



**The Court of Criminal Appeal**

**His Honour the Chief Justice Mark Chetcuti**

**The Hon. Judge Edwina Grima**

**The Hon. Judge Giovanni Grixti**

**Today the 22nd day of January 2025**

**Bill of Indictment No : 8/2022**

**The Republic of Malta**

**vs.**

**Kayode Kola Ogunleye**

**The Court:**

**1.** Having seen the Bill of Indictment bearing number 8 of the year 2022 filed against Kayode Kola Ogunleye, wherein he was charged by the Attorney General in the name of the Republic of Malta:

**In the First and only Count**, of having, on the seventeenth (17th) day of September of the year two thousand and fourteen (2014) and during the previous days, been

in possession the drug heroin for which section IV of the Dangerous Medicines Ordinance, Cap. 101 of the Laws of Malta applies, when he was not in possession of an import or export authorization issued by the Chief Government Medical Officer in accordance with the provisions of Part VI of the said Ordinance, and when he was not in possession of a license or other authorization to manufacture or supply the said drug, and where he was not otherwise licensed by the Minister responsible for the Department of Health and was not authorized by the Internal Control of Dangerous Drugs Rules, Subsidiary Legislation 101.02, or by any authority granted by the Minister responsible for the Department of Health to have such drugs in his possession, and such drug was not supplied to him for his use by means of a prescription as provided for in the above-mentioned Rules, hence this offence was committed under such circumstances which show that possession of the drug was not for his exclusive use and when he was within one hundred (100) metres of the perimeter of a place where young people habitually meet

2. Having seen the note of preliminary pleas of the accused filed in the registry of the Criminal Court on the 1st of June 2022.
3. Having seen the judgment of the Criminal Court of the 24th of January 2023, wherein the first (1), second (2nd), third (3rd) and fourth (4th) preliminary pleas brought forward by the accused were determined.
4. Having seen the judgment of this Court of the 22<sup>nd</sup> of November 2023 wherein the said four pleas were rejected.
5. Having seen the judgment of the Criminal Court of the 3<sup>rd</sup> of June 2024 wherein the 5<sup>th</sup> and 6<sup>th</sup> preliminary pleas were rejected.
6. Having seen the appeal application filed by the accused Kayode Kola Ogunleye of the 11<sup>th</sup> of June 2024 wherein the Court was requested to revoke the appealed judgment and instead find for the appellant's grievances, thereby accepting the appellant's fifth and sixth preliminary pleas.
7. Having seen the reply filed by the Attorney General on the 1<sup>st</sup> of August 2024 where she requested that the appeal be denied, and the judgment of the Criminal Court confirmed.
8. Having seen all the acts of the case.
9. Having heard submissions by the parties.

## **Considers:**

10. Appellant's grievances in the present appeal application relate to the judgment delivered by the Criminal Court with regards to the fifth and sixth preliminary pleas filed by him which concern the chain of custody of exhibits handed over to court-appointed experts Dr. Godwin Sammut for the forensic examination of the drugs seized, and Jeffrey Hughes the finger print expert. Moreover, appellant considers the exhibit or exhibits presented during the Inquiry which were not labelled with regards to their contents, and thus lack any indication as to the scope behind this piece or pieces of evidence, to be inadmissible too.

11. Appellant is referring, in his first grievance, to the proof emerging from the acts of the compilation of evidence regarding the chain of custody of the following documents, Dok 14CGU 201B, Dok 14CGU 202, and Dok 14CGU 203. He finds objection in the fact that whilst the scene of crime office PS404 Paul Camilleri indicates in his report, Document PC/MV, that he passed on the exhibits to expert Godwin Sammut for analysis on the 29th of September 2014, the expert indicates that these were passed on to him on the 25th of September 2014, thus creating doubt as to the chain of custody of the said exhibits, and consequently their traceability. Also, he finds fault in the fact that in his report expert Godwin Sammut indicates a code number of the drugs analysed which is different from the numbering of the said documents, as indicated above.

12. The Attorney General disagrees with this grievance, since in her opinion the issue of reliability or otherwise of this evidence should be left up to the decision of the jurors during the trial, in whose hands rests the final decision as to which evidence to discard and which to rely on in reaching their verdict, and this after being so directed by the trial judge.

13. The Criminal Court decided this plea in the following manner:

**This Court disagrees with the defence and believes that a defect in the chain of evidence can give rise to an issue of a probative nature and not of inadmissibility of evidence. Such an issue of fact should be left in the hands of the jurors to decide upon during the trial.**

**14.** Now, although the chain of custody of the evidence exhibited in court is crucial in determining the probative force of that piece of evidence, however, this does not render it inadmissible *a priori*, and this at a stage of the proceedings where the evidence is still to be heard during the trial. The chronological documentation, or paper trail, that records the sequence of custody, control, transfer, analysis, and disposition of materials, including physical or electronic evidence can only be carried out at the stage where the evidence is heard during the trial. The Court cannot at this stage of the proceedings delve into these questions of fact which still have to be established before the jury, and although it is true that the compilation of evidence preserves all the evidence which is to be brought forward during the trial, however, the jury is only bound by that evidence which will be presented before it during the actual trial itself. In fact, although the Prosecution generally hands out to the jurors a copy of the reports of the experts presented by them during compilation stage, it is only their testimony during the trial which will be adduced as evidence by the jury when reaching their verdict.

**15.** The necessity of establishing the chain of custody of the material evidence gathered, is necessary in order to prove that this evidence was handled in a scrupulously careful manner so as to prevent tampering or contamination. However, the traceability of this evidence can only be garnered at trial stage and not before. It is only when this evidence is brought forward that it would be possible to establish whether that piece of evidence is still strong, or has lost its probative force due to tampering or contamination.

**16.** The Court cannot at this stage of the proceedings declare inadmissible a piece of evidence which is relevant to the facts in issue simply because during the compilation of evidence a doubt may have arisen as to its traceability, a matter which can only be appraised by the jurors during the trial.

**17.** The Court has, however, examined the acts of the compilation of evidence from where it emerges that the Documents under contestation were handed over to Scene of Crime Officer PS404 Paul Camilleri by members of the Drug Squad carrying out the investigations, and this in the presence of appellant, on the 17th of September

2014(fol.73). This results from the report presented by the Scene of Crime Officers PC813 Clinton Vella and PS404 Paul Camilleri. In this joint report, PS404 Paul Sammut states that he has received the following exhibits:

- i. 14CGU 201b black plastic bag containing a white plastic bag in which there is a brown substance suspected to be an illicit drug, with the drugs given code number L00160177 ---L00160178.
- ii. 14CGU 202 - material bag with words "JB Departmentstores" written on it which contained a striped plastic bag. This plastic bag had in it another plastic bag containing a brown substance suspected to be illicit drugs and another plastic bag containing a brown substance also suspected to be drugs which are given code number L00160175 ---L00289821.
- iii. 14CGU 203 - cardboard box containing a white powder which powder is given code number L00160174

18. In the introductory part to the report, PS404 Paul Camilleri states that he handed the said exhibits to expert Godwin Sammut for scientific analysis on the 29th of September 2014, as indicated in the submission form attached to the report and marked as Document 14CGU GS. Now, the said submission form, which is evidence as to the traceability of the exhibits, states that PS Camilleri passed on these exhibits to Godwin Sammut on the 25th of September 2014 and not on the 29th of September. This same submission form is also attached to the report of expert Godwin Sammut. On the said submission form there is a note which states as follows: *"please note that exhibits, excluding the substance, need to be handed over to PS659 J. Hughes for fingerprint analysis."* (fol.74.)

19. With regard to the numbering of the illicit substance examined by the forensic expert scientist Godwin Sammut, the code number given by the Scene of Crime Officer to the drugs is identical to that indicated by the expert in his report.

20. Now, these facts will be ascertained once again during the trial and it will be left to the jury to decide whether this amounts to contamination and tampering, or otherwise, and the Court cannot at this stage interpret these facts and arrive at a

conclusion with regard to the probative force of such evidence, since this will be left in the hands of the jury, obviously as directed by the trial judge in his final address.

21. That the judgments which appellant makes reference to in his appeal application, as rightly pointed out by the Attorney General have no bearing on the subject matter at issue in this present instance. The judgment *il-Pulizija vs Nazzarno Zarb u Melchior Spiteri*, decided by the Court of Criminal Appeal in its inferior jurisdiction on the 16th of December 1998, speaks of the probative force of the expert report which was to be determined by the Court, and this in proceedings before the Court of Magistrates as a Court of Criminal Judicature. The other judgment cited by appellant *Ir-Repubblika ta' Malta vs David Norbert Schembri*, decided by the Criminal Court on the 31st of May 2007, deals with the question whether a recording of a telephone conversation was in violation of a disposition of the law thus rendering it inadmissible, where the Court decided that this recording presented by the Prosecuting Officer without bringing forward evidence as to its authenticity rendered it inadmissible and thus could not be presented before the jury.

22. In the present case, the scenario is completely different, since the experts compiling their reports were appointed by the Inquiring Magistrate in the course of the inquiry into the *in genere*, and thus valid at law. The manner in which their reports were compiled and the validity of their conclusions, and thus whether these contain probatory value, may only be decided during the trial and not before. Consequently the first grievance put forward by appellant is being rejected.

23. In his second grievance appellant contests the admissibility of all documents or objects vaguely referred to as 'exhibit' or 'exhibits' in the record of the Criminal Inquiry, with their contents allegedly remaining unknown making it impossible for him to exert any control over such evidence, by determining its nature, relevance and origins, and thus challenge the same. The Criminal Court decided this plea by making reference to its considerations with regards to the fifth preliminary plea, and thus passes on to reject the same.

**24.** Now, from an examination of the acts before the Criminal Court, and the submissions made by the parties, it seems that appellant is referring to the exhibits presented by experts Godwin Sammut and Jeffrey Hughes before the Court of Criminal Inquiry during the sittings of the 11th of November 2014<sup>1</sup> and the 14th of April 2015 respectively<sup>2</sup>. In fact from the minutes of these hearings the following was noted:

- i. 11th of November 2104 – “Godwin Sammut gave evidence under oath and exhibited Dok GS report and exhibit.”
- ii. 14th of April 2015 – “PS659 Jeffrey Hughes gave evidence under oath and exhibited Dok JH and exhibits.”

**25.** The Court considers this grievance put forward by appellant as completely frivolous. From an examination of the reports and the testimonies of both PS659 Jeffrey Hughes and that of Godwin Sammut, it is abundantly clear that the exhibits presented by these experts during their testimony are the items which were examined by them and indicated in their respective reports. In his report, found at folio 667 of the compilation of evidence, Jeffrey Hughes states that on the 22nd of September 2014 he received from SOCO PS404 Paul Camilleri Dok 14CGU 201a consisting of a shoe box. Then on the 11th of November 2014 he received from Godwin Sammut documents 248\_14\_01FP, 248\_14\_02FP and 248\_14\_03FP – these exhibits refer to the plastic and material coverings found in Dok 14CGU 201B, Dok 14CGU 202, and carboard box Dok 14CGU 203. In his testimony the expert even clarifies that he is presenting the exhibits on which he carried out his analysis. These documents were analysed for fingerprints, and were even photographed by the expert such that the defence is in a position to visually see on which exhibits the analysis was carried out and whether this tallies with the exhibits presented by the expert in court. The same may be said with regards to expert Godwin Sammut who declares that he is presenting to the court the exhibits on which he carried out the analysis and which he

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<sup>1</sup> Fol.63 of the compilation of evidence

<sup>2</sup> Fol.592 of the compilation of evidence

indicates in his report. Furthermore, the Court notes that the defence raised no objection when the experts testified and presented the exhibits as to the contents thereof. At least there is no minute in the records of the compilation of evidence that indicates that the defence raised an issue as to the inadmissibility of the exhibits because the contents thereof were unknown. In fact, the Court considers that there was no reason for the defence to raise such an objection, since both appellant and his lawyer were present in the court room and could verify *ictu oculi* the contents of the said exhibits which the experts were presenting to the Court<sup>3</sup>, and thus the allegation that the contents of such exhibits is unknown to the defence is completely unfounded. For the above reasons even this grievance is being rejected.

**Consequently, for the above-mentioned reasons the Court dismisses the appeal filed by appellant and confirms the judgment of the Criminal Court in its entirety. The Court orders that the acts be remitted before the Criminal Court so that the case may proceed to the trial by jury.**

**The Chief Justice Mark Chetcuti.**

**Judge Edwina Grima.**

**Judge Giovanni Grixti**

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<sup>3</sup> Vide minutes of the said sittings when appellant was present and assisted by his lawyer – fol.63, 592.



