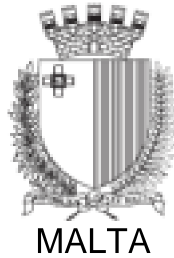

MALTA

CONSTITUTIONAL COURT

THE HON. MR. JUSTICE -- ACTING PRESIDENT
GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE
TONIO MALLIA

THE HON. MR. JUSTICE
NOEL CUSCHIERI

Sitting of the 9 th December, 2013

Civil Appeal Number. 32/2012/1

Mark Charles Kenneth Stephens

v.

Attorney General

Preliminary

1. This is an appeal lodged by applicant, and a cross-appeal filed by respondent from a judgment delivered by the First Hall of the Civil Court in its Constitutional jurisdiction on the 29th April 2013 by virtue of which that Court, whilst dismissing respondent's first two preliminary

pleas with costs, dismissed applicant's demands with costs against same.

2. In his constitutional application, applicant had requested the first Court to declare a violation of his fundamental human right enshrined in Article 6.1 and 6.3.c of the European Convention, and Article 39 of the Constitution, as well as to give the appropriate remedies, including the revocation of the judgment delivered by the Criminal Court on the 5th November 2008.

3. In his appeal applicant is requesting that, for the reasons contained therein, this Court variy the first Court's judgment by revoking that part which dismissed the requests made in his application, whilst confirming the rest of the judgment, with costs to be borne by respondent.

4. On his part, respondent is requesting that, for reasons contained in his reply, this Court reject plaintiff's appeal application, with costs.

5. In his cross-appeal, respondent is requesting that, for the reasons contained therein, this Court vary the first Court's judgment by revoking it in so far as that same court dismissed, with costs, its first two preliminary pleas.

<u>The First Court's Judgment</u>

6. Since the facts of the case and the issues raised have been adequately and concisely dealt with in the appealed judgment, the parts relevant to this appeal are being hereby reproduced in their entirety:
"By judgment delivered on the 5th November 2008 applicant was declared guilty of having associated himself with a person or persons in Malta and abroad, to commit crimes in breach of the provisions of the Dangerous Drugs Ordinance (Chapter 101). He was sentenced to twenty five years imprisonment and a fine of sixty thousand euro (60,000). He filed an appeal and by judgment delivered on the 24th June 2010 the appeal was dismissed.

"As regards to the facts of the case, on the 11th August 2003 the police stopped and searched Gregory Robert Eyre and Susan Molyneux on their arrival to Malta from London. In one of the bags, three packets containing a total of 2,988.2 grams of cocaine and two packets containing 7,151 ecstasy pills were found. In his first statement Eyre claimed that he was afraid to mention the person who had instructed him to carry the drugs to Malta, saying that he was Russian. In a second statement he said that it was Mark Stephens.

"With regards to the preliminary pleas, the court is of the view that:-

"i. The fact that the criminal proceedings have been concluded does not mean that a convicted person has no right to invoke his fundamental rights as guaranteed by Chapter 319 and the Constitution. On the other hand the scope of these extraordinary proceedings is not to be an attempt by the applicant to have his case reappraised on the merits by a different court. As will be highlighted later on in this judgment, a number of the grievances proposed by the applicant are nothing more than a weak attempt so that this court decides on the merits of the criminal proceedings. This court cannot rule on the merits of a specific case.

"ii. Article 39 of the Constitution guarantees the right to a fair trial when a person is ***"charged with a criminal offence"***. In **Republic of Malta vs Matthew-John Migneco** (15th November 2011) the Civil Court, First Hall[1] declared that this provision of law does not apply to the pre-trial stage. Although the emphasis is on the words *"charged with a criminal offence"*, this court sees no reason why a similar interpretation to that afforded to Article 6 of the Convention is not adopted with respect to Article 39 of the Constitution to the pre-trial stage[2]. One

[1] Mr Justice Joseph R. Micallef.

[2] In the judgment ***Eckle v Germany*** (15th July 1982) it was stated: *"Charge, for the purposes of Article 6 par. 1, may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the*

must remember that the pre-trial stage is an extremely delicate stage as it may affect the rights and interest of the suspect. The guarantees afforded by Article 6 may be relevant before a case is sent to trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. An interpretation which in the court's view should also apply to Article 39 of the Constitution, taking into account that Article 6 also refers to the *"determination….. of any **criminal charge**…."* [Article 6(1)] and *"Everyone charged with a criminal offence has the following minimum rights….."* [Article 6(3)].

" - - Omissis - -

"2. **The testimony of Gregory Robert Eyre**.

"The applicant complains that in his case the prosecution produced as evidence a statement made by Eyre on the 11th August 2003 and 12th August 2003:

""….. minghajr ma qabel kellu d-dritt li jikkonsulta ma' avukat.".

"There is no allegation that these statements were given under duress or ill-treatment. Access to legal counsel is a fundamental safeguard against self-incrimination by the person suspected of having committed a crime. However, the applicant has no right to try and exclude what Eyre said in his statements by invoking the Salduz judgment. A right which in the court's view was personal to Eyre. Furthermore the witness himself filed a constitutional case[3] contesting the two statements on the basis that prior to the interrogations he had no access to a lawyer. In a judgment delivered on the 27th June 2012 the court dismissed his request.

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situation [suspect] has been substantially affected' (see the above-mentioned Deweer judgment p. 24, par.46).".

[3] Gregory Robert Eyre vs l-Avukat Generali.

“Notwithstanding what has been stated above, according to Article 661 of the Criminal Code:

““A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person.”.

“Therefore the statements on their own could not prejudice applicant. What was relevant in this case was Eyre’s testimony in front of the duty magistrate on the 13th August 2003. In terms of Article 30A of Chapter 101, any statement confirmed on oath before a magistrate in cases relating to offences against the Dangerous Drugs Ordinance, *“…. May be received in evidence against any other person charged with an offence against the said Ordinance, provided that 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.”*.

“The applicant also complains that:

““…… wara harget informazzjoni li Gregory Robert Eyre kien taht l-effett tad-droga meta hu rrilaxxa z-zewg stqarrijiet tieghu u anke ftit wara huwa gie rikoverat gewwa l-isptar Monte Karmeli minhabba f’hekk. Dan wahdu jitfa’ dubju fuq il-veracita o meno fuq dak li qal Gregory Eyre fl-istqarrijiet.”.

“The applicant had ample opportunity to raise this grievance during the criminal proceedings. However he did not. Furthermore, there is absolutely no evidence that Eyre was not mentally fit to participate in the police interrogation and to give evidence on oath in front of the duty magistrate. Although Kevin Sammut Henwood declared that inmates who took drugs had withdrawal symptoms which produced psychological problems and *“under certain circumstances, the inmate tend to become more vulnerable.”*. The witness did not give any information regarding Eyre’s condition on being admitted to prison and as to whether he was mentally fit to testify in front of the duty magistrate.

"It transpires that Eyre gave evidence during the trial by jury. Applicant's claim that he had no opportunity to cross-examine Eyre on the contents of the two statements, is incorrect. The statements were in the court file. During the trial by jury, a copy of Eyre's testimony in front of the duty magistrate (13th August 2003) was also distributed to the jurors after defense counsel to Stephens declared that there was no objection to this. Through his defence counsel Stephens was free to ask questions to Eyre concerning what he told the duty magistrate. Therefore his object is ill-founded.

"Although after the sworn declaration of the 13th August 2003 Eyre tried his best to exculpate Stephens, this certainly does not mean that the fact finder had to conclude that what the witness said during the sittings of the 20th September 2005, 17th March 2006 and trial by jury, was the truth. Reading through the testimony of Eyre this court is of the view that the fact finder was fully justified in not believing what the witness said when he gave evidence during the compilation proceedings and the trial by jury. Thus for example:-

- "During the sitting of the 23rd September 2005 Eyre refused to reply to any questions;

- "During the sitting of the 17th March 2006 Eyre declared for the first time that he was sent to Malta with the drugs by Andrew Woodhouse. However he had not mentioned this name when he testified on the 20th September 2005 and 23rd September 2005. Furthermore he said:

""Pros. So you knew Mr Mark Stephens ?

"Witness: No I didn't know him. I knew him as well as I know you. I have seen him when I picked up my girlfriend from work and that's it, and I didn't know it was Mark Stephens I knew him as Mark.".

“However Vincent Stivala, an acquaintance of Eyre, confirmed that he was introduced to him by the applicant (sitting of the 23rd September 2005 – fol. 138).

“For this court it is evident that Eyre is prepared to say anything to try and save the day for the applicant. Testifying he said: *“While I was in police custody, police headquarters in Floriana, I started feeling sick. I needed drugs and alcohol. So anything the Police told me I agreed with it. I wanted to get out of the Depot at all costs.”* (sitting of the 20th September 2012). However during the compilation proceedings he claimed that what he told the police was fabricated *“because Mr Harrison said that I was looking at thirty years imprisonment if I did not cooperate.”* (20th September 2005).

“3. **Other evidence produced by the Prosecution**.

“The applicant claims that:

““Illi t-tielet violazzjoni si tratta dwar l-fatt li l-proceduri fit-totalita’ taghhom kienu jiffavorixxu aktar lill-prosekuzzjoni milli lill-akkuzat…… l-kundanna ta’ l-esponent kienet wahda sfavorevoli u li kienet unikament ibbazata fuq stqarrijiet ta’ xhud …….”.

“The applicant is clearly expecting this court to undertake a reappraisal of the facts of the case that lead to his conviction. This is certainly not possible. The issue of identification of the person who instructed Eyre to import drugs into Malta was also dealt with in detail by the Court of Criminal Appeal in the judgment (vide paragraphs 38 and 39). The court gave clear and unequivocal reasons why it believed that Eyre implicated the applicant when he referred to him during the interrogation held on the 12th September 2005 and his testimony in front of the duty magistrate. On the basis of those findings the court concluded:

“I. “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." (paragraph 38).

"II. "From all the above it is therefore abundantly clear that the Mark Stephens originally referred to by Gregory Eyre was indeed the appellant……." (paragraph 39).

"The conclusion reached by the Court of Criminal Appeal cannot be subject to review, as it is based on the appreciation of evidence produced during the criminal proceedings. Applicant also claims that a certain Richard Cranstorm knows the truth. Applicant filed an affidavit of Richard Cranstorm to try and convince this court that he was convicted for a crime committed by another individual. The contents of the affidavit are not relevant to these proceedings. The scope of these proceedings is certainly not to carry out a reappraisal of the merits of the case.

"4. **<u>Equality of arms</u>**.

"The applicant claims:

""….. il-kundanna ta' l-esponent kienet totalment ibbazata fuq l-istqarrijiet ta' xhud u liema stqarrijiet inghataw fl-istadju ta' qabel il-process innifsu (pre-trial stage). Ghaldaqstant kif diga' intqal l-esponent ma kellu l-opportunita' li jaghmel il-kontro-ezami ta' dan ix-xhud fuq dak li qal f'dawn l-istqarrijiet peress illi fil-proceduri dan ix-xhud irtira dak kollu li kien qal fihom.".

"Everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent. From the acts of the proceedings it is evident that at no stage was the applicant at a disadvantage.

"From the acts of the criminal proceedings it is amply clear that applicant was given ample opportunity to present his case.

“The applicant claims that the Criminal Court did not give importance to the fact that it transpired that applicant’s fingerprints were not found on the packets containing the drugs. In the court’s view:-

“i. this is a gratuitous assertion;

“ii. this submission has nothing to do with the principle of the equality of arms;

“iii. this submission should have been dealt with in the appeal stage. These proceedings cannot serve the purpose of reviewing the facts of the case.

“The claim by the applicant that the judge presiding the trial by jury directed the jurors to believe what Eyre said in front of the duty magistrate, is untrue. The judge said:

““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 thought that evidence was given in the absence of the accused during the inkesta, 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 bais 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…..”.

“The extract quoted by the plaintiff from the summing up of the trial judge cannot be understood as an invitation *“…into accepting the statement which the same Gregory Robert Eyre confirmed on oath in front of the Magistrate”* (vide page 8 of the note of submissions filed by the applicant on the 14th January 2013). The presiding judge simply explained what the law said. Furthermore, the appropriate forum where this grievance should have been dealt with was in the appeal. A reasoning which also applies to the complaint that the trial judge, in his summing up failed to refer to Article 639(3) of the Criminal Code. It is certainly not up to this court to deal with the interpretation of this provision of law and whether it should have been applied in the particular circumstances of this case.”

7. Given the nature of the grievances set out in both appeals, it is logical to deal first with the cross-appeal.

The Cross-Appeal

8. This is based on two grounds: that the first Court should not have dismissed respondent’s first preliminary plea based on Article 46(2) of the Constitution and Article 4(2) of Chapter 319 of the Laws of Malta, and his second preliminary plea based on Article 39 of the Constitution.

The first grievance

9. This grievance is in the sense that by filing the present application, thereby resorting to procedures of an extraordinary nature, two years after his case before the criminal courts have been definitely concluded, applicant is abusing of the judicial process, and is making a weak attempt to persuade this Court to give a decision on the merits of the criminal proceedings.

10. This Court observes that these present proceedings have been filed by applicant after the criminal proceedings, both before the Criminal Court and the Criminal Court of Appeal, have been definitely concluded, and therefore it cannot be validly argued that prior to filing constitutional proceedings, applicant has not exhausted all ordinary remedies available to him.

11. Also, as the first Court has rightly observed, claims for the violation of fundamental human rights are not extinguished by the lapse of two years, and therefore respondent's reference to the two year period between the conclusion of the criminal proceedings, and the institution of the present proceedings is irrelevant to the issue.

12. Therefore this grievance is manifestly unfounded.

The second grievance

13. Respondent's argument in this regard is that Article 39 of the Constitution is inapplicable to the present case, since the terms used therein refer to the trial stage, and does not include the pre-trial stage. This clearly results from the wording of the law, which guarantees the right to a fair trial when a person is *"charged with a criminal offence."*

14. In this Court's view, this argument is inapplicable to the case under examination, since the statements in question, and specifically the statement sworn before the duty magistrate, were not released by the accused but by a <u>third party</u>, that is Gregory Robert Eyre ["Eyre"], who was later produced as a witness in the criminal proceedings against applicant.

15. For the above reasons, this grievance is unfounded.

<u>**The Principal Appeal**</u>

16. This appeal is mainly based on the argument that the sworn statement of the principal witness, which formed the basis of applicant's extradition from Spain to Malta, and which formed the crux of the evidence in the criminal proceedings against applicant, have violated applicant's right to a fair trial.

17. Applicant gives the following reasons in support of his contention.

18. [1] That the witness Eyre did not have a right to speak with a lawyer prior to releasing the statements in question; [2] that he was pressured into releasing the statement; [3] that in the criminal proceedings against applicant, he consistently stated that the Mark Stephens he referred to in his statements was not the applicant [at that time the accused]; [4] that the Judge conducting the trial had failed to direct the jurors to treat the evidence of Eyre with special caution considering that the latter was an accomplice to the crime; [5] that the first Court has disregarded the evidence given before that same court by Superintendent Abraham Zammit who stated that subsequent to the release of the statements, applicant was sent to Mount Carmel Hospital for detoxification. Moreover, such evidence was given during these proceedings and so was not available before the criminal Courts hearing applicant's case.

19. Applicant states that the references made by him, before the first Court, to other evidence, were not intended as a request to that Court to *"undertake a reappraisal of the facts of the case that lead to his conviction"*[4], but were intended to show that the whole criminal proceedings were biased, unfair and unbalanced against the accused.

20. Applicant maintains that the principle of equality of arms was breached in his case, since, having regard to the nature of the offences and the punishments they carry, he had no choice but to be tried by a jury. This

[4] Judgmenet pg.6

placed him at a disadvantage as *"it is widely known that drug related offences tend to be looked upon in a biased way by the man on the street such that a conviction is liable."*[5]

21. Also the *"grand publicity"* afforded to the case on the media when the case was still in its pre-trial stages *"surely led the jury to already form an opinion on the case such that the verdict they reached was somewhat biased in nature and therefore breached applicant's human right to a fair trial."*[6]

22. He further affirms that his reference in the present proceedings to the fingerprint expert's conclusion was not an invitation for the first Court to make a reappraisal of the evidence produced in the criminal proceedings, but the purpose of the reference was to show, by way of an example, that the applicant did not have a fair trial.

23. Applicant complains that the judge presiding the trial by jury was *"utterly biased when he failed to explain this crucial Article [639 of the Criminal Code] of the law to the Jury. The omission to do so, which is mandatory and not discretionary on the Judge, put the appellant at a disadvantage in that Jury, all being lay people without a legal background, surely had no idea of the importance of treating the evidence of an accomplice with caution."*

24. He states that he strongly feels that in his summing up of the trial, the judge *"directed the jury [into] believing the statements released by the witness Gregory Robert Eyre and in particular, he directed the jury into accepting the statement which the same Gregory Robert Eyre confirmed on oath in front of the duty magistrate. Rather than merely interpreting and directing the Jury as to the relevant law on the admissibility of the statements of Gregory Robert Eyre the presiding Judge used an emphatic voice and stressed on particular phrases which*

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[5] Appeal application
[6] Ibid.

without doubt had a bearing on the Jury's *verdict and therefore on the trial in general."*

Court's Considerations

25. Regarding the absence of legal assistance when Eyre released his two statements, this Court agrees with respondent in that there is no fundamental human right for legal assistance during the pre-trial stage to safeguard any third parties from being incriminated. As the first court rightly observed, *"Access to legal counsel is a fundamental safeguard against self-incrimination by the person suspected of committing the crime ... a right which in the court's view is personal to Eyre"*[7]*,* who released the statements, and not to applicant who at that stage was merely a third party.

26. Moreover, Eyre had unsuccessfully contested the validity of the statements in question, one of which was confirmed on oath by him before the duty magistrate, in constitutional proceedings which ended in his claim to a breach of his fundamental human rights being dismissed.

27. Also, the fact that the second statement was confirmed on oath before the duty magistrate weakens applicant's claim that the statement was released by Eyre under pressure or duress. As has been stated by this Court in the case ***Il-Pulizija [Spettur Josric Mifsud] v. Amanda Agius,*** decided on the 22nd February 2013:

"Dik il-garanzija izda ma huwiex biss l-avukat li jista' jaghtiha ...... Il-prezenza ta' magistrat, ufficjal gudizzjarju indipendenti mill-pulizija, hija garanzija bizzejjed illi l-istqarrija tinghata b' ghazla hielsa, volontarja, u ma tigix imgieghla jew mehuda b' theddid jew b' biza' jew b' weghdiet jew bi twebbil ta' vantaggi."[8]

28. The above considerations also weaken applicant's claim that when releasing his sworn statement Eyre was

[7] Supra
[8] See also *Il-Pulizija [Spettur Josric Mifsud] vs Tyronne Fenech*, decided on the same date;

suffering from drug withdrawal symptoms. Moreover, apart from the fact that the sworn statement was confirmed in front of the duty magistrate, and apart from the fact that the evidence given by Assistant Commissioner [then Superintendent] Neil Harrison further weakens applicant's claim in this regard, this Court, agrees with the first Court's reasoning, that this is a question of fact to be decided upon in criminal proceedings, and not in the present proceedings.

29. Moreover, contrary to applicant's argument, the evidence tendered by the forensic psychologist is of a generic nature, and does not specifically relate to Eyre's mental state at the time of questioning. Also, applicant's claim that, as Eyre was suffering from withdrawal symptoms during the police interrogation, *"anything which the police told me [Eyre] I agreed with it",* is neutralized by what Eyre stated during the inquiry proceedings[9].

30. Regarding applicant's claim that, during the criminal proceedings, he could not have been aware of the contents of the evidence given by Superintendent Abraham Zammit during these proceedings, this Court observes that this witness was produced in these proceedings at the request of applicant himself and in the summons it was indicated that this witness was being summoned *"fil-kapacita' tieghu ta' Direttur tal-Habs".* This Court observes that there was no legal obstacle impeding applicant from producing this witness during the criminal proceedings. Moreover, from the evidence tendered by the said witness, supported by dokument AZ1, it results that Eyre was discharged from Mount Carmel Hospital on the 20th August 2005, and no evidence was produced regarding Eyre's mental health on admission. Therefore, there is no evidence showing that when giving evidence before the duty magistrate, the witness was suffering from withdrawal symptoms; on the contrary, as explained above, his mental state was such as to enable him to fabricate evidence, as stated by him during the inquiry proceedings.

[9] Vol.2 – fol.125 – records of the compilation proceedings

31. Regarding applicant's claim that there exists other evidence supporting his version of events, and regarding the production in these proceedings of the affidavit of a certain Richard Cranstorm, this Court observes that during the criminal proceedings applicant had the opportunity to bring forward all his evidence, both during the inquiry proceedings, and in his trial by jury, as well as raise all pertinent issues before the Criminal Court of Appeal.

32. Moreover, the purpose of these proceedings is not to make a reappraisal of the facts done by the competent ordinary courts, but to examine whether the criminal proceedings constituted a fair trial in terms of Article 6 of the Convention.

33. As this Court observed in **JFM Investments Limited v. Avukat Generali et,** decided on the 30th September 2011:

"Din il-Qorti tirriafferma l-principju li m' ghandhiex tigi kjamata sabiex tissostitwixxi d-diskrezzjoni taghha ghal dik tal-Qorti f' kompetenza ordinarja, u lanqas ghandha tissindika l-apprezzament tal-provi kif sar mill-qrati ordinarji, inkluz dik ezercitata mill-Qorti tal-Appell, u dan ghaliex ir-rimedju kostituzzjonali ma huwiex u ma ghandux jigiuzat bhala xi ghamla ta' appell tat-tielet grad … id-dritt ta' smigh xieraq ma jiggarantix il-korrettezza tas-sentenza fil-mertu, izda jiggarantixxi biss l-aderenza ma' certi principji procedurali [indipendenza u imparzjalita' tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament ta-sentenza fil-pubbliku] li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja.

34. Although applicant claims that his purpose in referring again to the evidence before the criminal courts is to demonstrate to this Court that he was not given a fair trial, in effect this request is tantamount to a request to re-open the case with a view to deciding again on the merits of the criminal case which has been definitely concluded.

35. As the first Court rightly states:

"The issue of identification of the person who instructed Eyure to import drugs into Malta was also dealt with in detail by the Court of Criminal appeal in the judgment [vide paragraphs 38 and 39]. The Court gave clear and unequivocal reasons why it believed that Eyre implicated the applicant when he referred to him during the interrogation held on the 12th September 2005 and his testimony in front of the duty magistrate."[10]

36. Also, the case **Lutsenko v. Eukraine**[11] decided by the European Court and cited by applicant, cannot be of any comfort to applicant, since in that case the witness [an accomplice] who had released the statement was absent from the criminal proceedings before the national court, and therefore could not be cross-examined by the defence. In those circumstances the European Court decided that the Lutsenko trial was in breach of his fundamental right to a fair hearing. That Court also observed:

"It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence, including statements by an absentee co-accused may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way which the evidence was obtained were fair [see, inter alia *Jallah v Germany [GC],* no 54810/00 para.95 ..]"

37. Contrary to the facts of the Lutsenko case, in the present case, apart from the fact that the statement was confirmed on oath before a duty magistrate, the author of the statement testified both in the inquiry proceedings as well as in the trial by Jury, and applicant had ample opportunity to cross-examine the witness in front of the jurors[12]. However, though a copy of the sworn statement made by Eyre was distributed to the jurors, after applicant,

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[10] Supra
[11] Appl.30663/04, para.42. - Dicembru 2008
[12] Fol.371- 374 of the trial proceedings.

through his counsel, stated that he did not object, defence counsel crosss-examined the said witness. This witness was also heard in confrontation with another prosecution witness, Vincent Stivala who was also cross-examined by defence counsel.

38. Regarding applicant's claim that the principle of equality of arms was breached in his regard, in various aspects specified by him, the following observations are relevant:

39. First of all, it has been stated in legal doctrine that:

"The most established right added to Article 6 (1) is the principle of the equality of arms. This is important to understand the operation of the underlying principle of 'fairness' and although it is not explicitly expressed in Article 6(1) it is necessarily implied. This concept comprises the idea that each party should have an equal opportunity to present his case and that neither party should enjoy any substantial advantage over his opponent*."* [Andrew Grotian – "*Article 6 of the European Convention on Human Rights – The Right tal a Fair Trial"]*

"The right to a fair hearing supposes compliance with the principle of equality of arms. This principle, which applies to civil as well as criminal proceedings requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In general terms, the principle incorporates the idea of a fair balance between the parties. [Harris O' Boyle and Warbick – *"Law of the European Convention on Human Rights"]*

40. Applicant's claim that the fact that he was tried by a jury put him at a disadvantage is unfounded, since he had ample opportunity to bring all his evidence and cross-examine the witnesses produced by the prosecution, including Eyre.

41. As to his claim that jurors are biased in case of drug-related cases, this Court observes that this is a

gratuitous assumption which is also weakened by the legal obligation on the part of the presiding judge to direct the jurors to decide only on the facts of the case produced before the, and there is no grievance that this obligation was not satisfactory executed.

42. Regarding applicant's claim that the presiding judge was *"utterly biased"* when he failed to explain to the jurors the import of Article 639 with reference to the evidence of Eyre, and when he directed the jury into accepting Eyre's sworn statement, this Court observes that an examination of the extract[13] cited by applicant in his note of submission, in support of this claim, reveals that the judge was merely explaining to the jurors the law's departure, in drug- related cases, from the procedural rule that in their decisions jurors are to consider only evidence produced in Court. He concluded saying that *"By allowing such statements to be considered as evidence, the Legislature, the Parliament, the Maltese Parliament had a reason for that, and I will stop there. These are difficult cases and the legislator wanted that all facts be brought to the notice of the judges of fact that is the jurors."*

43. In another part of the address, cited in the judgment of the first Court, the judge stated in clear terms that the prosecution's request to find guilt on the basis of Eyre's sworn statement is legally correct, whilst factually it depends on the jurors whether to accept that statement as the truth.

44. The Court observes that, notwithstanding applicant's assertion of misdirection by the judge to the jury or of bias on his part, no plausible argument was brought in support thereof. The judge merely explained the law, and was careful not to influence unduly the jurors on matters of fact.

45. Finally, it must be pointed out that these issues fall within the competence of the Court of Criminal Appeal which is the appropriate forum to deal with such

[13] Fol.110

grievances, and in fact that Court has dealt with the issue regarding Article 639, and also concluded that there was no misdirection of the jury.

46. For the above reasons, the grievances on which applicant bases his appeal are unfounded.

Decide

For the above reasons, the appeal is being rejected and the judgment of the first Court confirmed.

The expenses relating to the principal appeal are to be borne by applicant, whilst those relating to the cross-appeal are to be borne by respondent.

< Final Judgement >

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