



COURT OF CRIMINAL APPEAL

**HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO**

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

**THE HON. MR. JUSTICE
JOSEPH R. MICALLEF**

Sitting of the 23rd October, 2008

Number 6/2007

The Republic of Malta

v.

Steven John Lewis Marsden

The Court:

1. This is an appeal entered by the accused Steven John Lewis Marsden from a preliminary decision of the Criminal

Court delivered on the 9 June 2008. The facts of the case relevant to this appeal are, briefly, the following:

i. On the 25 January 2007 the Attorney General filed Bill of Indictment no 6/2007 against Steven John Lewis Marsden, in which the said Marsden is accused, in the one and only count of the indictment, with the offence of conspiracy *“for the purpose of committing an offence in violation of the provisions of the Medical and Kindred Professions Ordinance (Chapter 31 of the Laws of Malta) and specifically of dealing illegally in ecstasy pills”* including promoting, constituting, organising and financing such a conspiracy (Article 120A(1)(f), Cap. 31).

ii. By note dated 15 February 2007, the said Marsden gave notice of three preliminary pleas, to wit (a) *“the lack of jurisdiction of the Maltese courts on the allegation of conspiracy or of dealing, as the Bill of Indictment does not in any way provide any indication that the actus reus was committed in Malta”*, (b) *“the charge is not based on the facts as resulting from the compilation of evidence”*, and (c) *“in this case, as amply appears from the records, the accused actually imported into Malta pills which were not against the law and are not drugs, and therefore there is no offence. The alleged conspiracy, even if it were committed in Malta, followed by importation is absorbed by the importation, and in this case there was no illegality and no breach of Chapter 31 of the Laws of Malta”*.

iii. After several sittings held before the Criminal Court – sittings which are not relevant for the purposes of the issues under examination in this appeal – the accused, during the sitting of the 15 May 2008, withdrew the first preliminary plea. During the same sitting (15/5/08) oral submissions were made before that Court, and on the 9 June 2008 the Criminal Court delivered its judgment on the remaining two preliminary pleas, in effect dismissing both of them as unfounded at law. It is from this judgment that the accused is now appealing.

2. In its judgment the Criminal Court stated as follows:

“That with regard to the second preliminary plea filed by accused, namely that the charge is not based on the facts as resulting from the compilation of evidence, although it is not expressly stated in accused's Note, this second plea, as far as this Court can make out, would appear to be a plea of nullity of the bill of indictment based on article 449(1)(b) and on paragraph (b) of sub-article (5) of said article of the Criminal Code, which paragraph refers to the case when “... *the fact stated in the indictment does not constitute, in substance, the offence stated or described in such indictment* .” Now for a similar plea to be upheld it is necessary that that the facts as described in the bill of indictment the nullity of which is being pleaded do not in substance constitute the crime with which accused is being charged in that bill of indictment or in a particular count of said bill of indictment. (vide. Judgement of this Court of the 20th June, 1995 in re: “Ir-Repubblika ta’ Malta vs. Aibrahim Bashir Ben Matue” confirmed on appeal on the 15th February, 1996; “Ir-Repubblika ta’ Malta vs. Lawrence Gatt et.” [6.12.2002], confirmed by the Court of Criminal Appeal on the 22nd. May, 2003; “Ir-Repubblika ta’ Malta vs. Dominic Bonnici” [5.1.2004] confirmed on appeal on the 22nd.April, 2004, and others.)

“In these judgments the Court quoted abundantly from case law where it was held that in examining whether the facts, as stated, are related to the part of the indictment containing the charge, the Court has to limit itself to the facts as stated in the bill of indictment and not as these facts might result from the acts of the compilation of evidence or indeed the facts as they might eventually result in the course of the trial by jury.

“It has also been held by our Courts that the reason for the annulment of the bill of indictment should emanate from the document itself and the Court should not go into and investigate the truth or accuracy of the facts stated in the bill of indictment but it should limit itself to ensure that the formal requisites prescribed by law have been observed.

“In “Rex. vs. Strickland” [21.3.1923] (Vol. XXV , p.iv. p.833) it was held that:-

“Tanto secondo la nostra giurisprudenza quanto secondo quella inglese, la nullita` dell’atto di accusa non si accorda per ragioni nel merito ma per difetti sostanziali recanti un pregiudizio, non altrimenti rimediabile all’accusato, risultante dalla faccia dello stesso atto che si impugna..... Da altre sentenze stampate risulta ancora che quando si e’ trattato della nullita` o meno dell’atto di accusa, tale atto e’ stato sempre esaminato per se stesso, indipendentemente dal merito e delle prove.”

“Having considered;

“That the first and only count of the bill of indictment in this case refers to the crime of conspiracy for the purposes of committing an offence in violation of the provisions of Chapter 31 of the Laws of Malta, and specifically of dealing illegally in any manner in ecstasy pills and of having promoted, constituted, organised and financed such conspiracy. The facts upon which the Attorney General intends to base his accusation in this count of the bill of indictment are the following:-

“That Steven John Lewis Marsden planned to import drugs illegally into Malta in agreement with others. In fact on the night of the ninth (9) and tenth (10) of July, 2006, and the preceding months he intended to get from Alicante in South Spain a considerable quantity of drugs illegally which he had acquired from another person with whom he had agreed about the deals. The intended drugs included specifically ecstasy pills. That accused used to agree with others to obtain the drugs in Spain, planning the route and means of transport to Malta and to whom to sell the drugs, providing all necessary assistance for this illegal activity”

“By committing the abovementioned acts with criminal intent, Steven John Lewis Marsden rendered himself guilty of conspiracy to trafficking in dangerous drugs in breach of the provisions (of) the Medical and Kindred Professions Ordinance.”

“That it is obvious that the facts as stated in the narrative part of this count of the bill of indictment, and in particular the parts underlined by this Court, if proven, would constitute the offence of conspiracy accused is being charged with.

“As such, on the face of it the bill of indictment purports to state facts which are in perfect consonance with the charge.

“If on the other hand this plea is to be understood in the sense that the evidence collated in the course of the compilation of evidence would not lead to a verdict of guilt under the only count of the bill of indictment, this would not be a preliminary plea but more of a plea to the general issue which can only be decided by the jury at the appropriate stage of the trial.

“Therefore this second plea is unfounded at law and is being dismissed.

“With regard to the third plea, accused was arraigned and charged with three offences, namely that of conspiracy for the purposes of selling or dealing in a drug (ecstasy), that of importing or offering to import psychotropic and restricted drugs (ecstasy) and of having had in his possession such drug without special authorisation under such circumstances that indicated that such possession was not intended for his exclusive use. On filing the bill of indictment, the Attorney General limited himself to just one offence, namely that of conspiracy. Accused argues that he actually ended up by importing into Malta pills which were not against the law and which were not drugs. As such, once he has not been charged with the importation or possession of drugs, and once the offence of conspiracy would have been absorbed in these two offences if he had been charged therewith and found not guilty thereof, he should be likewise declared not guilty of the charge of conspiracy contained in the only count of the bill of indictment.

“To this Court's mind, this is a convoluted way of reasoning and cannot form the basis of any successful preliminary plea. Even if accused is correct in stating that the actual importation did not involve prohibited or restricted drugs, this does not debar the Attorney General from charging accused with conspiracy on the basis of other evidence, independently of what was the subject matter of the actual importation. Indeed, even if there resulted the importation and possession of an illegal drug, there was nothing to stop the Attorney General from limiting himself to charging accused solely with conspiracy. This is absolutely his prerogative and it cannot be queried by this Court for all that matters.

“Accused is not juridically correct when he expects firstly that the Attorney General should have also charged him with the importation of the drugs and then, because the charge of conspiracy - for purposes of punishment only according to article 17(h) of the Criminal Code - would have been absorbed into the charges of importation and possession, if the latter did not result as proven, he would likewise have had to be acquitted of the charge of conspiracy. This line of reasoning simply does not hold water legally.

“Moreover, whether, in that hypothetical case, a jury would have acquitted accused of the other charges of importation and possession, is purely a matter of conjecture and certainly can never be decided or assumed by the Judge in the Criminal Court, as matters of fact are reserved solely for the jury to decide.

“Accordingly also this plea is being dismissed.”

3. In his application of appeal, the accused, with reference to his second preliminary plea, states that since the drugs which he actually imported where (at that time) not illegal drugs, the *“charge as it stands is an invention of the Attorney General in his unfettered right to charge as he deems fit.”* The accused challenges this stance taken by the Attorney General. In fact he argues that *“This is not correct. He is allowed to exercise his prerogative, but*

finally it is for the courts to see whether he was right or wrong. And even the stage of the preliminary pleas is the first sieve to avoid sending people to trial (and detaining them for long periods) when the facts do not reveal a basis for a charge at law.”

4. This Court, having heard also submissions by counsel for the appellant and for the respondent Attorney General during to-day's sitting, finds it quite perplexing how accused can still insist on this preliminary plea when both the law and case-law are quite clear on this point. As the Criminal Court quite rightly pointed out, the stage dealing with preliminary pleas and pleas as to the admissibility of evidence is not a stage where that Court, or indeed this Court, can or should go into the merits of the case, examining the evidence in order to find out whether the charge as preferred in the indictment is substantiated or otherwise. Just as when a plea on the admissibility of evidence is raised by either party, the Courts at this stage will only examine whether there exist the formal conditions for the reception as evidence of the particular witness, document or deposition and will not go into whether the evidence is relevant or otherwise (see **Ir-Repubblika v. Edwin Cioffi** – CCA 27/11/1990) – other than where the evidence is so manifestly irrelevant that a Court would be justified in holding that evidence to be *a priori* inadmissible (see *passim* **Ir-Repubblika v. Meinrad Calleja** – CCA 3/5/2000) – so also when the nullity of the bill of indictment is put forward – and accused's second plea can only be regarded as such – the Criminal Court and the Court of Criminal Appeal can only look at the formal requirements of the said indictment or of one or more counts in the indictment. At this stage the said Courts are precluded from going into the merits, that is into the evidence, to see whether or not the charge will stand the test of the evidence. That would be a function for the jury. The vetting to which appellant refers in his appeal application is a function of the Court of Magistrates as a Court of Criminal Inquiry (and, exceptionally, in the instance referred to in sub-article (3) of Article 433, of the Criminal Court). It is the Court of Criminal Inquiry which has the function to decide whether or not there are

sufficient grounds for an indictment to be filed. Even if accused's second plea were to be regarded as a plea in terms of the proviso to sub-article (1) of Article 435¹ of the Criminal Code – an article which was not considered by the first Court – it is patently obvious that the charge brought in the Bill of Indictment is “founded on [the] inquiry” for the simple reason that the charge of conspiracy was in fact preferred against Steven John Lewis Marsden when he was initially arraigned before the Court of Criminal Inquiry. As was stated by this Court in its judgment of the 14 June 1999 in the case **Ir-Repubblika v. Christopher Borg et**

“In realta` dawn il-Qrati diga` kellhom diversi drabi l-opportunita` jiddeciedu x`inhi l-posizzjoni legali f`kazijiet bhal dan u cioe` li l-ezami li jrid isir biex wiehed jistabilixxi hux sodisfatt il-vot tal-ligi mhuwiex illi jigu ezaminati l-atti kollha ta' l-istrutturja, id-deposizzjonijiet kollha tax-xhieda, u l-provi kollha biex jigi stabbilit jekk kull fatt kif inhu indikat fl-Att ta' l-Akkuza huwiex korrett jew le, imma huwa bizzejjed jekk il-fatt addebitat jew ir-reat addebitat lill-akkuzat ikun jirrizulta almenu mir-rapport guramentat meta tkun saret il-prezentata. Din hija gurisprudenza kostanti u kwazi centinarja u ma jidhirx li jista' jkun hemm ragunijiet bizzejjed ghaliex din il-Qorti ghandha tid-disassocja ruhha minnha.”

Reference is also made to the judgment of this Court of the 19 April 2001 in the case **Ir-Repubblika v. Mario Pollacco**.

5. For these reasons appellant's first grievance relating to his second preliminary plea is being dismissed.

6. As to the third preliminary plea, appellant states in effect that the first Court failed to understand this plea. Appellant maintains that once that the drugs that he actually brought into Malta were “fake” ecstasy pills – pills which up to that time were not proscribed by law – then

¹ **Art. 435(1)**: “It shall be lawful for the Attorney General to collect and produce further evidence besides that resulting from the inquiry: Provided that he may not include in the indictment any charge for any offence, not founded on the said inquiry.”

under no circumstance can there be a conspiracy to import into Malta, or to traffic in, the “real” ecstasy pills, that is the ones whose chemical composition is proscribed by law. Even here appellant is simply trying to confuse issues and compound confusion. A person may be found guilty of, say, conspiracy to import heroin into Malta, even though the stuff that he eventually brings into Malta turns out to be baking powder. It all depends on what was actually agreed upon between the conspirators and, more specifically, on the object of the conspiracy. Was the object of the conspiracy “real” ecstasy or “fake” ecstasy? The Attorney General is clearly of the opinion that it was “real” ecstasy; appellant disagrees. But this is a point which has to be decided by the jury, and not at this preliminary stage either by the Criminal Court or by this Court. This issue has nothing to do with *concursum materialis* and *concursum formalis* which appellant throws into the fray to make, in the words of John Milton, confusion worse confounded. Unfortunately a lot of time – the Courts’ and accused’s own time – has been wasted in this case because of what can only be described as manifestly unfounded pleas by the accused and an equally manifestly unfounded appeal.

7. For these reasons, the Court dismisses the appeal entered by Steven John Lewis Marsden from the judgment of the Criminal Court of the 9 June 2008, and orders that the record be forthwith sent back to that Court for the case to proceed according to law.

< Final Judgement >

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