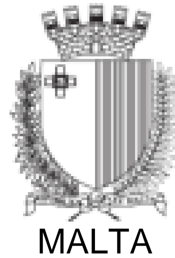

COURT OF CRIMINAL APPEAL

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

HON. MR. JUSTICE
DAVID SCICLUNA

HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 17 th January, 2008

Number 6/2006

The Republic of Malta

v.

Mark Charles Kenneth Stephens

The Court:

1. This is a decision pursuant to an appeal filed on the 19 June 2007 by the accused, Mark Charles Kenneth Stephens, from a preliminary decision of the Criminal Court delivered on 18 June 2007 in the names

aforementioned. For ease of reference the judgement of the first court is being reproduced hereunder:

“The Court,

“Having seen the bill of indictment no. 06/2006 against the accused Mark Charles Kenneth Stephens wherein he was charged with:

““Following the arrest of Gregory Robert Eyre and Susan Jayne Molyneaux in Malta on the 11th August, 2003, the Police became aware that these two had been sent from Spain by accused Mark Charles Kenneth Stephens with over three kilos of cocaine and seven thousand ecstasy pills for illegal importation into Malta. Mark Charles Kenneth Stephens had been exporting drugs to Malta on a regular monthly basis for the last fifteen years. These drugs included also cannabis resin, apart from cocaine and ecstasy pills. Therefore, prior to the eleventh (11) August, two thousand and three (2003) and the fifteen years prior to that date, Mark Charles Kenneth Stephens had conspired with Gregory Robert Eyre and others for illegally dealing and trafficking in drugs. That accused used to agree with others to deliver the drugs in Spain, indicate the means to be employed and the compensation to be paid for the importation of the drugs into Malta, and provide all necessary assistance for this illegal activity causing untold harm to Maltese society.

“By committing the above mentioned acts with criminal intent, *Mark Charles Kenneth Stephens* rendered himself guilty of conspiracy to trafficking in dangerous drugs in breach of the provisions of the Dangerous Drugs Ordinance and The Medical and Kindred Professions Ordinance.

“Wherefore, the Attorney General, in his aforesaid capacity, accused *Mark Charles Kenneth Stephens* of being guilty 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 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 of dealing illegally in any manner in cocaine, cannabis resin and ecstasy pills and of having promoted, constituted, organized and financed such conspiracy.

“Demands that the accused be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to a fine of not less than one thousand Maltese Liri (Lm1000), and of not more than fifty thousand Maltese Liri (Lm50,000), and the forfeiture in favour of the Government of Malta of the entire immovable and movable property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in sections 9, 10(1), 12, 14(1)(5), 15A, 20, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(c)(d), 22(f) u 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 in sections 20, 22, 23 and 533 of the Criminal Code, or to any other punishment applicable according to law to the declaration of guilty of the accused.”

“Having seen that accused filed a note of preliminary pleas on the Bill of Indictment and on the Evidence on the 28th. April, 2006, wherein he pleaded:-

1. the lack of jurisdiction of the Maltese Criminal Courts to take cognizance of and try an accused person under the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance when the fact is that the person charged, not being either a Maltese Citizen or a permanent resident of Malta, allegedly conspires on foreign soil, even though the allegation is that the final destination intended was Malta;
2. in the event that the bill of indictment is amended to cover complicity in importation, then the Maltese Courts do not have jurisdiction over the person charged, as the accomplice acting on foreign soil is not triable in Malta for violation of the two Ordinances mentioned in the Bill of Indictment, as such complicity does not fall within the

ambit of Article[1] 5(1) (g) of Chapter 9 nor is it envisaged under any special rule in the Ordinances mentioned in the Bill of Indictment;
3. the nullity of the Bill of Indictment, as the charge of conspiracy, when the facts being alleged amount to complicity on the importation of drugs to Malta. The facts alleged are not merely those of the conceptual or intentional stage, but the Prosecution is alleging the actual commission of importation, which necessarily absorbs the “conspiratorial stage”;
4. the nullity of the Bill of Indictment, as the charge does not in substance reflect the provision of the criminal law. In fact it has manipulated the text of the law in an attempt to fit an interpretation that would give jurisdiction to the Maltese Courts, and this by changing the wording, and especially by the introduction of punctuation marks, which do change the meaning of a provision of law;
5. the allegation that the accused had been infringing the law over a period of 15 years is not borne out by a single piece of evidence, as it was only an allegation of the prosecuting officer, and the Bill of Indictment should be amended, in any case, as the facts therein stated must result from the compilation of evidence and not constitute mere fiction;
6. that any extra-judicial statement, even if under oath, made by any other person mentioned in the first paragraph of the Bill of Indictment, cannot be considered as admissible evidence, as the Prosecution is requesting, as such persons are indicated as accomplices, and consequently in virtue of Article 30A of the Dangerous Drugs Ordinance they are not exempted from what is provided in Article 639(3) of the Criminal Code;
7. that any extra-judicial statement as above mentioned cannot be admissible evidence under article 30 of Chapter 101 and the relevant provision of the Medical and Kindred Professions Ordinance, as the persons therein mentioned are accomplices and not third parties who “purchased or

[1] The judgment of the Criminal Court uses the words “article” and “section” – to refer to a particular provision or to particular provisions of the law – indiscriminately. Although traditionally the Maltese word “artikolu”, with reference to a particular provision of law, was referred to as “section” in the English text, more recently the word “article” is being used in the drafting of the English version of the law. This Court – the Court of Criminal Appeal – will therefore in its judgment use the word “article”.

otherwise obtained or acquired" the drug, as this provision means and was meant to apply to the supply of the drug from a dealer to a consumer, who considers the drug as his. It does not apply to accomplices.

"Having seen the Note of Submissions filed by Defence Counsel during the sitting of the 30th. October, 2006 as well as attachments thereto;

"Having seen the Note in Reply filed by the Attorney General on the 7th. November, 2006 and attachments thereto;

"Having seen the Counter-reply of accused dated 20th. November, 2006;

"Having seen the minutes of proceedings of the sitting of the 8th. January, 2007, wherein Prosecuting Counsel declared that the Prosecution had taken note of the counter-reply filed by the accused on the 20th. November, 2006, and submitted that the prosecution was not invoking *res judicata* in this case but merely stating that the reason given by the Court of Magistrates for upholding jurisdiction were valid and could be confirmed by this Court and that the prosecution would not be filing any further written submissions on this point;

"Having seen that at the same sitting Dr. Joseph Brincat for the Defence bound himself to obtain a certified legal copy of the arrest warrant issued by Magistrate Dr. Tonio Micallef Trigona and the relative extradition order or request based upon said order;

"Having seen the Note filed by accused on the 11th. January, 2007, whereby he filed a legal copy of the documents which were originally filed in the Constitutional case **"Dr. Joseph Brincat noe.vs. Avukat Generali"** and finally decided on the 23rd.November, 2004. The relevance of these documents – according to said note – lay in that the request for extradition was based on Article 22(1)(e) and (f) of Chapter 101 and the corresponding and identical provisions Article 120A(1)(e) and (f) of Chapter

33 (recte : 31). No new request was issued and the new warrant issued by Magistrate Lofaro was considered as a new substituting document of the original request. The Spanish Court decided on “conspiracy to import drugs”.

“Having seen the Note of accused dated 23rd. January, 2007, whereby he filed the relevant articles for the purposes of the pleas of the UN Convention on Illicit Drugs 1988;

“Having considered all oral submissions made by learned Counsel;

“Having seen that on the 12th of March, 2007, the case was put off for judgement on the preliminary pleas to today;

“Now therefore considers;

“That with regard to the first preliminary plea, where accused is pleading lack of jurisdiction of the Maltese Courts, accused submitted that the Constitutional Court in its judgement in the case **“Dr. Joseph Brincat vs. Avukat Generali”** decided on the 23rd. November, 2004 , had held that the matter of jurisdiction had to be decided by the Criminal Courts and that it revoked the explicit statement of the First Hall of the Civil Court that Malta had jurisdiction to try the offence under paragraph (f) of Article 22 of Chapter 101, even though the alleged conspiracy occurred in Spain. He further submitted that although the case is being conducted in the English Language, the Maltese text of the law prevails. If there is no jurisdiction according to the Maltese version of Article 22(1)(f) of Chapter 101 then the story ends there. The thesis of the accused about lack of jurisdiction is even better confirmed in the Maltese text. An accurate examination of this article shows that (1)(f) provides for two hypotheses: (1) one who conspires with someone to sell drugs in Malta and (2) one who promotes, organises or finances this conspiracy. The construction of the sentence (by the insertion of the comma followed by the word "jew") shows a disjunctive structure. In the first hypothesis there is no mention that

the person is guilty of the offence whether he is in Malta or abroad. If the legislator wanted to express that intention to cover also the second hypothesis, then the extension of jurisdiction in the second hypothesis should have been made clear in the special law. As there is no extension of jurisdiction to cover activities outside the territorial domain, then Article 5 of Chapter 9 should apply. In this case the accused, as charged, never did anything in Maltese territory as he was in Spain.

“Accused further submitted that even the first hypothesis in the Maltese text shows that there is no clear intention of extending jurisdiction. All three verbs are in the singular person “jassocja ruhu, ibiegh jew jittraffika”. This means that a person in Malta who agrees with another person (wherever he may be) so that he can sell drugs is punishable for the mere fact of showing such design. Unlike Article 83A(5) of the Criminal Code, which has all its verbs in the plural and which is a clear example of the extension of jurisdiction, this is not the case with article 22(1)(f) of Chapter 101. While in the English Text use is made of present participles “selling or dealing in a drug” which may refer to a single person or a number of persons, the Maltese text with its use of the singular verb leaves no doubt that the person who sells or deals in drugs is the main subject of the sentence. As written in Maltese therefore, paragraph 22(1)(f) means that any person (A) is guilty of this offence, if while in Malta , A makes any form of contact with any other person, wherever that person may be around the world, so that A sells drugs in Malta. The structure of the sentence means that the offender has to be in Malta while the other person or persons may also be abroad.

“Accused then draws parallels with other sections of the Criminal Code where the use of the phrase *“sew f' Malta jew barra minn Malta”* or similar wording indicates an extension of jurisdiction, i.e. Section 337A, 106(3), 121(4)(f), 310B and 337E where the intention to extend jurisdiction cannot be said the be in doubt.

“Referring to the English Text of Section 22(1)(f), the accused submits that had there been at least a comma after the word “persons” the interpretation of the Attorney General would have prevailed. The expression *“in Malta or outside Malta”* would have been an adverbial phrase of place qualifying the verb “conspires”. However as it stands, it qualifies the noun phrase “one or more persons”. To reach the conspirator acting from abroad, this article had to be drafted differently and he goes on to give examples how.

“The accused then refers to the drafting of article 22(1)(d) and (e). The latter extends jurisdiction on the personal criterion to any one who is considered as a citizen of Malta or a permanent resident of Malta who in any place outside Malta does some act, which had it been committed in Malta would constitute drug trafficking, or a crime under paragraph (f) even though that person does nothing in Malta. Therefore here we have a clear admission in a different paragraph of the same article that if the act is committed in Malta, it would constitute an offence under paragraph (f), but if it is not committed in Malta, then it cannot constitute the offence against paragraph (f). Hence an offence under paragraph (f) must be committed in Malta (and not in Spain).

“Accused concludes that these arguments are not based on the text of Article 5 of Chapter 9. They challenge the true meaning and ambit of paragraph (f) of Article 22(1) of Chapter 101 and the analogous provision in Article 120A in the Medical and Kindred Professions Ordinance. In the **Knajber** case the interpretation of Article 22 (1) was taken for granted. On the text of the law, the Maltese Courts do not have jurisdiction to try a person, not being a Maltese Citizen or a permanent resident of Malta, who conspires according to Chapter 101 when he is on foreign territory.

“In his Note in Reply, the Attorney General on the other hand succinctly contends that the issue of jurisdiction was extensively dealt with before other courts and referred to the decision of the Magistrates Court of the 23rd.

February, 2006. Reference was also made to the decision of the Constitutional Court of the 14th. February, 2006.

“That in his rejoinder accused again submitted that the Attorney General in his reply had perfunctorily dismissed the arguments of the defence and almost pleaded “res judicata”. The Constitutional Court had quashed the decision of the First Hall which had affirmed jurisdiction and remitted the question to the Criminal Courts and the decision of the Magistrate Court as a Court of Criminal Inquiry did not decide the issue finally. That court only decides on matters finally according to the powers conferred upon it by Section 403 of the Criminal Code. Otherwise the Court of Criminal Inquiry does not deliver a judgement and res judicata is based on judgements and not on preliminary opinions. Then accused goes on to quote article 449(5) and (6) of the Criminal Court with regard to the want of jurisdiction (which in the Maltese text is referred to as “l-inkompetenza”) where he argues that the matter of jurisdiction is so important that the Criminal Court itself may raise it *ex officio*.

“Accused then went on to draw a conclusive argument from what is stated in part of the judgement (para. 11) of the Constitutional Court of the 14th. February, 2006 above mentioned, which states that:

““….f' kaz li l-Qorti Istruttorja tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza, l-imputat jibqalghu xorta wahda l-opportunita`, fi stadju ulterjuri tal-process penali, li jikkontesta il-kwistjoni tal-gurisdizzjoni, kif minnu sollevata in limine litis”.

“Having considered;

“That in the latter mentioned judgement of the Constitutional Court, it was clearly stated that :-

““…terga’ tqieghed lill-istess Mark Charles Kenneth Stevens fil-pozizzjoni li kien fiha minnfieh qabel dik id-decizjoni sabiex il-Qorti Istruttorja tiddeciedi mill-gdid jekk hemmx jew le ragunijiet bizzejjed biex huwa jitqieghed

taht att ta' akkuza WARA LI DIK IL-QORTI TIEHU KONT TAL-ECCEZZJONI DWAR IL-GURISDIZZJONI (fis-sens kif hawn aktar 'l fuq imfisser f' dan il-gudikat)" (emphasis added by this Court).

"It was therefore clearly the intention of the Constitutional Court that the plea of lack of jurisdiction had to be taken into consideration by the Magistrate's Court when deciding whether there were sufficient grounds for accused to be placed under a bill of indictment, but that this issue could be decided finally by this Court. It is only this construction that this Court can give to the judgement under reference faced with the phrase *"(fis-sens kif hawn aktar 'l fuq imfisser f' dan il-gudikat)"* and this is how this Court can reconcile this statement with the final decision above quoted.

"In actual fact the Court of Magistrates - as clearly directed to do by the Constitutional Court - did deal with and decide the issue of jurisdiction in its ruling of the 23rd. February, 2006 and in no uncertain terms upheld and affirmed the jurisdiction of the Maltese Courts with regards to the charges of conspiracy brought against the accused in relation to drug trafficking, for the detailed reasons mentioned in its ruling.

"This Court is however being called upon to decide this issue afresh.

"Having considered;

"That the Constitutional Court in another judgement of the 23rd. November, 2004 had already pronounced itself on this issue and went on record as stating that :-

""Fil-fehma ta' din il-Qorti d-dispozizzjoni tal-paragrafu (f) tal-artikolu 22 (1) tal-Kap.101 taghti lok li jinhareg il-mandat ta' arrest bhalma nhareg f' dan il-kaz , u dan ghax il-Qrati ta' Gustizzja Kriminali f' Malta ghandhom gurisdizzjoni fuq , u jistghu jipprocedu kontra, kull persuna li tassocja ruha <u>"ma' xi persuna jew persuni ohra f' Malta jew barra minn Malta"</u> sabiex tbiegh jew tittraffika d-droga

f' Malta , (sottolinear ta' din il-Qorti). Fi kliem iehor, il-fatt ta' l-assocjazzjoni, bi skop ta' traffikar ta' droga f' Malta, li jsir kemm f' Malta kif ukoll barra minn Malta, jidher li hu kontemplat f'din il-ligi specjali bhala reat u ghalhek jaqa' fil-kompetenza tal-Qrati tal-Gustizzja Kriminali."

"It is true that in the same judgement the Constitutional Court went on to say that there could be two plausible different interpretations of paragraph (f) of article 22(1) of Chapter 101, namely that the agent who conspires has to commit the act of conspiracy in Malta, as accused Stephens maintains; or that the agent can also be guilty of conspiracy when he is physically outside Malta, as has been held in various cases by the Courts of Criminal Justice in Malta (even though in some cases only implicitly) that court had to decide that the arrest of accused was according to law, but this Court, in the light of such a clear and univocal pronouncement of the highest Court of the land quoted in the previous paragraph, that the Maltese Courts have jurisdiction to try such a case even if the conspiracy takes place outside Malta, would be presumptuous to decide otherwise.

"Furthermore in this Court's view, in spite of the lure and appeal of the clever exercise in punctuation, syntax and semantics which emerges from accused's note of submissions, it is this Court's view that the spirit of the law was clearly to make an act of conspiracy committed outside Malta accountable to the jurisdiction of the Maltese Courts when the aim was the trafficking of drugs in Malta. The aim of the legislator was clearly that of extending jurisdiction to cover those persons who, although not being citizens or permanent residents of Malta, but who were causing irreparable social harm to the population of these islands by conspiring to sell drugs here, and whose deeds were in most cases more nefarious than those of the poor couriers who were lured to act as such by the promise of some financial gain, should also be brought to justice in Malta, even though they were operating - relatively safely - from abroad. No juggling of commas can convince this court that the intention of the legislator was in any way different.

“Indeed this Court has been regularly and constantly convicting accused persons (particularly drug couriers) of the crime of conspiracy - albeit after guilt pleas were filed by them in most cases - even though this offence is alleged to have taken place outside Malta, i.e. at the stage before the courier actually entered these Islands with the drugs. (vide: **The Republic of Malta vs. Gregory Robert Eyre** [4.10.2004]; **The Republic of Malta vs. Winnie Wanjiku Kanmaz** [5.10.2004]; **The Republic of Malta vs. Rahman Abdirahaman Ibrahim** [4.4.2005]; **Ir-Repubblika ta' Malta vs. Omar Mohamed Mehemud Erayani** [6.3.2006]; **Ir-Repubblika ta' Malta vs. Khallouf Fatiha** [22.5.2006]; **The Republic of Malta vs. Kamil Kurucu** [11.12.2006]; **Ir-Repubblika ta' Malta vs. Atanas Paskalev Dimitrov** [12.2.2007]; and others)

“As such, this Court is dismissing the first preliminary plea raised by accused and holds that this Court has jurisdiction to try this case even though it is being alleged by the prosecution that the alleged conspiracy took place when accused was outside Malta.

“Having considered;

“That accused's second plea is a conditional or hypothetical one, namely based on the possibility or eventuality that the Bill of Indictment might be amended to cover complicity in importation. In that case accused submits that the Maltese Courts would not have jurisdiction as the accomplice acting on foreign soil is not triable in Malta for violation of the provisions of the two Ordinances mentioned in the Bill of Indictment.

“However, to date no such request to amend the Bill of Indictment has been tabled by the Attorney General or indeed ordered by this Court and therefore this is merely a hypothetical scenario that accused is raising and not one based on the actual Bill of Indictment as it stands.

“In the opening paragraph of the Bill of Indictment , i.e. in the narrative part, said Bill states inter alia :-

""…prior to the 11th. August, two thousand and three (2003) and fifteen years prior to that date, Mark Charles Kenneth Stevens had conspired with Gregory Robert Eyre and others for illegally dealing and trafficking in drugs. That accused used to agree with others to deliver the drugs in Spain, indicate the means to be employed and the compensation to be paid for the importation of the drugs into Malta and provide all necessary assistance for this illegal activity causing untold harm to Maltese Society."

"In this Court's view these facts clearly refer to the crime of conspiracy under section 22(1)(f) of Chapter 101 and section 120A of Chapter 31. The fact that earlier on in this same opening paragraph the Bill of Indictment states that following the arrest of Gregory Robert Eyre and Susan Jayne Molyneaux in Malta on the 11th. August, 2003, the Police became aware that these two had been sent from Spain by accused with over three kilos of cocaine and seven thousand ecstasy pills for illegal importation into Malta and that he had been exporting drugs ranging from cannabis resin, cocaine and ecstasy pills to Malta on a regular monthly basis for the last fifteen years, does in no way detract from the charge of conspiracy proffered against the accused. These facts are merely being stated to give a background to the case and to state how the Police came to know about accused's alleged conspiracy and are not intended as a preamble to a charge of complicity in the importation of drugs into Malta. The Attorney General had every right to choose with what offence to charge the accused. He was in no way bound to opt to charge him with the offence of importation into Malta or complicity in said offence, even if matters had gone beyond the conspiratorial stage and translated into actual importation of said drugs into Malta (in this case by other persons).

"The crimes of conspiracy, importation, and possession of drugs (with or without intent to traffic) are distinct and separate offences created by the two Ordinances under reference (Chapters 31 and 101) and the Prosecution has

the absolute discretion in deciding with which of these different offences to charge an accused person. In some cases it charges an accused with all three depending on the alleged involvement of the accused, as viewed by the prosecution. In others, where according to the Prosecution, the accused was only involved with one or only two stages, it can opt to charge as it deems fit.

“Clearly in his note of submissions the accused is confusing the question of the absorption for purposes of punishment of the crime of conspiracy into the crime of actual importation in those cases where it results that accused is guilty of both offences, if he has been charged with both in the first place, with the Prosecution’s absolute discretion as to with what offence or offences it deems fit to charge a person in a Bill of Indictment. Clearly even though it might appear to others that an accused person could have also been accused of another equally grave or indeed even more serious offence in which the offence as charged would be absorbed for purposes of punishment, say according to Section 17(h) of the Criminal Code, it remains the Attorney General’s prerogative to charge accused with a lesser offence or with one offence instead of two or more others. The notion of “assorbiment” only arises had the Attorney General also opted to charge accused with the offence of importing drugs into Malta or complicity in said offence and it would only have assumed relevance in the sentencing stage if and when accused were to be found guilty of both charges. But in this case the Bill of Indictment contains only one charge and therefore the issue elaborated on in accused's written note of submissions is irrelevant at this stage. In any case accused's attempt to widen the scope of his second preliminary plea from a hypothetical one to one of an entirely different nature cannot be countenanced at this stage.

“Therefore once that the facts stated in the Bill of Indictment do refer to the offence of conspiracy and once there has not been any request to amend the Bill of Indictment, this hypothetical plea is being rejected.

“Similarly the third plea is being rejected as even if in the narrative part of the Bill of Indictment there are references to facts which suggest that the acts of accused went beyond the conspiratorial stage and resulted in the actual importation of drugs into Malta, once there is also reference to the conspiratorial stage, as quoted above, there can be no nullity of the Bill of Indictment. This reference to actual importation has only been included to reinforce the allegation that prior to this stage accused was indeed involved in the crime of conspiracy and in no way detracts from the facts constituting the basis of the charge of conspiracy. This is not a case where the Attorney General is recounting one set of facts and charging under another provision as stated by accused in his written note of submissions. The Attorney General is clearly stating facts which amount to conspiracy and reinforcing said facts by stating in addition other facts which show that the conspiracy eventually materialised into the separate offence of drug importation. But the latter facts are clearly meant to support the facts on which the charge of conspiracy is based and not to supplant them. In this Court’s view the facts stated in the Bill of Indictment do constitute in essence and substance the crime with which accused has been charged - even if they say more. Hence this plea presumably based on paragraph (b) of the proviso of subsection (5) of Section 449 is being rejected.

“Having considered;

“That the fourth preliminary plea raised by accused is that the Bill of Indictment is null because the charge does not in substance reflect the provision of the criminal law and because (the Attorney General) has manipulated the text of the law in an attempt to fit an interpretation that would give jurisdiction to the Maltese Courts and this by changing the wording and especially by the introduction of the punctuation marks, which do change the meaning of a provision of law.

“Clearly this plea is based on paragraph (a) of the proviso to Section 449(5) of the Criminal Code.

"Now the operative accusatory part of the Bill of Indictment states as follows:-

""…accuses …..Stephens of being guilty 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 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 of dealing illegally in any manner in cocaine, cannabis resin and ecstasy pills and of having promoted, constituted, organised and financed such conspiracy."

"The relevant part of the text of Article 22(1)(f) of Chapter 101 reads as follows in the Maltese version :-

"" Kull min…. jassocja ruhu ma' xi persuna jew persuni ohra f'Malta jew barra minn Malta sabiex ibiegh jew jittraffika medicina f'Malta kontra d-dispozizjonijiet ta' din l-Ordinanza, jew li jippromwovi, jikkostitwixxi, jorganizza jew jiffinanzja l-assocjazzjoni".

"The relevant part of the text of Article 120A(1)(f) of Chapter 31 in the Maltese version is almost identical word for word to the above text and runs as follows :-

""Kull persuna… tassocja ruha ma' xi persuna jew persuni ohra f'Malta jew barra minn Malta sabiex tbiegh jew tittraffika medicina f'Malta kontra d-dispozizzjonijiet ta' dan l-artikolu, jew li tippromwovi, tikkostitwixxi, torganizza jew tiffinanzja l-assocjazzjoni".

"No commas exist in both texts except after the word "Ordinanza" and after each of the words "jippromwovi" and "jikkostitwixxi" in Section 22(1)(f) of Chapter 101 and after the words "artikolu", "tippromwovi" and "tikkostitwixxi" in section 120A(1)(f) of Chapter 31.

“The exact wording in the corresponding English version of Section 22(1)(f) of Chapter 101 is as follows:-

““Any person…..who with another one or more persons in Malta or outside Malta conspires for the purposes of selling or dealing in a drug in these islands against the provision of this Ordinance or who promotes, constitutes, organises or finances the conspiracy”.

“The English version of Section 120A(1)(f) of Chapter 31 runs as follows :-

““Any person ……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.”

“Clearly what accused is objecting to is the use of the commas after the words “in Malta” and “outside Malta” in the third paragraph of the Bill of Indictment. His objection is that the use of these commas were meant to manipulate the text of the law to ground jurisdiction. Otherwise this Court sees no substantial difference between the wording used in the Bill of Indictment and the text of the two provisions of law above quoted.

“It is true that no such commas exist in the text of the two provisions above quoted, but as this point is only relevant to accused' s submissions on the issue of jurisdiction, already decided by this Court and can have no other bearing or relevance whatsoever on the merits of the actual charge contained in the Bill of Indictment, this Court sees no grounds for upholding a plea of nullity of the Bill of Indictment under section 449(5) (proviso) (b) of Chapter 9.

“Hence this fourth plea is also being dismissed.

“As to accused’s fifth preliminary plea, that the allegation that accused had been infringing the law over a period of

fifteen years contained in the narrative part of the Bill of Indictment is not borne out by any single piece of evidence, as it was only an allegation of the prosecuting officer, and that therefore the Bill of Indictment should be amended, this Court notes that it is left to the Attorney General's discretion as to what facts he chooses to refer to in the narrative part of the Bill of Indictment even though these, in some cases, might not reflect the results of the evidence collected in the compilation of evidence. It is then left to the Court - in this case the jurors as directed by the presiding judge - to sift the wheat from the chaff - and see what facts alleged have in fact been proved and how these proven facts relate to the actual charge or accusation proffered in the Bill of Indictment and whether they should lead to a conviction on that charge or not.

“However, in this case accused is not being charged with a continuous offence under section 18 of the Criminal Code, in which case his activity during the fifteen years preceding the 11th. August, 2003, could not only have been very relevant but would also have been essential to have been clearly stated in the narrative part of the Bill of Indictment to support such a charge.

“As drafted, the Bill of Indictment, as accused quite rightly submits, purports to cast a dark shadow on his activities throughout the previous fifteen years, by alleging that throughout this long period he had been committing the same offences for which he has -- as far as this Court can make out -- never been charged and, even more so, never convicted. This could indeed be interpreted as an oblique or indirect reference to accused’s criminal conduct, prior to the alleged conspiracy that took place on or around the 11th. August, 2003, when matters came to a head with the arrest of Gregory Robert Eyre and Susan Jayne Molyneaux on their arrival in Malta, and with which he is being charged before this Court. In this Court’s view such a reference could conceivably prejudice the jury unduly in spite of and notwithstanding any warnings or directives which might be given by the judge presiding this Court.

"In the circumstances therefore this Court, even as a measure of prudence, is upholding accused's plea by ordering the amendment of the Bill of Indictment and the deletion from the first paragraph of the First (and only) Count thereof the words: ***"on a regular monthly basis for the last fifteen years"*** and the words: ***"and the fifteen years prior to that date".***

"Having considered;

"That in his two pleas regarding the evidence, accused only made generic objections regarding extra-judicial statements without in any way identifying such statements to which he was referring, either in the course of his oral pleadings before this Court and, even less so, in his very detailed written submissions contained in his note of the 30th. October, 2006.

"As such, this Court is not in a position to address these pleas in a specific and concrete way and therefore can only limit itself at this stage to stating that it will be guided in deciding whether to admit or not to admit any such evidence only by the relevant provisions of the law and the principles which have been accepted by our Courts in ensuring that the accused is given a fair hearing and that due process, as interpreted by our Constitution Court and the European Court of Human Rights (including those to which accused has referred to in his note of preliminary pleas and written submissions) is observed.

"Now therefore this Court is dismissing and rejecting accused's first, second, third and fourth preliminary pleas contained in his note of the 28th. April, 2006, and upholding his fifth preliminary plea by ordering that the Bill of Indictment be amended by deleting the words: ***"on a regular monthly basis for the last fifteen years"*** and the words: ***"and the fifteen years prior to that date"*** in the first paragraph of the First (and only) Count of the Bill of Indictment, which Bill of Indictment as now amended, is to be served anew upon the accused.

“Furthermore this Court is disposing of accused’s two generic pleas as to the admissibility of evidence by the (equally generic) declaration contained in the next but last preceding paragraph.

“The case is therefore being adjourned ***sine die*** to be re-appointed to be heard by jury according to its turn on the list of pending cases, and, in any event, after any appeal from this judgement, if any, is definitively decided.

“Till then accused is to remain on bail under the present conditions.”

2. Appellant Stephens is appealing only in so far as the Criminal Court dismissed his first four pleas (with regard to his pleas regarding the admissibility of evidence he states that “for practical purposes” no appeal is being lodged from the decision of the first court). In his appeal application, the appellant in effect repeats the arguments already advanced by him before the first court in support of his contention that in the instant case the Courts of Criminal Justice of Malta have no jurisdiction to take cognizance of the “fact” that he conspired on foreign soil to sell or deal in a drug in Malta. This is really the crunch of this appeal – the first grievance in connection with the first preliminary plea. The other grievances, in connection with the other three pleas, are intimately connected with, and to a certain extent dependent on, this first plea. In other words, the main issue to be decided by this Court is whether the provisions of Article 22(1)(f) of the Dangerous Drugs Ordinance and the corresponding (and almost identical) provisions contained in Article 120A(1)(f) of the Medical and Kindred Professions Ordinance require that the accused should have conspired with the others (those others being either in Malta or outside Malta) while he (the accused) was in Malta, or whether the accused could also have been, at the time of the conspiracy, himself abroad (i.e. outside Malta). In this connection it must be pointed out that appellant’s often highly convoluted arguments, advanced by him in his notes of submissions before the first Court, and ostensibly summarised in the application of appeal – arguments which were carefully examined and

re-examined by this Court in the course of its deliberations – did not facilitate the task of this Court.

3. Now there is no doubt that Article 5 of the Criminal Code provides the general ground of jurisdiction of the Courts of Criminal Justice in Malta. This provision, however, quite clearly allows for other laws conferring jurisdiction upon the courts in Malta to try other offences: *"Saving any other special provision of this Code or of any other law conferring jurisdiction upon the courts in Malta to try offences, a criminal action may be prosecuted in Malta…"*. Although these words were introduced in the *chapeau* of sub-article (1) of Article 5 by Act III of 2002, the legal position was, even prior to this amendment, the same not only in virtue of the provision of Article 5 of Chapter 23, but also because the Criminal Code did not prevent the legislator from creating new offences in other laws or from conferring jurisdiction upon the Courts over and above that conferred by the said Article 5. It is true that, prior to the extensive amendments introduced in the said article from 1996 onwards, jurisdiction was generally conceived in terms of "territorial jurisdiction" – the offence had to be committed in Malta or within its territorial jurisdiction or constructively so (on ships or aircraft belonging to Malta) – and in terms of the personal law of the accused or of the victim (e.g. paragraph (d) of Article 5(1)). Territoriality, in fact, remains the rule of thumb. Indeed, it is significant that although a number provisions of the Criminal Code have either abandoned or qualified the concept of territoriality (e.g. Articles 208A(1), 248E(5), 310B), the general offence of conspiracy under the Criminal Code – Section 48A – requires that the agent should be in Malta.

4. The position, however, is clearly different when it comes to drugs. The appellant agrees that in this context the Maltese text of the law is to prevail. Taking, to begin with, Chapter 101, the Court observes that whereas paragraphs (d) and (e) of sub-article (1) of Article 22 explicitly require that the act of complicity or conspiracy should have been committed in Malta (para. (d)) and that the act of selling or dealing should have been committed

outside Malta (para. (e)), paragraph (f) is much more wide in its purport as regards the place where the conspiracy takes place: *"Kull min…jassocja ruhu ma' xi persuna jew persuni ohra f'Malta jew barra minn Malta sabiex ibigh jew jittraffika medicina f'Malta kontra d-disposizzjonijiet ta' din l-Ordinanza, jew jippromovi, jikkostitwixxi, jorganizza jew jiffinanzja l-assocjazzjoni…ikun hati ta' reat kontra din l-Ordinanza."* It is patently clear to this Court that in this case the legislator is grounding the jurisdiction of the Courts of Malta (see sub-article (2) of Article 22) not on the basis of the place where the conspiracy takes place, or on the place where the agent was when he conspired with the other person or persons, nor on the place where the agent was when he promoted, constituted, organised or financed the conspiracy, but on the fact that the aim of all this, i.e. the conspiracy or its promotion, constitution etc., is that drugs are going be sold or dealt with in Malta – the so called "effects" principle. No amount of grammatical or syntactic gymnastics can change what is obvious. And this point has, after all, already been decided: implicitly in the several judgments mentioned by the Criminal Court in its judgment of the 18 June 2007, and explicitly in the judgment of this Court – the Court of Criminal Appeal – of the 20 April 1995 in the names **Ir-Repubblika ta' Malta v. Ali Mohammed Ali Knajber**. Appellant, both before the first court and before this Court, insists that in the **Knajber Case** the point at issue and the point decided by the court, was somehow different (see in particular appellant's note, before the Criminal Court, filed on the 30 October 2006). This Court cannot agree. A careful reading of that judgment clearly shows that the plea raised by Knajber was in essence the same as that which is being raised by appellant Stephens, to wit, that the fact constituting the offence took place outside Malta and that therefore the Courts of Criminal Justice did not have jurisdiction to entertain the action. In fact the preliminary plea in that case was to the following effect: *"…l-akkuzat preliminarjament eccepixxa n-nuqqas ta' gurisdizzjoni ta' din il-Qorti b'referenza ghall-ewwel kap tal-att ta' akkuza in kwantu r-reat dedott kontra tieghu f'dan il-kap jirriferixxi ghac-cirkostanza li dan ir-reat sar barra minn dawn il-Gzejjer u dan peress illi dan ir-reat*

mhux wiehed li dwaru tista' titmexxa azzjoni kriminali a tenur ta' l-artikolu 5 tal-Kodici Kriminali." As aforesaid, in essence, this plea is the same as that raised by the present appellant – the only difference being that the text of the law then referred to *"dawn il-Gzejjer"* instead of just *"Malta"*. In fact this Court, in the **Knajber Case**, made it quite clear that the courts had jurisdiction precisely because it was conferred by Article 22(1)(f) notwithstanding that the fact of the conspiracy had taken place outside Malta:

"Fil-kaz in dizamina, kieku kien hemm biss l-Artikolu 5 tal-Kap. 9, in kwantu l-ewwel kap ta' l-att ta' l-akkuza jirreferixxi ghall-assocjazzjoni ma' persuna/i barra minn dawn il-Gzejjer, ma kienx ikun hemm gurisdizzjoni limitatament ghal dik il-parti mill-ewwel kap ta' l-att ta' l-akkuza. Pero` il-gurisdizzjoni f'dan il-kaz tohrog mill-artikolu 21(1)(f) [2] *tal-Kap. 101 u mid-decizjoni ta' l-Avukat Generali li fit-termini ta' l-istess artikolu* [3] *ghazel li jipprocedi kontra l-akkuzat f'Qorti li hija wahda minn dawk li l-imsemmi artikolu jipprovdi."*

5. If further indication is needed that the interpretation in the foregoing paragraph is the correct interpretation, reference can be made to the "Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988"[4]. This Convention, to which Malta acceded on the 28 February 1996, provides in Article 4(1)(b)(iii) that the parties may take such measures as may be necessary to establish jurisdiction over offences committed outside its territory with a view to the commission of an offence within its territory. In this connection the said Commentary states as follows:

"The effect of [this] provision is to allow States to establish jurisdiction where one of those preparatory offences was committed outside its territory but 'with a view to' the commission, within its territory, of an offence established in accordance with article 3, paragraph 1. An example

[2] Clearly the reference to the article of the law is wrong – this should read 22(1)(f).
[3] Article 22(2).
[4] United Nations Publication, New York, 1998.

would be a conspiracy formed in one State to effect the distribution of narcotic drugs in another State. The latter State could establish jurisdiction over that conspiracy, whether or not it actually led to the distribution of drugs on its territory…The final discretionary ground for the establishment of extraterritorial prescriptive jurisdiction for which specific treatment is afforded in paragraph 1, subparagraph (*b*), is the so-called 'effects' principle. This principle, which has been the source of some controversy in other contexts, is strictly limited in its application to the offences enumerated in article 3, paragraph 1, subparagraph (*c*), clause (iv)[5], when committed outside the territory of a party with a view to the commission within that territory of an offence established in accordance with article 3, paragraph 1. While there is therefore a clear nexus between the act complained of and the territory of the State, the effects principle, as expressed in this context, is wider than the territorial principle envisaged in paragraph 1, subparagraph (*a*), clause (i). This is because, in this instance, the offence is committed outside the State's territory, and there may indeed have been no overt act in the territory of the State. In other words the principle may extend to intended but as yet unrealised effects within the State territory." [6]

This is exactly what the legislator wanted to do, and did.

6. All this applies also to Cap. 31, where Article 120A(1)(f) provides as follows: *"Kull persuna…[li] tassocja ruhha ma' xi persuna jew persuni ohra f'Malta jew barra minn Malta sabiex tbiegh jew tittraffika medicina f'Malta, kontra d-disposizzjonijiet ta' dan l-artikolu, jew li tippromovi, tikkostitwixxi, torganizza jew tiffinanzja l-assocjazzjoni…tkun hatja ta' reat kontra dan l-artikolu."*

7. For these reasons, the Court dismisses appellant's first grievance relative to the first preliminary plea as raised in the note of the 28 April 2006.

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[5] Article 3(1)(*c*)(iv): "Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article."
[6] *Op. cit.* paras. 4.22 and 4.30 at pp. 107 and 111 respectively.

8. Appellant's second grievance cannot be entertained at this stage as it was never formally raised before the first court. In this second grievance appellant is raising the issue of some type of formal concurrence of offences – presumably between the offence of conspiracy to import drugs into Malta and the offence of actually importing drugs into Malta. It will be recalled, however, that before the Criminal Court the preliminary plea raised by Stephens was – as that court quite rightly observed – "a conditional or hypothetical" plea: *"In the event that the Bill of Indictment is amended to cover complicity in importation…"* (emphasis added by this Court). To date, however, no amendment as envisaged in the said second plea has been effected in the indictment, whether at the request of the prosecution or *ex officio* by the Criminal Court. Consequently this second grievance is also being dismissed.

9. The question of some form of concurrence or absorption could, however, conceivably come into the picture in respect of the third preliminary plea raised by the accused in his note of the 28 April 2006; and appellant's third grievance can be understood in the sense that appellant is stating that since the facts (as stated by the Attorney General in the narrative part of the Indictment) disclose not merely conspiracy to import but actual importation into Malta of drugs, then the indictment is null for the reason that the more serious offence of importation or of complicity in such importation "absorbs all the preparatory stages into one single completed offence". Now, as the first Court quite rightly pointed out, the Attorney General was perfectly within his rights to charge the accused only under Article 22(1)(f) of Cap. 101 (and the corresponding provision of Cap. 31) without charging also the accused with complicity in the importation of drugs (assuming, for the sake of argument, that this latter offence was one with which Stephens could be charged). This fact *per se*, therefore, can in no way bring about the nullity of the Indictment as pleaded by the accused. Moreover, the question of formal or ideal concurrence, no less than the question of concurrence of

offences and punishments in terms of Article 17 of the Criminal Code, arises only when there has in fact been a multiplicity of charges and not, as in this case, where the charge is only that of conspiracy. This third grievance is, therefore, also being dismissed.

10. Finally, as to the fourth grievance – which refers to the fourth preliminary plea raised in the note of the 28 April 2006 aforementioned – this Court has very little to say, other than to point out that the said grievance and plea are frivolous. Paragraph (a) of the proviso to sub-article (5) of Article 449 of the Criminal Code speaks of the indictment not containing "…in substance, a statement or description of the offence as stated or described in the law" (Court's emphasis). The insertion of commas by the Attorney General in no way detracts from the substance of the offence of conspiracy as envisaged in Sections 22(1)(f) and 120A(1)(f) of Chapters 101 and 31 respectively. Consequently this fourth grievance is also being dismissed.

11. For these reasons the Court dismisses the appeal filed by Mark Charles Kenneth Stephens on the 19 June 2007 in respect of the first four preliminary pleas raised by him in his note of the 28 April 2006, and confirms in its entirety the judgment of the Criminal Court of the 18 June 2007. The Court orders that the record of the case be forthwith transmitted back to that Court for the case to continue according to law. Meanwhile the accused is to remain on bail under the present conditions.

< Partial Sentence >

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