MALTA

QORTI TA' L-APPELL KRIMINALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
JOSEPH A. FILLETTI

ONOR. IMHALLEF
DAVID SCICLUNA

Seduta tas-6 ta' Marzu, 2003

Numru 15/2001

The Republic of Malta

vs

Steven John Caddick
Phillip Walker
…. *Omissis* ….

The Court,

Having seen the judgement of the Criminal Court delivered on the 5th March 2002 which reads as follows:

"The Court,

Having seen Bill of Indictment 15/2001.

Having heard and seen the verdict given by the Jury during the sitting of the 4th March, 2002 whereby the Jury (1) by six (6) votes in favour and three (3) votes against found ***Steven John Caddick*** not guilty of the charge under the First Count, by six (6) votes in favour and three (3) votes against found the same said ***Steven John Caddick*** guilty of the charge under the Second Count, and by six (6) votes in favour and three (3) votes against found the same said ***Steven John Caddick*** guilty of the charge under the Third Count; (2) by six (6) votes in favour and three (3) votes against found ***Phillip Walker*** guilty of the charge under the Second Count, by six (6) votes in favour and three (3) votes against found the same said ***Phillip Walker*** guilty of the charge under the Third Count, and by seven (7) votes in favour and two (2) votes against found the same said ***Phillip Walker*** guilty of the charge under the Fourth Count, and (3) by six (6) votes in favour and three (3) votes against found ***Steven Peter Cushnahan*** guilty of the charge under the Second Count without the circumstance, however, that the offence was under such circumstances which show that possession of the dangerous drug (cocaine) was not for the exclusive use of the said ***Steven Peter Cushnahan***, and by six (6) votes in favour and three (3) votes against found the same said ***Steven Peter Cushnahan*** not guilty of the charge under the Third Count.

Declares ***Steven John Caddick*** not guilty of the charge brought against him under the First Count and consequently acquits him therefrom; whereas it declares him guilty of the charge brought against him under the Second Count, that is of knowingly having been in possession of a dangerous drug (cocaine) in breach of the law and this in circumstances which show that such possession was not for his exclusive use, and declares him guilty also of the charge brought against him under the third Count, that is of having, with another one or more persons in Malta, and outside Malta, conspired for the

purpose of committing an offence in violation fo the Dangerous Drugs Ordinance, and specifically of importing and dealing in any manner in cocaine, and of having promoted, constituted, organized and financed such conspiracy.

Declares ***Phillip Walker*** guilty of the charge brought against him under the Second Count, that is of knowingly having been in possession of a dangerous drug (cocaine) in breach of the law and this in circumstances which show that such possession was not for his exclusive use, it also declares the said ***Phillip Walker*** guilty of the charge brought agianst him under the Third Count, that is, of having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the Dangerous Drug Ordinance, and specifically of importing and dealing in any manner in cocaine, and of having promoted, constituted, organized and financed such conspiracy, and also declares the said ***Phillip Walker*** guilty of the charge brought against him under the Fourth Count, that is, of knowingly having been in possession of a dangerous drug (the whole or any portion of the plant Cannabis) specified and controlled under the provisions of Part III, First Schedule, of the Dangerous Drugs Ordinance, when not in possession of any valid and subsisting import or possession authorization granted in pursuance of said law.

Declares ***Steven Peter Cushnahan*** guilty of the charge brought against him under the Second Count, that is, of knowingly having been in possession of a dangerous drug (cocaine) in breach of the law without the circumstance, however, that the offence was under such circumstances which show that possession of the dangerous drug (cocaine) was not for his exclusive use, and declares the same said ***Steven Peter Cushnahan*** not guilty of the charge brought against him under the Third Count and, consequently, acquits him therefrom.

Having heard Defence Counsel Dr. Jose' Herrera and Prosecuting Counsel Dr. Mark Said regarding the punishment to be awarded to the above-mentioned

Steven John Caddick, Phillip Walker, and Steven Peter Cushnahan with regard to the charges on which they have been found and declared guilty.

Having seen the records of these proceedings, having considered all the circumstances of the case, including the nature, quality and amount of the drugs involved (cocaine and cannabis) with respect to each one of the said three persons found and declared guilty, having taken into consideration the time spent in preventive custody by each of the said three persons, having considered that ***Steven Peter Cushnahan*** has a long medical history of a serious heart condition as has been proved during these proceedings by relative evidence to the Court's satisfaction, having seen the clean conduct sheet of all these persons found and declared guilty, having seen that the verdict of the Jury is not a unanimous one, as well as having considered any other circumstances which might be relevant.

Having seen Sections 2 (1), 4, 9, 10, 10 (1), 12, 14, 14 (1) (5), 15A, 20, 22 (1) (a) (b) (i) (f) (1A) (1B) (2) (a) (b) (i), (3A), (c) (d), 22E, 22 (1G) (2) (a) (aa) (bb) (ii), 22F, 26 (1) (2) of the Dangerous Drugs Ordinance (Chapter 101), Regulation 8 of the 1939 Regulations for the Internal Control of Dangerous Drugs (Legal Notice 292/39), also Sections 17 (b), 20, 22, 23, 17(h) and 533 of the Criminal Code, as well as sections 5 (2) (b) (d) and 15 of the Immigration Act.

Sentences the said ***Steven John Caddick*** to imprisonment for a period of thirteen (13) years (from which period is to be deducted the time he has already spent up to today in preventive custody) and to a fine (Multa) of Twelve thousand Maltese Liri (Lm12,000) convertible into an additional one year imprisonment if it is not paid according to law; and further orders him to pay to the Registrar of these Courts, within one month from today, the sum of One Hundred and Ten Maltese Liri (Lm110) being his share from the total Court experts' fees incurred in these proceedings.

Sentences the said ***Phillip Walker*** to imprisonment for a period of fifteen (15) years (from which period is to be deducted the time he has already spent up to today in preventive custody) and to a fine (Multa) of Twelve Thousand Maltese Liri (Lm12,000) convertible into an additional one year imprisonment if it is not paid according to law, and further orders him to pay to the Registrar of these Courts, within one month from today, the sum of One Hundred and Ten Maltese Liri (Lm110) being his share from the total Court Experts' fees incurred in these proceedings.

Sentences the said ***Steven Peter Cushnahan*** to imprisonment for a period of two (2) years (from which period is to be deducted the time he has already spent up to today in preventive custody), and to a fine of Six thousand Maltese Liri (Lm6000) convertible into an additional six (6) months imprisonment if not paid according to law, and further orders him to pay to the Registrar of these Courts, within fifteen days from today the sum of Fifty Maltese Liri (Lm50) being his share from the total Court Experts' fees incurred in these proceedings.

Orders the forfeiture in favour of the Government of Malta of the entire immovable and movable property of each of the three persons found and declared guilty in which the offence took place as described in the Bill of Indictment.

Orders the destruction of all the drugs exhibited under its authority in these proceedings unless the Attorney General, by a Note filed not later than a week from today, declares that such drugs are required in connection with some other proceedings. The destruction of said drugs is to be carried out by chemist Mario Mifsud who is being appointed for the purpose.

The said Mario Mifsud is to file a Proces-Verbal in the record of these proceedings detailing the said destruction, and such Proces-Verbal is to be filed not later than a month from today.

Finally the Court is declaring the said ***Steven John Caddick, Phillip Walker and Steven Peter Cushnahan*** to be prohibited Immigrants under Section 5 (1) (d) of Chapter 217 (Immigration Act) and by virtue of Section 15 of the same Act orders that a Removal Order be made against each of the said three persons which shall become operative only and as soon as each one of them has served his prison sentence."

Having seen the applications of appeal of the said Steven John Caddick and the said Phillip Walker filed on the 22nd March 2002 wherein they requested that this Court allow their appeals, thereby quashing their conviction in respect of the second and third counts of the bill of indictment, and in respect of the said Phillip Walker the fourth count as well, directing that a verdict of not guilty be entered in respect of the said counts, and quashing the sentence passed or, alternatively, quashing the sentence passed at the trial and passing such other sentence of lesser severity if convinced that such other sentence ought to have been given, thus varying the same sentence in its punitive part;

Having seen the declaration registered during the sitting of the 28th November 2002 whereby Dr. Jose` Herrera for appellants and Dr. Mark Said for the Attorney General agreed that one judgement be delivered for both appeals;

Having seen all the records of the case and the documents exhibited;

Having heard the submissions made by counsel for appellants and counsel for the respondent Attorney General;

Considers:-

In their applications of appeal, appellants allege in the first place that there was an irregularity during the proceedings deriving from the bias shown towards the prosecution by the trial judge during his summing up. Secondly they allege that during the summing up there were several

instances when the trial judge gave a wrong interpretation and/or made a wrong application of the law. Thirdly appellants allege that they were wrongly convicted on the facts of the case. Finally, and without prejudice to the principal ground of appeal, they submit that the punishment inflicted was excessive.

The Court will be dealing with the various grounds in the same order as they have been submitted in the applications of appeal. Consequently, the Court will start by considering the first ground, namely the alleged irregularity based on bias towards the prosecution.

In their applications, appellants cite several points which they believe should lead this Court to find that during the proceedings before the First Court, there was an irregularity which had a bearing on the verdict in such a way that a miscarriage of justice has occurred, namely that when the trial judge delivered his summing up, it was rendered null by way of bias shown towards the prosecution. They state:

"That in this regard, the First Court in its summing up excluded completely the submissions of the defence and addressed solely the case as presented by the prosecution with the result that the jurors were swayed completely adrift from the possibility of considering objectively the case before them.

That as required by art. 465 of Chap. 9 of the Laws of Malta, the presiding judge should in his summing up address and explain to the jurors all points of law and sum up the evidence in such a manner as may tend to direct and instruct the jury for the proper discharge of their duties.

That as a matter of fact the First Court at no point in its summing up made any mention of the facts highlighted by the defence which in themselves would have had great bearing in the minds of those who had [to] judge on the facts. In fact although the First Court repeatedly guided the jurors to consider the trial as three separate ones

because of the fact that there were three accused persons, yet it failed to mention the fact that nowhere from the evidence tendered was there any glimpse of proof shedding any light as to whom did the drugs found belong out of the three accused. This in itself is quite an omission which becomes even graver in light of the fact that the defence made extensive submissions on the point which would have had definitely a great impetus on the issue of guilt or otherwise of the accusations of possession with intent.

That the First Court failed to mention in its summing up that from the evidence it emerged that on the scene of the crime there were found certain implements such as straws cut in half, open sachets of cocaine, pharmaceuticals with sedative properties, all objects which would make more probable the fact that the accused had the drugs in their possession merely and exclusively for their personal use.

That at no point in its summing up did the First Court mention that as Mr. Mifsud, the Court appointed expert, had related in his report, the drug was of a low level of purity (20%) which level is usually the street level and that this was further indicative of a probability that the drug was not intended for re-sale but for personal consumption.

That furthermore not only did the First Court omit to address the said point as brought up by the defence but at fol. 32 of the summing up the presiding judge went a step further and took the liberty of interpreting the defence submissions as an admission of guilt to the charge of simple possession. In fact the First Court held:

'From submissions put forward to you by defence counsel, I think he was putting forward to you his submission that they did possess this cocaine …'.

However, contrary to that held by the First Court, what defence counsel actually conceded was that someone of the three accused did possess the drug but from the evidence there resulted no proof of who it was. Thus defence was contending that once the trial in itself

consisted of three different trials in respect of each accused then the jurors could not find guilt of any of the accused unless they were convinced from the evidence tendered that it was actually in possession of one or more of the accused.

That as regards the question of possession with intent the First Court misdirected the jurors and repeatedly invited them to consider solely the deposition given by the Court expert Mario Mifsud wherein he held that a cocaine user could at most use up to 5 grams a day of the drug, thus excluding the thesis of personal use in light of the amount found in the accused's flat. However no mention was made of the deposition of Dr. Zammit Montebello, a witness for defence, who clearly rebutted Mr. Mifsud's statement by stating that in more than 12 years of practice in the medical profession exclusively with drug addicts, he had numerous encounters with clients of his who consumed more than 25 grams of the drug daily. In the humble opinion of the appellant such a deposition was of tremendous probative value in light of his line of defence and thus should not have been discarded in such blunt manner.

That in furtherance to the above the First Court misdirected the jurors when it omitted to make mention of the depositions of the doctors who examined the three accused upon their arrest at the Corradino Correctional Facility, who tested positive for cocaine. Such evidence was clearly indicative of the fact that the accused were in fact drug addicts thus making more probable the submissions of the defence, that is, that the drugs found were meant exclusively for the accused's personal use. Similarly no mention was made of the fact that the co-accused Caddick tested positive for cannabis, which fact emanated from the same depositions, and which corroborated further the deposition of Dr. Zammit Montebello in the sense that so heavy was the use of cocaine by the three accused (which drug has a highly stimulating effect), that they had to resort to the use of cannabis for its sedative effect. Thus once again a highly probative deposition for the case of the defence was left

out of the First Court's summing up with the result that the jurors were never put in a proper position so as to evaluate impartially the case put before them."

This Court has examined thoroughly the summing up made by the trial judge and can categorically state that it finds in it no element of bias. During oral submissions made before this Court, however, it was clarified that what appellants were actually complaining of was that the trial judge, in his summing up, did not strike a fair balance between the prosecution case and the defence case as he completely excluded the defence case.

It is undoubtedly the duty of the trial judge to outline fairly the case put forward by the defence. How this is done, however, will depend on all the circumstances of the case. As Rosemary Pattenden points out in her work **Judicial Discretion and Criminal Litigation** (OUP 1990):

"Whatever mode of summing-up the judge employs he must ensure that the defence is outlined fairly. How this is done is governed by open-ended rules. The judge must put the 'substance' of the defence, however weak, save where the accused has failed to discharge an evidential burden. '[T]hat does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given…' (per Goddard LCJ, *Clayton-Wright* (1948) 33 Cr App R 22 p. 29). As the New Zealand Court of Appeal stressed in *R. v. Ryan* (per Richmond J., [1973] 2 NZLR 611 at p. 615): *'Each case obviously must be judged having regard to its own particular facts. In some cases it may be sufficient for the Judge to refer in the most general terms to the issues raised by the defence, but in others it may be necessary for him not merely to point out in broad terms what the defence is but to refer to the salient facts and especially those upon which the accused based his defence. Again, an election by the Judge to embark on a discussion of the evidence and inferences therefrom which are favourable to the Crown may throw upon him the duty of making some*

reference to any important features of the case which militate against those inferences'.

The summing-up, in other words, should look balanced, and any defence which is not merely fanciful or speculative, particularly in a homicide trial, must be put to the jury…The Judge can, of course, comment adversely on an unconvincing defence…" (pp. 178-180).

In the case in question, when the trial judge was explaining the duties of the jurors, he explained to them unequivocally that they are the "judges of facts". He stated:

"Going back to what the prosecuting counsel told you, and going back to what defence counsel told you, last Thursday and Friday, you may remember that a lot of facts were mentioned by both sides, and they gave you their interpretation of those facts, basing themselves upon the evidence of course which was produced during this trial. I myself as well may mention some facts, during this summing up, but whenever reference is made to facts, whenever an interpretation is made to facts, by the lawyers or by myself, you are absolutely in no obligation to follow what we have told you, or what I might be telling you, about facts. Whatever the lawyers say about facts, whatever I may say about facts is just an opinion, it does not in any way constitute proof, or evidence, so you are not bound by law to accept those facts as interpreted to you by lawyers representing the accused or by the counsel for the prosecution or by what I may say about facts."

What the trial judge said in relation to the second count of the bill of indictment, therefore, has to be seen in the light of these directions given to the jurors as well as the explanation he gave of the law applicable. Indeed, in the relative part of the summing up the trial judge explained quite clearly the meaning of possession and the various elements that were to be considered, even stating *inter alia* that:

"when a person holds the drug on behalf of somebody else, the mere fact that I am holding drugs on behalf of somebody else, the mere fact that I may be in the vicinity or near the drug in question does not necessarily always imply that I too am guilty of possession of drugs. I mean I may be near something, which turns out to be a drug, that does not necessarily, or always, mean that I am in physical or legal possession of that drug".

This is being pointed out as appellants claim that their line of defence that there was no proof as to whom the cocaine actually belonged, was not mentioned by the trial judge. They refer specifically to submissions made by their defence counsel before the First Court on the 28th February 2002 (vide transcription tape 18 side B pages 1, 2 and 3).[1] It is indeed clear, from submissions made by defence counsel before the First Court, that the cardinal line of defence brought forward by the accused was that the drugs found were for their exclusive use. Reference is made, for instance, to what was stated by defence counsel earlier on during the same sitting (vide transcription tape 17 side A page 6) that "they were using it themselves, and I will bring evidence in the afternoon, to prove to you in the most unequivocal manner, with direct evidence, that the accused had consumed cocaine". Of relevance in this respect are the submissions made by defence counsel relating to the cut straws, the open sachets of cocaine, the low level of purity of the drug found, the evidence given by Dr. John Zammit Montebello regarding the daily amount of consumption of cocaine by addicts, and the evidence of the prison doctors regarding their findings, both before the First Court and by appellants in their applications of appeal. Hence there was nothing irregular when the trial judge, having emphasised that the jurors could only find guilt if they were morally convinced that the prosecution had proved up to the level of moral certainty that the accused or any

[1] This Court cannot fail to observe that defence counsel stated quite clearly (at page three thereof) that the line of argument he was making was "a sort of sidekick".

of them were found in possession of the drug cocaine, continued as follows:

"In this second count it might not be so difficult - but again this is up to you to decide - to establish whether the accused were in the physical or legal possession of the drug cocaine. From submissions put forward to you by defence counsel, I think he was putting forward to you his submission that they did possess this cocaine, but without the aggravating circumstance mentioned in the second part of the accusation".

The trial judge then passed on to consider the aggravating circumstance indicated in the second count, namely that the possession of cocaine was in circumstances denoting that it was not for the exclusive use of the accused. Article 465 of the Criminal Code states, *inter alia*, that when addressing the jury the trial judge should sum up, "in such manner as he may think necessary, the evidence of the witnesses and other concurrent evidence". As has already been pointed out, this cannot be interpreted as an obligation to rehearse all the evidence or all the arguments. Now in this case it is evident from the relative part of the summing up that the trial judge did not refer to the various points identified by the defence that should indicate that the drug was for the exclusive use of the accused. Likewise, however, the trial judge did not mention the points identified by the prosecution as indicating that the drug was not for the exclusive use of the accused. There is therefore no imbalance in this respect. What the trial judge did was to analyse, correctly, the elements that had to be considered by the jurors in determining whether there existed the aforesaid aggravating circumstance or not. This Court finds nothing irregular in this.

It may be opportune in respect of appellants' first grievance to point out also what Simon Brown, L.J. said in *R. v. Nelson* [1997] Crim. L. R. 234, CA (as quoted in Archbold's **Criminal Pleading, Evidence and Practice 2001** (p. 457 para. 4-376):

"Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities … there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."

In conclusion, therefore, appellants' first grievance is rejected.

In their second grievance appellants claim that in its summing up the First Court made a wrong interpretation and application of the law which had or could have had a bearing on the verdict, in such a way that a miscarriage of justice occurred, when it commented on the nature of expert evidence in criminal trials. In this regard appellants state that they disagree with what the First Court said in its summing up (at page 16), that is to say that *"an expert can give an opinion basing himself upon his experience and as such the law allows him to reach the level of probability"*. They submit that nowhere in the law is it stated that expert witnesses in their evidence have to or can reach the level of probability.

This Court, after examining the summing up, believes that the excerpt quoted by appellants - which excerpt, taken in isolation, does seem to contain an unfortunate turn of phrase - has to be seen in the context of the explanation that was given by the trial judge regarding evidence given by experts. Indeed the trial judge had just stated that an expert need not "give an opinion to the level of certainty" and that experts could give their opinion "even to the level of probability" (at page 15) and then made reference to the evidence given by forensic expert Mario Mifsud who had stated that "probably" the cocaine was packed abroad. The trial judge stated:

"It is an opinion based upon probability. He could do that, but it is up to you whether to accept it or not. You are not bound to accept an opinion of that expert …I am mentioning it simply to point out that an expert can base his opinion up to the level of probability".

Later on in the summing up (at page 25) the trial judge returns once again to this point and says:

"And pharmacist Mario Mifsud said that such circumstance in his opinion indicated that the drug - now whether he used the word 'possibly' or 'probably' I don't know, but he said that in his opinion that circumstance shows that the drug was wrapped abroad - he could have used the word 'possibly', I don't remember, he could have use the word 'probably'. If you want to know exactly which word he used, you could always go back to the tape, during the deliberation stage, and see exactly what pharmacist Mario Mifsud said. But it is most important that whichever word he used, 'possible' or 'probable' you have to analyse and consider whatever he said in the context of all the evidence given in this particular circumstance. My whole point was that Court appointed experts, because of the fact that they are Court appointed experts, can give an opinion and can give that opinion even up to a level of probability. So if he use the word 'possible' it … is not valid legal admissible evidence. If he used the word 'probable', then it is up to you to decide whether to accept that opinion or not".

The fact of the matter is that experts rarely express themselves in categorical terms; more often than not they are called upon, or feel obliged to limit themselves, to state that something is “likely” or “unlikely” to have happened as a matter of cause and effect. In some areas of forensic science (for example, ballistics and fingerprinting) certain “facts” (amounting to an opinion) may be stated with certainty; in other areas, however, this may not be possible. A doctor, for instance, is unlikely to state categorically that a particular weapon caused a particular wound, but is more likely to state it is “highly unlikely” to have caused the wound, “likely” to have caused it, or perhaps “most likely” to have caused it. In such case, the opinion thus expressed has to be valued and examined in the light of all the other evidence submitted by the prosecution and, if the accused elects to produce evidence, by the defence. This is, in effect, what the trial judge was telling the jury. The trial judge may have expressed himself differently or perhaps better; but, in the opinion of this Court, this does not amount to a wrong interpretation or application of the law.

It would thus appear that appellants' grievance in this regard is also unfounded. All the more so when one considers that this discussion related to the manner in which the cocaine was packed and whether or not it was packed abroad and was thus of primary relevance to the first count of the bill of indictment in respect of which appellant Steven John Caddick was declared not guilty.

Appellants also submit that the First Court made a wrong application or interpretation of the law which had or could have had a bearing on the verdict when it invited the jury to consider the deposition of Mr. Mario Mifsud as regards the origin of the drugs found at the residence of the three accused. They refer to what the First Court said in its summing up (at page 15) that *"… Mifsud said that in his opinion because of the way the drug was found packed in the balloon plastic capsules, … he never came in a situation when they were so packed … and because of this fact, it is his opinion that most probably the cocaine*

was packed in that way abroad". Thus, according to appellants, Mr. Mifsud's deposition was corroborating the prosecution's case that the drugs were imported. Appellants state that the Court, apart from misquoting the said witness, failed to direct the jury that that extract of his deposition was to be ignored for the simple reason that Mr. Mifsud was appointed as a Court expert in lieu [**recte:** view] of his expertise as a pharmacist and not as a criminologist or otherwise, and thus his deposition ought to have been limited to the issue of purity and quantity of the drug. In allowing him to venture an opinion as to the packing, appellants say, the First Court was accepting as expert evidence that which in fact was nothing more than a conjectural and gratuitous comment made by Mr. Mifsud.

This Court believes that it need not dwell at length on this grievance which also relates primarily to the first count of the bill of indictment which is not in issue here. Suffice it to say that it results that Mario Mifsud's opinion (expressed in his evidence by the words "could be they were brought in" - tape 14 side B page 9) was based on his general expertise in the field of drug abuse. And this was aptly pointed out by the trial judge, who also emphasised to the jury that it was up to them whether to accept such opinion or not. This Court, thus, disagrees that Mario Mifsud's comment was "conjectural and gratuitous". The grievance based on this point is consequently also rejected.

Appellants also submit that the First Court made a wrong interpretation and application of the law which had or could have had a bearing on the verdict when in its summing up it directed the jury to ignore completely the fact that certain witnesses gave evidence about facts, during the trial, which they never mentioned in the course of the compilation of evidence. They refer specifically to what the First Court said in respect of P.C. 10 Trevor Cassar Mallia, namely that although he said something during the trial which he had not said before (that is during the compilation of evidence), the jury should not conclude that he was lying and that he cannot be relied upon as a witness. Appellants state that the First Court should have

explained that although P.C. 10 was not necessarily lying, such omission could impinge on his reliability as a witness in view of his imperfect re-collection of the facts witnessed by him.

This Court cannot agree with appellants. Although it would have been preferable had the said witness described the part he had carried out in the shadowing of the accused even when he gave evidence during compilation proceedings, the fact that he did not, taken in isolation, cannot be seen to detract from his reliability as a witness. It is for the jury to make the necessary assessment as to whether that fact has any bearing on the evidence tendered. The First Court explained the position as follows:

"… you may well remember, about a particular witness who did mention certain facts here which he never mentioned in the compilation of evidence. Now as a fact, that could have been the case. However, these are things which happen quite often in trials. It is not something which happened exclusively in this trial, but these are things which happen in trials. So if you see that this witness did as a matter of fact say something here which he never mentioned before, please do not take that fact as an indicator that that witness is lying. Whether that witness is credible or not you have to reach that conclusion from the examination or analysis of that witness. The law allows a witness to say something here which he had never mentioned before. There could be instances where witnesses say something before which they never mention here. I mean it is the same situation. What I am saying is that the fact that a witness mentions something here which he never mentioned before, please do not take that fact as something, as a pointer to the credibility of that witness, in the sense that that witness necessarily must have been lying. Whether he was lying, whether he did it purposely or not, this is something which you have to decide when you come to analyse that witness, when you come to analyse those facts which he is mentioning now, as facts which have or have not any relevance to the facts in issue. I am referring particularly

to P.C. 10 when he mentioned the shadowing exercise. You may remember that questions were put to him, emphasis was placed upon it by the defence, to the effect that in the compilation of evidence P.C. 10 never mentioned the shadowing exercise.

Now shadowing or no shadowing, what you have to see is whether that piece of evidence has any bearing, has any relevance on the facts in issue. But by the fact that he never mentioned it before, please do not arrive to the conclusion that the witness cannot be relied upon simply because he never mentioned them before. He is mentioning them now. The law allows such a situation. Now use your intelligence, use your maturity, use your discretion to see whether that witness in the light of everything he said, in the light of all other evidence, whether this fact alone has any bearing upon the whole situation."

The grievance based on this point is consequently dismissed.

Before dealing with appellants' grievance regarding their conviction under the third count of the bill of indictment, this Court will be considering another issue raised by appellants. Appellants submit that they were wrongly convicted on the facts of the case since from the evidence produced there results, at least up to a level of probability, that the drugs found were clearly meant for their exclusive and personal use. They state that there was ample evidence which would reasonably induce one to believe that at no point did they ever intend to deal the drugs in question. This, they claim, is evident from the fact that they tested positive for the drug when examined by medical officers at the local prisons, that the drug found was of a very low level of purity, that in the apartment where they were residing there were found various objects related to drug abuse, such as straws cut in half having traces of the drug, that the drug was not split in sachets but was rather found in one lump, and that the same drug package was found open, thus indicating that the appellants were actually making use of the drug. The

conviction on the count of possession with intent to deal was therefore one which could not be considered as reasonably justified.

It is hardly necessary to point out that this is a delicate field relating to the appreciation of the evidence submitted during the trial - an exercise that is reserved to the jury - and this Court will not disturb such appreciation, even though it may not necessarily fully agree with it, if it results that the jury, properly directed by the First Court, had reached their verdict in a legitimate and reasonable manner. In other words it is not this Court's function to consider what conclusion it would have reached had it to evaluate the evidence gathered in first instance, but to see if, on the basis of the evidence produced, the jury could have legitimately and reasonably reached such verdict. If the verdict is regular in this sense, this Court will not alter such verdict.

This Court has examined all the evidence produced and it is satisfied that there is sufficient, indeed almost compelling evidence to justify the jury's finding of guilt in respect of the second count of the bill of indictment. Significantly, in their applications of appeal, appellants even misrepresent some of the evidence. While appellant Walker says he tested positive for drug[s] when examined by prison medical officers, evidence shows that he did not in fact take these tests (Dr. Richard Portelli, 1st March 2002 - tape 20 side B page 3). While appellants say that there were traces of drug found in the cut straws, the forensic report shows that no traces were found in any of the straws found and tested. Appellants also say that the drug was not split into sachets but found in one lump; it is true that one lump or block was found in the bedside table of the hotel room occupied by appellants, but appellants conveniently forgot to mention the nineteen rubber bags containing more of the same substance found in a white travelling pouch hidden beneath the wardrobe. This Court cannot fail to note also that from the same room a food mixer, a number of empty plastic bags and an unusually large number of Dioralyte sachets were seized (Dioralyte being a substance indicated for the replacement of

essential body water and salts lost from the body and in the treatment of watery diarrhoea and which comes in the form of a white powder). Electronic scales were also seized from appellant Caddick's luggage (although from the forensic report it appears that they were not in working condition).

Consequently there seems to be no legally valid reason why this Court should vary the jury's verdict finding appellants guilty of the third count of the bill of indictment. The evidence is such that the jury could have legitimately and reasonably reached the conclusion they did.

The Court will now turn to appellants' grievances regarding the third count of the bill of indictment, that is the count of conspiracy. They submit that the First Court made a wrong interpretation and application of the law which had or could have had a bearing on the verdict when in its summing up it addressed the jury on the question of conspiracy. They state that while the First Court rightly outlined the three elements of the crime, in elucidating the second and third elements, that is, common design and common plan of action, it held (at page 37) that *"… if there is evidence which shows that there was dealing in drugs in Malta, then that is a circumstance which shows that there has been this conspiracy"*. They submit that such an interpretation is fallacious in the sense that if the evidence were in fact to show that there was "dealing", then the offence would have gone beyond the limits of conspiracy and would have then become a completed offence, thus excluding the conspiracy.

Appellants argue that, as English authors opine, when the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspiring to commit it. They state that the crime of conspiracy under the Dangerous Drugs Ordinance is defined in such a way as to envisage something short of an attempt to deal in drugs, with the word "dealing" being given a very wide interpretation. Thus, they argue, from the verdict it results that the jurors

were misled by the First Court's comments and they found the appellants guilty under both the count of conspiracy and that of possession with intent, which latter crime, if proved, would be the stepping stone to an actual "dealing" in the drug, thus excluding completely the crime of conspiracy.

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

"Obviously if there is evidence which shows that the agreement was put into practice, if there is evidence which shows that there was dealing in drugs in Malta, then that is a circumstance which shows that there has been this conspiracy. That this is a circumstance which proves that the conspiracy had existed. But if for argument's sake, there is no evidence that the agreement was put into actual practice, then you will still have the crime of conspiracy complete. So do not think that it is an essential element of the crime to have to prove up to the level of moral conviction that there was the actual dealing of drugs in Malta".

This Court believes that the position at law was in fact misstated by the First Court, as 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 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.

Appellants also indicate that in respect of the third count, they were wrongly convicted on the facts of the case, stating that the jury was at no point presented with any objective evidence which could reasonably lead to a conviction in respect of such crime, and that the evidence adduced fell short of proving beyond any reasonable doubt that either one of the accused, together with another person, agreed and achieved a common design and a concerted plan of action to deal the drug. Yet again, they say, there was no objective proof which indicated that there existed a common plan of action to deal.

In his summing up, the trial judge made reference to circumstances cited by the prosecution in its arguments regarding the alleged plan of action: that the cocaine found in both bedrooms had the same purity, that one of the accused (Steven Peter Cushnahan whose appeal against the punishment inflicted has already been decided) arrived on the 6th March while appellants arrived on the 7th, and that they all stayed at the same hotel. But the trial judge also went on to emphasise that apart from a mode of action, the jury had to find the agreement, the common intention, to deal in drugs.

From a thorough examination of the evidence adduced, this Court is not satisfied that there is clear and unequivocal evidence pointing to an agreement between the accused. Nor is there any clear and unequivocal evidence pointing to an agreement as to a particular mode of action to deal in the drug cocaine. In the bill of indictment it was alleged that in the weeks prior to the 6th March 2001, appellants together with Steven Peter Cushnahan conspired and agreed between them to involve themselves in dealing in drugs. Not only had they agreed, the prosecution alleges, but they had also concurred on the means to be employed in the realization of said conspiracy. "Walker and Cushnahan had to transfer themselves to Malta so as to pave the way for trafficking the drugs which were to be, as indeed they were, materially imported into Malta by Caddick. Walker and Cushnahan were also responsible for helping in locally weighing and packing the drugs, and for making contact with local drug sellers and pushers. All three of them had previously forked out their share of money in acquiring and procuring in bulk the drug cocaine". This Court is of the view that not only was no evidence adduced to prove these allegations, but appellant Caddick was even declared not guilty of the crime of importation. So, while sufficient evidence was adduced to prove that appellants were in fact in possession of the drug cocaine in circumstances denoting that it was not for their exclusive use, there was insufficient evidence to prove the conspiracy.

In the light of the foregoing, this Court finds that the verdict handed down by the jury by means of which appellants were found guilty of the crime of conspiracy cannot, in the light of all the circumstances and evidence, be deemed to be a correct verdict and consequently appellants are to be held as having been wrongly convicted on the facts of the case with respect to the third count.

The Court will now consider the grievance in respect of the fourth count of the bill of indictment, and which count refers only to appellant Phillip Walker. Appellant Walker is

submitting that he was wrongly convicted on the facts of the case in respect of the charge of possession of cannabis. He says that the only evidence tendered was the fact that upon being "ambushed" (sic!) by the police, he reacted by grabbing the container holding the said drug to throw it under the bed. Later it transpired that it was only appellant Caddick who tested positive for cannabis. The mere fact that appellant reached for the drug when confronted by the police proves only that he knew where the drug was but not that he actually possessed it. He furthermore submits that in view of the above it is more likely that the said drug belonged to Caddick rather than to himself.

Here too the Court believes that the evidence is sufficient to justify the jury's finding of guilt in respect of the fourth count of the bill of indictment. Indeed the fact that appellant reached for the drug to throw it under the bed not only shows that he knew where it was but also that he knew what it was and that it was an illegal substance which is why he tried to hide it. He therefore undoubtedly had the constructive possession of the said drug. Whether he made use of it or not is besides the point. This grievance is consequently also dismissed.

The Court will finally turn to the question of punishment which appellants feel was excessive. They refer for the Court's consideration the following: the fact that the verdict was not unanimous, the relatively small amount of drugs found, its low level of purity, that it results that appellants were dependent on drugs, that it is far more traumatic for a foreigner to be imprisoned in a foreign country, their medical history, their clean criminal records, and that, in respect of appellant Walker, an extra two-year term of imprisonment for possession of a minute amount of cannabis is excessive and unreasonable.

This Court is obviously going to take into consideration the fact that in so far as the third count of the bill of indictment is concerned, the relative verdict is to be quashed. As to the second count of the bill of indictment, that is the crime of possession of a dangerous drug

(cocaine) under such circumstances that the Court is satisfied that it was not for appellants' exclusive use, section 22(2)(a)(i) of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) provides that the punishment shall be that of imprisonment for life, provided that where the verdict of the jury is not unanimous, then the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (*multa*) of not less than one thousand Maltese liri but not exceeding fifty thousand Maltese liri.

In passing sentence the First Court had in fact taken due account of the nature, quality and amount of the drugs involved, that neither Caddick nor Walker had any previous conviction in Malta, the fact that the verdict was not unanimous and other relevant circumstances.

Appellants invite this Court to consider their medical histories and the fact that they are both drug dependents. From the evidence tendered it would appear that no information regarding appellant Walker was provided. Indeed Dr. Joseph Spiteri, Dr. Andrew Amato Gauci and Dr. Richard Portelli provide most information with regard to appellant Caddick and none with regard to appellant Walker. There is in fact no evidence that appellant Walker was a drug dependent. As has already been pointed out previously in this judgement, appellant Walker had even refused being tested for drugs.

As to appellants' submission that it is far more traumatic for a foreigner to be imprisoned in a foreign country, this is undoubtedly true. But this Court believes that appellants should have thought about this before they decided to abuse of this country's reputed hospitality by breaching its laws, especially its drugs laws, well knowing that drugs are a social evil and a menace to society.

Appellants state that the amount of drugs found is relatively small. This Court does not believe the amount of cocaine found to be small. And the fact that it was only 20% pure does not mean that it could not be further cut

up, thereby reaping an increased profit for the vendors. Furthermore the fact that a person may himself be a drug dependent does not automatically lessen his criminal responsibility.

Appellants also refer to section 490 of the Criminal Code which provides that if the accused makes no opposition to the applicability of the punishment demanded by the prosecution, the Court shall pronounce sentence applying the punishment demanded if it is that prescribed by law. They state that the First Court did not consider the fact that defence did not object to the punishment demanded by the prosecution, that is seven years in respect of appellant Caddick and eight years in respect of appellant Walker.

Appellants, however, are here clearly misinterpreting section 490 because this section refers to the punishment demanded by the Attorney General in the bill of indictment and not to any suggestion as to punishment made by the Attorney General during submissions regarding punishment.

The Court believes that in determining the appropriate punishment where drug offences of a serious nature are concerned, while due weight is to be given to the individual circumstances of the offender, the deterrent aspect of the punishment has to be kept in mind, and that the punishment should represent society's emphatic denunciation of the particular crime concerned.

For these reasons the Court:

1. Rejects both appellants' requests for this Court to quash their conviction in respect of the second count of the bill of indictment,

2. Rejects appellant Phillip Walker's request for this Court to quash his conviction in respect of the fourth count of the bill of indictment,

3. Allows both appellants' request to quash their conviction in respect of the third count of the bill of indictment, and consequently quashes the said conviction in respect of this count,

4. Varies the sentence passed by the First Court in its judgement of the 5th March 2002 by condemning appellant Steven John Caddick to imprisonment for a period of eleven years (from which period is to be deducted the time he has spent in preventive custody) and to a fine (*multa*) of ten thousand Maltese liri (Lm10,000) convertible into an additional period of six months imprisonment if it is not paid according to law, and condemning appellant Phillip Walker to imprisonment for a period of twelve years and three months (from which period is to be deducted the time he has spent in preventive custody) and to a fine (*multa*) of ten thousand Maltese liri (Lm10,000) convertible into an additional period of six months imprisonment if it is not paid according to law.

5. Confirms the rest of the judgement from which these appeals were lodged.

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