MALTA

COURT OF CRIMINAL APPEAL

HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO

THE HON. MR. JUSTICE
DAVID SCICLUNA

THE HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 24 th June, 2010

Number 6/2006

The Republic of Malta

v.

Mark Charles Kenneth Stephens

The Court:

1. Having seen the bill of indictment filed by the Attorney General on the 17th April 2006 wherein the said Mark Charles Kenneth Stephens was charged with having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in

violation of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) and the Medical and Kindred Professions Ordinance (Chapter 31 of the Laws of Malta), and specifically the crime of dealing illegally in any manner in cocaine, cannabis resin and ecstasy pills and of having promoted, constituted, organized and financed such conspiracy;

2. Having seen the judgement delivered on the 5th November 2008 whereby the Criminal Court, after having seen the jury's verdict by which the said Mark Charles Kenneth Stephens, by seven (7) votes in favour and two (2) votes against, was found guilty of the first and only count of the bill of indictment, declared him guilty of the said first and only count, namely of having prior to the eleventh (11) August two thousand and three (2003), with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and The Medical and Kindred Professions Ordinance (Chapter 31 of the Laws of Malta) and specifically the crime of dealing illegally in any manner in cocaine and ecstasy pills and of having promoted, constituted, organized and financed such conspiracy;

3. Having seen that by the said judgement the first Court, after having seen Sections 9, 10(1), 12, 14, 15A, 20, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(c)(d), 22(f) and 26(1)(2) of the Dangerous Drugs Ordinance (Chap. 101), together with Sections 120A(2)(a)(i)(2A)(2B) and 121A(1)(2) of Chapter 31, and Sections 20, 22, 23 and 533 of the Criminal Code, sentenced the said Mark Charles Kenneth Stephens to a term of imprisonment of twenty five (25) years from which term are to be deducted all the periods during which he was being held under preventive custody in Corradino Correctional Facility only in respect of the charge of conspiracy of which he was found guilty as well as the period of time between his arrest in Spain on the 5th August 2004 until his extradition to Malta on the 9th September 2005, except for the short period from the 23rd November 2004 to the 1st December 2004, and sentenced

him also to a fine *multa* of sixty thousand Euros (€60,000) which fine is to be automatically converted into a further term of imprisonment of eighteen (18) months according to law if it is not paid within fifteen days from the day of the appealed judgement; the Criminal Court further ordered the said Stephens, in terms of Section 533 of the Criminal Code, to pay the sum of one thousand, five hundred and fourteen euros and eighty-five cents (€1,514.85) being the court experts' fees incurred in this case; the amount is to be paid within fifteen (15) days from the day of the appealed judgement. The first Court furthermore ordered that all objects related to the offence and all monies and other moveable and immovable property appertaining to the person convicted are to be confiscated in favour of the Government of Malta; and, finally, ordered the destruction of all drugs exhibited in this and other related cases under the direct supervision of the Deputy Registrar of that Court duly assisted by court expert Mario Mifsud, unless the Attorney General informs the said Court within fifteen days from the day of the appealed judgement that the drugs are also to be preserved for the purposes of other criminal proceedings against third parties and, for this purpose, the Deputy Registrar is to enter a minute in the records of this case reporting to that Court the destruction of said drugs;

4. Having seen that the first Court reached its decision after having considered the following:

"Having considered ALL submissions made by defence counsel which are duly recorded and in particular – but not only – the following:

1. That the verdict of the jury was not a unanimous one;
2. That prior to the proceedings in Malta, he had been under arrest in Spain between the 5th August 2004 and the 9th September 2005, except for a short break between the 23rd of November 2004 and the 1st of December 2004;
3. That although accused was released on bail on the 7th April 2006, as he was under "house arrest", which

in itself created anxiety and a sense of isolation, this should also be taken into account;
4. The Court should also take into Court the length of time of the proceedings in Malta, albeit this was not due to any delay on the part of the Courts but because the accused was contesting the charges on other legal grounds;
5. The accused had children by his first marriage in the United Kingdom some of whom were even university graduates and he has kept up his contact with them during the course of these proceedings and his character has changed dramatically;
6. Although the prosecution had emphasized that this was a case of International drug trafficking this element was not peculiar to this case as practically in most cases, except where cannabis was cultivated locally, all drugs were imported from abroad;
7. Defense counsel also revealed that accused himself has confided with him at the end of the summing up this morning that the presiding Judge had put his case to the jury fairly and had shown a sense of justice;
8. He therefore appealed to this Court to administer punishment with the same sense of justice shown to accused during this trial.

"Having considered prosecuting counsel's submissions that:

1. That although the prosecution agreed that the period during which Stephens had been held under arrest in Spain between the 5th August 2004 and his extradition to Malta on the 9th September 2005 should also be deducted from the punishment to be meted out, except for the period of one (1) week between the 23rd of November and the 1st of December 2004, Stephens had been instrumental in the exportation to Malta of a considerable amount of drugs, namely almost three (3) kilograms of cocaine and over seven (7) thousand ecstasy pills which would have caused untold harm to Maltese society had they not been intercepted at the Malta International Airport by the Police and Customs Officials;

2. That accused had a circle of friends in Malta who were known to dabble in drug dealings. In this case where Eyre has already been convicted and sentenced by this Court after benefiting from certain pleas in mitigation of punishment, one had to keep in mind that Stephens was the main culprit;
3. It resulted from Stephens' Criminal Conduct sheet that he had already been convicted of being in possession of the resin obtained from cannabis and as recently as January of this year was in breech of his bail conditions and sentenced to one month imprisonment;
4. What was of even greater concern however was the fact that on the 21st July 2008 he was arrested at the Airport on the point of departing from Malta under a false passport, thereby attempting to evade the course of justice in this trial. He was therefore at present undergoing Criminal proceedings for possession of a false passport apart from having his bail revoked;
5. All this showed that, contrary to what defense counsel has stated, accused was in no way rehabilitated;
6. Accused's activity was part of an international drug trafficking activity sending out drugs to Malta and Maltese society could not tolerate such activity and when it was discovered, a substantial punishment had to be applied.

"Having seen accused's updated criminal conduct sheet filed by the prosecution and examined by the defense from which the above mentioned convictions result to this Court's satisfaction.

"Having considered the gravity of the case particularly with regard to the volume of drugs involved in the conspiracy."

5. Having seen the application of appeal[1] of the said Mark Charles Kenneth Stephens wherein he requested that this Court revoke the verdict and judgement delivered against

[1] Appellant filed two applications of appeal, one on the 11th November 2008 and another on the 21st November 2008. During the sitting of the 23rd April 2009, appellant's counsel – Doctor Joseph Brincat – stated that the application of appeal that appellant was requesting this Court to consider was that dated 21st Novembr 2008.

him on the 5th November 2008 by the Criminal Court, and instead declare him not guilty, and in any case and alternatively revoke it as to Court expenses and reform it as to punishment; having seen all the records of the case and the documents exhibited; having heard the lengthy submissions made by counsel for appellant and counsel for the respondent Attorney General in the course of a number of sittings; considers:-

6. Appellant's grievances may be, briefly, summed up as follows: (1) there was a wrong interpretation and application of law regarding conspiracy and how it is to be proved; (2) there was a wrong interpretation and application of the law regarding the question of identification or recognition; (3) there was a wrong interpretation and application of the law regarding the difference between impeaching the witness and believing him in whole or in part, or not at all; (4) the first Court's direction to the jury "that the statement could be used to convict (without making the distinction between what is a fact that could be deposed in the statement and procedures which could only be made in the presence of the accused – such as recognition)" was a misdirection to the absolute detriment of the appellant; (5) there was a procedural defect in the summing up which constitutes a violation of the law and had a bearing on the verdict; (6) appellant was wrongly convicted on the facts of the case; (6 *bis*) there was an irregularity in the proceedings regarding the law of evidence which was detrimental to the accused; (7) he should not have been condemned to pay all Court experts' expenses; (8) without prejudice to his insistence that he is not guilty, the punishment was disproportionate. These grievances will be dealt with *seriatim*.

7. With regards to the first grievance, appellant states that "there was no question about the instantaneous nature of the offence of conspiracy in general or in drug dealing. The question was, however, regarding the proof of such an offence. The defence of the appellant dutifully conceded from the very start that it was not always possible, or rarely so, that a conspiracy can be proved in

the ordinary way." Appellant refers to an excerpt[2] from the judgement in the names **Ir-Repubblika ta' Malta v. Godfrey Ellul** delivered by this Court on the 17th March 2005 and states that the meaning of this excerpt is "that the inference may be drawn when the two or more conspirators (and not one of them) do certain criminal acts done in pursuance of an apparent criminal purpose in common between them." He thus argues that the importation attributable to Gregory Eyre, "without any further act, without the involvement of any other person, could not be used as the basis for an inference. The subsequent criminal acts must be [by] the 'parties accused', and not one of them only." Appellant says that the Criminal Court was very attentive on this point during the main defence speech, but during the rejoinder it interjected and said that it would give a direction to the jury on this point. According to appellant, what actually happened was that the presiding judge glossed over the difference, and actually referred to the importation by Gregory Eyre as the execution of the common plan, and from it one can deduce the existence of the original plot. Appellant submits that at best it could prove possibly a plot between Gregory Eyre and Susan Molyneux but not a plot between Gregory Eyre and
appellant. It was abundantly clear from the evidence, the appellant maintains, that there was no involvement even by a telephone call from him [to Gregory Eyre] or to him by Gregory Eyre when he was on Maltese territory. Referring again to the Godfrey Ellul case where the said Ellul was acquitted from the crime of conspiracy, appellant observes that in the Ellul case the witness who made a sworn statement did not accept that he had been part of a plot; in this case it was the other person, the appellant, who denied any such involvement. "The Criminal Court", continues appellant, "could not extend the interpretation of subsequent acts of one alleged conspirator from which inferences could be drawn regarding another alleged conspirator. To rub salt into the wound, the Court repeatedly referred to the fact that the defence did not contest that what Gregory was importing were drugs. The

[2] The relative excerpt will be quoted in its entirety *infra*.

defence had stated also that it was irrelevant to the issue." Appellant also refers to how the defence drew a parallel with a possibly common situation: "A man meets a married woman Mrs X in the village square, whispers something in her ear, they meet later and drive off to a secluded area, where they are surprised in adultery. It is legitimate to draw an inference that the whispering in the ear was a 'conspiracy'. On the other hand, if that same man whispers in that woman's ear, but then is found in a secluded area with another woman, no inference can be drawn that Mrs X had conspired to commit adultery. That is why the excerpt from English case-law is appropriate in the plural when it mentions the acts of the 'parties accused'. This does not necessarily mean that they must be undergoing trial on the same day. It is enough if they are tried separately, but both are indicated as conspirators."

8. Appellant then poses the question as to how this could have such a bearing on the verdict of the jury, and comments:

"When one considers that the underlying theme of the prosecution was that the jurors should use their common sense and intelligence, and see what happened, they could easily reach the conclusion that, once there was the importation, there was the plot. At other times, it was, once there was the plot there was then the importation. So the importation of one proved the plot with the other.

"The Criminal Court agreed with this point of view propounded by the prosecution. Sometimes implicitly and sometimes not so implicitly. It never asked the jury to consider whether there was any evidence (and there was none) of any subsequent act, connected with the actual importation, in which any one else figured (except for the fiancée of Gregory Eyre – whose case was terminated by the Attorney General). The Court used the historical analogy of the conspiracy to murder Julius Caesar. Only those who acted together could be presumed to have acted in the pre-concerted common design, or in the words of English texts 'done in pursuance of an apparent

criminal purpose in common between them'. The sixty conspirators in the murder of Julius Caesar (*recte:* Gaius Julius Ceasar) could have been charged with conspiracy to murder, even if the Roman leader had escaped unscathed.

"The appellant ventures to say that the reasons brought forward by this Honourable Court in the Godfrey Ellul case show that there must be an unequivocal link between the acts done by any one party to implicate the other in a conspiracy.

"There was no question that there was importation of drugs. The defence did not contest it and consequently there was no need for expert evidence. But the defence made it clear that it was irrelevant to this case, as the importation was not attributable in any way to the appellant but solely to Gregory Eyre.

"The Court did at no time in the summing up refer to this defence which was fundamental. It was so fundamental that the appellant gave prior notice on which his defence would be raising objections.

"The position of the appellant was irremediably prejudiced."

9. Now, in his summing-up, the trial judge gave the jurors the following explanation as to the manner in which evidence of a conspiracy could be forthcoming[3]:

"You may tell me, but how are you going to prove that these two have met and agreed? Ah that is a question of evidence, of circumstantial evidence sometimes, how you can infer from other circumstances that there was this agreement because if they were alone when they agreed, nobody can come forward and tell us: 'Yes they were agreeing.' Nobody heard them. One of them might come forward and tell us: 'Yes, I agreed with the other fellow to do that.' But then we have of course to consider how he

[3] Transcription of summing-up at pages 37 and 38.

said that and when he said that, whether he said that voluntarily, whether he said that to benefit from some reduction in punishment, for example, those are other considerations. So you have the crime of conspiracy immediately upon two minds, or more minds – you can have three or four – come together. They need not meet personally; they can use the phone; they can use SMS; they can use fax or whatever, or other means of communication and agree on the mode of operation how they are going to put into practice their plan, the mode of action. In Maltese we call it 'jiftehmu fuq il-mezzi li ser juzaw'."

Later on in the summing-up, the presiding judge said[4]:

"As I told you it is very difficult to prove this crime unless you have a witness to prove it. You can prove it from circumstances as well, surrounding circumstances. Now, if somebody was overhearing the conspirator conspire and that somebody goes to the police and spills the beans and tells them listen yesterday I was in a bar and I heard Mr X and Mr Y conspiring to start importing drugs into Malta. Of course the police will jump on that information and will take action and immediately arrest these people and investigate the matter. There may be another way how the police can get to know of it. If one or more of the conspirators themselves for one reason or another decide to spill the beans or else invent a story because basically this is the alternative here. If Mr Eyre was really conspiring with somebody and that somebody was really the accused, I am saying if, the fact that Mr Eyre comes forward and says I was conspiring with the accused, this of course is one way how the prosecution can prove its case. However one must not only stop there. There are also other means of reaching a conclusion.

"As we said, the essence of the conspiracy is the agreement only, even if nothing else follows. And when two or more agree to carry out their criminal scheme into effect, the very plot is the criminal act itself. The mere fact

[4] *Ibidem* at pages 48 to 50.

that two minds have come together and have agreed to do something on the mode of action, that is enough to constitute the crime and nothing need be done in pursuance of that agreement; they can stop there, forget all about it. They have committed a crime just the same. But how are you going to prove it?

“The agreement may be proved in the usual way by having a witness come forward telling you ‘listen I overheard them conspiring’, Or one of them – they are two or three – one of them comes forward saying ‘listen I was conspiring with X and Y or with X alone, but now I want to come clean’. That is another mode how you can prove the conspiracy, and that is how the prosecution is expecting in this case to prove its case, from what Eyre said. Proof of the existence of conspiracy is generally a matter of inference and you remember yesterday when I was speaking about the example of the circumstantial evidence and I gave you the example of the baby there. I told you what is the inference you can draw from the fact that that man went into there and went out again and you found the baby dead? And in your mind, I hope at least you all came to the same conclusion that that man had murdered that baby, I hope you didn’t reach another conclusion on that one. But when I gave you the second example with the woman coming in again, we all seemed to understand each other and agreed that there the question was different and there were at least two possible inferences, possibly three, and possibly more. And I told you that for circumstances to lead to a conviction they must be univocal and lead to one conclusion and one conclusion alone, because if they can give rise to more than one conclusion then it is not safe to rely on these circumstances to infer and give a conviction of guilt.

“How do you infer? You can infer from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose in common between them. Now, as we said, the case of Eyre and Molyneaux is a charge which is completely different from the charge of conspiracy here, but certainly if you believe Eyre’s first

statement without the modification he made later on there would seem to be, or rather, consider if there seems to be a connection between that [*recte:* this] case and the other case only however to determine the circumstances of the case. The fact that Eyre was convicted because he admitted his guilt should of course in no way imply that the accused should be convicted of conspiracy, because the two are different charges. They are different cases. But certainly the circumstances that follow the alleged conspiracy have to be taken into account to complete the general picture of what happened. As I said you have to be very careful here not to come to the conclusion that Eyre was found guilty of trafficking – possibly of conspiracy as well I think – that you then decide that the accused must be guilty of conspiracy as well. No. But certainly that event which triggered off the whole investigation and the whole case we have before us here today, had a connection undoubtedly - whether rightly or wrongly in the minds of the police, in the minds of the prosecution – with the case of Mr. Stephens. But please make sure to keep it distinct from each other, and it must not influenced [*recte:* you must not be influenced] by the fact that Eyre pleaded guilty or admitted his guilt and was subsequently sentenced. No, that has no bearing on the guilt of the accused, absolutely.

“However, the circumstances have to be considered as well and when you consider these circumstances you will then see whether these circumstances in any way can reflect on the criminal purpose which was agreed to between them. Here, of course, defence counsel argued that whatever Eyre did he didn’t do with the other person. If Eyre imported the drugs here he was on his own, the other one wasn’t with him, Stephens. Fair enough, it is true, yes. But the fact that Eyre came under those circumstances – the other circumstances of when he came the first time and Stivala sent the money and Stivala in the first Court told that he sent the money to this Mr. Stephens and not another Mr. Stephens, whether he got it or not is different now, whether he received it or not is different. Those circumstances are also to be taken into account to complete the general picture, to find out

whether Eyre's first story that he came the first time and had this free holiday and with Mr. Stivala guiding him around and driving him here and there and sending his girlfriend to drive him to the airport and then at the end of it all giving him a packet of thirteen thousand five hundred euros or eleven thousand euros meant for this Mr. Stephens, at the time I was sure now I am not sure, anyway, that again is another question of fact on the basis of likelihood and probability you will decide …."

10. The first thing that this Court wishes to observe is that, as Lord Hailsham, L.C. opined: **"The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case…. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case."** [5] And this is what the presiding judge attempted to do in his summing up. Indeed, this Court cannot see any wrong interpretation or application of the law as suggested by appellant. Appellant's grievance is in fact based on his misinterpretation of what was said in the Godfrey Ellul case. Suffice it here to refer to what was stated by this Court in its judgement of the 2nd November 2009 in the names **The Republic of Malta v. Steven John Lewis Marsden**:

"11. In the Godfrey Ellul case[6] mentioned by appellant, this Court had referred to what is said in **Archbold's Criminal Pleading, Evidence and Practice 2003** in respect of conspiracy**:**

'The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: *Mulcahy v. R*. (1868) L.R. 3 H.L. 306 at 317; *R. v. Warburton* (1870) L.R. 1 C.C.R. 274; *R. v. Tibbits and Windust*

[5] *R. v. Lawrence* [1982] A.C. 510 at 519, H.L. (**Archbold, Criminal Pleading, Evidence and Practice 2006**, para. 4-368, p. 491).

[6] **Ir-Repubblika ta' Malta v. Godfrey Ellul**, decided by this Court on the 17th March 2005.

[1902] 1 K.B. 77 at 89; *R. v. Meyrick and Ribuffi*, 21 Cr.App.R. 94, CCA. Nothing need be done in pursuit of the agreement: *O'Connell v. R.* (1844) 5 St.Tr.(N.S.) 1. [7]

….

'The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it: *R. v. Parsons* (1763) 1 W.Bl. 392; *R. v. Murphy* (1837) 8 C. & P. 297. Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': *R. v. Brisac* (1803) 4 East 164 at 171, cited with approval i*n Mulcahy v. R.* (1868) L.R. 3 H.L. 306 at 317.' [8]

"12. In the Godfrey Ellul case this Court had not stated that this is the position under Maltese law. However it is in agreement with what is stated therein as it is quite clear from the said quotation that evidence of a conspiracy is not necessarily or only derived by inferring it from criminal acts of the parties involved. Indeed, a conspiracy may exist even though there is no subsequent criminal activity, that is to say even though the agreement to deal in any manner in a controlled substance is not followed by some commencement of execution of the activity agreed upon[9].

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[7] See para. 33-4, page 2690.

[8] *Op. cit.* Para. 33-11, page 2692.

[9] See also **The Republic of Malta v. Steven John Caddick et** decided by this Court on the 6th March 2003 wherein it was stated: "… although it is true that for the crime of conspiracy to subsist it does not have to be proved that the agreement was put into practice, the converse is not true, that is that evidence of dealing does not necessarily point to a conspiracy. Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed "from the moment in which any mode of action whatsoever is planned or agreed upon between" two or more persons (section 22(1A) Chapter 101). Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of the

In such circumstances it is obvious that no inference can be drawn from criminal acts because there are no criminal acts subsequent to the conspiracy itself. Indeed the quotation from Archbold clearly states that a conspiracy may also be proved 'in the usual way' – so by means of direct evidence and/or circumstantial evidence which must be univocal, that is to say, that cannot but be interpreted as pointing towards the existence of a conspiracy. Unfortunately defence counsel misinterpreted that quotation and wrongly submitted that proof of the existence of a conspiracy has to be deduced or inferred from the criminal acts of the parties, and even seems to have led the first Court to understand that that was the conclusion to be derived from the Godfrey Ellul case. This is clearly incorrect. As one finds stated in the 2008 Edition of **Blackstone's Criminal Practice** [10]

"There are no special evidential rules peculiar to conspiracy. In *Murphy* (1837) C C & P 297, proof of conspiracy was said to be generally 'a matter of inference deduced from certain criminal acts of the parties accused', but there is no actual need for any such acts, and conspiracies may also be proved, *inter alia*, by direct testimony, secret recordings or confessions…".

"13. This appears to be also the position in Scots law. Professor Gerald Gordon, in his standard text **The Criminal Law of Scotland** [11] makes reference to the dictum of Lord Avonside in ***Milnes and Others*** (Glasgow

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mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person or persons concerned may be charged both with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming (for the purpose of the attempted or consummated offence) co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason, namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement."

[10] OUP, p. 99, para. A6.24.
[11] W. Green & Son Ltd. (Edinburgh), 1978, p. 203.

High Court, January 1971, unreported) to the effect that "you can have a criminal conspiracy even if nothing is done to further it", adding that, indeed, this is the very essence of conspiracy[12]."

11. Nor is appellant correct in stating that from the excerpt quoted from Archbold, the inference may be drawn when the two (or more) conspirators (and not one of them) do certain criminal acts done in pursuance of an apparent criminal purpose in common between them. As stated, the crime of conspiracy subsists from the moment the mode of action is agreed to or planned by the conspirators. This does not mean that the agreement has to envisage that each and every one of the conspirators have to physically participate in any of the subsequent criminal acts amounting to the execution of that plan. Thus, while one conspirator might be the financier and another might be entrusted with recruiting mules, others might be involved with the acquisition of the drug, its importation, and its sale. It cannot be said that the financier and the recruiter cannot be any longer considered as conspirators because they have not themselves acquired (and therefore been in possession of) the drug, imported it or sold it. Consequently, appellant's first grievance is dismissed.

12. Appellant's second grievance relates to the question of identification. He refers to sections 646 and 648 of the Criminal Code and says that taken together they imply that when the identity of a person has to be established, it is enough that the person is pointed out in Court without the need to make such an identification from a group. Appellant says that establishing identity is not a question of approximation but has to exclude all doubts about the accuracy of the witness and his definite answer to the question whether he is referring to a person or to a particular person. According to appellant, the Criminal Court directed the jurors that there are various modes to identify a person. "Even the identity card", says appellant in his application of appeal, "and the passport require a

[12] See also the judgement of this Court of the 23 October 2008 in the names **The Republic of Malta v.John Steven Lewis Marsden**.

photograph of the fact to establish identity. General descriptions may be an aid, but are no substitute for certainty. Even voice recognition is not enough. Apart from similarities and resemblances, there may be other factors which are not taken into consideration and which give false impressions about identity…. What the Criminal Court was driving at was that details could be used to identify a person, even when direct identification and positive identification (by pointing a finger towards a specific person) is absent. It is submitted that this may serve as circumstantial evidence but not as identification, which has to be **positive and unequivocal**. This is why forensic science has developed tests for fingerprints and DNA to establish identity. When it comes to visual identification, Malta has its rules stated in Article 648 of the Criminal Code, and if it is of any validity it has to be *viva voce* in court. It may be true that recognition may for everyday popular purposes depend on various modes. But when it comes to legal proof, there are rules to be observed. If an analogy may be drawn, the features of a child may look like those of the lover of the mother, but when it comes to proof only DNA establishes paternity."

13. On this matter appellant further submits:

"Article 648 of the Criminal Code dispenses with an identity parade in most cases, unless the court considers it advisable, but does not dispense with identification according to article 646 that it has to be in court, and according to the precepts of the Constitution and of the Criminal Code itself. And there is no provision on Chapter 101 which says 'Notwithstanding the provisions of Article 646 and 648 of the Criminal Code ….'

"This wrong interpretation of the law, although it may be correct in the streets, had a most damaging effect on the case of the defence.

"The defence had been arguing that:
(1) The laws on drugs allow for sworn statements as being admissible as evidence contrary to

the general rule contained in Article 661 of the Criminal Code.

(2) What is stated as a fact that happened in the statement may constitute proof, but when it comes to identification, there is no exception to the rule that the identification has to be sworn as well, and that identification must be positive and unequivocal, unless there is a sworn identification in the statement itself or in a subsequent sworn statement procedure. It would have sufficed to show a photograph of facial features of the person and have that identification sworn on oath. As there was collaboration with the Spanish Police, they could have obtained a photograph of the appellant (At this point the court interjected that it was not lawful as Gregory Eyre was charged and the police could not interview him, according to case-law. Even this interjection was not correct in substance and at law, as the police could have requested the Magistrate to proceed according to procedural law.).

(3) The defence also stated that the police, once Gregory Eyre's judgment had become final and the appellant was in Malta, an identity parade according to the Police Act (art 74) could have been held and if there was identification this was sworn before the attending magistrate.

(4) As things stood during the trial, the prosecution could not affirm that it had a **sworn statemtn of the facts and of the identification**. It only had a sworn statement of the facts and a **very scanty description of the person charged**.

(5) The corollary was that the sworn identification could only be in subsequent stages of the criminal process.

"The Criminal Court never tackled this question and the distinction between the sworn facts and the sworn identification, even though the defence was insisting that this was a point of law.

"What in actual fact happened was that the Court dealt with the questions in an oblique and incorrect way.

"**The court stated that the police are not bound to hold an identity parade.** The defence was arguing that the police failed to tie up all the loose ends, and would have had proof if they had proceeded to an identity parade. The Court in an oblique way cited as an example the thousands of yearly cases of complaints by neighbours against neighbours, and it would be impossible to hold identity parades. But the police all the same proceed with the summons. **The Court failed to continue that the identification is then held in court.** The defence does not contest that in general an identity parade is not necessary according to Maltese law, but **in this particular instance**, the question was whether the sworn statement of Gregory Eyre on which the prosecution was relying actually had a positive unequivocal assertion that the person about whom Gregory Eyre was making a statement was in actual fact the appellant. It was nothing more and nothing less than when a judgment is delivered against a named person, the proof of identity in subsequent proceedings has to be through another process of identification, such as in the case of being a recidivist.

"The jurors were asked to consider what the prosecution proved through the statement that is the identity of the name, the Maltese mother and that one of the two brothers (while the appellant has only one brother) had a private school and the question of residence in St. Julian's. This again reminds the undersigned of the story of the Splash and Fun Complex referred to above.[13]

"Furthermore Superintendent Harrison testified that on the basis of the information given by Eyre, the police proceeded to request the extradition of the appellant. Superintendent Harrison did not exhibit any copies of the transmissions to the Spanish authorities. Definitely the police could not ask for a person probably Maltese, who

[13] In a news broadcast it was stated that "Dr. Brincat, the member of parliament, who is a shareholder in the Splash and Fun Complex, arrived at the complex where the young man was electrocuted, in a few minutes." At the time there was a Dr. Carmelo Brincat who was also an MP and who, with his brother, had interests in the Splash and Fun Complex. Someone reached the conclusion that it was appellant's lawyer, Dr. Joseph Brincat.

has a mother and two brothers, one of them running a private school as the system of identification to the Spanish authorities. But also this was used by the Court, that is the extradition, as a proof of identification. Identification has to be in a Maltese court and according to Maltese rules of evidence.

"**This is a wrong application and wrong interpretation of the law about identification in a court of law, although it may suffice in the village square or in the press.**"

14. Appellant then proceeds to refer to a U.K. judgement, **Daniel Brennan, R v (1996) ECWA Crim 705 (25th July 1996)**, and quotes excerpts from said judgement which he believes fit like a glove to the present case, even keeping in mind that there is the procedure under English law whereby a judge may not even allow a case to continue and be decided by the jury after the close of the case for the prosecution, and that identity parades are mandatory when a person sees another for the first time. In the Brennan case, appellant says, a person was convicted of grievous bodily harm of two persons who, on account of some misunderstanding about procedure, did not recognize the defendant as Danny Brennan even though they referred to the aggressor as Danny Brennan. The prosecution failed to investigate and bring any other evidence to establish this link. This, insists appellant, is very similar to what happened in this case, *mutatis mutandis*, as no case perfectly tallies with any other on all details. The judge instructed the jury to seek circumstantial evidence and other material to arrive at the link between the accused and the two witnesses. The Court of Appeal allowed the appeal, stating *inter alia*, that "having regard to the way that the Crown had chosen to present the matter, there was at that stage no evidence that was fit to be left to the jury that the appellant was the man who had committed the offence." According to appellant, in his case there was no recognition in court and the police were satisfied with a statement in which a name had been mentioned. Other details were simply circumstantial evidence which could only corroborate any

recognition, but it was no substitute for that recognition. So, the presiding judge indirectly invited the jurors to plug in all possible gaps in the case of the prosecution by his wrong interpretation and application of the law on identity. On the other hand the defence had been insisting that **"because the police had 'a' statement(s) indicating that the person concerned had 'been' called (himself Danny Brennan) 'Mark Stephens' and therefore they had a named individual, it was unnecessary to seek any further evidence, whether by way of identification parade, confrontation or whatever. That was an assumption that is all too readily made when a witness names someone, and if identification may be in issue – and it usually is fairly simple to discover whether it may be – the prosecution should take all necessary steps to plug any particular gap in the evidence. That does not seem to us to have happened here."**

15. Appellant concludes his arguments regarding his second grievance by stating that, taking all the complaints together, that is, the directions that there are various modes to identify a person, that it was not necessary or impossible to have Gregory Eyre confirm on oath before a Magistrate some sort of identification through facial recognition, and how identification is valid according to Maltese law, the judge presiding the jury misdirected the jury into believing that identification can be effected by way of "approximation" and, if they were satisfied, then that was enough.

16. Now, Section 648 of the Criminal Code to which appellant refers states: **"In order to identify any person whose identity is required to be proved, or in order to identify any object to be produced in evidence, it shall not, as a rule, be necessary that the witness should recognize such person from among other persons, or pick out such object from among other similar objects, unless the court, in some particular case, shall deem it expedient to adopt such course for the ends of justice."**

17. As clearly appears from the said Section, there is no obligation on the part of the court for it to conduct an identification parade. Indeed for purposes of identification it is sufficient for a witness to indicate in open court whether he recognizes the person charged or accused. The problem arises where no such identification is forthcoming or where a witness says that the person charged or accused is not the person he had previously mentioned to the police or that although he had mentioned the person charged or accused, the person responsible is somebody else. Some of these problems could, to a certain extent, be obviated if the police, in their investigations, carry out identification parades. But here again, the police are not at law bound to carry out such parades. And this Court sees no reason to comment on what the police, in the instant case, should or could have done better. Consequently, the jury had to examine whether identity could be determined from other factors, and whether there was evidence beyond reasonable doubt that Eyre was referring to appellant Stephens. The mere fact that Eyre had not pointed a finger at appellant in open Court could not, as appellant seems to expect, lead to an automatic acquittal.

18. Appellant also complains about the fact that the first Court referred to the extradition proceedings as proof of identification. What the first Court said in this respect was this:

"… they [the Police] thought they had enough information to identify the person. After all when they requested the extradition proceedings from Spain – and the extradition proceedings are normally, there are certain formalities to be followed, you don't just say extradite somebody and the Spanish police will pick out somebody from a crowd and send him here – you have to send specific identifications, like name, surname and other details you might have, and the Spanish police after a long time managed to trace the accused where it is alleged – that is being mentioned in evidence here – he returned from another country, from Brazil to Spain, and at that point they arrested him and sent him to Malta. So the police in

this situation, in this particular case, seem to be perfectly satisfied that the person extradited was the same person to whom Eyre had referred to in that deposition, in that confirmation on oath of his statement. Yes you might argue, wouldn't they have avoided everybody a lot of trouble if they had the time to do it? Bringing Eyre out of prison, bringing him to the police headquarters and ask him do you identify this man in ID parade? They could have done that but they were not bound to do it. They thought they could move on the identification details they had already, nothing wrong with that according to law. Now if you think that according to fact they should have done this and that it is a matter of … but according to law the police in that respect did not break any law. They might have taken a chance, they might have taken a risk, they might have hurried too much or else they were perfectly right doing what they did because they thought that with the evidence they had the identification tag. That is a question of fact which I leave in your hands."

As the first Court rightly pointed out, it was the police who were satisfied that the Mark Stephens mentioned by Gregory Eyre in his statement was the same Mark Stephens who was extradited from Spain. However it was then for the jury to determine whether the Mark Stephens before them was the Mark Stephens who had conspired with Gregory Eyre and who was mentioned by the same said Eyre. Consequently appellant's second grievance is also being dismissed.

19. With regard to the third grievance, the appellant says that the defence made it clear that it was not accepting any evidence from Eyre because he was a liar. It referred to Section 585 of Chapter 12 which states that a witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth is bad. This is different, argues appellant, from believing that a witness made an honest mistake along the line, and one who is such a barefaced liar that no credibility can be accorded to anything that he says. His reputation about telling the truth is so bad that he confirms anything on oath as if nothing happened. The

defence was saying that the witness had given proof that his contradictory statements cannot be reconciled or explained, that one had to discard him as a witness. Notwithstanding the distinction, says appellant, the Court directed the jury that they were entitled to believe a witness in whole, in part or not at all. This, he says, is different from the impeachment of a witness.

20. Appellant also states that the prosecution extolled the veracity of Eyre solely as far as the sworn statement was concerned, while maintaining that any evidence given in a court of law was not true. The defence on the other hand maintained that Eyre was a liar and that his credibility was in issue and not whether he said the truth at times and was mistaken at other times. Furthermore the defence pinpointed the fact that even when, after confirming the statement, the Magistrate asked him questions, he was lying intentionally and then he was found out, he changed his version; this with reference to his return trip to the airport on his first visit to Malta. There he was lying, and he continued to lie. The defence, continues appellant, was not at all pleased with such a stance, as it was going to be interpreted as a concoction between the appellant and Eyre, which was definitely not the case. The prosecution actually used that argument with impunity, without proving the honesty of its prime witness. On the contrary it went to prove his dishonesty and lack of credibility. Appellant goes on to state further:

“When the Court failed to distinguish between credibility (and impeachment of a witness) and reliability and what the jurors are entitled to believe, the direction given was defective. The distinction should have been between defects in evidence due to dishonesty as distinct from error, a distinction which one so often finds in criminal appeals of the England and Wales Court of Appeal. It stated only one aspect of the law. It failed to cover another important article about evidence which is that of impeachment, whereby the whole of the evidence of the witness is rejected, as being unsafe to rely on in any way, even if in certain parts he may be saying the truth. The risk is too great to believe a persistent liar.

"If there was any doubt about Eyre's performance in the witness box, it is enough to state that the Court before delivering sentence, pronounced a decree whereby it requested that an investigation should be started against Eyre for perjury (naturally excluding the sworn statement).

"The issue was between credibility and preciseness. One is an inherent characteristic of the individual, the other (reliability) may be influenced by several external factors, such as sharpness of observation, memory, and mental state of the witness at the time. Honesty does not take naps.

"As propounded by the Criminal Court, the question of impeachment was neglected to the detriment of the appellant. The Court should have asked whether the jurors were satisfied that Eyre was such a liar that no credibility could be attached to him, and if that was the case, then he should not be believed in anything that he said anywhere.

"It is not amiss to state that the Court cautioned Gregory Eyre about perjury and even openly accused him of perjury, but this was when he failed to confirm that the Mark Stephens he mentioned in the statement was the Mark Stephens in the dock. That left an impression on the jurors about what the judge was believing or was ready to believe more easily.

"Naturally this cannot be taken in isolation. When the judge on the morning of the 5th November 2008 was addressing the jury about the admissibility of the statement, his voice became very poised and emphatic, and rather than restricting himself to the interpretation and direction of the law, in a most solemn fashion, with calculated pauses, said words to the effect: 'Drug offences are very serious offences …. The legislator thought it fit to depart from the usual rules of evidence. The legislator that is the Maltese Parliament, because drug offences are so serious to apprehend….'

"Although it is a historical legal fact that the law was changed to exclude article 661 of the Criminal Code, which by the way did not exclude other articles and remain applicable (such as 648 Criminal Code and 585 of Chapter 12), the emphasis that the court put on the *ratio legis* was an unwarranted warning to the jurors to deal with drug offences in a particular serious manner. The duty of the jurors is to sift the evidence before them, and to arrive at a conclusion of guilt only if they are satisfied that their conscience allows them to be satisfied, without entering into the *ratio legis* of a particular provision of the law. The voice, delivery, pauses and the whole emotion created during this passage is considered as having influenced the jury not on what the law meant, but on how important it was to follow the social thinking behind it. All crimes are serious. The legislators make laws to be interpreted by the courts, but it is not for the courts to evaluate the stimulus that led the legislator to enact. In the scenario of a trial by jury, the court should restrict itself to its role of interpreting and applying the law."

21. Appellant here again argues about what the first Court should or should not have said or done, and this in relation to the credibility or otherwise of Gregory Eyre. Now, in terms of Section 465 of the Criminal Code it is the function of the judge presiding a jury trial to address the jury explaining to them the nature and the ingredients of the offence preferred in the indictment, as well as any other point of law which in the particular case may be connected with the functions of the jury, summing up, in such manner as he may think necessary, the evidence of the witnesses and other concurrent evidence, acquainting them with the powers which the jury may exercise in the particular case, and making all such other remarks as may tend to direct and instruct the jury for the proper discharge of their duties. In this way the judge places the jury in the best possible position to reach their verdict serenely and with the least possible complications and confusion.

22. In this context, the judge presiding the trial by jury outlined defence submissions on the matter in the following manner:

"The main line of defence of Dr Brincat is that there is no evidence on which you can rely to convict the degree of moral certainty to prove that the acvcused was guilty of this crime. And he has produced a number of arguments, mainly the inconsistency of the main witness for the prosecution Gregory Eyre. He has also invited you to throw out the baby with the bath water, he is telling you this Eyre is so incredible in what he says and he has contradicted himself on certain other things which he mentioned, and he gave you an example, that you should certainly not rely on any part of his evidence to convict the accused. He also told you that he has been contradicted by other witnesses for the prosecution and that therefore he is manifestly unreliable and you cannot rely on what he said. That is the first line and possibly the main line of defence…. And basically he told you that not only did the prosecution not prove its case at all because Gregory Eyre by telling us here positively excluding the accused of being the Mark Stephens he was referring to in that statement confirmed on oath, but the accused himself even gave evidence, gave his version of the facts which is consistent …."

From this it would appear that although the defence wanted to impeach Gregory Eyre, at the same time it sought to benefit from the fact that Eyre had, subsequently to his sworn statement, excluded appellant as being his co-conspirator.

23. As to other comments by appellant, reference is being made to what Rosemary Pattenden states in her book **Judicial Discretion and Criminal Litigation** (OUP 1990)[14]:

"The English criminal trial is adversarial, which means that the parties determine the evidence to be

[14] F'pagna 98.

called and the manner and timing of its presentation. The self-interest of the parties, so the theory goes, will ensure that all issues of law and fact are thoroughly aired. If taken to its logical conclusion this principle reduces the role of the judge to that of an umpire – someone whose job it is to see that the rules are obeyed but who takes no direct part. But theory and practice do not entirely coalesce and criminal judges are not, as the Supreme Court of Canada once put it, 'sphinx judges'. A trial is more than a contest between two parties. There is a public interest in seeing that justice is done and since the parties may be unevenly matched the judge may have to involve himself in the trial to ensure that the truth emerges. So long as he acts fairly and preserves an appearance of impartiality he will not be criticized for taking a relatively active stance.

One of the ways in which the judge may participate in the trial is by questioning witnesses. This is an example *par excellence* of the exercise of discretion during a criminal trial … in *R. v. Evans* Lord Justice Scarman affirmed that although 'our system is accusatorial and it is not the part of a Judge to run the case for the Crown or to run the case for the defence but to keep himself apart from the arena in which battle is joined, yet he does have a duty to ensure that justice is done and, if he thinks that justice requires him to put questions, then he has the right and the duty to intervene."

24. Moreover, in **Archbold, Criminal Pleading, Evidence and Practice, 2006**, we read[15]:

"Interventions by the judge during a trial will lead to the quashing of a conviction: (a) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing up that the facts are for the jury, and that they may

[15] Para. 7-81, p. 1047.

disregard anything said on the facts by the judge with which they do not agree; (b) when they have made it impossible for defending counsel to do his duty; (c) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way: *R. v. Hulusi and Purvis*, 58 Cr.App.R. 378, CA; see also *R. v. Frixou* [1988] Crim.L.R. 352, CA, and *R. v. Roncoli* [1998] Crim.L.R. 584, CA…. In *R. v. Matthews and Matthews*, 78 Cr.App.R. 23, the Court of Appeal said that in considering the effect of interventions made by the trial judge the critical aspect of the investigation was the quality of the interventions as they related to the attitude of the judge as might be observed by the jury and the effect that the interventions had either on the orderly, proper and lucid deployment of the defendant's case by his advocate or on the efficiency of the attack to be made on the defendant's behalf on vital prosecution witnesses by cross-examination administered by his advocate on his behalf. Ultimately the question was: might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing up of the judge, be such that the jury's verdict might be unsafe?"

25. Whatever interventions were made by the judge when Gregory Eyre was giving evidence, even if they may have indicated that he was not believing Eyre, these were made in the interest of establishing the truth. The decree handed down by the first Court on the 5th November 2008 before pronouncing judgement, whereby it ordered the arrest of Gregory Robert Eyre and ordered that he be brought before the Court of Magistrates for the necessary inquiry in terms of section 523 of the Criminal Code because of reasonable suspicion that he had given false evidence before the first Court on the 3rd November 2008 as well as before the Court of Magistrates as a Court of Criminal Inquiry on the 17th March 2006 and in subsequent sittings before that Court, clearly had no bearing on the verdict as it was pronounced after the discharge of the jury. As to comments made by the judge

regarding the *ratio legis*, this Court finds nothing irregular in these comments, whatever the tone of delivery. Indeed, all that the judge said was:

"... any accused in a drug offence, the legislator had a purpose in doing that, in going against the normal law of evidence by allowing such statements to be considered as evidence, the legislator, the Parliament, the Maltese Parliament had a reason for that and I will stop here. These are difficult cases and the legislator wanted that all facts be brought to the notice of the judges of facts, that is the jurors."

Therefore, in the light of all this, the third grievance is dismissed.

26. In his fourth grievance appellant says that the Criminal Court "instructed the jury, along the lines of the prosecution, that the sworn statement was admissible as evidence and there was enough in the statement to convict the party charged, notwithstanding the lack of recognition in court (apart from the inconsistent evidence given by Eyre) Eyre was to be believed on the sworn statement." Appellant says that he did not contest that the sworn statement is admissible as evidence notwithstanding the provisions of Section 661 of the Criminal Code (but no other rule of evidence excluded). One of these rules, he says, is to take the evidence as a whole, and our case-law makes it imperative that the person who makes the sworn statement is brought to testify in Court and submit himself to cross-examination. Can the statement, asks appellant, be used as to matters not included therein? The recognition in Court was not and could not be in the statement. Appellant says that according to a rightful interpretation of the provision regarding the admissibility of witness statements, the direction by the judge would have been consonant with case-law and "legal", had the deponent come to Court, testified that the person he was referring to was the person in the dock, but contrary to the fact sworn that the man in the dock handed drugs over to him, now the deponent says that it was not true. Appellant continues:

"The defence pointed to the jurors that if there were details which tallied with those of the appellant, apart from not being enough, they could have easily been known to Eyre, as his partner Susan Molyneux had been working part-time for the appellant for more than a year and a half. As the issue was about identification or more specifically recognition of the person, that could not be in the statement. The fact that the direction to the jury was on the lines that the statement could be used to convict (without making the distinction between what is a fact that could be deposed in the statement and procedures which could only be made in the presence of the accused – such as recognition) was a misdirection to the absolute detriment of the appellant."

27. The relevant part of the summing-up is the following:

"Once you are satisfied, if you are satisfied that there wasn't this intimidation or promises or whatever and it was done voluntarily, then that statement confirmed on oath will become admissible as evidence. What does that mean? It doesn't mean that it is the Bible truth, it means you can consider it as evidence like all the other evidence which we have here even though that evidence was given in the absence of the accused during the inkjesta, during the magisterial inquiry. The prosecution is asking you to consider that statement confirmed on oath as true. It is also asking you to find the accused's guilt on the basis of that statement confirmed on oath before Magistrate Hayman. Legally he is perfectly entitled to do so, whether you do so or not that is a question of fact which is up to you to decide, but when the prosecution tells you irrespective of what he said here, irrespective of what he said before the magistrate in the compilation of evidence, if you decide to believe his first statement confirmed on oath before Magistrate Hayman and you accept that as the truth then on the basis of that statement you can convict the accused. Legally he is correct, factually it depends on you whether you are prepared to accept that first statement on oath …."

28. In the light of what has already been said with regard to the second grievance and in the light of the above excerpt, this Court finds that there was no misdirection on the part of the first Court. Furthermore, this excerpt cannot be extrapolated from the remainder of the summing-up where it was made abundantly clear that the jurors had to determine first whether the Mark Stephens mentioned in the sworn statement was indeed the appellant. Consequently the fourth grievance is also dismissed.

29. The fifth grievance raised by appellant refers to the failure of the judge to direct that the jurors have to weigh the evidence tendered by Eyre before they can safely convict. Appellant says that in terms of Section 639(3) of the Criminal Code, the judge has to warn the jurors that (a) the witness is an accomplice and (b) although there is no need for his evidence to be corroborated, yet the jurors must carefully weigh his evidence before they can rely on that evidence to convict.

30. Section 639(3) of the Criminal Code provides: **"Where the only witness against the accused for any offence in any trial by jury is an accomplice, the Court shall give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused."** Although Gregory Eyre was a witness for the prosecution, in the course of the trial by jury he did not give evidence against the accused but rather sought to exculpate him by saying that the Mark Stephens he had mentioned in his sworn statement was in fact a certain Andrew Woodhouse who used the name "Mark Stephens". Consequently the first Court was in no way bound to direct the jurors as indicated in said Section 639(3), and the fifth grievance is thus also dismissed.

31. In grievance six *bis*, appellant refers to the evidence given by Superintendent Neil Harrison when he said that he was informed by the Spanish authorities that they could not trace the appellant as he had gone to Brazil. This was hearsay evidence which should not have been allowed by the Court. On the contrary, the Court during the summing-up, said that the appellant could not be

traced because he had gone for two years to Brazil. Appellant states that during a break, and when asked by the Court, the defence pointed out in the presence of the prosecution that this was factually incorrect and it would be advisable to remedy this error. The Court did not want to correct this error and said that it would advise the jury to listen to the recording. Appellant states that this was wrong because the Court not only allowed, but used hearsay as part of an argument, and gave the impression that the appellant had escaped from Spain for two years, and appellant's passport was in the record of the proceedings and it was evident that this was factually incorrect.

32. As results from the transcription of the evidence of Superintendent Neil Harrison, the rule regarding hearsay evidence was explained to the jurors almost at the outset of his evidence. This Court agrees that in the summing-up, the judge was not precise when he referred to the period allegedly spent by appellant in Brazil. At the stage when he mentioned this point he was, however, referring to the evidence given by Superintendent Harrison, and from what he said, clearly no inference can be derived therefrom that the appellant "had escaped from Spain for two years." In fact what the judge said was that when the police started extradition proceedings in 2004, "at the time Mr. Stephens could not be traced because it resulted that he was away from Spain in Brazil. However when subsequently in September 2005 Stephens went back to Spain he was then arrested and sent back to Malta….". Moreover, when the defence commented that appellant was arrested in August of the year before and that the Spanish courts took over one year to conclude the extradition proceedings, the Court observed: "So in that two year gap he might have spent about a year in Brazil and a year under the custody of the Spanish police before he was sent here. Is there any contestation on that fact? Everybody agrees with that. Sorry, but that is what Mr. Harrison might have said and which I might have noted badly perhaps. Anyway, we now agree that that was the case." So appellant is not correct in stating that what the judge said "had the effect of implying that the appellant

was fleeing from justice, with the attendant corollary that he was fleeing because he was guilty." Accordingly this grievance is dismissed.

33. This Court will now turn to appellant's sixth grievance whereby appellant maintains that he was wrongly convicted on the facts of the case. He states that in this case there was no evidence at all and there was much more than a lurking doubt. The prosecution, argues appellant, must prove not only that a crime was committed but also that it was the accused who committed it.

34. Appellant comments at length in his application of appeal – as did his counsel during submissions before this Court – about the turn of phrase used by Gregory Eyre in his statement, about what he did not say in his statement, about how, according to him, Eyre was inventing stories even in his statement, and how the statement does not provide even a *prima facie* case of identification of the appellant as the person whom Gregory Eyre knew "as Mark Stephens". Appellant refers to the evidence given by Eyre during the compilation proceedings when he did not recognize appellant as "his Mark Stephens", and how he repeated this version during the trial by jury. He comments on how Eyre stuck to this version even though the judge warned him severely and even went as far as to tell him that he had perjured himself during the proceedings. Appellant also says that Gregory Eyre admitted that there was bad blood between him and appellant because of a problem with Eyre's girlfriend Susan Molyneux.

35. Appellant then turns to Vincent Stivala and says that his evidence does not in any way confirm any involvement in drugs as far as appellant is concerned. Stivala's only contribution, says appellant, could be that Mark Stephens knew Eyre before he came to Malta in late July 2003. Appellant never denied that he knew Eyre as the violent boyfriend of Susan Molyneux, whom he had to protect from his violence. Appellant suggests that Eyre's story could well signify that he was acting on his own and in direct contact with Vincent Stivala. He suggests that Eyre

wanted to keep Stivala out of it. Appellant also states that Stivala was insisting that he was sending the money [money which was handed to Eyre] to Mark Stephens, whom he believed had called him on the phone, without explaining why he had to send them. And he had no reply why he did not wire them to appellant. This is no incriminating evidence, according to appellant.

36. As regards appellant himself, he states that he was consistent throughout and explained his relationship with Gregory Eyre, including the bad blood that existed between them, even by revealing certain personal details.

37. These matters, which are clearly matters necessitating a reappraisal of the facts of the case, were put to the consideration of the jury which was free, and was directed in like sense by the judge presiding over the trial, to evaluate all the evidence produced and decide as to whether it was ready to accept the prosecution's contention that appellant was indeed the same Mark Stephens mentioned by Gregory Eyre in his sworn statement and Eyre's co-conspirator, or whether to accept the defence's contention that there was no evidence at all whereby appellant could be convicted. The jury had the obvious advantage of seeing and hearing the witnesses. What this Court is called upon to do is to determine whether the jurors, who were correctly addressed by the presiding judge, could have legally and reasonably reached the verdict which they eventually gave.

38. As to the question of identification, it is true that in his second statement dated 12th August 2003 and confirmed on oath on the 13th August 2003 before the duty magistrate, Gregory Robert Eyre stated that the drugs in question were delivered to him by a person "I know as Mark Stephens", and that subsequently before the Court of Magistrates (Malta) as a Court of Criminal Inquiry and then again during the trial by jury, he stated that appellant was not the Mark Stephens he had mentioned in his sworn statement. The Court makes the following observations:

- In his evidence of the 20th September 2005 Gregory Eyre stated: “The Mark Stephens I know is not in this Court room.” This clearly means that Eyre was stating that he did not know appellant. He is given the lie by appellant himself who in his statement to the police on the 11th September 2005 was asked if he knew a certain Gregory Eyre, to which appellant replied: “Ye.” He was also asked how he knew him and appellant replied: “He used to drink in my bar.”

- During his evidence of the 20th September 2005, Gregory Eyre described the instructions he was given by “his” Mark Stephens who owned a restaurant in Spain. On being asked whether its name was “Mountain Side”, Eyre replied: “Yes I believe it is.” In his statement to the police, appellant stated that he was leasing a bar in Zaragoza called “Mountain Side Inn”.

- During his evidence of the 20th September 2005, Gregory Eyre alleged that it was the investigating officer, then Inspector, Neil Harrison who mentioned Mark Stephens to him and told him what to say. However, he did not allege this when he gave evidence before the inquiring magistrate, and gave further details in reply to questions put by the inquiring magistrate and by the investigating officer.

From this it is evident that what Eyre was seeking to do when he gave evidence during the compilation proceedings – and later in the trial by jury – was to divert responsibility away from appellant onto another person, whom he eventually referred to as Andrew Woodhouse. Coincidentally, in his statement to the police, appellant stated categorically that it was “Andrew Woodhouse who is called Drew who supplied Greg with the drugs.”

39. Apart from the observations made in the preceding paragraph, there are other factors which also lead to the identification of Eyre’s Mark Stephens as appellant and upon which the jurors could have relied to come to the conclusion beyond reasonable about the identity of “Stephens” and upon appellant’s guilt:

- In his statement Eyre says that if he is not mistaken Mark Stephens is Maltese because he has two brothers who live in Malta and who are Maltese and run private schools. In his statement appellant says that he has a brother and sister who, while officially are his full brother and sister, yet they are really his half brother and half sister as his biological father is a man by the name of Umberto Anastasio, yet on his birth certificate his father appears to be Kenneth Stephens who was married to his mother. So in reality both appellant's parents are Maltese. Eyre could be excused for thinking that appellant had two brothers rather than a brother and sister. However, when he gave evidence before the inquiring magistrate, he was more specific when he said that one of appellant's brothers runs a private school in Malta. Indeed, this has not been contested.

- In his statement Eyre said that Mark Stephens' mother lives in Malta. Here again there appears to be no contestation about this fact.

- In his statement Eyre said that prior to the drug run and on Mark Stephens' instructions, he came to Malta to collect a large quantity of money and deliver it to him in Spain. His contact was to meet him at the airport. He was in fact met at the airport by a certain Vince who told him that he had known Mark Stephens for a very long time and was going into a partnership with him in the purchase of a club in Spain. Eyre described how he received the package which he delivered to Mark Stephens who opened it in front of him and he could see that it contained euro notes. Eyre confirmed this in his evidence during the compilation proceedings. Vincent Stivala gave evidence during the compilation proceedings on the 23rd September 2005 and confirmed that he had once been asked by his friend Mark Stephens – whom he identified as the person charged, i.e. now the appellant – to pick up Gregory Eyre from the airport and to take care of him. He also confirmed that he and appellant were going to take a business together in Spain with another English person,

and that he actually handed a sum of money to Eyre to pass on to appellant.

From all the above it is therefore abundantly clear that the Mark Stephens originally referred to by Gregory Eyre was indeed the appellant and it now remains to be seen whether the jury could have legally and reasonably concluded that appellant was guilty as charged.

40. The facts of the case themselves are relatively simple. On the 11th August 2003 the police stopped and searched Gregory Robert Eyre and Susan Molyneux on their arrival from London. In one of their luggages, three packets containing a total of 2,988.2 grams of cocaine of around 70% purity were found, and two packets containing a total of 7,151 pills containing MDMA (ecstasy) were also found. Gregory Robert Eyre made two statements to the police. In his first statement he said that he was afraid to mention the person who had instructed him to carry the drugs to Malta, saying that he was Russian. In his second statement he said that it was Mark Stephens who, it has now been established, was the appellant. He confirmed his second statement on oath before the duty magistrate and, in terms of section 30A of Chapter 101 of the Laws of Malta:

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

41. Now, in terms of subsection (1A) of Section 22 of Chapter 101 of the Laws of Malta, a conspiracy as is

contemplated in subsection (1)(d) and (1)(f)[16] thereof shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between the persons participating in the conspiracy. That an agreement did exist for the importation of drugs into Malta is beyond doubt. This results clearly both from Eyre's sworn statement and also from evidence subsequently given. Moreover the mode of action for the importation and delivery of such drugs was also spelled out and described by Eyre. Consequently the jury's verdict was both a legal and a reasonable one, and the appellant's sixth grievance is thus dismissed.

42. Appellant's seventh grievance refers to the court experts' fees which he was condemned to pay. He argues that the only expert witness was the fingerprints expert Joseph Mallia and that Mr. Mario Mifsud did not give evidence as there was no contestation that Eyre was carrying drugs.

It would appear that in this respect appellant is correct. All experts in this case, excluding the fingerprints expert Joseph Mallia and Pharmacist Mario Mifsud insofar as his report presented during the compilation proceedings on the 9th February 2006 are concerned, were the same experts appointed in the Eyre case. In that case Gregory Robert Eyre was condemned to pay their fees. The only amount due by appellant should therefore be those fees related to the fingerprints expert Joseph Mallia (€309.81) and Pharmacist Mario Mifsud as regards his aforesaid

[16] "Any person - … (*d*) who in Malta aids, abets, counsels, or procures the commission in any place outside Malta of any offence punishable under the provisions of any corresponding law in force in that place, or who with another one or more persons conspires in Malta for the purpose of committing such an offence, does any act preparatory to, or in furtherance of, any act which if committed in Malta would constitute an offence against any such regulations; or … (*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 Malta against the provisions of this article or who promotes, constitutes, organises or finances the conspiracy, shall be guilty of an offence against this article."

report (€25.04), totalling three hundred and thirtyfour euros and eightyfive cents (€334.85).

43. Appellant's final grievance relates to the punishment meted out, and which he considers disproportionate particularly in relation to that awarded to Gregory Robert Eyre. This Court is not going into the considerations which led to the punishment awarded to Eyre. That matter was decided conclusively by this Court on the 25th August 2005. Suffice it to say that in Eyre's case, Eyre benefitted from the provisions of Section 120A (2B) of Chapter 31 and Section 29 of Chapter 101 of the Laws of Malta, and punishment was determined in terms of Section 453A(1)(2) of Chapter 9 of the Laws of Malta. Furthermore in matters of disparity this Court has had occasion to refer to UK case law on the matter and which is worth reproducing here. Thus, in **Blackstone's Criminal Practice, 2004** (para. D23.49 at page 1697) it is said:

"A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by *Stroud* (1977) 65 Cr App R 150. In his judgment in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal - the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his lordship put it, 'The appellant's proposition is that where you have one wrong sentence and one right sentence, this court should produce two wrong sentences. That is a submission which this court cannot accept'. Other similar decisions include *Brown* [1975] Crim LR 177, *Hair* [1978] Crim LR 698 and

Weekes **(1980) 74 Cr App R 161…. However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, *Wood* (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender's sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.**

"Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where, however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of disparity. The question then is whether the offender sentenced more heavily has been left with 'an understandable and burning sense of grievance' (*Dickinson* [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of whether the appealed sentence was in itself too severe. Thus, in *Nooy* (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed. Lawton LJ said:

"There is authority for saying that if a disparity of sentence is such that appellants have a grievance, that is a factor to be taken into account. Undoubtedly, it is a factor to be taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences."

And in **Archbold, Criminal Pleading, Evidence and Practice, 2006** (para. 5-106, p. 589):

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: 'would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?' (per Lawton L.J. in *R. v. Fawcett*, 5 Cr. App.R.(S) 158 C.A.). The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see *R. v. Large*, 3 Cr.App.R.(S) 80, C.A.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see *R.v. Stroud*, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as *R. v. Wood,* 5 Cr.App.R.(S) 381. C.A., *Fawcett*, ante, and *Broadbridge*, ante. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in *Fawcett* is satisfied."

44. In the instant case, appellant appears to have been the prime mover in organising this conspiracy to deliver drugs to Malta. Furthermore, the first Court took into consideration the submissions made by the prosecution, to wit (i) that "it resulted from Stephen's Criminal Conduct sheet that he had already been convicted of being in possession of the resin obtained from cannabis and as recently as January of this year was in breach of his bail conditions and sentenced to one month imprisonment;" (ii) that "what was of even greater concern however was the fact that on the 21st July 2008 he was arrested at the Airport on the point of departing from Malta under a false

passport, thereby attempting to evade the course of justice in this trial. He was therefore at present undergoing Criminal proceedings for possession of a false passport apart from having his bail revoked;" and (iii) that "accused's activity was part of an international drug trafficking activity sending out drugs to Malta and Maltese society could not tolerate such activity and when it was discovered, a substantial punishment had to be applied." In the light of all this, it is difficult for "right-thinking members of the public" to consider "that something had gone wrong with the administration of justice."
Appellant's final grievance is thus also dismissed.

45. For these reasons, the judgement delivered by the Criminal Court on the 5th November 2008 is being reformed in the sense that that part whereby appellant was ordered to pay the sum of one thousand, five hundred and fourteen euros and eighty-five cents (€1,514.85) being the court experts' fees incurred in this case is being hereby revoked and instead, in terms of Section 533 of the Criminal Code, appellant is being condemned to pay the Court experts' fees as aforesaid amounting to three hundred and thirtyfour euros and eightyfive cents (€334.85), while the remainder of the judgement is being confirmed, save that the time for the payment of the fine and the Court experts' fees, as well as the time within which the Attorney General is to inform the Court whether he requires the drugs to be preserved for the purpose of other criminal proceedings, is to start running from today.

< Final Judgement >

----------END----------