MALTA

COURT OF CRIMINAL APPEAL

HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO

THE HON. MR. JUSTICE
DAVID SCICLUNA

THE HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 2 nd November, 2009

Number 6/2007

The Republic of Malta

v.

Steven John Lewis Marsden

The Court:

Having seen the bill of indictment filed by the Attorney General on the 25th January 2007 wherein the said Steven John Lewis Marsden was charged with having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence

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

Having seen the judgement delivered on the 7th January 2009 whereby the Criminal Court, after having seen the jury's verdict by which the said Steven John Lewis Marsden, by eight (8) votes in favour and one (1) vote against, was found guilty of the first and only count of the bill of indictment, declared him guilty of the said first and only count, namely that on the night between the 9th and the 10th July 2006 and in the preceding months, with another one or more persons in Malta, and outside Malta, the same Steven John Lewis Marsden conspired 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 any manner in ecstasy pills and of having promoted, constituted, organized and financed such conspiracy;

Having seen that by the said judgement the first court, after having seen Articles 120A(1)(f)(1A), (2)(a)(i)(aa)(bb)(2A), (2B) and 121A(1)(2) of Chapter 31, and Articles 20, 22, 23 and 533 of the Criminal Code, sentenced the said Steven John Lewis Marsden to a term of imprisonment of twenty five (25) years from which term is to be deducted all the period (or periods) during which he was being held under preventive custody in Corradino Correctional Facility only in respect of the charge of conspiracy of which he was found guilty, and sentenced him also to a fine *multa* of sixty thousand Euros (€60,000) which fine is to be automatically converted into a further term of imprisonment of eighteen (18) months according to law if it is not paid within fifteen days from the day of the appealed judgement; the Criminal Court further ordered the said Marsden to pay the sum of five thousand, one hundred and fifty nine Euros and twenty four cents (€5159.24) being the court experts' expenses incurred in this case according to Article 533 of the same

said Criminal Code within fifteen (15) days from the day of the appealed judgement. The first Court furthermore ordered that all objects related to the offence and all monies and other moveable and immovable property appertaining to the person convicted are to be confiscated in favour of the Government of Malta; and, finally, ordered the destruction of all drugs exhibited in this case under the direct supervision of the Deputy Registrar of that Court duly assisted by court expert Mario Mifsud, unless the Attorney General informs the said Court within fifteen days from the day of the appealed judgement that the drugs are also to be preserved for the purposes of other criminal proceedings against third parties and, for this purpose, the Deputy Registrar is to enter a minute in the records of this case reporting to this Court the destruction of said drugs;

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

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

1. that the verdict of the jurors was not unanimous;
2. that the long hours taken to reach a verdict indicate that the case was not contested frivolously;
3. that the drug actually imported was not scheduled at the time and therefore not illegal;
4. that accused had a clean conduct sheet;
5. that this was his first drug run to Malta;
6. that he was only going to obtain a payment of LM5,000 for the run;
7. that he had given the names of the two persons who had incited him to do the run together with details about their other business interests in Malta;
8. that as accused stated in his statement to the Police, he had done this out of stupidity and financial difficulties and this is borne out by the fact that no assets were discovered by Dr. Vincent Galea in his report and during the Police raid on accused's house;
9. that he fought this Court case loyally.

"Having considered prosecuting counsel's submissions that:

1. in this case over 50,500 pills were involved which would have fetched a retail market price in the vicinity of 500,000 Euros and the effect on Maltese youth and society in general of such a volume of drugs, which had the same effects as the scheduled drugs, would have been incredible;
2. this was a case were the accused, who was himself a guest of Maltese society, had conspired with other foreigners who were likewise guests in Malta to ruin Maltese society and it was shocking for these foreigners to take advantage of the hospitality of the Maltese in this way;
3. this practice had to be stopped in all possible ways;
4. that accused's motive was to make money on this deal, in fact a sum of LM 5,000 was involved;
5. accused had not cooperated at all with the Police who spent ten hours searching the vehicle for the hidden drugs;
6. it was clear that eight out of the nine jurors had not believed accused's version that he conducted a research on [the] internet to determine whether he could legally import the drug into Malta or not;
7. this case merited no serious consideration because of its seriousness and quantity of drug involved and the *modus operandi* used which was vicious.

"Having seen accused's updated criminal conduct sheet filed by the prosecution and examined by the defence.

"Having considered the gravity of the case."

Having seen the application of appeal of the said Steven John Lewis Marsden wherein he requested that this Court reverse the verdict, revoke the judgement delivered against him on the 7th January 2009 by the Criminal Court, and instead that he be acquitted of the charge preferred against him, and without prejudice to the above

and in default, that in any case a more moderate punishment also within the parameters of law should be applied;

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

Having heard the lengthy submissions made by counsel for appellant and counsel for the respondent Attorney General in the course of a number of sittings;

Considers:-

1. Appellant's grievances may be, briefly, summed up as follows: (1) he was found guilty of an offence which was no offence at law at the relevant time; (2) there was a misdirection in the summing-up regarding the inferences that could be made to prove conspiracy; (3) he was wrongly convicted on the facts of the case; (4) whatever he had legally before the dates in question, cannot be legally subject to confiscation; (5) he should not have been subjected to any punishment and to a long preventive detention; however, without prejudice to his contention of innocence, the punishment inflicted is excessive.

2. With regards to the first grievance, appellant made reference to what the court appointed expert Pharmacist Mario Mifsud stated that "ecstasy" is a generic name and is not envisaged under the Third Schedule of Chapter 31 of the Laws of Malta; and furthermore that it is a street name for a number of drugs. Appellant said that the defence was not opposed to a request for a correction of the bill of indictment. In its summing up the first Court stated that it would have been preferable had the words used been "MDMA pills (also known as ecstasy)". The prosecution, however, did not request any change or correction. Consequently, appellant submits, he was found guilty of conspiracy "specifically of dealing illegally in any manner in ecstasy pills ….". According to appellant, ecstasy cannot be just another name for MDMA, the substance which was then prohibited, because at that

time the generic name ecstasy was applicable to various other substances which were not included in the Third Schedule of Chapter 31. Appellant therefore concludes that he has been found guilty of an offence which is not envisaged by law, or was not an offence at the time of the commission of the relevant act, and this in violation of Article 589(d) of the Criminal Code and of Article 7 of the European Convention on Human Rights. This ambiguity in the use of the word “ecstasy” only became manifest during the hearing; so much so that the first court asked the expert why he had not pointed out this ambiguity in the report he filed before the Magistrates’ Court. Article 589(d) of the Criminal Code imposes an obligation on the Attorney General to copy the law – neither did he do this nor did he request a correction. This is now no longer possible as the verdict has been read out in the Criminal Court.

3. As to this grievance and ground of appeal this Court observes that, as appellant points out, the charge in the bill of indictment specifically refers to “ecstasy pills”, that is to say, he was charged with conspiring to deal illegally in “ecstasy pills”. The expert Mario Mifsud, when giving evidence before the first Court, stated that the term “ecstasy” is a generic name used for pills which may have different chemical compositions or components – MDMA, MDEA, MDA, BZP, and so on. It is not the term “ecstasy” which renders the pill illegal but its chemical composition, because not each and every substance imaginable that may be used to manufacture “ecstasy pills” is controlled by law. Having said that, however, it is the view of this Court that the wording of the bill of indictment cannot but be interpreted as meaning that appellant was charged with conspiring to deal in pills that were illegal, that is conspiring to deal in “ecstasy pills” whose chemical composition is, or was at the time the pills in question were seized, proscribed by law. Moreover, although the word “ecstasy” may, in certain quarters, be regarded as a generic term, it is MDMA which was first referred to as “ecstasy”. “MDMA” and “ecstasy” are in fact constantly and consistently used interchangeably, the former being a reference to the chemical composition, the latter today

being the street name[1]. And, indeed, the constant practice in our Courts of Criminal Justice for the last nineteen years (ever since the Third Schedule to Cap. 31 was substituted by Legal Notice 48 of 1990) has been that anyone charged with possession of, trafficking in, or with conspiring for the purpose of dealing in "ecstasy" was invariably understood as being charged with possession of, trafficking in, or with conspiring for the purpose of dealing in MDMA or one of the closer "relatives" of MDMA, that is DMA, MDA or MMDA. Anyone legally assisted – as appellant was – would have known perfectly well with what he was being charged. Indeed, the bill of indictment could well have done away with the words "ecstasy pills" and instead referred simply to "drugs in breach of the provisions of the Medical and Kindred Professions Ordinance". In fact the second paragraph of the bill of indictment does exactly that: *"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."* In the subsequent paragraph of the bill of indictment this formula is again used, but with the rider *"and specifically of dealing illegally in any manner in ecstasy pills".*

4. To conclude on this point, although it is recommendable that, where possible[2], when a person is charged with an offence in relation to ecstasy pills, a

[1] "MDMA is a synthetic substance commonly known as ecstasy, although the latter term has now been generalised to cover a wide range of other substances", http://www.emcdda.europa.eu/publications/drug-profiles/mdma#headersection. "There are various popular street names for MDMA such as Ecstasy, E, Adam, X and Empathy." See *The Invention of MDMA or ecstasy* by Mary Bellis; http://inventors.about.com/library/weekly/aa980311.htm. See also *The History of Ecstasy Pills* by Paul Betters, http://www.ehow.com/about_5035337_history-ecstasy-pills.html. And in *Us Against Drug Abuse*: "By the early 1980's, MDMA was being promoted as 'the hottest thing in the continuing search for happiness through chemistry,' and the 'in drug' for many weekend parties. Still legal in 1984, MDMA was being sold under the brand name "Ecstasy," but by 1985, the drug had been banned due to safety concerns", http://www.drugabuse.youthkiawaaz.com/2009/07/all-about-ecstasy.html. And see *Utopian Pharmacology Mental Health in the Third Millennium – MDMA and Beyond*, http://www.mdma.net/.

[2] "Where possible" because there may be instances when a person is charged with an offence or offences related to "ecstasy pills" before the chemical composition of the pills has been ascertained.

reference to the chemical composition of the pills in question be made, the fact of not doing so would not render the charge invalid or otherwise vague or such that the accused would not know with what he is being charged; and it would remain to be seen from the evidence tendered whether the pills to which the charge refers have a chemical composition that is proscribed by law (where the charge is one of possession of, or trafficking in, ecstasy pills).

5. Appellant's first grievance is, therefore, rejected.

6. Appellant's second grievance refers to the manner in which a conspiracy may be proved. He states that the defence took the position that proof of conspiracy has been defined, with reference to Maltese law, in the Godfrey Ellul case in the following manner: *"The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it: Proof of the existence of a conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."* Appellant then argued that although it does not result from the records, the first Court asked both counsel to approach the bench and indicated that it would be preferable if the defence rephrased the emphasis on inferences from "certain criminal acts of the parties", even though counsel for the defence was making it clear that he was quoting from the Ellul case and the Criminal Court had a copy of that judgement and a further excerpt was handed over to it.

7. In the summing up, the Court said that the position quoted by the defence was according to English law and not Maltese law. Furthermore, it stated that according to Maltese law, circumstantial evidence of any sort could be relied on, provided that it was unequivocal, and not necessarily inferred from criminal acts. As an example to illustrate this point, the Court stated that a conspiracy could be established by evidence of a number of telephone calls. According to appellant, this is not the

correct position at law in the field of conspiracy. He says that when there is no direct evidence, proof of the existence of a conspiracy has to be deduced from the "criminal acts of the parties". The opposite is not legally correct. Conspiracy cannot be deduced from the mere acts (which are not criminal) of the parties. An inference must have a starting point. It is a subsequent criminal behaviour from which one may go up the line to the other conspirators, or even to the existence of a conspiracy. In his application of appeal, appellant gives a number of examples to demonstrate that at some point there must be some illegality, committed at least by one of the alleged conspirators, so that inferences can be drawn, in the absence of direct evidence. He makes reference to what was decided in the Godfrey Ellul case, reversing the jury's verdict because no inference could be drawn about conspiracy even though the drugs were found in the flat of a certain Magri.

8. In this case, appellant argues, the point in issue was not the question of an agreement, but on whether there was an agreement to traffic in illegal drugs. That was the bone of contention. But the same rules apply. There must be further criminal activity from which one could infer unequivocally the existence of a prior conspiracy to deal not in medicinal products generally but in prohibited or controlled or dangerous or illegal drugs. The Criminal Court objected to the emphasis of criminal activity and relied solely on "any activity" provided it was unequivocal. In conspiracy, appellant states, equivocation is dispelled through criminal activity.

9. Why was this fundamental? asks appellant. Because, he replies, he did nothing criminal. How could there be an inference, as to the criminal chemical nature of the pills that it was agreed should be imported, from circumstances which were not in any way criminal? If they were not criminal, then there could be no univocal conclusion. This wrong interpretation of the law, appellant concludes, had a bearing on the verdict, as all the theories of the prosecution could appear as being not only very populist but also perfectly legal.

10. Now, in his summing-up, the trial judge gave the jurors the following explanation as to the manner in which evidence of a conspiracy could be forthcoming (see transcript from p. 29 onwards):

"Of course, still we have to adhere to very rigid rules to find out, however, whether two people have come together and all this has to result from evidence: whether these two people have agreed to traffic in Malta illegal drugs and we have to have the evidence that they actually agreed to traffic illegal drugs and the evidence has to come from the prosecution, and the prosecution also has to prove, always beyond reasonable doubt, that this agreement included as well the means, the mode of operation to be followed in furtherance of that plan. If the prosecution proves these three things beyond reasonable doubt, then it would have called the point. If it fails to prove any one of these elements, at least, then it would not have proven the elements of this offence. So although in this case we all know, and it is agreed because there is no contestation about this, that in actual fact the accused was caught and intercepted bringing in fifty thousand capsules of mCPP into Malta … that fact as such has a bearing and at the same time not a necessary bearing on the offence in question. We have to analyse the elements of the offence in question separately on [*recte:* from] what actually happened and what was actually discovered ….

"But I tell you we have to consider this crime in isolation from the fact that actually resulted. It has been held by authority that even if two persons agree to import heroin for example into Malta which I tell you is an illicit drug under the other law, but instead of heroin they, it results that finding the person who brought whatever had to be brought in, brought in baking powder, if those two persons when they agreed had agreed to import heroin, in spite of the fact that baking powder was imported those two persons can still be held guilty of conspiracy to import heroin. That is the position at law independently of what resulted afterwards. However, and this is very important however, it has to be proven to you beyond reasonable

doubt, from the evidence, either direct evidence of witnesses if there are any, indirect evidence from circumstantial evidence if there is any, that the agreement in this case was to import an illicit drug under the Schedule of Chapter 31 and although the reference is to ecstasy in the bill of indictment at one point for a number of times they mention an illicit drug or a drug illicitly or illegally but at one point reference is made to ecstasy although it is not the precise reference, it is true. The Prosecution has to prove that the agreement between the accused and whoever else was involved in this business, was to import the drug ecstasy as contemplated under the law at that time which was MDMA specifically and therefore you have to see and ask yourself, is there any evidence to show that these people agreed to import MDMA? Because that is what the law mentions here. Now that is a question of evidence and you have occasion to review the evidence together later on this afternoon but that is the question, so don't confuse what happened after with the time of the agreement. If an offence was committed, it was committed the moment these people agreed on a common plan and on the way they had to put it into action, and even if afterwards baking powder was imported into Malta it does not mean that the plan could not have been a guilty plan but it has to be proven to you beyond reasonable doubt that the plan was to import the drug which was prohibited by the law. You cannot assume it, you cannot conjuncture it, you have to have it proven to you beyond reasonable doubt by the Prosecution. I think I don't have to say more about the elements of these [recte: this] offence but we will revise them very quickly.

“The elements would again be in this case therefore we go through them again, first of all the Prosecution has to prove that at one particular time, we had a particular time something happened. So here you have to look in the evidence for the type [recte: time] when this alleged plan, this alleged conspiracy took place. That this plan was concocted or agreed to with at least one other person in Malta or outside Malta, that is the second element, the objective of the plan should be the trafficking of an illicit

drug in this case being the MDMA because at that time that was the only drug which could have fallen under the generic term used in the bill of indictment of ecstasy and that these two persons, including the accused, had at least agreed on the means and the way how this plan was going to be put into operation, the mode of action, how they were going to go about it. It is not necessary, however, for this crime to subsist, that drugs have effectively been changing hands or moved from one place to another or that anything else besides the plan had taken place. It has to be considered within brackets, this offence. What did they agree? Did they agree, did they agree with all these parameters? Then there is the offence, what happened afterwards then one can draw certain arguments.

"The Prosecution might argue, listen in another case not in this case, in effect what was imported was a prohibited drug. I am not referring to this case on purpose, I am using another example and they will say: The proof of the pudding is in the eating, they agreed to import heroin so much so that they actually ended up importing heroin. It could be argued in another sense as well, that once that what was actually imported was different from what should have been agreed, wasn't it possible therefore that this was not agreed but it was agreed to import something which was harmless, which was at least not legal and in fact these were the arguments which were exchanged before us yesterday evening and this morning. So really what you have to decide here is whether those four elements have been proven to you, all of them, beyond reasonable doubt by the Prosecution.

"Now before going further into the question of the lines of defence taken by defence and what the Prosecution rebutted, there is one point I have to, of law, I have to explain. This morning it was put to you by defence counsel as a point of law, of Maltese law, that 'the agreement may be proved in the usual way or by proving circumstances from which the jury may presume. Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties

accused done in pursuance of an apparent criminal purpose in common between them.' When he was putting that position to you I found out that Defence Counsel was quoting without mentioning the author from a position under English law. As far as this Court is aware, that is not the position under Maltese law. The inference from circumstantial evidence can be made from any circumstance. It does not have to be criminal acts of the parties and I give you an example. If it is being alleged that A conspired with B, and I give you an example. If it is being alleged that A conspired with B, if the police prove that A has been phoning B and B has been phoning A over that period of time, six, seven, eight, nine, ten times, that proof can be brought forward and you can infer within the limits I explained this morning about circumstantial evidence, that there was at least a contact between these two people and that they were in contact but of course, phoning each other is not a criminal offence. But the Prosecution can bring evidence to the effect that they have been phoning each other and try to convince you that that proof is one of the evidences, one of the proofs that there was this connection between the two. So to draw an inference from a circumstance it does not have to be a criminal act of these people. In other words if the Prosecution is trying to convince you that A is conspiring with B, so to enable you to make an inference that A is in fact conspiring with B, it doesn't have to prove to you that A and B for example are also indulging in illegal betting, which would be a criminal offence. Or they are going somewhere and performing irregular sexual acts between them for example with minors. Those will be criminal acts but no that is not what is necessary here. Under Maltese law, you can draw inferences from circumstances; however, as I explained to you this morning and this is the safeguard, however for you to base your conclusion of guilt on an inference drawn from circumstantial evidence, that inference has to be the only one possible. That yes, because if it gives you different possibilities then you're left in square one, but not necessarily from criminal acts of these two together. To prove one crime you don't have to prove that they have been doing other crimes together. No, that is absolutely either misquoted here in this place

from where it was quoted, not by him, not by Dr Brincat but whoever put it in where it is and where he quoted it from. That is not the position under Maltese law and where it was quoted from doesn't say that that is the position under Maltese law."

11. In the Godfrey Ellul case[3] mentioned by appellant, this Court had referred to what is said in **Archbold's Criminal Pleading, Evidence and Practice 2003** in respect of conspiracy**:**

"The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: *Mulcahy v. R*. (1868) L.R. 3 H.L. 306 at 317; *R. v. Warburton* (1870) L.R. 1 C.C.R. 274; *R. v. Tibbits and Windust* [1902] 1 K.B. 77 at 89; *R. v. Meyrick and Ribuffi*, 21 Cr.App.R. 94, CCA. Nothing need be done in pursuit of the agreement: *O'Connell v. R.* (1844) 5 St.Tr.(N.S.) 1. [4]

….

"The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it: *R. v. Parsons* (1763) 1 W.Bl. 392; *R. v. Murphy* (1837) 8 C. & P. 297. Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': *R. v. Brisac* (1803) 4 East 164 at 171, cited with approval i*n Mulcahy v. R.* (1868) L.R. 3 H.L. 306 at 317." [5]

12. In the Godfrey Ellul case this Court had not stated that this is the position under Maltese law. However it is in agreement with what is stated therein as it is quite clear from the said quotation that evidence of a conspiracy is

[3] **Ir-Repubblika ta' Malta v. Godfrey Ellul**, decided by this Court on the 17th March 2005.
[4] See para. 33-4, page 2690.
[5] *Op. cit.* Para. 33-11, page 2692.

not necessarily or only derived by inferring it from criminal acts of the parties involved. Indeed, a conspiracy may exist even though there is no subsequent criminal activity, that is to say even though the agreement to deal in any manner in a controlled substance is not followed by some commencement of execution of the activity agreed upon[6]. In such circumstances it is obvious that no inference can be drawn from criminal acts because there are no criminal acts subsequent to the conspiracy itself. Indeed the quotation from Archbold clearly states that a conspiracy may also be proved "in the usual way" – so by means of direct evidence and/or circumstantial evidence which must be univocal, that is to say, that cannot but be interpreted as pointing towards the existence of a conspiracy. Unfortunately defence counsel misinterpreted that quotation and wrongly submitted that proof of the existence of a conspiracy has to be deduced or inferred from the criminal acts of the parties, and even seems to have led the first Court to understand that that was the conclusion to be derived from the Godfrey Ellul case. This

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

is clearly incorrect. As one finds stated in the 2008 Edition of **Blackstone's Criminal Practice** [7]

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

13. This appears to be also the position in Scots law. Professor Gerald Gordon, in his standard text **The Criminal Law of Scotland** [8] makes reference to the dictum of Lord Avonside in ***Milnes and Others*** (Glasgow High Court, January 1971, unreported) to the effect that "you can have a criminal conspiracy even if nothing is done to further it", adding that, indeed, this is the very essence of conspiracy[9].

14. Consequently appellant's second grievance is also being rejected.

15. Appellant's third grievance relates to the finding of guilt by the jury. Here appellant makes a number of submissions, which are being reproduced hereunder:

In the first place, appellant insists that there was no evidence at all which could support a conviction according to law. He refers to what he calls the prosecution's very "populist" theory that appellant had been cheated in Spain and was given mCPP pills which are of an inferior quality instead of true ecstasy. He points out that the court-appointed expert Mario Mifsud did not say that they were of an inferior quality. They had the same "feel good effect". What evidence, asks appellant, was there to prove that things happenend in the way the prosecution is

[7] OUP, p. 99, para. A6.24.
[8] W. Green & Son Ltd. (Edinburgh), 1978, p. 203.
[9] See also the judgement of this Court of the 23 October 2008 in the names **The Republic of Malta v.John Steven Lewis Marsden**.

alleging? The prosecution said that it could not bring the witnesses from Spain, but the jurors should take it on the authority of the prosecution that he had been cheated. He had intended to bring MDMA and got mCPP. Did any witness say this? Who drew the inference, and from which circumstance? This, appellant laments, was an absolutely gratuitous assertion, not founded on any evidence or on any circumstantial unequivocal evidence. The narrative part of the indictment actually stated the opposite regarding the pills that were found, i.e. that he had agreed with another person in Spain about the deals. If there was agreement how is it that there was also cheating? Agreement is a *consensus ad idem*. Apart from what was stated in the bill of indictment, there was no unequivocal evidence that appellant had agreed on one thing and was given another. If there was any evidence to go by, appellant says, and this contrary to the contention of the prosecution, the court expert Mario Mifsud states that those pills had the same recreational effects and the same street value. From a conspiracy point of view this involved a better economic return for a lower risk factor.

Secondly, appellant says that on entry into Malta he was stopped by the police. He was asked whether he had anything illegal, and he denied. He was correct and in fact no charge of illegal importation at the trial was made. At the same time the prosecution laid stress on the fact that the pills were tightly hidden in the panes of the vehicle. The way in which they were hidden unequivocally proved, according to the prosecution, that it was ecstasy “of the illegal type”. The corollary, says appellant, is that if they were of the “legal type” they would have been placed on the dashboard. Here, according to appellant, comes into play the question of the importance of the direction of the Criminal Court to the jurors that the criminal acts of conspirators could lead to the inference of the conspiracy. Now was it illegal to hide pills in a vehicle if they were not illegal? There was no import duty to be paid, nor was it alleged that such duty had to be paid. The method of hiding was the basis of an inference to be drawn regarding the chemical composition of the pills to be

imported and this, appellant contends, was a wrong inference.

The method of hiding, appellant goes on to say, was a bland circumstance which did not unequivocally indicate what the intention was. Why do people take and hide the front panel of radios in their cars when left unattended? Because radios in cars are illegal? Appellant stresses that in his evidence he stated that as he was travelling overland and especially through Southern Italy, he was particularly concerned that the pills, if seen, would be stolen. It was bad enough that he had a Maltese number plate and that, by itself, could attract more attention. Furthermore he stated that, if seen, the police would have confiscated the pills and although they were not illegal, they would not be returned to him. This actually happened during the proceedings. The pills and their possession and importation were no longer considered illegal, but were not returned to him. Moreover, says appellant, he had been promised a commission if he delivered the pills and therefore had every interest to hide them until delivered to destination. All these circumstances are more cogent than the one brought forward by the prosecution which presumed that he did not know that they were mCPP pills and instead that he thought that they were MDMA pills.

Thirdly, appellant says that the prosecution mounted a strong denigrating campaign because he had not cooperated with the police in showing them where the pills were. *Ergo*, they were illegal otherwise he would have handed them over to the police. Defence counsel emphasised that no person under interrogation, or speaking to a person in authority, is bound to say anything or in any way to collaborate. Lack of cooperation could not lead to an inference about the chemical composition of the pills that were to be imported. If this were not the correct legal position, argues appellant, then serious consequences would follow, as the arrested person had no right to legal assistance and would not have known the implications of his lack of cooperation and that it could be used as a basis for an inference of guilt. As there was

nothing illegal which had to be declared at customs according to law, appellant maintains that he had no obligation to say anything or to cooperate with the police.

Fourthly, the prosecution stressed that the accused was not to be believed in his evidence that he always intended to import mCPP pills, which were cheaper and not illegal. And if not believed then what the prosecutor was saying was to be believed. This is not legally correct, appellant says. If an accused is not believed the prosecution still has to bring forward evidence of guilt. In such cases, the burden of proof is never shifted, and this according to both criminal law principles and constitutional principles.

Fifthly, the prosecution, according to appellant, propounded the theory, without adducing evidence, that he came to know about mCPP after the report of the expert. Appellant says that there is no proof at all for such an allegation. What was ignored was that he had insisted even earlier, that is at the time of his arrest, that the pills were not real ecstasy. The first time that the question of ecstasy, being a generic name of various pills, came up was only in the trial, as evidence. He had already used the double meaning of ecstasy in his appeal on the preliminary pleas. After expert Mario Mifsud stood down, there was a lot of perplexity in the court-room. It was from that point onwards that the prosecution started to press on ecstasy of the illegal type. Previously ecstasy was simply ecstasy. The presiding judge asked Mario Mifsud why he had not mentioned the double interpretation of the word ecstasy in the report to the Magistrates' Court.

What single proof is there, asks appellant, or what unequivocal circumstance is there from which a deduction [recte: inference] in a legal way could be made that the conspirators agreed on the importation of MDMA pills and not on mCPP pills? If there is a single uncontested circumstance from which an inference can be drawn it is that the pills were tested and found to be mCPP and not MDMA. If this leads nowhere, where do the other suppositions and illegal assumptions of the prosecution unequivocally lead to? Until the contrary is proved by the

prosecution, the appellant obtained from the foreign source what he bargained for. If they were MDMA pills, the prosecution could assert that they were illegal. If they were mCPP pills, they were not. There is no single iota of evidence, appellant argues, to prove that one intended a kind and the other delivered another. When one applies the criteria of the Godfrey Ellul judgement referred to, one can only reach the same conclusion which was reached in that judgement about conspiracy.

Finally, appellant refers once again to the rule about how conspiracy may be proved and asks what single act, concomitant or subsequent, can be considered as criminal? The fact that in default of direct evidence it may be difficult to prove conspiracy or the object of the conspiracy, does not mean that the guarantees and rules of evidence are to be disregarded in the name of the supreme interests of society to protect itself. In conspiracy the law does not create any presumptions of guilt. Appellant concludes that although what he did was not laudable, yet it was not criminal.

16. Defence counsel, Dr Joseph Brincat, amplified these arguments further during oral submissions made before this Court in the course of the various sittings.

17. Now, regarding the rules as to how conspiracy may be proved, reference is made to what has already been said before. Suffice it to say here that the judge presiding the first Court did in fact correctly state the manner in which conspiracy could be proved. Since this was the only grievance relating to the summing-up and the Court deems the summing-up – apart from what was stated before, and subject to what will be said hereafter – to be intrinsically correct, it remains to be seen if, on the basis of the evidence produced, the jury could have legally and reasonably reached its guilty verdict.

18. The facts themselves are simple. On the night between the 9th and 10th July 2006, appellant arrived in Malta from Pozzallo with his Pajero number LEW-154. The Police had information that he would be carrying

drugs. A lengthy search of the items in his vehicle and of the vehicle itself resulted in the finding of 28 plastic bags containing around 50,579 tablets hidden between the back side glass panes and a sheet of metal. It was at first suspected that these tablets were "illegal ecstasy tablets", i.e. MDMA. However, upon examination by pharmacist Mario Mifsud, it resulted that the active ingredient in these tablets was mCPP, a substance not, at the time, controlled or rather proscribed by law[10]. Consequently the original charges brought against appellant of importation and possession of an illegal substance were dropped in the bill of indictment, which accused him solely with the crime of conspiracy.

19. Now, in terms of subarticle (1A) of Article 120A of Chapter 31, a conspiracy as is contemplated in subarticles (1)(d) and (1)(f)[11] thereof shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between the persons participating in the conspiracy. That an agreement did exist for the importation of drugs into Malta is beyond doubt. This results clearly both from appellant's statement when he was being investigated by the Police and from his evidence before the first Court. The point in issue is not whether there was such an agreement, including agreement on the mode of action, but whether the conspiracy was for him to import "illegal ecstasy tablets" or whether the conspiracy was for the importation of the tablets which he actually brought over and which, at the time, were not controlled by Chapter 31 (or, for that

[10] 1-(3chlorophenyl)piperazine, or mCPP, was added to the Third Schedule of Cap. 31 by L.N. 127/2007.

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

matter, for the importation of some other object which was not illegal). What the prosecution had to prove in this case beyond reasonable doubt was that the "object of the conspiracy" was an illegal drug and not just a drug. In other words, it had to prove beyond reasonable doubt that when appellant agreed with one or more persons to bring something into Malta, that something was an illegal drug and that both he (that is, appellant) and at least one other person (conspirator) had intended (to bring to Malta) an illegal drug. As is stated in the 2008 Edition of **Blackstone's Criminal Practice** (already referred to, above) *"…fraudulent drug dealers who intend to supply their customers with harmless powder cannot be regarded as having conspired to supply drugs. Their plan is in fact to obtain property from the customers by deception."* [12]

20. Furthermore, as Timothy Jones and Michael Christie point out in the second edition of **Criminal Law** [13]:

"Proof of the agreement essential to a criminal conspiracy will generally be inferential. Sometimes overt acts will have been committed by some or all of the accused, but this will not always be the case. But even if there have been some such overt acts, the existence of *mens rea*, in the form of an agreement and commitment to the criminal purpose of the conspiracy, will have to be proved by inference. For example, if a group of men is apprehended wearing masks and carrying weapons while sitting in a car outside a bank, there is a clear inference to be drawn that there is an agreement to rob the bank. The group is unlikely to be there for any other purpose.

"Lord Justice-Clerk Grant pointed out to the jury in *H.M. Advocate v. Wilson, Latta and Rooney* (1968): *"You won't often get eye-witnesses of the agreement being made or eavesdroppers who actually hear it being made. Accordingly, in many cases it is a question of judging from the acts of the alleged*

[12] Page 96, para. A6.18.
[13] Greens Concise Scots Law (Edinburgh), 1996, page 140, paras. 7-46 to 7-48.

conspirators whether in fact there was a conspiracy between them in pursuance of which they are acting."

"The evidence derived from such decisional process will not always be as unambiguous as the example in the previous paragraph. An individual who may appear at an early stage of the 'conspiracy' to be involved might not be firmly committed. This problem is raised in a crucial form by the absence of any requirement of proximity such as is to be found in the law of attempt.

"The cynical view of proof in conspiracy cases would be that the apparent difficulty in proving the agreement is to the advantage of the prosecutor. There is the danger that in stressing to the jury that a conspiracy can be proved inferentially, the judge may neglect to emphasise the necessity of proof *per se*."

21. Now, in this case the prosecution did not produce any direct evidence that could shed light on the matter. Nor were there any subsequent "criminal acts" on the part of appellant (like the actual importation of an illegal drug) from which one could infer the existence of a criminal conspiracy, from which, that is, one could infer that appellant and at least one other conspirator had agreed to import an illegal drug. The issue in this case, therefore, boils down to whether there is sufficient circumstantial evidence to indicate that, although an uncontrolled drug was imported, the conspiracy was in fact for the purpose of importing a controlled drug. As this Court stated in its preliminary judgement of the 23rd October 2008: **"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."**

22. The Court has deliberated at great length over this issue and has examined in detail the evidence (including, of course, appellant's statement to the Police) resulting both from the committal proceedings and from the evidence given during the trial. It is, in the opinion of this Court, quite clear that the main circumstance which could point to the existence of a combination of guilty minds (in the sense above explained) – and one which was repeatedly emphasised by the prosecution – is the fact that the pills in question were well-hidden, so much so that it took hours of laborious work to find them, and this only after the Pajero had been scanned at the Malta Freeport using equipment that is used by Customs to scan containers. Furthermore, there is nothing in appellant's statement to the Police to suggest that he knew that the active ingredient in the tablets was an uncontrolled substance. In his statement he says that he had specifically told Engelbert Debono[14] to disembark as a foot passenger and not sit with him in the Pajero as Debono did not know about the situation with the Pajero[15]; that the drugs were delivered to him in Alicante, Spain, via a taxi; that it was he himself who hid the packets in the Pajero without any help; that the main reasons for which he agreed to bring them were "stupidity, financial problems and pressure from third parties"; that it was possible that he had used Engelbert Debono's mobile phone with his (appellant's) Spanish sim card to phone third parties in Malta in relation to the drugs he was carrying in the Pajero; and that he did not wish at that stage and before seeking legal advice, to give details about the business transaction involved regarding the acquisition of the drugs, about the amount he had been offered to transport the drugs and about the identity of who had approached him to effect the drug run.

[14] Engelbert Debono was travelling with appellant.

[15] See following extract from appellant's statement dated 10th July 2006: "Q: Why did you choose to separate before disembarking from the catamaran on arrival in Malta? A: It was my choice because I knew the situation with the Pajero and he didn't. Q: So this means that you did not wish to get Engelbert involved in anything? A: That is correct. I specifically told him to disembark as a foot passenger and not stay with me inside the Pajero."

23. When giving evidence before the first Court, appellant mentioned the two persons who had approached him – a certain Kenneth William Donaldson and a certain Andrew John Woodhouse. He said that they asked if he would be interested in bringing the pills that he brought from Spain from one of their contacts in Spain. Appellant said that he did some serious thinking and studying, and that he checked as to the legal situation in Malta, and with the help of his daughter found information on the internet in a report by the European Monitoring Centre for Drugs and Drug Addiction in the sense that mCPP was not illegal here. He then agreed to transport the substance safely from Spain. When he had collected the pills, he decided to put them in the rear window panels. Asked by his counsel why he had to hide the pills, appellant replied that "the value of the pills being what they were" and since he would be stopping during his three-day trip, he was afraid that someone could break into the vehicle and steal them. Asked how sure he was that what was delivered to him was mCPP, he replied that he asked the chap who was dealing with him in Spain. "He said if you are going to buy a different type of ecstasy you will pay three times the value. These were very cheap, imitation pills which gave a happy sensation, not exactly the same, and due to the fact that they were easily obtainable, due to their legal status there wasn't any risk or any problem."

24. Appellant further stated that when, upon arrival in Malta, he was approached by Inspector Ciappara, the said Inspector told him that he had reason to believe that there was a large amount of drugs in appellant's vehicle. To this appellant said that he denied having any illegal substances in the car or on his person or in his person. He said that both Inspector Ciappara and Inspector Dennis Theuma repeatedly asked him to tell them where the ecstasy pills were, and that he replied that there were no ecstasy pills, no illegal drugs in the vehicle. When the pills were found, Inspector Theuma told him "We've got you now, I told you there was ecstasy in this car and we'll find it." Appellant says that he retorted that they are not real ecstasy. When he was making his statement, appellant said that he was asked who put the alleged

ecstasy pills in the car and that he replied that he had done so and that it was not ecstasy. When questioned by the Court as to whether the two persons he mentioned had specifically referred to mCPP, appellant replied that they offered him “to bring mCPP pills”, and that they may have said that it was a new type of ecstasy and they may have not. Appellant kept insisting that he knew that these pills were not illegal.

25. Under cross-examination, appellant was asked why he did not tell the Police that the pills were not illegal. He replied that whether legal or not, the pills would be confiscated because that is what he read in the report. As regards Engelbert Debono, he said that he was a young boy and that the pills did not concern him, so he did not disclose anything to him. He did not allow him on the Pajero because when docking he noticed several customs personnel and presumably police, and he was concerned because he had 50,000 pills in the car that belonged to somebody else, and that these were “very valuable.” He had been promised Lm5,000 by the two persons who had approached him. In Spain he contacted another Englishman by phone as had been planned. This person came by taxi, they met, had a coffee and the pills were handed over to him. The cost of the pills, which had not yet been paid for or had to be paid by the persons who had approached him in the first place, was €40,000. Appellant said that he contacted Mr. Woodhouse by phone to tell him and his colleague that he had the pills and would be on his way as soon as he finished his business.

26. Appellant was repeatedly asked by the prosecution why he had never indicated that the pills were mCPP pills until there was the expert’s report. Appellant replied: “This is the first time today, apart giving testimony about the bail application, it is the first time in two and a half years being held, that I’ve actually have been allowed to say one word. Not one word have I spoken in two and a half years of being in that stinking prison.” At this point the Court interjected:

“Court: Look, Mr. Marsden, that is not correct and I am going to point it out to you before you start sneering about prisons, when you had the opportunity to make your statement to the police, you knew then, as you are telling us now at least, that you were on an mCPP mission.

Witness: Yes.

Court: Why didn’t you tell Mr. Ciappara and Mr. Theuma exactly what you are telling us now?

Witness: When I’d spoken to Inspector Theuma at the time they pulled the panels and his reaction, it was plainly evident to me that they weren’t interested and I chose to take legal advice before I spoke anything. I thought that was the better option of it.

Prosecution: But you had ample opportunity up till now to state your defence. Did you tell the Magistrate or anyone else that these were mCPP pills?

Witness: I told my legal counsel at the time Dr. Leslie Cuschieri and he said we get a translator once they finish. Dr. Leslie Cuschieri is not here today but I’m sure that he can be called at a later date. Dr. Cuschieri knew from the first meeting. Dr. Cuschieri also had private meetings with the two other people I have named. You yourself declared to the Chief Justice ...

Court: I am not interested in what Dr. Cuscheiri said or what Dr. Barbara said here. I just want to know what you did and what you didn’t do.

Witness: I told Dr. Cuschieri at the first opportunity.

Court: Whatever you told your lawyer is privileged.

Witness: He told me that we have to wait for a normal court proceeding to take ...

Court: Ok, you can stop there on that point. You cannot ask him what he told his lawyer.

Prosecution: So at no stage did you say to anyone except today that these were mCPP pills, to anyone over here.

Court: This is your first official ...

Witness: This is the first time I have been allowed to speak in a court. I wasn't allowed to speak in the magistrate's court at all.

Prosecution: And you insist that you had told the Inspector about it or not? Because previously you were saying that you had told Inspectors that it was mCPP.

Witness: I told Inspector Theuma at the time they pulled the panels.

Court: Did you actually mention the formula.

Witness: No I did not.

Prosecution: You didn't.

Witness: It's not the real stuff that you are thinking, that you think you are after.

Prosecution: So even though you knew that it was or you were saying it was mCPP and you had done all this research that it was not illegal and so on, and you didn't mention this to the police.

Witness: I didn't say anything to the police in that point."[16]

27. The prosecution made much of the fact that appellant did not say at the outset that the pills he had were mCPP.

[16] Transcript of evidence, p. 32 *et seq.*

In the course of giving evidence during the trial appellant insisted that when the pills were found he told the police that they were not the real stuff. On this point, when Inspector Dennis Theuma was asked by the defence whether he could recall that when the packets were found appellant said that it's not real ecstasy, he replied "I do not, no, no. I do not remember Mr. Marsden saying anything like that." And in answer to the question "You do not remember?" he replied: "No I don't. It's not a question, I do not recall Mr. Marsden as saying anything of that kind." Even Inspector Ciappara said that after they had found the pills appellant "never gave any indication to qualify that the pills which we had seen were not in fact ecstasy pills." Clearly the jurors did not believe appellant's version.

28. The whole point is, however, that we are here dealing with a conspiracy where there must be the meeting of at least two minds. If appellant knew all along that the pills were not illegal and the agreement was for him to transport such pills, then he could not have been found guilty of the charge brought against him. On the other hand, if the contention that he knew that they were not illegal is disbelieved, it does not necessarily mean that he is consequently to be found guilty. In order to reach such conclusion, it was necessary for the prosecution to prove, by direct or circumstantial evidence, and beyond reasonable doubt that his conspirators, or at least one of them, were also intending to import illegal drugs. Such evidence is clearly lacking. Appellant's statement about the agreement to import the pills (with the generic reference to the word "ecstasy") raises a strong suspicion that the object of the agreement was illegal drugs – and indeed had MDMA pills actually been found or had no pills at all been found, the jury could reasonably have come to the conclusion that the object of the conspiracy was, in fact, illegal drugs by relying on appellant's statement. But in this case drugs were found which were (at the time) not illegal, and therefore, as has already been explained, it was still incumbent upon the prosecution to prove that at least one other conspirator had illegal drugs in mind. From the application of appeal it would appear that the

prosecution suggested that appellant and his conspirators were cheated in Spain by being given mCPP instead of MDMA. This is mere speculation. It is difficult to determine whether there was any cheating from the prices quoted by Pharmacist Mario Mifsud and by appellant. Mr. Mifsud said that an MDMA tablet costs not more than 25 Maltese cents (€0.58) to produce and that in 2006 ecstasy was sold at around Lm5 to Lm7 (€11.65 to €16.31). However, while mCPP costs less to produce, their street price is in general the same as that for MDMA tablets[17]. Appellant said that the purchase price of the pills he brought to Malta was €40,000. Pharmacist Mifsud was unable to provide the wholesale price of mCPP. This could have given an indication of where the truth lies, but again it would not have been such as to prove, beyond reasonable doubt, the intention of the conspirator or conspirators. As Buchanan and Brown maintain, "**Designer drug** [mCPP is a designer drug] is a term used to describe psychoactive drugs which are created (or marketed, if they had already existed) to get around existing drug laws, usually by modifying the molecular structures of existing drugs to varying degrees, or, less commonly by finding drugs with entirely different chemical structures that produce similar subjective effects to illegal recreational drugs."[18] In this sense appellant is correct when he asserts in his application of appeal that from a conspiracy point of view this involved a better economic return for a lower risk factor.

29. To conclude, the Court, after having examined all the evidence as aforesaid and after taking into consideration the various arguments brought forward by both counsel for the prosecution and counsel for appellant, is of the firm opinion that this is a case which falls to be decided under

[17] See http://www.emcdda.europa.eu/publications/drug-profiles/bzp#headersection.

[18] Buchanan JF, Brown CR: **Designer drugs. A problem in clinical toxicology**. Medical Toxicology and Adverse Drug Experience. 1988 Jan-Dec; 3(1):1-17.

paragraph (a) of subarticle (1) of Article 501 of the Criminal Code, in the sense that appellant has been wrongly convicted on the facts of the case since the prosecution did not prove beyond reasonable doubt that one or more of the co-conspirators had “illegal” ecstasy in mind at the time of the agreement with the said appellant. It is therefore not necessary to enquire into the other two final grievances or grounds of appeal.

30. For these reasons, the Court, allows the appeal, quashes the verdict and the conviction of appellant Steven John Lewis Marsden, revokes the judgement of the 7 January 2009 and orders that, unless the said Marsden is being detained in Malta in connection with some other proceedings, he is to be forthwith set free.

< Final Judgement >

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