to what has been outlined above, the Court has no reason to doubt the veracity of the various testimonies given by Attila Somlyai, both infront of this Court as diversely presided and in the Sworn Statements released by him and which form part of these proceedings.

The First Court without even hearing and assessing the various testimonies given by Attila Somylai decided to believe and not doubt the veracities of such statements since the court could not examine demenaour, the conduct and character of the witness when on the witness stand. Such exercise could only be conducted by the Magistrate who heard the witness Attila Somylai viva voce which in this case was not the magistrate who eventually delivered the judgement.

That it is the prosecution duty and the burden of evidence lies on the prosecution to produce the best evidence in the best possible manner according to law and the defence has obviously no duty to proof the prosecution's case. That the current situation is tantamount and similar to a situation where in a trial by jury jurors would have to decide on a case in which they did not hear viva voce any main witnesses of the case, a situation, which is clearly not in the best interest of the administration of justice.

Moreover, since due to this defect the case cannot be considered to be proven beyond reasonable doubt, hence the appellant humbly submits that this should an acquittal.

(2) No evidence of what was inside the capsules and in what amounts

Prosecution chose to accuse the appellant with the possession, conspiracy and importation of a specific drug [cocaine] under the Dangerous Drugs Ordinance [Chapter 101 of the Laws of Malta] and hence the burden of proving such an

ingredient of the crime lies on the Prosecution in default of which the appellant should be acquitted.

In this case, the Prosecution's position is even much weaker since not only no illicit substance was ever retrieved but the Prosecution main witness expressly stated various times and in various instances that he did not know and that he had no idea what was inside the capsules and in what amounts. In fact, when asked by the Court Attila Somalyi answered that he did not know what was inside the capsules:

Court: Did you know what type of drug?

Interpreter: No, he did not know.

Court: No, he didn't

Pros: Did he suspect what type of drug it could be?

Interpreter: He never came close to drugs before. He never used it, so he didn't know.

Furthermore, the Prosecution case is further weakened since no evidence was brought as to the amount of any alleged [even if not proven] illicit substance.

Hence the Prosecution failed to provide neither direct nor circumstantial evidence in any manner whatsoever that there was any illegal substance, let alone the specific drug specified in the charges and neither did the Proseuction prove the amount. In the absence of such important ingredients of the charges brought against the appellant the Court could not safely and satisfactorily reach a verdict of guilt and appellant humbly submits this should lead to a declaration of acquittal.

In fact, the Court should completely discard and should not be misled by the then Inspector Dennis Theuma a fol 160 that Attila had stated he has been to Malta in

another occasion with some other 24 capsules also containing the drug cocaine since from a deep examination of the facts of the case does not result from anywhere and in fact Attila never knew what was inside the capsules.

(3) Evidence relating to the November incident should have no bearing on the October incident and no inference should be drawn

Preliminarily one has to make a clear and absolute distinction between the facts regarding the November controlled delivery case and the previous October circumtances which concern the present case. In the October incident no drugs were ever found even due to the fact that the Police came to know about it weeks later and hence no substance could be exhibited in court or analyzed. This is contrary to the November controlled delivery since drugs were found and analyzed by the Court appointed expert. However, one must distinguish the two instances completely since even according to Attila Somylai himself the appellant was only present in the October incident and he was not present in the November controlled delivery:

Pros: Ok. We are talking about November. We are talking about November.

Interpreter: No, he is not here. The one in November is not here.

Defence: first he said yes and now he is saying no.

Court: Mr. Somylai, the gentleman you are referring to, regarding the incident in November, is he present in the Court room?

Interpreter: No he is not.

Thus, Attila Somylai both in the October incident and in the November controlled delivery had met Stephen Egbo and the appellant was only present in the October incident.

Evidence to the drugs, consignment, should not have a bearing and no inference should be drawn about the October case since they are two separate instances and it would be completely wrong for example even to infer that for example since the November consignment resulted to be an illegal substance hence the October event also concerned an illegal substance.

Furthermore, even the report exhibited by Mr. Godwin Sammut in these acts [a fol 232 et seq.] concering the November incident should be in no way be construed as valid evidence to the October case and no inference should be drawn from such report.

As with regards this report subsidiarly and without prejudice to the above, such report was not compiled by an accredited laboratory. In fact, the drug found relating to the November controlled delivery was analyzed by the Scientist Godwin Sammut in a laboratory that at that time was not accredited and therefore not complying with standards as envisaged by the EN ISO/IEC 17025.

That this lack of accreditation of the Laboratory in question does not lead to reassurance in the appellant that the analysis, collection and the results obtained by the same scientist are in accordance with the law but rather that the same analysis, collection and the results obtained violate the fundamental human right of a fair trial of the appellant since they do not comply with international standards especially EN ISO/IEC 17025.

(4) Lack of a good and effective translation

In the present case as regards the appointed translator Ms. Alina Stivala it does not result from the acts of the case whether or not the appointed person effectively possesses the necessary expertise to discharge such functions and to translate in a faithful manner the testimony of Attila Somylai.

The right for a translator is enshrined both in the Constitution and the European Convention which provide that: Article 39 (6) (e) of the Constitution shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, Article 6 (3) (e) of the European Convention: to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Karen Reid in A Practitioner's Guide to the European Convention on Human Rights stipulates that:

"The ability to comprehend the proceedings in a criminal trial, guaranteed in Art. 6, para. 3(e), may be seen as another aspect of the importance for an accused to participate effectively in the proceedings. For the right to be effective, the obligation of the authorities is not limited to the provision of an interpreter, but may also extend to a degree of control over the adequacy of the interpretation provided. Issues as to the standard of the interpretation could arise if it could be established as damaging to the accused's effective participation in the proceedings.

It should be noted that when the accused is represented by a lawyer it is not sufficient that the defendant's lawyer, and not the accused, to know the language used in court or understand the language being used but even the accused must have full cognizance of the whole proceedings. Good interpretation and full understanding of the proceedings is necessary and is extended even to the accused as part of the right to a fair trial, which includes the right of the accused to participate in the hearing, therefore requires that the accused be able to understand the proceedings and inform his lawyer on any point to be made in his defense.

In fact in the judgement UCAK v. The United Kingdom delivered by the Euroepan Court it was held that:

"The Court observes that the guarantee, provided in paragraph 3(e) of Article 6, signifies that a person "charged with a criminal offence" who is unable to understand or speak the language used in the court has the right to the free assistance of an interpreter for translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see the Luedicke, Belkacem and Koç v. Germany judgment of 28 November 1978, Series A no. 29, p. 20, § 48). It does not require however that all written evidence or official documents should be translated

For the right guaranteed to be effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 35, § 74). Above all, the guarantees in paragraph 3 represent the constituent elements of the general concept of a fair trial embodied in paragraph 1 of Article 6 (see, amongst other authorities, the Vacher v. France judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2147, § 22),

The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings.

Moreover, in this context the appellant makes reference to the criminal code which provides that:

534AE. (1) Not with standing the provisions of article 533, the services of interpretation and translation resulting from the application of articles 534AB to 534AD, both inclusive, shall be free of charge.

(2) The registrar shall keep a register of translators and interpreters who are appropriately qualified. Once established, such register shall, where appropriate, be made available to legal counsel and other relevant authorities.

This defect has implications not only as to the erroneous appreciation of facts and erroneous application of the law but also on the right of the appellant to have a good and effective translation according to the Constitution and the European Convention.

(5) The charge of importation has not been proved

The prosecution did not produce any evidence linking the appellant to the importation of any illicit substances. There is no evidence in the acts of the proceedings that establish any link between Attila Somylai and the appellant before the importation or any other evidence that it was the accused who imported or caused to be imported or took steps preparatory to import the dangerous drug (cocaine) in Malta. The proseuction has produced no evidence that even remotely directly or indirectly shows that the appellant did any of the above acts and hence the appellant should be acquitted from this charge for all the grounds explained above as well as those hereunder regarding the charge of conspiracy.

Indeed, the same reasoning that led the Court to acquit the accused from the charge of aggravated possession should have been applied also to the other charges and lead to a logical conclusion of acquittal.

(6) Elements of conspiracy not proved and in any case not proved beyond reasonable doubt

As regards to the alleged conspiracy the evidence of the prosecution is limited to Attila's testimony who says that he met the appellant and another person [Stephen Egbo] but he made no absolute dealings with the accused. Indeed the accused confirms that he did not even speak with the appellant and that the appellant was just a driver:

Court: I am going to make you a diret question because I can. At this stage in time, when you met Steve and Anya, did Anya ever speak to you? For the Court, Anya is the gentleman.

Interpreter: No he did not speak to him. He was only the driver of the car.

Court: only the driver of the car. Ok. Always in the car, there were the three (3) people, you Anya and Steve. Steve asked you for the drugs?

Interpreter: yes, Steve asked for it.

Court: ok you gave the drugs to Steve?

Interpreter: yes he gave them to Steve.

Court: steve gave you the money.

Interpreter: yes, Steve gave the money.

Court: Anya just drove the car

Interpreter: Yes.

Court: now you told me that the only person you spoke to in the car was Steve. Right or wrong? The conversation was with one person. With Steve, am I right?

Interpreter: Yes, yes.

Moreover, one has to reiterate that in his testimony Attila leaves in doubt the nature of the substance and the details furnished by him are very scanty. In addition there are various times in his various testimonies whereby he is not consistent at all or provides details which are contrary to what he has stated before. Therefore, Attila Somylai is not credible since he contradicts himself various times:

a) In relation to the colour of the car

Attila Somylai in his statement released to the Police and later sworn in front of the Inquiring Magistrate explains that the colour of the car where the October event took place was white however in his testimony before the Magistrates Court he states that the colour of the car was blue:

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Mr. Somylai in your testimony you mentioned a car coloured blue, in the statement it is white, do you remember what was the colour?

He does not know white, blue, probably, white, he does not know the colour of the car maybe white, maybe blue but probably white.

b) In relation to who was the driver during the October incident

Attila Somylai in his sworn statement before the Magistrate and even during the compilation of evidence had stated that the appellant was driving the car however then he stated that it was not the appellant who drove the car but Stephen Egbo and then again changing his version of facts by stating that it was the appellant who was driving the car. Thus, in this instance, even the simple fact of who was driving the car lead Attila Somylai to change his version of facts several times even whilst being under oath:

Court: The statement that the Inspector read to you, which I remind you that you gave under oath you said that the accused was driving the car. Today you are saying the accused was not driving the car, Stephen was driving the car so somewhere you are right under oath which is the truth please?

Witness: The truth is that Stephen was the driver.

Court: But why did you tell the other. Magistrate something different. In other words why did you lie under oath?

Witness: He is saying Stephen was driving the car.

Court: Ok then ask him why does he lie under oath?

Witness: He doesn't know.

Court: He doesn't know why he lied, there is also reason to a lie.

Witness: Two persons there were.

Court: But two persons can't drive the same car at the same time. I'm waiting for an answer Mr. Somylai. Who was driving this blessed car?

Witness: He is saying Stephen.

Dr. Demarco: But before he said the accused was, and before he also said he didn't see accused there eh. Ane when the Court told him...

Court: Who was driving the car?

Witness: Stephen.

Court: I'm still waiting the answer.

Dr. Demarco: Both are under oath either this one or the other one, mhux hekk.

Moreover, in these proceedings Stephen Egbo chose not to testify since he still had pending criminal proceedings and this fact should also be considered in favour of the accused.

For a charge of conspiracy to be brought under Article 48A, the prosecution must determine the crime for which the defendants associated to commit. For this reason conspiracy must always be linked to another crime for which it was committed, which in itself must be punishable by imprisonment.

Maltese Jurisprudence [Ir-Repubblika ta' Malta vs Godfrey Ellul; Ir-Repubblika ta' Malta vs Stephen John Caddick and Philip Walker hold that there are three elements which constitute the commission of the crime of conspiracy, namely: "

1. the agreement between two or more persons
2. the intent [...]
3. the agreed plan of action

In order to be found guilty, the presence of all three elements must be present simultaneously, and as held by Maltese Courts, if any one of the elements is missing, the crime of conspiracy shall not be deduced. Thus, intention alone is not enough for the prosecution to prove criminal conspiracy.

In the present case it is evident that none of the above mentioned elements is present since both Attila himself and even the appellant confirmed that there was no agreement between themselves, there was no intention between Attila and the appellant to conspire and there was no agreed plan of action. The prosecution need not prove that such agreement has been physically, and the showing that there has been a meeting of minds is sufficient but in this present case the prosecution failed to prove that there was an agreement between the appellant and Attila Somylai since both Attila and the appellant confirmed that they did not know each other and that they did not even speak to each other.

Moreover, conspiracy is consummated once the conspirators collectively agree, with the intent, to commit a crime. In fact, conspiracy is a specific intent crime, whereby for the crime to subsist, it must be committed voluntarily and purposely with a determined intent to engage in criminal activity. Even this element fails to subsist in the present case since no proof of intent to commit a crime between the appellant and Attila Somylai was brought forward in front of the Court. Thus, the prosecution needed to prove that the conspirator had the knowledge of the existence and the awtul objective of the common design and action. A person having no knowledge the conspiracy cannot be found guilty as a conspirator and thus mere association annot be legally punishable without proving that the conspirator had prior knowledge of the unlawful event. In this case, the prosecution failed to proof or bring evidence that the appellant was aware or had prior knowledge of the conspiracy.

Another vital requisite for conspiracy to subsist is the agreed plan of action. Thus, under Maltese Law it is sine qua non condition that there should be, not only an acceptance (an agreement of interest and intent) but there must also be an agreement on the mode of action to follow in the execution of the intention. The prosecution in this case needed to prove It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of the mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished,

Even this element of an agreed plan of action between the appellant and Attila Somylai is missing in its entirety in the present case.

Thus, if one analyzes all these elements and applies them to the case in question, one will immediately realize that neither of these elements is present in this case and this results even from the testimony of the witness Attila Somylai.

From the testimony of the appellant it is beyond doubt that the applicant had no relation whatsoever with the drug business activities of Stephen Egbo and therefore any offence if so committed it was surely committed without his knowledge and without him knowing anything whatsoever.

In fact, Attila Somylai never ever spoke to Anya Uchena neither before meeting him in the car not even in the car itself did he communicate with him and he only communicated with Stephen Egbo and in fact he passed the drugs to Stephen Egbo and the latter passed the money to Attila Somylai. Thus, the appellant fails to understand where his involvement is supposed to be.

In fact, as already pointed out, the appellant did not even know what business activities his friend was involved in and he never directly or indirectly took part in Thus, there is no reason whatsoever to believe that the appellant was involved in these allegedly criminal offence/s:

Defence, You were present during these Court proceedings and the prosecution produced a person by the name of Somali Attiya who testified during these proceedings. First of all, do you know this person?

Witness, No

Defence; You don't know him?

Witness; No I don't know him

Defence: This Attilla explained that he was involved in a drug dealing where you were even present, what do you say about all this?

Witness; I never deal with I don't know Atilla

Defence; Have you ever been involved in any drug dealing?

Witness; No

Defence; Did you ever speak with Egbo about any drugs?

Witness; No

Thus, from this evidence it is very clear that Anya Uchena did not even know Attila Somyali and he was simply a friend of Stephen Egbo and the fact alone that he was a friend of Stephen does not mean that he participated in the drug deal in question. Even in the submissions of the Prosecutor there are a lot of wild guesses which are not supported by any proof namely that they were from the same region, that Anya was the person who was translating everything and thus was helping them, and other statements which are merely false allegations and do not result from evidence from the acts of the proceedings. The fact that the accused used to live with Stephen and the fact that there were occasions where he used to drive Stephen does not mean that the accused knew and was aware and actively participated in the agreed plan regarding the drugs.

Somlyai clearly testified that Ikechukwu Stephen Egbo and not the appellant was the same person to whom he had delivered drugs on a previous occasion in October 2010. He also described how and why he could identify him as being the same consignee both in October 2010 and in the controlled delivery in November 2010. At the same ime, Somlyai indicated the accused in these proceedings as having also been present with Ikechukwu Stephen Egbo. The fact that the appellant was simply present in the car does not mean that he was involved in the drug dealing business between Somlyai and Egbo.

Thus, after considering what has been outlined above, the appellant notes that his version of facts that he was never involved in any drug dealing is credible. In fact, the appellant notes that all the above considerations point to the direction that the accused

was not involved in this conspiracy and did not know what had happened, what was going to happen, what was planned to happen and who was involved.

The Investigating Officer himself contends that the proof in this case is limited to circumstantial evidence however, in this case this circumstantial evidence does not lead to the finding of guilt of the appellant. Maltese courts had a lot of opportunities to analyse circumstantial evidence and they have held that in order for guilt to be found on the basis of circumstantial evidence every circumstance must lead to the same conclusion that is that the accused committed the alleged offence.

In **The Republic of Malta v. Eduardo Navas Rios** the Court of Criminal Appeal held that;

It has been constantly held that in order that circumstantial evidence may serve as a basis to convict it must first and foremost be narrowly examined and then in order to give weight to a circumstance or to a number of circumstances as proving guilt ***this or these must be unambiguous or unequivocal meaning that these must be definite or unmistakable or clearly pointing to only one conclusion. If circumstantial evidence may have more than one meaning then that circumstance or circumstances cannot be given any weight or consideration at all because although circumstances do not lie they may deceive.***

Thus, the appellant humbly submits that there is no direct evidence nor sufficient circumstantial evidence to find guilt in the appellant and as a result the appellant humbly requests this Honourable Court to acquit him of the above-mentioned charges.

Indeed the same reasoning that led the Court to acquit the accused from the charge of aggravated possession should have been applied also to the other charges and lead to a logical conclusion of acquittal.

(7) Appellant testimony sufficient on a balance of probability

The appellant chose to testify viva voce and from his testimony it is beyond doubt that the appellant had no relation whatsoever with the drug business activities of Stephen Egbo and therefore any offence if so committed it was surely committed without his knowledge and without him knowing anything whatsoever. In fact, as already pointed out, the applicant did not even knew what business activities his friend was involved in and he never directly or indirectly took part in. Thus, there is no reason whatsoever to believe that the appellant was involved in these allegedly criminal offence/s.

The appellant confirmed under oath that he did not know Attila Somlyai and that he has never been involved in any drug dealing. Regarding Stephen Egbo, he said that they lived together in an apartment and when he was asked if they were friends, he says that were not properly friends but they lived together. Asked if he ever spoke with Stephen Egbo about any drugs, he replied in the negative.

Contrary to the prosecution whose evidence must reach a level beyond reasonable doubt, defence whilst not bound to prove anything requires a threshold of a balance of probabilities to prove whatever it needs to prove. The appellant chose to testify viva voce and surely his testimony definitely reaches the grade of probability as required by law and which raises sufficient reasonable doubts in the prosecution case such as to warrant an acquittal.

In fact, the appellant makes reference to II-Pulizija vs Jonathan Grech & Omissis [28th January 2021] decided by the Court of Criminal Appeal:

L-Ewwel Qorti ikkunsidrat ukoll li l-appellant jghid li kellu impjegati li kienu qed jarawlu izda naqas milli jipproducihom sabiex jixhdu. Dwar dan, din il-Qorti taqbel mas-sottomissjonijiet maghmulha mill-appellant u cioe' li huwa ma ghandu bzonn jipprova xejn. Li hija l-

Prosekuzzjoni li hija obbligata li tressaq il-provi fuq bazi ta' minghajr dubju dettat mir-raguni u f'kaz lil-appellant ried jiprova xi haga, kien bizzejjed li jaghmilha fuq bilanc ta' probabilita".

(8) The charge relating to money laundering not sufficiently proven

In the present case since the charges relate to 2010 and the three preceding years therefore the prosecution was still bound by what the law stipulated pre-amendments. Thus, in order for the prosecution to find guilt in the charge of money laundering in the present case, there must be a conviction with regard the underlying criminal activity (the appellant is contending that he should be acquitted of drug-related charges] and the Prosecution must also prove which criminal activity was at the source of the laundered money. In this case the Prosecution failed to prove both elements and therefore the accused should be acquitted even of this charge.

In fact, in the case in the names 'Il-**Pulizija Spettur Antonovich Muscat Vs Omissis, Sharon Camilleri**' the Court considered that:

"Issa huwa minnu illi kif inghad mill-Ewwel Qorti, I-mezzi ta' l-ghejxien ta' Sharon Camilleri ma jikkorisspondux ma'l-istil ta' hajja taghha b'ammont konsiderevoli ta' flejjes u gojelli fil-pussess taghha meta ghandha zewgt itfal, mhijiex mizzewwga u tghix bl-assistenza socjali, izda dak li kien jenhtigielha tipprova qabel xejn il-Prosekuzzjoni kien illi tezisti xi attivita' kriminali sottostanti u li allura kien hemm in-ness bejn il-flejjes li instabu fil-pussess ta'l-appellata u din l-attivita'. Ma hemmx l-icken prova in atti li tindika illi Cutajar kien involut fxi attivita' kriminali ghajr ghax-xhieda skarna tal- ispettur Keith Arnaud li ighid li kien investiga lil Cutajar fuq omicidju. Dan l-involviment ta' Cutajar fallegat serq u hold- ups huma kollha tajjar fl-ajru billi ma hemmx indikazzjoni wahda ta' x'hold ups kienu jew x'serq seta' kien, jew jekk forsi xi gojelli li instabu fis-safety deposit box kenux provenjenti minn dan l-allegat serq biex b'hekk jigi stabbilit xi attivita' kriminali u kwindi xi ness ma'l- appellata. Langas il-fedina penali ta' Cutajar ma hija wahda allarmanti u kwindi 1- Prosekuzzjoni ma tistax tghid li irnexxielha tipprova anke sal-grad tal-prima facie illi kienet ghaddejja xi attivita' kriminali da parti ta' dan Cutajar.'

In the case **The Police [Superintendent Paul Vassallo] vs Dayang Sakienah Binti Mat Lazin**' the Court held that:

"That it is to be emphasised that the charge of money laundering brought against defendant is based on Chapter 373 of the laws of Malta and not Chapter 101. In the latter case the prosecution must necessarily show a link between the assets being laundered and some criminal activity prohibited under Chapter 101. In the former case (ie. an offence under Chapter 373) what the prosecution must show is a link between the laundered assets and an offence listed in either the first or second schedule of the said Chapter 373 which however also include traffic in narcotic drugs and psychotropic substances.

That it must also be emphasised that what must be shown for the prosecution to satisfy its onus is a link between some criminal activity and the assets in question.

(9) Lack of proof of financial gain by the appellant

Subsidiarily and without prejudice even in the case the Court finds guilt regarding the drug offences the appellant contends that the prosecution did not prove that any financial gain was made by the accused relating to drugs and hence the prosecution failed to produce any evidence whatsoever linking the transfer of money to any illegal activity of drugs and hence the prosecution failed to prove the charges beyond the reasonable doubt and hence he should be acquitted.

10) The appellant under oath explained the Western Union transfers

Subsidiarily and without prejudice even in the case the Court finds guilt regarding the drug offences the appellant contends that he still should not be found guilty of the money laundering charges since he gave a justification of the transfers relating to Western Union. In fact, when the accused testified on oath before this Court he explained the source of funds that were allegedly according to the Prosecution a source of money laundering. In fact, when testifying on oath he explained that he was

gainfully employed [as even confirmed by the representative of Jobsplus] and thus he had a fixed income apart from doing other jobs and earning money from such jobs. Moreover, he explained that the transactions he used to make via western union were done for his friends since they used to ask him to send money to their families abroad via western union since they did not have the service required. Thus, the accused used to help his fellow friends in Malta by sending money to their families and relatives abroad via Western Union in so doing without earning anything. He explained on oath that his friends used to give him money and then he used to send it abroad but that was not his money, and it was not sent to his family but to relatives of his friends and thus even the charge of money laundering does not subsist in the present case.

(11) Wrong appreciation of the facts in general

In light of the above the accused humbly submits that in view of all the evidence produced and the submissions made, he should be acquitted from all the charges since they have not been sufficiently proven beyond reasonable doubt by the prosecution. That the evidence brought forward by the Prosecution is insufficient to prove the charges beyond reasonable doubt and that in any case the evidence produced by the Defence reaches a level on a balance of probability which prevents the court from reaching a level of moral certainty and hence appellant humbly requests that the verdict of guilt reached due to a wrong appreciation of the facts as above explained should be substituted by a verdict of not guilty.

B. Punishment Inflicted

That this grievance is subsidiarily and without prejudice to the grievances relating to merit and consists in the fact that the punishment of nine years imprisonment and a fine of 10,000 euro meted out was disproportionate to the facts of the case. Thus, whilst it is not being contested that the punishment inflicted is one within the parameters of

the law, however, when one considers the circumstances of the case in question, the punishment is definitely an exaggerated one.

Furthermore, the appellant humbly submits that the facts of this case relate to more than 11 years ago and thus the appellant should benefit from this long passage of time.

Moreover, in consideration for punishment the appellant humbly asks on what basis such punishment was meted out since the amount of drugs that the appellant has allegedly caused to import was not determined.

The appellant contends that his conduct sheet is a clean one and thus in the eventuality that he is found guilty he should be considered as a first time offender.

As a result and in view of the above the punishment of nine years imprisonment and a fine of 10,000 euro both in its quality and in its quantity is disproportionate to the facts of the case and does not provide the balance required between the retributive and reformative aspect so important in today's criminal justice systems.

Various times the Court has accentuated the importance of punishment in having a rehabilitative effect rather than having a deterrent effect. Moreover, as rightly pointed out in **Il-Pulizija vs Francis Mamo**:

Fil-verita l-iskop tal-piena muhiex wiehed ta' tpattija. Huwa ben stabbilit li l-piena m'ghandhiex isservi bhala xi forma ta' vendikazzjoni tas-socjeta' fil-konfront tal-hati. Il-piena ghandha diversi skopijiet. Wiehed minnhom huwa sabiex jigi ripristinat it-tessut socjali li jkun gie mcarrat bil-ghemil kriminali ta' dak li jkun. Taht dan l-aspett jassumu importanza, fost affarijiet ohra, kemm ir-rizarciment tad-dannu da parti tal-hati kif ukoll ir-riforma tal-istess hati.

Skop iehor tal-piena huwa dak li tigi protetta s-socjeta`. Dan l-iskop jitwettaq kemm billi fil-kaz ta' persuni li b'ghemilhom juru li huma ta' minaccja ghas-socjeta dawn jinzammu

inkarcerati u ghalhekk barra mic-cirkolazzjoni, kif ukoll billi, fil-kaz ta' reati gravi, is-sentenza tibghat messagg car li jservi ta' deterrent generali. Il-Qrati ta' gustizzja kriminali dejjem iridu jippruvaw isību l-bilanc gust bejn daron u diversi skopijiet ohra tal-piena.

Illi huwa propju ghalhekk illi ghal kull reat il-Ligi ma tistipulax piena fissa imma tistipula minimu u massimu; jispetta lill-Qorti biex fid-diskrezzjoni tagħha, u entro dawk il-parametri, teroga dik il-piena permezz ta' liema, skond ic-cirkostanzi ta' kull kaz, tipprova ssib dak il-bilanc gust bejn d-diversi skopijiet li għandhom jintlahqu.....

Illi huwa car li l-imputat mhux persuna ta' kondotta vjolenti jew li ghandu bzonn ta' xi tip ta' riforma fil- karattru tieghu; dan pero ma jfissirx necessarjament li huwa m'ghandux jinghata piena karcerarja jekk hija din il-piena li tohloq dak il-bilanc gust bejn id-diversi skopijiet li jridu jintlahqu permezz taghha, inkluz dak li tibghat messagg car li jservi ta' deterrent.

Illi fil-kaz in ezami l-imputat m'ghandux l-iskuza ta' l-inesperjenza jew il-blugha taz-zghozija, huwa ragel adult u ta' certa esperjenza li pero ghazel li jinjora dak li din l-esperjenza bil-fors kienet ghallmitu;...

Furthermore, in **Il-Pulizija vs Anton Vassallo decided by the Criminal Court of Appeal on the 9th of January 2013:**

"Il-piena ghandha diversi skopijiet. Wiehed minnhom huwa sabiex jigi ripristinat it-tessut socjali li jkun gie mcarrat bil-ghemil kriminali ta' dak li jkun. Taht dan l-aspett jassumu importanza, fost affarijiet ohra, kemm ir-rizarciment tad-dannu da parti tal-hati kif ukoll irriforma tal-istess hati. Skop iehor tal-piena huwa dak li tigi protetta s-socjeta'. Dan l-iskop jitwettaq kemm billi fil-kaz ta' persuni li b'ghemilhom juru li huma ta' minaccja ghas-socjeta dawn jinzammu inkarcerati u ghalhekk barra mic-cirkolazzjoni, kif ukoll billi, fil- kaz ta' reati gravi, is-sentenza tibghat messagg car li jservi ta' deterrent generali. Il-Qrati ta' gustizzja kriminali dejjem iridu jippruvaw isibu l-bilanc gust bejn dawn u diversi skopijiet ohra tal-piena."

12. Din il-Qorti hi tal-fehma li fil-kaz in ezami jidher illi lappellant/l-appellat qieghed fit-triq it-tajba u qieghed jagħmel l-isforzi mehtiega biex izomm in lineja mar-responsabbiltajiet tieghu. Is-socjeta' ghalhekk ma tistax tigi protetta bl-inkarcerazzjoni tieghu izda billi, bl-ghajnuna ta' ufficjal tal-probation, ikompli jirresponsabbilizza ruhu, u dan anke billi jaghmel il-pagamenti opportuni lill-vittmi tieghu kif ukoll billi jrodd xi haga lis-socjeta' permezz ta' servizz fil-komunita'. Ghalhekk huwa l-kaz illi, minbarra ordni ta' kumpens, l-appellant/l-appellat accettanti, jitqieghed taht ordni ta' probation u servizz sabiex ikun hemm ammont ta' supervizjoni minn ufficjal tal-probation filwaqt illi l-hati, permezz tal-hidma tieghu, ikun qieghed irodd lis-socjeta offiza dak is-sodisfazzjon li hija tippretendi li ghandu jkollha minhabba l-agir kriminuz tieghu.

Having seen that these proceedings were assigned to this Court by the Chief Justice following Hon. Judge Neville Camilleri's abstention from the case;

Having seen the reply of the Attorney General filed in the registry of this Honourable Court on the 1st October, 2023;

Having heard the parties put forward their oral submissions on the 10th of April 2024.

Considers,

In view of the first grievance put forward by the appellant, which is divided in several sub-sections, this Court deems it fit to start off by stating that 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. As held in the judgment delivered by this Court, differently presided, in the case of **Il-Pulizija vs. Julian Genovese**[1] :

[1] Decided by the Court of Criminal Appeal on the 31st July, 2008.

> *"hu principju ormaj stabilit fil-gurisprudenza ta 'din il-Qorti (kemm fil-kaz ta 'appelli minn sentenzi tal-Qorti tal-Magistrati kif ukoll filkaz ta 'appelli minn verdetti w sentenzi tal-Qorti Kriminali) li din il-Qorti* ***ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-Ewwel Qorti jekk tasal ghall-konkluzzjoni li dik il-Qorti setghet ragonevolment u legalment tasal ghall-konkluzzjoni li waslet ghaliha.*** *Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-Ewwel Qorti,* ***izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-Ewwel Qorti kienetx ragjonevoli fil-konkluzzjoni taghha.*** *Jekk izda din il-Qorti tasal ghall-konkluzzjoni li l-Ewwel Qorti fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment tasal ghall-konkluzzjoni li waslet ghaliha, allura din tkun raguni valida, jekk mhux addirittura mpellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni w konkluzzjoni* (ara f'dan is-sens "inter alia" l-Appell Kriminali : "**Il-Pulizija vs. Raymond Psaila et.**[2]" [12.5.94]; "**Ir-Repubblika ta' Malta vs. George Azzopardi**[3]" [14.2.1989]; "**Il-Pulizija vs. Carmel sive Chalmer Pace**[4]" [31.5.1991]; "**Il-Pulizija vs. Anthony Zammit**[5]" [31.5.1991] u ohrajn.)

In this regard, this Court refers to what was stated by **Lord Chief Justice Widgery** in the case of **R. v. Cooper** (in connection with section 2 (1) (a) of the English Criminal Appeal Act, 1968):

> *"assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate) ,*

[2] Decided by the Court of Criminal Appeal on the 12th May, 1994.
[3] Decided by the Court of Criminal Appeal on the 14th February,1989.
[4] Decided by the Court of Criminal Appeal on the 31st May, 1991.
[5] Decided by the Court of Criminal Appeal on the 31st May, 1991.

because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone . However, should the overall feel of the case – including the apparent weakness of the prosecution evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed."[6]

In **Ir-Republika ta' Malta vs. Ivan Gatt**,[7] 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.[8]

[6] See also BLACKSTONE'S CRIMINAL PRACTICE (1991), p. 1392.
[7] Delivered by the Court of Criminal Appeal on the 1st. December, 1994.
[8] See **Ir-Republika ta' Malta vs. Mustafa Ali Larbed** decided by the Court of Criminal Appeal on the 5th July, 2002.

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 be forthcoming 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.*

Furthermore, article 638 of the Criminal Code states that:

> *(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.*

Judgments such as **Il-Pulizija vs Joseph Bonavia**[9] and **Il-Pulizija vs Antoine Cutajar**[10] have confirmed the above-mentioned principles. Moreover, as it was held in Il-**Pulizija vs Joseph Thorne**:[11]

[9] Decided by the Court of Criminal Appeal on the 6th November, 2002.
[10] Decided by the Court of Criminal Appeal on the 16th March 2001.
[11] Decided by the Court of Criminal Appeal on the 9th July 2003.

> *'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'.*

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. A Court of Criminal Jurisdiction can only convict an accused if it is sure[12] 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 Criminal Jurisdiction is sure of an accused's guilt, then it is obliged to convict and mete out punishment in terms of Law.

In view of the above and the appellant's first grievance, this Court will go on to evaluate the most salient testimonies heard and to the documents exhibited before the First Court.

WPC 127 Carmen Gauci[13] testified on the 15th December, 2010 that on the 7th December 2010 at about 10.00am while she was waiting in front of of Hall 9 to testify

[12] **R v Majid**, 2009, EWCA Crim 2563, CA at 2.
[13] Fol. 110 et seq of the proceedings.

in the case of Attila Somlyai,[14] she noticed the two same women who were present before for the Court sitting of the mentioned Egbo specifying that they were with the appellant in this case. She said that after a few minutes, Attila Somlyai was escorted to Hall 9, and she saw the appellant looking at him and then stood up and left Court. She says that she entered Hall 9 and asked the Prosecuting Officer Dennis Theuma to ask Attila Somlyai if he recognised someone in Court and then Inspector Theuma told her that Attila Somlyai had recognised the Nigerian guy (i.e the appellant in this case) who was sitting in front of Hall 9 and that he was the same person who was with Ikechukwu Stephen Egbo the first time he came to Malta with the drugs. She said that the appellant was arrested in Valletta at around noon later that day and that he was with the same two women she mentioned before. She stated that these women were Vanda Granek and a certain Tunde.

WPC 127 Carmen Gaući[15] testified once again on the 1st February 2011 and apart from testifying on the same lines she had testified on the 15th December 2010, this time she made reference to Hall 7 and not to Hall 9.

PS 1220 Chris Baldacchino[16] testified on the 15th December, 2010 that on the 26th November, 2010 a Romanian guy by the name Attila was arrested at the airport. He said that on the 27th of November 2010 he was at Roma Hotel in Sliema with Attila since a controlled delivery was being carried out. He said that Attila told him that in October he came to Malta and did the same thing where he handed over the capsules to two African guys and said that Attila also told him that he was waiting for a call to go outside of the hotel. He stated that at around 5.00pm Attila received a call, went out of the hotel and a certain African guy named Stephen was arrested. He further stated that on the 7th December, 2010 he was in Court with WPC 127 and he observed that the appellant looked at Attila when Attila passed in front of him and then the appellant went out of Court. He said that the appellant was later arrested in Valletta.

[14] This person was arrested with capsules and was ready to make a controlled delivery as a result of which the Police arrested Ikechukwu Stephen Egbo
[15] Fol 172 et seq of the proceedings.
[16] Fol. 113 et seq of the proceedings.

Prosecuting Officer Dennis Theuma[17] testified on the 15th of December 2010 and he exhibited the statement released by the appellant.

The appellant released a statement on the 8th of December 2010[18] where he stated that he had been living in Malta for five years and that he was living with Tunde Egbo and her husband as they were his friends. Asked whether he had a nickname he stated that 'Ben' was his English name and 'landlord' was his nickname. Asked whether he had ever abused drugs, he stated that in Nigeria he used to take marijuana, but in Malta he only took cannabis grass. He also stated that he occasionally takes cocaine about once weekly when he goes out. Asked from where he got the marjuna, he replied from a guy in Paceville, who he does not know. Asked when he used cocaine last, he replied 'two weeks ago' and the first time he abused from it was a about six months prior. Asked why he was at the law courts the day before, he stated that Tunde had asked him to go to court with her to help her speak to her husband's lawyer. Asked whether he was friends with Ikecukwu Stephen Egbo, he said that they were not friends but since they came from the same region in Nigeria, they consider themselves as brothers. He said that he got to know Stephen in Msida about two months before. Asked whether he has relatives or family in Malta, he replied that he is alone. Asked whether he has friends or relatives in Holland, Hungary and Spain, he said that in Hungary he has his girlfriend Vanda who was at the time in Malta. He also stated that he has friends in Holland, Spain, Switzerland and Italy. Asked whether he knows any other language than English and Igbo dialect, he said he knew a little bit Maltese and a little bit Hungarian. Asked whether he was employed, he replied that he has been unemployed for around three (3) weeks because the person who he used to work with as a tile layer has left the island. Previous to this employment, he used to work with Float Glass Company and he used to earn around €600/€700 depending on work. He used to be paid by cheque and if he worked overtime, he used to be payed in cash. He also gave a brief of his employment history. Asked to explain his money transactions to countries like Nigeria, Spain Holland and

[17] Fol. 116 et seq of the proceedings.
[18] Fol. 118 et seq of the proceedings.

Denmark, he said that not all the money was his and some people asked him to do them a favour. He explained that on the 1st of August 2009, he had sent €1,000 to his friend John Akor in Denmark. He had lent him the money and he gave him the money back. On the 18th of May 2009 he had sent €2,500 to a woman in Spain but said he did not know her and a person from Marsa told him to send the money to her. He also explained that he and Festus had sent Isaac Godwsill Ekeoma, his brother, from Nigeria €4,825. Asked about his transaction of €1,620 to an individual in India, he said that he does not recall it and knows no one in India. He stated that on the 27th of August 2010 he sent €1659.32 to his brother Isaac Ikechukwu in Nigeria. On the 21st of January 2010, he had sent €1,200 to his brother Isaac Godswill Ekeoma, his brother in Nigeria and the money was his. On the 11th of August 2009 he had sent €4857.45 to Isaac Godswill Ekeoma, and the money were both his and Festus. He explained that Festus preferred sending money to his brother rather than keeping it in a bank or losing it. He said that he is confused regarding the transaction dated the 1st of August 2009 where he had sent €2,000 to a certain Kingsley Ejiogu residing in Hamrun. On the 14th of March 2009 he had sent his brother Isaac Ekeoma in Nigeria €2,177.31; on the 6th of June 2009, he sent him the sum of €2,415.79; on the 13th of July 2009 he also sent him €1,216.72; on the 10th of February 2009 he once again sent him the sum of €2.176.62 and on the 24th of April 2009 he sent him the sum of €1,352.77. Asked to explain all these transactions amounting to almost €30,000 he said that these were not all his money, some were his, some were Festus' and some belonged to other people. He said that one cannot transfer more than €3,000 via Western Union, so at times people asked him to do it on their behalf and he would get paid for it, around €180/€200. Asked to explain the amont of €20,221 sent to his brother Isaac Goodswill Ekeuma in Nigeria over two years, he said that he saved the money and when he had enough, he would send him the money. Asked whether he had any bank accounts, he stated that he had with HSBC Bank and also he had one bank account in Nigeria. He stated that he own part of the family home in Nigeria and stated that he does not own any companies. He stated that he bought his car from a dealer in Qormi. Shown a picture of a Romanian national, he said that he does not recognise him and he also

says that he did not see him in Court. He says he is not involved in drugs. He confirmed that both mobile phones found on his person by the police belonged to him.

Prosecuting Officer Dennis Theuma[19] testified on the 1st of February 2011 where he stated that on the 26th of November 2010 late in the evening a Romanian national by the name of Attila Somlyai arrived in Malta on a flight from Dusseldorf, Germany. He said that since the mentioned Somlyai looked suspicious, it was decided that he'd be further investigated. He explained that PS 1220 C. Baldacchino assisted by PC 777 Chris Ebejer, PC 323 Cedric Buhagiar and WPC 237 Antonella Vella went to the Malta International Airport to assist in this procedure. He continued to state that Attila Somlyai was subsequently taken to Mater Dei Hospital where after signing a declaration that he refused legal advice and had no objection for x-ray scanning since it was suspected that he was carrying foreign bodies inside his body. Inquiring Magistrate Dr. Gabriella Vella, nominated a number of witnesses to assist her in the Inquiry. He had spoken to Attila with a translator and Attila had admitted to carrying about sixty (60) drug capsules, containing approximately six hundred (600) grams of alleged cocaine. Attila told him that he had been to Malta on another occasion in 2010 with some other twenty-four (24) capsules also containing cocaine. Attila told him that he was to reside at the Roma Hotel in Sliema and after excreting all the capsules, he had to call the person who had sent him with the drugs , possibly an African national living in Amsterdam. Following this, he had to await instructions to deliver the capsules containing the alleged drugs. Attila also agreed to help the police with a controlled delivery. Attila informed him that he would receive fifteen Euros (€15) for every capsule he smuggled and so he would receive around nine hundred Euros (€900) from the same people he had met in October outside the Roma Hotel. The Inquiring Magistrate authorised the controlled delivery. Subsequently, a controlled delivery was staged at the Roma Hotel and a certain Ikechukwu Stephen Egbo, a Nigerian national, was arrested. He stated that eventually both Attila Somlyai and Ikechukwu Stephen Egbo were arraigned separately in Court. On the 7th of December 2010 both Attila Somlyai and Ikechukwu Stephen Egbo had their first hearing at the

[19] Fol. 159 et seq of the proceedings.

Law Courts and when both of them were inside the hall, he was informed by WPC 127 Carmen Gaući that a Nigerian national who was accompanying the female partner of Ikechukwu Stephen Egbo reacted in a very suspicious manner on seeing the Romanian courier. He says that he immediately requested Magistrate Dr. Miriam Hayman to be authorised to speak to Attila and when he spoke to him, the latter confirmed that the other Nigerian who was present for the case of Ikechukwu Stephen Egbo was the other Nigerian to whom he had handed over a number of capsules in October in front of Roma Hotel. As a consequence, the other Nigerian guy was later arrested. He was with his girlfriend Vanda Granek and with Ikechukwu Stephen Egbo's wife, i.e. Tunde. He also testified that in the meantime Attila released a third statement which he later confirmed on oath before Magistrate Dr. Audrey Demicoli in which he confirmed that in October 2010 when he came to Malta the first time with the twenty-four (24) cocaine-filled capsules, the accused was present and assisted Ikechukwu Stephen Egbo during the drug deal. Further investigations carried out prior to the appellant's arraignment, it was established that the appellant had sent an excess of forty thousand Euros (€40,000) overseas using Western Union money transfer and this over a period of three years. The money were sent to various individuals of Nigerian origin in various countries, including Spain, Holland and Nigeria. He added that it was established that the appellant arrived in Malta as an illegal immigrant about five years before and most of his employment history "*is anything but official*".

WPC 237 Antonella Vella[20] testified on the 19th January, 2011 and stated that on the 26th November, 2010 they went to Malta International Airport where the customs had stopped a Romanian national named Attila Somlyai because it was suspected that he was carrying foreign bodies inside him. PC 777 and PS 1220 took him to hospital and they verified that Attila Somlyai had capsules inside him. She stated that PS 1220 and herself went to the Roma Hotel and they made a check-in on Attila Somlyai since he was going to help the Police. Furthermore, WPC 237 said that that on the 27th

[20] Fol. 135 et seq tal-process.

November, 2010 they went to Roma Hotel and a controlled delivery was carried out and a certain Stephen Egbo was arrested.

PS 1086 Johann Micallef[21] testified on the 19th January, 2011 and stated that on the 26th of November 2010 a certain Attila Somlyai was apprehended at Malta International Airport carrying drugs. He stated that the mentioned Attila Somlyai did a controlled delivery as a result of which on the 27th November, 2010 a certain Stephen Egbo was arrested in the vicinities of Roma Hotel in Sliema. From the investigations it resulted that Attila Somlyai had came to Malta some time earlier and met two Nigerians to whom he had passed a parcel suspected to be drugs. One of these Nigerian men was Stephen Egbo. He explained that on the 7th December, 2010 whilst waiting for the Court hearing of Attila Somlyai in front of Hall 7, WPC 127 saw suspicious movements by the appellant and after she informed Inspector Theuma, they were given instructions to arrest the appellant as a consequence of which the latter was later arrested.

When cross-examined he was asked whether during the controlled delivery, he was in a hotel room or outside, he said that he was both inside and outside and also said that he was with Attila Somlyai. He passed around ten hours with him and confirmed that the hotel was the Roma hotel. He testified that there were other police officers and that even a translator was present in the room and says that several calls were made which were all initiated by a third person from abroad. Asked whether he was understanding what was being said by Attila on the phone, he said no. He said: "*At that time I was given the impression that someone had to come and pick up the package. Last time, it was, he was telling me, it was two Nigerians and at some point, Attila told me in his broken English that it will be the same persons as last time*". He confirmed that following this, he went outside to observe the arrival of whoever was to come to collect the packet and to apprehend the person who came to collect the drugs. He said that he was observing in the vicinity of Roma Hotel specifying that he was opposite on the promenade. He continued to state that he observed other Nigerians passing on the

[21] Fol. 137 et seq tal-process.

promenade but none of them stopped and also says that he observed a lot of persons that have criminal records with the Police. He also said that he was observing and took mental notes of Nigerian persons who stopped and looked at the Roma Hotel, confirming that he was looking for persons of a dark colour. He confirmed that he identified one person in particular who he says was not the appellant. He also confirmed that he followed a person who crossed the street from the promenade to the Roma Hotel during which time Attila Somlyai was on the outside of the mentioned hotel. He said that he saw Stephen Egbo who he had observed crossing the promenade towards Attila Somlyai and then arrested Stephen Egbo. He confirmed that at no point did he see the appellant in the vicinities whilst this controlled delivery was taking place.

PC 323 Cedric Buhagiar[22] testified on the 19th of January 2011 where he stated that on the 26th of November 2010, they took Somlyai Attila to Mater Dei Hospital and it was certified that he was carrying foreign bodies inside his body. He also stated that on the 27th November, they escorted Attila to the Roma Hotel where a controlled delivery was taking place and as a result Stephen Egbo was arrested.

PC 323 Cedric Buhagiar[23] testified once again on the 11th of February 2011 whereby he added that during their watch Attila excreted seven (7) capsules in their presence.

Ronald Cilia[24] testified on the 1st of February 2011 and when shown Doc. "RC" he stated that this document relates to transactions sent by the appellant, which search was made from the 1st January, 2008 up to the 13th December, 2010 from which it resulted that Uchena Anya made five transactions for the total sum of €3169.87. As far as Doc. "RC 1"[25] is concerned, he said that it relates to other transactions sent by Uchena Anya from the 1st January, 2008 to the 13th December, 2010 for the total sum of €45,620.33.

[22] Fol. 152 et seq of the proceedings.
[23] Fol. 189 et seq of the proceedings.
[24] Fol. 166 et seq of the proceedings.
[25] Fol. 22 et seq of the proceedings.

Audrey Ghigo[26] testified on behalf of HSBC Bank on the 11th February, 2011 and gave details about the appellant's bank account details.

George Cremona[27] testified on the 11th February, 2011 where he stated that his position is that of Principal Officer at the Social Security Department. He testified that the appellant is registered under the Social Security Act with the number B43860287 and said that the appellant was in receipt of an injury benefit for some period during the year 2009 and that when testified the appellant was not receiving any benefits.

Jennifer Debono[28] testified on the 11th February, 2011 as a senior executive at the ETC Corporation and verified the copy of the employment history of the appellant which indicates that he worked with Float Glass Ltd from the 26th September 2008 to the 31st December 2009 as a machine operator. Following the termination with Float Glass, she said that they did not have any records of further employment.

Romuald Attard[29] testified on the 11th February, 2011 on behalf of BOV Bank and stated that the appellant had no bank accounts with the bank.

Joseph Gauci[30] testified on the 11th February, 2011 where he stated that he was the Principal Officer at the Inland Revenue in Floriana. He stated that the appellant is registered with the department, but he never sent any claims.

WPC 149 Ruth Sammut[31] testified on the 11th February, 2011 where she stated that on the 27th November, 2010 she was duty first watch Mater Dei with Attila together with PC1099. PC 323 and PC 777 handed over to them thirty-five (35) capsules. During their shift, Attila excreted another 25 capsules. All the capsules were handed over to the SOCO police, PS 36 and PS 612.

[26] Fol. 176 et seq of the proceedings.
[27] Fol. 179 et seq of the proceedings.
[28] Fol. 182 et seq of the proceedings.
[29] Fol. 185 et seq of the proceedings.
[30] Fol. 187 et seq of the proceedings.
[31] Fol. 191 et seq of the proceedings.

PC 1099 Charles Farrugia[32] testified on the 11th February, 2011 that on the 27th November, 2010 he was fixed point with Attila at Mater Dei Hospital and at 5.00am they took handover from PC 777 and 323 the amount of thirty-five (35) capsules and during the shift time, Somlyai excreted another twenty-five (25) capsules.

Godwin Sammut[33] testified on the 17th May, 2011 and presented a copy of his report in the Inquiry regarding the finding of capsules containing a substance suspected to be illicit drugs on Attila Somlyai on the 27th. of November 2010. As a conclusion, cocaine was found from the extracts from the white powder and the total number of capsules was sixty (60) and the total weight was of 582.6 grams with purity of 38% and value of €44,266.96.

PS 612 Theo Vella and PS 36 Sergio Azzopardi[34] testified on the 17th May, 2011 and stated that on the 27th November, 2010 they were informed by Inspector Dennis Theuma that a Magisterial Inquiry was being held in connection with a drug-related case. They testified that on the same date they went to Mater Dei Hospital where they were handed over sixty (60) capsules containing suspected drugs, which on the same day were handed over to Scientist Godwin Sammut. They exhibited their report which was marked as Doc. "TV".

Anthony Cutajar[35] testified on the 17th May, 2011 that on the 26th November, 2010 he was duty at Malta International Airport and whilst monitoring passengers arriving on a flight from Dusselforf with his colleague Neville Cesareo they stopped a Romanian national by the name of Attila Somlyai and that nothing irregular resulted from a search on his person and in his luggage. He said that Inspector Dennis Theuma was informed and that Attila Somlyai was eventually escorted by PS 1220.

[32] Fol. 193 et seq of the proceedings.
[33] Fol. 230 et seq of the proceedings.
[34] Fol. 247 et seq of the proceedings.
[35] Fol. 256 et seq of the proceedings.

Cross-examined and asked about the appellant, he replied that he does not know him, never heard of him and was not involved in the search carried out on Attila Somlyai.

Stephen Cachia[36] testified on the 4th of August 2011 on behalf of Transport Malta stating that from research on vehicles registered in the name of the appellant, it transpired that he has a vehicle Kia Avella bearing registration number DAI 608, colour blue and that the same vehicle had been registered on his name since the 16th February 2010.

Alphonse Cauchi[37] testified on the 4th of August 2011 on behalf of AirMalta and stated that on the 26th of November 2010 Attila Somlyai travelled to Malta from Dusseldorf on flight number KM 353. He continued by saying that the same Somlyai travelled again to Malta on the 29th October, 2010 on KM 539 from Budapest and that on the 3rd November, 2010 he left Malta for Vienna on flight number KM 512.

Mario Mizzi[38] testified on the 4th August, 2011 on behalf of Malta Institute for Finance Computer Science and said that he had been working with the company from the 6th June, 2011 and that he does not know the appellant but specifies that the appellant had attended two courses: one which he ended and the other one not.

Dr Kristina Mintoff[39] testified on the 16th September, 2011 and exhibited a discharge letter (Doc. "CM") of Attila Somlyai from the Surgical Department at Mater Dei Hospital. She said that the mentioned Somlyai was admitted to Mater Dei Hospital on the 26th November, 2010 because he had ingested pellets and that he was discharged on the 27th November, 2010 once he passed them.

[36] Fol. 277 et seq of the proceedings.
[37] Fol. 281 et seq of the proceedings.
[38] Fol. 287 et seq of the proceedings.
[39] Fol. 298 et seq of the proceedings.

Maria Barbara[40] testified on the 16th September, 2011 on behalf of Roma Hotel and said that from her records it resulted that Attila Somlyai stayed at the mentioned hotel for five (5) nights, specifically from the 29th October, 2010 till the 3rd November, 2010 and that he went again on the 26th November, 2010, when he was with the police.

Attila Somlyai released two statements to the police. The first statement[41] is dated the 27th November, 2010 and the second statement is dated 28th November, 2010.[42] Subsequently, Attila swore these two statements before Magistrate Antonio Mizzi.[43] On the 7th December, 2010 Attila Somlyai released another statement[44] where amongst other things he also identified the appellant from a set of photos shown to him. This statement was also sworn before the then Inquiring Magistrate Dr Audrey Demicoli.

Dr Martin Bajada[45] testified on the 24th January, 2012 where he informed the Court that his appointment was extended by the Court. He exhibited his report which was marked as Doc. "MB 1".

Dr. Martin Bajada[46] also testified during the sitting of the 23rd March, 2017 where he presented as Doc. "MB 1" a true copy of his report together with a CD which forms part of the same report.

Dr. Martin Bajada[47] also testified during the sitting of the 15th June, 2017 where he presented as Doc. "MB 1", a true copy of his report filed in the case *The Police vs. Ikechukwu Stephen Egbo*.

[40] Fol. 304 et seq of the proceedings.
[41] Fol. 361 et seq of the proceedings.
[42] Fol. 365 et seq of the proceedings.
[43] Fol. 369 et seq of the proceedings.
[44] Fol. 43 et seq of the proceedings.
[45] Fol. 379 et seq of the proceedings.
[46] Fol. 848 et seq of the proceedings.
[47] Fol. 856 et seq of the proceedings.

Attila Somylai[48] testified on the 7th March, 2012 saying that he had been to Malta twice, once in October 2010 and once in November 2010, to bring cocaine in his stomach by swallowing it. He said that whilst he was in Amsterdam the person with whom he used to work in drugs told him to come to Malta to bring drugs since this person had some friends in Malta who would buy the drugs from him. He also said that he does not know the name of this person but says that he was a man having black skin colour. He further said that he had the number of his boss saved in his mobile and that his boss in Amsterdam gave him drugs in capsules, he put them in the food, swallowed them and came to Malta directly by plane from Dusseldorf, after going to Dusseldorf by train from Amsterdam. He stated that he did this on both occasions when he came to Malta and that the travelling expenses were paid by his boss who told him to stay at Roma Hotel whose reservation was made by his boss, and which was also paid by his boss. Asked how many capsules he was carrying when he first came to Malta he replies thirty (30). He says that he was meant to get six hundred Euros (€600) from his boss's friend. Asked what the name of his boss's friend is he replied that he does not know but he knew what he looked like. His boss had told him that he had to meet his friend in his hotel room at the Roma Hotel. He said that his friend's boss was supposed to take the drugs from him, that he would be waiting in front of the hotel in a car and he was supposed to go down and deliver the capsules. He continued by saying that his friend's boss was alone in a blue car. When he was asked if he would recognise this individual, he replied in the affirmative and when he was asked if this person was in the Court room, he replied in the negative.

Subsequently, Attila was asked about the second time he came to Malta, in November 2010. His boss' friend gave him the drugs to bring to Malta to give them to his friend who was the same person he had met in October 2010. He said that his friend speaks a little Hungarian and has black skin. He testified that the second time he came to Malta he had brought sixty (60) capsules of cocaine and said that he was not told how much he was going to get paid but he was to be paid by the same person who had paid him in October. He confirmed that when he came to Malta in November 2010 he

[48] Fol. 416 et seq of the proceedings.

was stopped at the Airport and accepted to co-operate with the Police. Asked about the instructions he was given by his boss regarding the delivery in November 2010, he said that he was told to come to Malta, to go to the Roma Hotel and wait for the friend. From the airport the police took him to hospital and subsequently went to the Roma Hotel and then he told the Police that the person was waiting for him. Asked how he knew this, he replied that the boss in Amserdam phoned him on his mobile and told him that the friend will be waiting for him. He said that apart from himself and the Police, in the room there was also the translator present. He says that the boss told him to get out of the room and go downstairs because the person would be waiting for him, so he went downstairs, went to the supermarket with this person, the person realised that there was the Police and he started running to the car and the Police ran after him and caught him. He said that he saw the car but he did not see the colour and also he did not see anyone in the car. He said that he went back to the Roma Hotel and when his boss called him and asked him what happened, he said that he told him that he did not know what had happened and that his friend got scared and just ran away. Asked about the last instructions given to him by the boss before leaving the hotel, he said that the boss told him to go to the toilet, take the capsules out, clean them, put them back in the food, swallow them again and take them back to Amsterdam. When he was asked if when he came to Malta on both occasions in 2010, whether he made any phone calls to anyone, he replied in the negative. He stated that he only received calls from the boss.

He confirmed that he was then arraigned in Court and when asked regarding what happened in December 2010 whilst in Court, he stated that whilst waiting outside the Court Hall, he noticed his boss' black friend, who he said was on his own, doing nothing. He said that he did not speak to anyone and confirmed that Prosecuting Officer Theuma had spoken to him and said that he had told the Prosecuting Officer that that person was the person whom he was supposed to deliver the drugs to. He confirmed that this boss' black friend was the one who was in the car and said that the person's name was Stephen and that he had his number in his mobile phone. He stated that before there were two (2) individuals, both black. He indicated the appellant

Uchena Anya as one of these men. Asked how he knew the appellant, he said that he knew him by name from prison. He also says that he met the appellant for the first time in prison in Malta. Then he says, through the interpreter: "*Yes he knows him from before is the one from the car as the friend of the boss*". Asked about October 2010, he said that there were two persons and confirmed that he went inside a blue car and said that on the driver's seat there was the other individual and the appellant was outside walking. He specified that the appellant was outside the car on his own waiting for him and asked what happened then, he says: "*They went together him and the appellant went to the car and went in the car and delivered the capsules*". He specified that he delivered the capsules to the driver named Stephen who is not present in Court and who in turn gave him the money. Asked if he had spoken to the appellant when he was outside the car, he says that he told him: "*Ok. Thank you*". He says that the appellant was fifty meters away from the car and when they were walking together, the appellant spoke to him in English but he did not understand what he said, however, he made him gestures from which he understood to be quick and that they ended up in the car. He explained that once he handed over the drugs, the two persons stayed in the car and then drove away and he went back to the hotel. He said that Stephen was driving the car.

The witness was shown statement marked as Doc. "DS 1" [49]on which statement he recognised his signature. When he was told that whereas in his testimony he mentioned a blue colour, in the statement he says it was white, and asked if he remembers what was the colour, he replied through his interpreter: "*He does not know white, blue, probably white, he does not know the colour of the car may be white, may be blue but probably white*" When he was told that in the statement he said that the appellant was driving the car and that in his testimony he said that the appellant was not driving the car, he said that the truth is that Stephen was the driver. When asked by the First Court: "*But why did you tell the other Magistrate something different? In other words, why did you lie under oath?"* he replied through his interpreter: "*He is saying Stephen was driving the car*". When asked by the Court as diversely presided why he was lying

[49] Fol. 43 et seq of the proceedings.

under oath, he replies that he does not know. Asked again who was driving the car, he replies that Stephen was. Again he was asked by the Court as diversely presided who was driving the car and he replied that the appellant was. Asked by the defence why an hour ago he said that the driver was Stephen, through his interpreter he replies: "H*e is saying that he does not speak Romanian very well and he got mixed up*" He testified: "*The truth is that the accused here was the driver*". When asked by the First Court whyhe had lied before, he replied that he is afraid of the driver, whom he says is the appellant and of Stephen. He said that he is afraid of Stephen because he fears that when he will finish his sentence, he will be killed. The witness insisted that the written statements contain the truth. Asked by the the First Court "*Why he told us a different story today*?", through his interpreter he replies: "*Because he did not understand, because he speaks Hungarian very good"* He says that he is from Romania and that he speaks Hungarian because in that part of the country they speak Hungarian. He testified: "*Stephen spoke to him and the accused was the driver*". He also specified that here were two persons in the car and that in Romania they drive on the other side. Whereas the appellant was behind the steering wheel, on the passenger's seat there was Stephen and that he was behind the passenger's seat.

Attila Somylai[50] testified again on the 31st of October 2012 and said that he was given sixty (60) capsules by the black man who told him he had to come to Malta and that there will be two persons waiting for him here in Malta. He said that he swallowed all the capsules but did not know what type of drug they contained. He stated that he did this job because he needed money. He also said that he was to receive fifteen Euros (€15) for each capsule and that he had no room booked at Roma Hotel and that when he arrived, he booked the room, he paid for the room from the money the black man known as *nigger*, gave him, who he said gave him two hundred Euros (€200). When asked who was going to pay him for the capsules, he said that two persons were supposed to wait for him in front of the Roma Hotel. He stated that the black man phoned him when he was in the hotel and told him- that there were two persons waiting for him in front of the hotel. At the time he was accompanied by the police.

[50] Fol. 515 et seq of the proceedings.

Asked how he would recognise these persons, he said that he would recognise them since this was his second time round in Malta. He went down from the hotel, he saw the man and he started walking with him. This man was sitting on a bench in front of the sea and as he got downstairs, the Nigger phoned him again to ask him whether he is seeing the man who was sitting down and who he met in October. He confirmed that he did see him and that he recognised him. Asked to look around the Court Hall before the First Court and asked if he could see the dark-skinned person who was on the bench, he first replied in the affirmative and when he was told that he was being asked about November, he replied in the negative. He said that the name of this dark-skinned person who was on the bench was Stephen. Asked how he knew him before November, he replied that in October he had met him when he was waiting for him sitting in a car. Stephen got up and started walking towards him and then he followed him, then Stephen entered a shop, Attila followed him and even the Police followed, but in the shop it seemed that Stephen noticed that something was not on and so he started running out from the shop, but the Police ran after him and caught him. He said that he was then charged in Court and that on one occasion when he was in court, he recognised the appellant Uchena Anya as being the person whom he had met in October when he came to Malta and said that he was also the driver in a blue white car which was about fifty or sixty meters away from the Roma Hotel.

Asked whether he saw the car or the two people first in front of the hotel, he replied that he saw the two people first. When he was asked who were the two men, he replied that one of them was the appellant Uchena Anya and the other was Stephen. He says that when he saw these two men, they approached him and he started walking with them towards the car. When asked to describe the car, he says that it was: "*blue, small car, sort of rounded with rounded corners*". He explained that the car had five doors and asked why he said "*blue and white before*?", he replied: "*He remembers more blue now*". He said that the vehicle was a manual car and that he was still holding the bag whilst walking towards the car. He stated that they sat inside the car and the appellant Uchena Anya was on the right behind the steering wheel, Stephen was on the passenger seat and that he was sitting at the back more to the left but sort of in the

middle. He said that he showed the capsules to Stephen and then handed them over to him. Subsequently, Stephen gave him six hundred Euros (€600). He said that they drove him to the hotel and that Uchena Anya was driving the car, he got out of the car, phoned the black man who told him that in three days he was going to send him a plane ticket and then he travelled back by plane to Amsterdam. This all happened in October 2010.

He testified once again that in November he was offered again fifteen Euros (€15) per capsule and that the *Nigger* gave him one hundred Euros (€100) as spending money. When he was asked whether when he swallowed the capsules in the hotel in Amsterdam in October there were other people as there were in November, he said that in November there were persons from Romania and mentions a couple of names and that in October there were a certain Nikolai and a certain Csaba Fazakas. Asked what Fazakas was doing at the hotel, he said that he was doing the same thing as him but said that Fazakas was sent to another country but does not know where since he left before him.

With reference to the October incident, he stated that he never spoke to the appellant and when the car the latter only spoke to Stephen in a language which he did not understand. Stephen spoke to him in Hungarian. He confirmed the contents of the statements he released before.

Attila Somlyai[51] continued to testify in the sitting dated 10th of January 2013 and when asked about the vehicle he had mentioned, he said that he remembers it was an Opel and when asked if he is sure, he replied that he is not totally sure and later during his testimony he said that it was either an Opel or an Oltcit. He said that it is a five-door car and asked about the colour, he replied that it was blue and then specifies that it was light blue. He continued giving his testimony during the sitting of the 18th February 2014[52] and when he was shown nine photos numbered from one to nine and

[51] Fol. 562 et seq of the proceedings.
[52] Fol. 695 et seq of the proceedings.

asked to try and recognise or identify the vehicle he was mentioning in the other sitting, he chose photo number two.[53] He testified that in his opinion the colour of the car was blue but says that he cannot remember the brand of the car and says that it was either Volkswagen or Opel. Finally, Attila Somlyai[54] testified for the last time during the sitting of the 15th June, 2017 when he no longer had criminal proceedings pending against him. Asked whether he wanted to change or add anything to what he had already testified in these proceedings against Uchena Anya, he replied in the negative.

Inspector Johann Fenech[55] testified on the 10th January, 2013 and said that on the 23rd April, 2011 a certain Csaba Fazakas was arrested at Malta International Airport after approximately two kilos of cocaine were found in his bag. He said that it resulted that Csaba was born in Romania and had a Romanian passport. During the time Csaba was under arrest, he was aware that Csaba had a son abroad named Sabi Fazakas and there were several contacts by sms and by calls between the two during the time Csaba was under arrest. He also said that Csaba Fazakas had told him that his son was calling him and smsing him because a controlled delivery was underway which did not succeed.

Imelda Fede[56] testified on the 27th of November 2013 where she exhibited as Doc. "a translation into English Language of the Letters Rogatory executed by the Judicial Authorities of Spain.

Csaba Fazakas[57] testified via Letters Rogatory that he was born on the 25th May, 1971 and that he does not know who Attila Somlyai is. He said that he has never been to Malta and that the only time he left Romania was through Amsterdam and from there he went to the Gran Canarias. Asked whether he knows Uchena Anya, Csaba says

[53] Fol. 687 of the proceedings.
[54] Fol. 864 et seq of the proceedings.
[55] Fol. 559 et seq of the proceedings.
[56] Fol. 624 et seq of the proceedings.
[57] Fol. 626 et seq of the proceedings.

that he does not know him and that does not know anyone in Malta. Asked if he has heard of a black Nigerian man by the name of Uchena, he answers in the negative and says that he does not know him.

Csaba Fazakas (Senior)[58] testified on the 4th March, 2014 and said that he has a son also called Csaba Fazakas and who is in jail in Spain. When asked how he knows Somlyai, he said that he met him in prison in 2011. Asked: "*Did you ever tell […] Mr. Somlyai Attila or speak to Mr. Somlyai about your son and tell him that he is in prison*?" he replied in the affirmative. He confirmed that he told Attila that he has a son who is in prison.

Andre Azzopardi[59] testified on the 10th December, 2014 and formally exhibited as Doc. "AA" exhibit number KB153/2011 consisting of a white packet containing documents 473/10/01 to 473/10/02, which exhibit was exhibited in the case **The Police vs. Attila Somlyai.**

That, during the sittings of the 17th November 2011, 10th April, 2014, 2nd July, 2014 and 15th October, 2015, Ikechukwu Stephen Egbo testified and when he was duly cautioned since he had a criminal case pending against him, he chose not to tender evidence.

Neville Cesareo[60] testified on the 15th February, 2016 and stated that he is a customs officer at the Customs Department. He said that on the 26th November, 2010 he was night duty at Malta International Airport and that a certain Attila Somlyai who had just arrived from Dusseldorf on flight number KM 353 was stopped. He said that Somlyai's luggage was scanned and was even submitted to a personal search which searches resulted in the negative. He also said that Inspector Dennis Theuma was informed and that two police officers were sent, and they took the mentioned Somlyai

[58] Fol. 699 et seq of the proceedings.
[59] Fol. 748 et seq of the proceedings.
[60] Fol. 793 of the proceedings.

with them to the Police Headquarters and that later they were told that Somlyai was taken for an abdominal x-ray which resulted positive as he was carrying drug capsules in his stomach.

PS 1174 Adrian Sciberras[61] testified on the 15th February, 2016 and stated that his colleagues had apprehended a certain Attila Somlyai as a consequence of which on the 27th November, 2010 the latter was involved in a controlled delivery which was being effected at the Roma Hotel. He said that he learnt that Attila Somlyai received instructions to go out from the hotel and he was outside the hotel and started following Attila as soon as he exited the hotel. He testified: *"He went out from the Roma and went uphill not towards the sea but opposite the sea. He went there, turned on the left in an alley and entered in that alley there was the Tower Supermarket. He entered the Tower Supermaket, I stayed outside the supermarket and PS 1086 went after him in the supermarket"*. He explained that later he saw PS 1086 coming out of the supermarket following another man of dark complexion who later was identified as being Stephen Egbo and PS 1086 asked for his assistance cause the person he who was following was the suspect. He said that they managed to stop Stephen Egbo near Joinwell in Tower Road, Sliema. He followed instructions given by PS 1086 because he was the one who saw contacts between Stephen Egbo and Attila Somlyai.

PS 659 Jeffrey Hughes[62] testified on the 21st March, 2016 where he exhibited his report marked as regarding the recovery of a substance suspected to be drugs on Somlyai Attila on the 27th November, 2010. He says that after examining several pieces of plastic which he retrieved from Court, no fingerprints were developed from the document in question.

PC 777 Chris Ebejer[63] testified on the 21st March, 2016 that on the 26th November, 2010 he was working night watch and they were given instructions to go to the airport to

[61] Fol. 794 of the proceedings
[62] Fol. 800 of the proceedings.
[63] Fol. 811 of the proceedings.

observe passengers arriving on flight number KM 353 from Dusseldorf. He stated that a certain Attila Somlyai was stopped where it was decided that he'll be taken to hospital for an x-ray to check if he was carrying any foreign bodies in his stomach. He testified that the x-ray resulted in the positive and that they had to wait until Somlyai passed the capsules. He said that at about 5.00am he was replaced by other colleagues and later on that day, i.e. on the 27th November, he was instructed to go to Roma Hotel in Sliema because Attila Somlyai wanted to assist in a controlled delivery. He was in Somlyai's room and at some moment Somlyai was contacted by someone and was told to go downstairs into the street because someone had arrived for the capsules. He testified that whilst Somlyai was downstairs, the latter was instructed to walk towards the Tower Supermarket and then he was informed that PS 1086 had arrested a certain Stephen Egbo who had contacted Attila Somlyai.

Dr Maria Cardona[64] testified on the 19th July, 2016 where she said that following her appointment to carry out a report regarding the assets of the appellant, she had compiled her report and presented it to Court. She confirms that this report is the one contained in a blue Arch-Lever File (Doc. "MC").

John Coppini[65] testified on the 30th August, 2016 where he stated that he occupies the position of a Manager at the Valletta Branch of W & J Coppini Financial Services. when he was asked whether he can recognise any signature after being shown pages 140 to 160 of Doc. "MC" (Arch-Lever File), he says that he can recognise his signature.

Adrian Petrilla[66] testified on the 17th November, 2016 and when shown Doc. "DS 1"[67] he said that he had translated from the English Language to the Romanian Language what Attila Somlyai was being asked and confirms that this was a statement released by the same Somlyai. When he was shown page numbers 361 to 367, he once again said that he had translated from the English Language to the Romanian Language and

[64] Fol. 825 of the proceedings.
[65] Fol. 829 of the proceedings.
[66] Fol. 837 et seq of the proceedings.
[67] Fol. 43 of the proceedings.

vice-versa the statements contained in these pages and says that he recognises his signatures on all pages.

Alexia Attard[68] testified on the 29th November, 2016 where she confirmed on oath true copies of Procès-Verbal Number 736/10 relating to drugs found on the person of Attila Somlyai and of Procès-Verbal Number 756/10 relating to the testimony of Attila Somlyai which photocopies she said were made from the proceedings **The Police vs. Ikechukwu Stephen Egbo**.

Anya Uchena[69] testified voluntarily on the 4th April 2019 and stated that he has been in Malta since 2006 and that he came by boat as an immigrant. He had worked at several places after being released from detention and says that he worked at Float Glass Company, Valletta Glass and at the time being he was working in Buġibba. He confirmed that during the period between 2009 and 2011 he worked regularly and earned money and asked how much he earned, he said about seven hundred (700) or eight hundred (800). He also said that he did some other work and even overtime. Asked if he knew Attila Somlyai who testified in these proceedings, he replied in the negative. Asked what he had to say about the fact that Attila explained that he was involved in a drug dealing where he was also present, he replied "*I never deal with I don't know Attila*". He stated that he has never been involved in any drug dealing. Regarding Stephen Egbo, he said that they lived together in an apartment and when he was asked if they were friends, he said that they were not properly friends but they lived together. Asked if he ever spoke with Stephen Egbo about any drugs, he replied in the negative. When he testified, he is working as a bartender and that he was working regularly. To the question: "*During the case, there are a lot of transactions whereby you used to send money via Western Union to various people, what can you say about those transactions if you remember anything*?",he replied: "I *can remember some transactions I make even to my continent some of the money is not mine cause some people had them to send the money because I have…*". Asked to repeat, he said that some persons who did not

[68] Fol. 878 of the proceedings.
[69] Fol. 890 et seq of the proceedings.

have a valid document, would go to him, give him the money so that he could send money on their behalf via Western Union to their parents. He explained that in this case the money was not his. He confirmed that there were some transactions which were sent by his money. Asked who are the persons who he used to send money for, he replied: "I *can't remember because most of them they made when I used to find a job in Marsa nobody's staying at Marsa over there so they would come with me I don't know them"* He confirmed that he did send money to his family members and mentions his brother Isaac Ekeoma. He also confirmed that he used to send him money from the money he earned here in Malta to help him and his family.

Cross-examined by the prosecution he confirmed that he was arrested in 2010. Asked if he was working all the time during the four years he was in Malta before he was arrested, he replied in the affirmative. He said that he got paid on average seven hundred Euros (€700) and sometimes he used to do overtime. He said that he does not have many expenses as he even worked on Sundays. He confirmed that he did pay rent to the landlord and asked how much rent he paid he said around three hundred and twenty Euros (€320). He stated that it was a two-bedroom apartment and the rent was shared between two and hence he personally paid one hundred and sixty Euros (€160). When asked how much he would quantify the expenses regarding food and other needs, he replied: "*In a month may be seventy because we share by two because we cook together*" He confirmed that he bought a car for one thousand and eight hundred Euros (€1,800) and that he paid eight hundred Euros (€800) as deposit and that the remaining one thousand Euros (€1,000) were paid in instalments. He said that not all the money he sent abroad was his because at times he would do a favour to other individuals. He testified that even the €20,000 where not all his because some people they don't trust even they will talk "*can you give to your brother maybe after someone will come and collect it from your brother*?" He confirmed that the money his brother was receiving from him was given to him by others in Malta and the role of his brother was to give that money to their family. He said that his brother was a bank employee. He confirmed that he speaks very good English and when he was asked if he understands a bit of Hungarian, he replied in the negative. Asked if Stephen Egbo

understood Hungarian, he replied in the affirmative because he lives in Hungary. He said that Stephen Egbo and himself are not from the same region in Nigeria and that they are not neighbours but said they hail from the same tribe and they speak the same language. He stated that he met Stephen Egbo about two or three months before he was arrested. He said that the first time he met Stephen Egbo was in Msida where they used to make telephone calls and Stephen Egbo told him that he was looking for a house and he told him that a friend of his was leaving and when this friend leaves, he would tell Egbo. He confirmed that when he was arrested he was in the company of two Hungarian ladies. He said that one of them is his wife Vanda Granek and the other is Tunde, Stephen Egbo's wife. Asked the question: "*So how did you communicate with Vanda because I don't recall that she understood English*?" he replied "*She does not understand English but Steve that is the most important we are living together because I know through Steve and his wife they all translate but she understand but she can't speak*". He said that he has never been to Hungary. To the question as to how he met his wife, he replied that he knows Vanda through Tunde. He said that he had a Kia Avella. When asked if before he was arrested he had ever been to Sliema with his car, he replied in the affirmative and said that he went with Vanda, Tunde and Stephen Egbo because they wanted to translate the marriage certificate. When he was asked if Stephen Egbo had ever asked him to take him somewhere with his car, he replied that normally, if he has time, he would take him. He said that he never saw Attila Somlyai.

Probation Officer Charisse Boffa[70] testified on the 16th January 2020 where she exhibited a social inquiry report drawn up by herself. She said that according to the Malta Police criminal records, the appellant is of clean conduct and he informed her that he had another pending case regarding similar charges. She said that the appellant explained to her that he came to Malta in June 2006 due to troubles in his home country and that at this point in time he had limited contact with his family since he has been in Malta for a number of years. She said that the appellant has two daughters, one in Nigeria and one in Hungary and that he keeps contact with his family through social media. She also stated that the appellant has been in a stable

[70] Fol. 907 et seq of the proceedings.

relationship for the past five years and that they live together in an apartment in Xemxija where she carried out a home visit. She also said that the appellant works as a store-keeper on a full-time basis and that this is confirmed from the Jobs Plus records. She testified that the appellant affirmed that he occasionally drinks and that he used to smoke cannabis however he no longer makes use of any illicit substances. She said that all urine tests carried out at the department resulted in the negative for the substances of cocaine, heroin, amphetamine and cannabis.

Considers,

The first part of the appellant's first grievance is **marked A (1)** and it regards the fact that the Magistrate presiding over the case and who delivered judgment did not have the opportunity to hear Attila Somylai and the bulk of the other witnesses, and thus was not in a position to appreciate his testimony as required by law in Article 637 of the Criminal Code. This Court here makes reference to fol. 780 of the proceedings where in the sitting dated the 15th of October, 2015, both the prosecution and the defence exempted the First Court, as presided by the new, then Magistrate Dr Neville Camilleri, to re-hear all the witnesses who had already testified before the same Court as previously presided by a different Magistrate. On the 15th of October 2015, the appellant was also duly assisted by his lawyer at the time, and this is reflected in the minutes recorded in the acts of the proceedings a fol. 780. This Court is perplexed about the fact that the appellant brought forward this grievance at this stage when previously he had declared through his lawyer that he was exempting the Magistrate who gave judgement from re-hearing the witnesses that had already testified before another Magistrate. Moreover, the appellant is not correct, and his claim is contradictory to what had been declared in the minutes a fol. 780 of the proceedings. Therefore, this part of the first grievance is being dismissed.

In the second part of the first grievance **marked A2**, the appellant is claiming that there is no evidence of what was inside the capsules and in what amounts. The appellant in his application is emphasising on the fact that the Prosecution's main witness Attila

Somalyi emphasised more than once that he was not aware of the type of the drug the capsules contained. The appellant also states that no evidence was brought as to the amount of any alleged illicit substance. In this regard, this Court makes reference to Scientist Godwin Sammut's report a fol. 232 et seq of the proceedings where he concluded that the drug found in the capsules was cocaine which in total weighed 582.46 gramms with 36% purity. Furthermore, the Court makes reference to the statement[71] dated 28th November, 2010 when the prosecutor asked Attila about the twenty-four (24) capsules he got to Malta in October. When asked about the type of drug the capsules contained he replied with the following:

> "***they contained cocaine, they were the same size, shape and colour as the capsules I brought in last Friday."***

Reference is also being made to the statement[72] of Attila Somlyai dated 7th December, 2010 where the latter mentioned more than once specifically '**cocaine filled capsules'.**

Moreover, this Court also refers to fol. 416[73] of the proceedings where Attila Somylai testified the following:

> *Pros: So explain to the Court you have been to Malta how many times?*
>
> *Witness: Twice*
>
> *Pros: And in those **two times**[74] you came to Malta what was the reason for your visit Mr Somylai?*
>
> *Witness: To bring drugs*

[71] Fol. 365 et seq of the proceedings.
[72] Fol. 43 et seq of the proceedings.
[73] During the sitting dated 7th March, 2012.
[74] Emphasis of this Court.

Pros: What type of drugs?

Witness: ***Cocaine****.*

Once again, a fol. 421, when Attila was asked the following by the prosecution: '*When he came over in October two thousand and ten (2010) what types of drugs he was carrying and in what form he was carrying those drugs?'* Attila replied: '***Cocaine and it the capsule'.*** In all fairness, the Court also notices how in his first statement[75] released to the police asked what type of drugs he was carrying in November, he replied: '***I know the 60 capsules I swallowed contained drugs but I do not know what type of drugs***'. Subsequently, in his testimony[76] before the first Court on the 31st October, 2012, Attila, when asked about the contents of the sixty (60) capsules he replied that he knew it was a drug since the black man from abroad had told him, but when asked '*Did he suspect what type of drug it could be*?' The interpreter on his behalf replied '***He never came close to drugs before. He never used it, so he didn't know****.*' In view of the above, conflicting versions can be noted, where at times Attila stated that he knew the type of drug the capsules contained, while at other times he stated that he knew that the capsules contained a drug but not the type of drug. This Court believes that Attila Somylai is credible and consistent in most parts of his statements and testimonies, however, with regards to the October capsules, while this Court is convinced that the latter contained drugs, it is not convinced beyond reasonable doubt that the drug was in fact cocaine. For these reasons, this part of the first grievance is being upheld.

In the grievance **marked as A3,** the appellant is stating that evidence relating to the November incident should have no bearing on the October incident and no inference should be drawn. Even though, the two incidents are separate and took place in two different months, it is needless to say that both cases have some common denominators. Attila Somylai is the main witness of both cases, where the latter ingested drugs and brought them over to Malta from abroad. Furthermore, inferences

[75] Fol. 361 et seq of the proceedings.
[76] Fol. 519 of the proceedings.

should not be drawn, for instance it doesn't mean that the drugs brought to Malta in October were of the same purity of the drugs brought to Malta in November. The appellant also mentions how the drugs brought to Malta in November were not tested in an accredited laboratory. On this matter, this Court have pronounced itself in various judgments.[77] The Council Framework Decision 2009/905 JHA on Accreditation of forensic service providers carrying out laboratory activities dated 30th November 2009 was transposed to Maltese law by means of Subsidiary Legislation 460.31 on the 29th March, 2016. Moreover, Article 2 of the Council Framework Decision and Article 3 of the aforementioned Subsidiary Legislation both provide that the framework decision shall apply to laboratory activities resulting in DNA-profile and dactyloscopic data, both of which have nothing to do with drugs analysis. Hence, this part of the first grievance is also being rejected.

The grievance **marked as A4** speaks of lack of a good and effective translation. The Court highlights the fact it is only at this stage that the appellant has brought up this issue. Throughout the proceedings before the First Court, the appellant was always assisted by a lawyer, and this issue was never raised. The appellant fails to substantiate his claims as to Ms Stivala's alleged incompetence, an interpreter that has served these Courts in other cases. For these reasons and since this part of the first grievance is vexatious, this Court is dismissing it.

The appellant, in the grievance **marked as A5** states that the charge of importation has not been proved. He insists that the prosecution did not produce any evidence linking the appellant to the importation of any illicit substances. He continued to say that there is no evidence showing any link between Attila Somylai and the appellant before the importation or any other evidence that it was the accused who imported or caused to be imported or took steps preparatory to import the cocaine in Malta.

[77] See **Ir-Repubblika ta' Malta vs Jonathan Cassar** delivered by the Criminal Court on the 5th March, 2024.

Article 2 of Chapter 101 of the Laws of Malta defines "import" with the following:

> *"import" with its grammatical variations and cognate expressions, in relation to Malta, means* ***to bring or cause to be brought into Malta*** *by air or water, otherwise than in transit."*

Furthermore, Article 15A of Chapter 101 of the Laws of Malta provides that:

> *'15A. (1) No person shall* ***import*** *or export, or* ***cause to be imported*** *or exported,* ***or take any steps preparatory to importing*** *or exporting, any dangerous drug into or from Malta except in pursuance of and in accordance with the provisions of this Ordinance.*
>
> *(2) For the purposes of this article the words "import" and "export" and their grammatical variations and cognate expressions shall have the meaning assigned to them in article 2(1).'*

This Court believes that there have been preparatory acts and/or participation by the appellant to cause the importation of the drug capsules into Malta in October 2010. However, the appellant was specifically accused of the importation of the drug cocaine and not just any drug. Reference is here made to the previous sub-grievance marked as A2, where it was highlighted that it was not proved beyond any reasonable doubt that the drug imported to Malta in October was in fact cocaine. Furthermore, as it results from the acts of the proceedings, since the appellant was only involved in the October incident, this Court believes that it cannot find the appellant guilty of the charge of importation and hence why it is upholding this part of the first grievance marked as A5.

In the grievance **marked as A6**, the appellant states that the elements of conspiracy have not been proved beyond reasonable doubt.

Article 22(1)(f) of Chapter 101 of the Laws of Malta provides that:

> *'Any person (f) who 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.'*

Furthermore, Article 22(1A) of Chapter 101 continues by stating that:

> *'**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'***

Therefore, the three elements that must be proved for the crime of conspiracy to result are:

i) The agreement between two or more persons

ii) The intention to deal in drugs

iii) The agreed plan of action.[78]

In the judgment in the names **The Republic of Malta vs Steven John Caddick, Phillip Walker, Omissis**[79] the Court mentioned the abovementioned elements which are essential to the crime of conspiracy:

> *"… the First Court correctly stated that the three elements that had to be proved for the crime of conspiracy to result, were the agreement between two or more persons, the intention to deal in drugs and the agreed plan of action; and, as also correctly stated by the First Court, "it is irrelevant whether that agreement was ever put into practice".*

[78] See **Il-Pulizija vs Dumbaya Almani** decided on the 31st January, 2013.
[79] Decided by the Court of Appeal in its Superior Jurisdiction on the 6th March, 2003.

> *… Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed "from the moment in which any mode of action whatsoever is planned or agreed upon between two or more persons" (section 22(1A) Chapter 101).* ***Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of the mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person or persons concerned may be charged both with conspiracy*** *and the attempted or consummated offence of dealing, with the conspirators becoming (for the purpose of the attempted or consummated offence) co-principals or accomplices …"*

This Court has gone through all the evidence brought before the Court of Magistrates and took note of all the acts of the proceedings. Furthermore, this Court believes that it was proven beyond any reasonable doubt that the appellant was involved in the conspiracy to deal in drugs and this particularly to the incident of October 2010. Attila Somlyai came to Malta carrying drug capsules in his body. Everything was planned, where he had to go, what he had to do, who he had to meet and that in the end he was also going to get paid for his service. The appellant knew what was going to happen, what was planned to happen and who was involved. Therefore, a detailed plan to import drugs in Malta was in place and this Court is convinced that the appellant was actively involved in this. For these reasons, since the three elements that make up the crime of conspiracy exist, this Court is dismissing this grievance marked as A6.

In the grievance **marked A7**, the appellant is emphasising that his testimony is sufficient on a balance of probabilities. This Court have seen both the appellant's

statement and the appellant's testimony before the First Court. Furthermore, it does not believe that the appellant was not involved in drug business activities and that he did not know and/or that he never met Attila Somylai. The evidence of Somlyai was even corroborated by the evidence of the police. This Court believes that the majority of what Somlyai has stated in his statements and testimonies is more credible than what the appellant had stated in both his statement and testimony. Moreover, even though the level of proof required by the appellant is lesser than that of the prosecution, this Court is of the opinion that the appellant didn't even convince this Court on a balance of probabilities. Hence for these reasons, the sub-grievance marked A7 is also being rejected.

By means of grievance **marked A8,** the appellant is arguing that the charge relating to money laundering was no sufficiently proven.

In the case in the names **The Police vs Omissis and Vladimir Omar Fernandez Delgado**[80] the Court stated the following on the crime of money laundering and our law:

> *'The prevention of Money Laundering Act was enacted on the 23rd September 1994, with subsequent amendments coming into force by means of Act XXXI of 2007 and 13 Act VI of 2010. These amendments had a significant impact on the offence of money laundering to the extent that although prior to 2007, the suspect necessarily had to have full knowledge that the money in his possession was laundered, having as its source an underlying criminal activity, after 2007 it was enough for the prosecution to prove that the accused had the suspicion of the illegal source of that money, for a guilty verdict to be reached. With the amendments coming into force in 2010, not only was the prosecution relieved of the burden to prove that there had been a conviction with regard to the underlying criminal activity, but it was no longer*

[80] Decided by the Court of Criminal Appeal (Inferior Jurisdiction) on the 19th November, 2015.

necessary either to prove which particular criminal activity was at the source of the laundered money. These amendments, in the opinion of this Court, had far reaching effects, since the burden of proof needed to obtain a conviction for the offence of money laundering is now less tough on the prosecution, shifting the ball into the accused's court who is in a more difficult position to prove his innocence, necessarily having to give plausible justifications with regard to his degree of knowledge or suspicion about the underlying criminal activity linked to the offence with which he is being charged.'

*This is being said since the Prosecution need only prove a mere suspicion on the part of accused regarding the source of the money, the degree of suspicion, as opposed to the certainty brought about by proof of full knowledge, being merely subjective and personal. In the past the courts have extended the definition of knowledge beyond actual knowledge and included situations where the facts would be clear to an honest and reasonable person. It would also include turning a blind eye. Suspicion, on the contrary, is essentially a subjective issue and so is less than knowledge. The Court of Appeal in England had this to say on the matter: (**Regina vs Hilda Gondwe Da Silva**):*

"The word suspect means that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.

…

Unfortunately our law does not give a definition of what amounts to "suspicion" and consequently if the prosecution manages to prove such suspicion of the illegal source of the money, then their job is done. It is incumbent on the accused to bring forward evidence to rebut the alleged "suspicion", as being fanciful or a mere possibility. It is then up to the

judge or jury to evaluate both sides of the coin in order to establish whether that suspicion is such as can lead to a conviction."

Article 2 of Chapter 373 of the Laws of Malta defines money laundering. Furthermore, for the appellant to be found guilty of the offence of money laundering, his activity has to fall within the circumstances described in paragraphs (i) to (iv) of Article 2. In the judgment in the names **Il-Pulizija (Insp Angelo Gafa') vs Carlos Frias Mateo**,[81] the Court of Magistrates highlighted some amendments that were made to Chapter 373 of the Laws of Malta:

'L-Att kontra l-Money Laundering sar parti mil-ligi taghna fit-23 ta' Settembru 1994. Wara dana kien hemm diversi emendi fil-ligi, bl-emendi ewelenin jigu fis-sehh bl-Att XXXI ta'l-2007 u l-Att VI tal-2010. Dawna l-emendi huma sinifikanti fis-sens illi filwaqt illi qabel l-2007 l-persuna suspettata trid ikollha ix-xjenza illi l-flus jew proprjeta tkun gejja minn attivita kriminali, wara l-2007 huwa bizzejjed illi l-persuna suspettata ikollu is-suspett ta' tali provenjenza kriminuza sabiex tkun tista' tinstab htija. Inoltre ai fini ta' prosekuzzjoni tar-reat l-emenda li dahhlet fis-sehh fl-2010 ghal-artikolu 2(2a) ta'l-Att, il-prosekuzjoni mhux biss ma tenhtigiliex tipprova illi kien hemm il-kundanna ghar-reat sottostanti illi lanqas jinhtiegilha tipprova bil-preciz liema hija l-attivita kriminali sottostanti, tali emenda ovvjament ma issibx applikazzjoni fil-kaz in dizamina peress illi l-akkuza tirreferi ghas-sena 2009.'

That contrary to the abovementioned case, Article 2(2)(a) applies to these proceedings since Act VII of 2010 came into force on the 22nd June, 2010 and the alleged drug dealings took place in the months of October and November of the same year. The

[81] Decided by the Court of Magistrates on the 5th August, 2011. This Case was also appealed and decided on the 19th January, 2012.

Court of Magistrates in the case above also explained Article 2(2)(a) of Chapter 373 of the Laws of Malta:

> *'Dana ifisser illi ghalkemm l-attivita kriminali sottostanti ma tigix ippruvata, madanakollu jekk il-prosekuzzjoni jirnexxielha tipprova illi s-sors tal-flus gej minn dik l-attivita kriminali allura ir-reat ikun gie ippruvat, u ma ikunx hemm il-htiega ta' prova rigward xi sentenza ta' kundanna in konnessjoni mar-reat sottostanti.'*

The Prosecution is assisted, to a certain extent, in demonstrating the necessary criminal origin of the questioned laundered proceeds through direct evidence when available, or through circumstantial or other types of evidence. The Prosecution is not required to obtain an actual conviction for the underlying offence. The Law does not mandate that they precisely prove the specific nature of the crime involved.

Moreover, the accused does not need to be aware of the exact nature of the crime from which the proceeds are derived. It is sufficient that he knows or suspects that these proceeds may have an illicit origin.

In applying this to the current case, it means that the Prosecution does not need to prove the appellant's guilt specifically, but rather the nature of his operations, such as the drug dealings, or that something appeared suspicious to him at a certain point in time.

An exception concerning the level of proof and/or the burden in such cases emanates from Article 3(3) of Chapter 373 which refers directly to a shift in the burden of proof:

> *'In proceedings for an offence of money laundering under this Act the provisions of article 22(1C)(b) of the Dangerous Drugs Ordinance shall mutatis mutandis apply.'*

In the abovementioned Article, reference is made to Article 22(1C)(b) of Chapter 101 of the Laws of Malta which provides:

> *'In proceedings for an offence under paragraph (a) where the prosecution produces evidence that no reasonable explanation was given by the person charged or accused showing that such money, property or proceeds was not money, property or proceeds described in the said paragraph, the burden of showing the lawful origin of such money, property or proceeds shall lie with the person charged or accused.'*

It must be emphasised that the Prosecution must still proof the nexus between the criminal activity and the dubious monies, but it lies with the accused, the appellant in this case, to provide a reasonable explanation and to prove on a level of probability, the lawful origin of the proceeds in question. It is incumbent on the appellant to give a reasonable explanation as to the source of the money and concluded "*tqis il-presunzjoni hija rebuttable and is not in itself unreasonable, u … illi x-shifting tal-burden of proof huwa wiehed legali u jhalli l-fair balance rikjest ghall-iskopijiet ta' guri."*[82]

In the appeal in the names **Il-Pulizija (Insp Angelo Gafa') vs Carlos Frias Mateo**[83] it was further explained that:

> *'Dana jfisser illi l-prosekuzzjoni m'ghandix tipprova lill-Qorti l-origini tal-flus, lanqas jekk il-flus kienu llegali.* ***Kull ma trid tippruva huwa fuq grad ta' "prima facie" illi ma hemm l-ebda spjegazzjoni logika u plawsibbli dwar l-origini ta' dawk il-flus. Darba ssir din il-prova fil-grad imsemmi, jkun imiss lill-akkuzat sabiex juri illi l-origini tal-flus ma kienx illegali.'***

[82] See **Andrew Ellul Sulivan vs Commissioner of Police et**, decided by the First Court Civil Court(Constitutional jurisdiction) on the 8thJuly, 2004.
[83] Decided by the Court of Criminal Appeal (Inferior Jurisdiction) on the 19th January, 2012.

The above stated case also made reference to another case in the names "**Il-Pulizija vs Paul Borg**[84] the following was stated:

> *'Ried l-ewwel jigi stabilit xi ness al menu "**prima facie**" li juri li meta l-appellant kien qed jesporta l-flus inkrimati minn Malta kellu l-hsieb li jahbi jew jikkonverti flus li jkun jaf jew li jkollu suspett li dawk il-flus kienu miksuba direttament jew indirettament bhala rizultat ta' xi reat kontemplat fil-Kap.101.'*

Blackstone (At D 6.21) states the following on *prima facie* evidence:

> *"Thus, the standard of proof the Prosecution are now required to satisfy at committal proceedings is very low, lower than that resting on a plaintiff in civil proceedings. It is commonly expressed as establishing a prima facie case or **a case to answer**".*

The *prima facie* level of proof that needs to be proved by the prosecution has been held by our Courts to mean something in between the level of proof on the level of possibility and the level of proof of on a balance of possibilities. It has also been stated that if the Prosecution succeeds to reach this level of proof with regards to the nexus between the property in question and an underlying criminal activity, then the law burdens the accused with proving the legal origins of the property concerned. So the question that needs to be asked here is, 'Is there a case to answer?' If the answer is yes, then the burden of proof is shifted on the accused/appellant to prove the legitimate origin of the proceeds on a balance of probabilities.

This Court is convinced beyond any reasonable doubt that the appellant conspired with others to import drugs into Malta and for this reason it will confirm the appellant's guilt with regards to the first charge. Furthermore, with reference to the

[84] Decided by the Court of Criminal Appeal (Inferior Jurisdiction) on the 6th October, 2003.

grievance **marked as A9,** the appellant argues that the prosecution failed to prove any financial gain that he made through drugs. However, it was up to the appellant to prove that all the money transfers to third parties abroad were legitimate and this on a balance of probabilities. The appellant had the chance to bring forward witnesses stating that he used to transfer money for them; correspondence and other documentation attesting to the facts as purported by him. However, he did not present the necessary evidence to substantiate his claims. Moreover, reference here is also made to the grievance **marked as A10**, where the appellant is stressing the fact that he explained the Western Union transfers under oath. This Court have gone all through the transactions made by the appellant to third parties abroad and while it is true that many third country nationals send money abroad to their families, the evidence and the explanation given by the appellant do not add up. The appellant has transferred the total sum of €45,620.33 and this from the 1st January, 2008 to the 13th December,2010, just a span of a bit less than two years. The appellant was only officially employed on a full-time basis as a machine operator with Float Glass Ltd from the 26th September 2008 to the 31st December 2009. Even though the appellant had also confessed that he did some other odd jobs, he did not bring forward any evidence to back up his version and this because this Court believes he is not stating the truth. The appellant did not justify the frequency of the transactions and was not credible when he stated that the money he had sent abroad was not his. Hence, in view of the above, the money laundering charge brought against the accused has been sufficiently proven and for all the abovementioned reasons, this Court is dismissing the grievances marked A8, A9 and A10.

In grievance marked **as A11**, the appellant contends that there has been a wrong appreciation of facts in general. As it has already been stated, it is not customary for this Court as court of appellate jurisdiction to substitute the discretion exercised by the First Court regarding the appreciation of facts if the judgment was legally and reasonably correct. Furthermore, this Court reiterates what it has stated with regards to the previous grievances and even though this Court is upholding the grievances

marked as A2 and A5, thinks that it would be just that this part of the first grievance is also rejected.

The appellant's second grievance **marked with the letter B** regards the punishment inflicted. The appellant contends that even though the punishment inflicted is one within the parameters of the law, it is too harsh, especially when considering that the case goes back eleven (11) years and that he's a first-time offender. Nevertheless, it must be pointed out that these crimes are very serious, and which are also drastically affecting our society and destroying our youth. For these reasons offenders should be punished harshly. However, since this Court is going to uphold the grievances marked A2 and A5, the appellant will be acquitted from the second charge of importation and thus it is only just that the punishment is varied. Hence, for this reason, this grievance is being upheld.

Consequently, this Court is rejecting the grievances marked as A1, A3, A4, A6, A7, A8, A9, A10 and A11. On the other hand, it is upholding the grievances marked as A2 and A5 and so it is acquitting the appellant from the second (2nd) accusation and confirming his guilt in relation to the first (1st) and fifth (5th) accusations. The grievance marked with the letter B, in relation to the punishment inflicted, is also being upheld and so this Court is condemning the appellant Anya Uchena to a period of seven (7) years imprisonment and to the payment of a fine (multa) of nine thousand Euros (€9,000). This Court is confirming the rest of the judgment of the Court of First Instance.

Consuelo Scerri Herrera
Judge