



MALTA

**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE
MAGISTRATE DR.
MIRIAM HAYMAN**

Sitting of the 8th July, 2014

Number. 101/2009

**The Police
Inspector Pierre Grech**

VS

**Uchena Obi, son of Ukweme and Elizabeth nee'
Adruke', born in Nigeria on the 21st September, 1984,
residing at 97, Qronfla, Triq ix-Xatt, Bormla, holder of
identity card number 37436A;**

The Court;

Having seen charges brought against the above-mentioned **Uchena Obi** who was charged of having on these Islands and outside these Islands, on the 7th February, 2009 and during the last preceding days:

- a) Together with another one or more persons in Malta or outside Malta, conspired for the purpose of selling or dealing in a drug (cocaine) in these Islands, against the provisions of The Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, or promoted, constituted, organised, or financed the conspiracy;
- b) Also of having imported, or caused to be imported, or took any steps preparatory to importing any dangerous drug (cocaine) into Malta in breach of Section 15A of Chapter 101 of the Laws of Malta;
- c) Also of having had in his possession the drug cocaine, specified in the First Schedule of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, when he was not in possession of an import authorisation, or of any export authorisation issued by the Chief Government Medical Officer in pursuance of Part 4 and Part 6 of the Ordinance, when he was not licensed or otherwise authorised to manufacture or to supply the drug, and was not otherwise licensed by the President of Malta, or authorised by the Dangerous Drugs Internal Control Rules (GN

292/1939), to be in possession of the drug, and failed to prove that the mentioned drug was supplied for his personal use according to a medical prescription as provided in the said rules and this in breach of the regulations of the Internal Control of Dangerous Drugs Regulations (GN 292/1939) as subsequently amended and in breach of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta, which drug was found in such circumstances indicating that the possession was not for his exclusive use.

Seen also that at the stage of the examination of the accused, it was noted in the Court verbal a folio 5 that proceedings were to be conducted in the English language.

Seen that accused answered that he was not guilty to the charges proffered.

Seen that later on in the records of the case, Attorney General now sent a Counter Order in terms of the said Chapter of the Law.

Seen also all the evidence gathered in the course of the compilation and later that produced by the Defence.

Heard all oral submissions.

Considers:

First and foremost in examination of the charges proffered, the Court is going to proceed to review, examine and summarise the salient points of evidence produced in this case.

The Prosecutor Officer testified that the Maltese Drug Squad, were informed by the Frankfurt International Airport Customs Office, that they had intercepted a suspect parcel containing liquid drug cocaine and they established that it was addressed to Malta from South America, Argentina. This parcel was posted through EMS mail from Buenos Aires. He continued that on the 3rd February, 2009 he obtained authorisation from the Enquiring Magistrate to effect a controlled delivery in that a Maltese police officer was to receive possession of the parcel from the Frankfurt authorities.

Inspector Pierre Grech himself testified that he, travelled to Frankfurt and on the 4th of February 2009 called at Frankfurt Alemagne International Airport where he was handed over the parcel by Customs Officer ZHS Peter Dorre the parcel in question. He described the parcel as one being made of a carton box which contained a soccer t-shirt - one of the Argentinean national team, a wooden container described as a sort of souvenir, a plastic bag containing eight (8) green leaves – later established to be tea, and a German customs plastic bag which contained a

preserved tin container. The Inspector was informed by the Customs Official that originally this tin contained a yellowish substance believed to be liquid cocaine. The Inspector was also informed by the Customs Official that this tin was emptied for analysis and its contents were now placed in a plastic bottle. On his return with the seized objects, the Inspector informed the Inquiring Magistrate accordingly and experts were appointed to aid in the investigation/inquiry.

Continuing with the controlled delivery, the Inspector further testified that the contents of the parcel were emptied and all except for the tin and liquid drug were packed in the original parcel box. The original tin was replaced by another one – a decoy tin bought purposely, and altered to match the original one by one of the experts Inspector John Ellul. He added that the Drug Squad were trying to effect the controlled delivery on the 5th, 6th, and 7th of February. He said that this was finally effected by PS 891 Oscar Baldacchino who, impersonating a postman, who delivered the said parcel to a certain Uchena Obi.

Apprehended thus by the police, Mr Obi released two statements to the testifying officer and later confirmed both on oath.

He presented various documents; the actual parcel containing the decoy tin as Dok PG; Dok PG1 was the original can handed over to Inspector Grech by the Frankfurt authorities; Dok PG2 is the plastic in which the tin (original) and plastic bottle were handed over to him by the foreign authorities; Dok PG3 is the original label that

was stuck to the original tin; Dok PG4 is the receipt for the decoy tin bought from a Maltese supermarket; Dok PG5 is a mobile phone with Vodafone written on it, black and silver, seized from Mr Obi's possession on his arrest; the original label of the decoy tin Dok PG6; a receipt signed by the witness and also by Mr Peter Dorre Dok PG7; he also presented the conviction sheet of the accused as Dok PG8.

Under cross-examination he confirmed that in Germany, Frankfurt, he saw a blue carton box inside of which he saw a football t-shirt, a paper resembling a fiscal receipt and a plastic bag. He confirmed that by that time the box had already been opened by the German authorities, in fact he further testified that the tin was in fact already emptied by the Customs Officials – this not in his presence.

He confirmed that the parcel was in fact addressed to a certain Sow Abdullai, being the same person shown on the identity card as explained by the accused.

He confirmed that the “juice” liquid cocaine was in fact placed in the plastic container once removed from the original tin by the German authorities. He confirmed that thus in Malta, he got over with him the plastic bottle full of the liquid drug, and that this was handed over to analyst for the appointed analysis. He also confirmed that the drug was not placed in its new plastic container in his presence.

Under further cross-examination he confirmed that during the controlled delivery, the parcel delivered contained no drugs, no illegal substances and that the accused never materially came into possession of any drugs.

Police officers involved in this controlled delivery also gave evidence.

Thus **PC 364 David Borg** deposed that together with PS 1086 on Inspector Grech's instructions, they were carrying an observation in Carini Street, Santa Venera. Here he noticed the accused picking the package. Together with his colleagues, this person was followed, thus he walked all Carini Street, then down St Joseph Street, then the followed person took a bus. Once this person stepped off the bus, witness says he continued following him saying that from Hamrun he walked to the Marsa Church. Here, they – the police, stopped him next to the Salib Tal-Marsa (The Marsa Cross). Here he followed him on foot confirming that this person had the package with him all the time, referring to Dok PG.

On his part, **PS 1086 Johann Micallef** stated that he was instructed by Inspector Grech that a controlled delivery was to be effected at the address listed on the parcel. He testified that they tried to deliver the package on the 6th with no success. On the 7th at around 1100hrs, he testified that they managed to deliver this package to Uchena Obi – the accused. He further stated that then they followed the accused to Santa Venera where he got on a bus, stopped at Hamrun and on foot proceeded to Marsa. The witness further stated that it was here that Uchena Obi was stopped by them, arrested and taken to Police General Headquarters. He further stated that whilst in his vision,

barring when on the bus, the accused was always carrying the package.

On his part **PS 891 Oscar Baldacchino** testified that he received instructions from Inspector Grech to deliver a parcel to the address Electron Apartments, No 41, Flat 3, Carine Street, Santa Venera addressed to a certain Sow Abdulai. After trying several times to effect this delivery, he was successful on the 7th of February at around 11.00am. He said that he went back to the apartments and upon approaching the entrance, there he saw the African person leaning against the wall. This person approached him and asked him if he was going to deliver a parcel to Flat number 3. The witness asked this person if he actually resided there, he answered that he lived in Cospicua but was collecting a parcel on behalf of his friend Sow Abdulai who had also left him a copy of his identity card. The witness further stated that he told Mr Obi that he had to refer this to his Director. He continued once he received his instructions to proceed and he took the personal details of Obi Uchena who also signed the delivery note as well as gave the witness the copy of the identity card of Sow Abdulai on whose behalf he was collecting the parcel. Witness said he was acting as a postman and wore the appropriate clothes to resemble so. He recognised the parcel shown a photo thereof, as also the delivery note signed by Uchena Obi - Dok OB; and the photocopy ID document as Dok OB1 (both exhibited at folio 51).

As premised the controlled delivery was done under the umbrella of the Inquiring Magistrate. Thus Court experts were therein nominated.

Expert Inspector John Charles Ellul presented his report. Viva voce he testified that his task was to recreate a label on a metal can. Thus he replaced that found on the tin can already opened (part of parcel) by another label of a tin can purposely purchased of the same dimensions. His task completed, he handed the document back to Inspector Pierre Grech. He stated that this whole process was photographed by PC 826 Matthew Parnis.

On his part **Godwin Sammut** presented various reports reflecting the tasks received. He testified that on the 5th of February at about 11.30 he proceeded to the Drug Squad offices, wherein he was shown by Inspector Pierre Grech a blue/orange parcel box inside which were an empty can, a sealed plastic bottle containing yellow liquid, a souvenir, a transparent plastic bag containing green leaves, a white and blue t-shirt and a fiscal receipt. He collected for analysis the plastic bottle and the leaves, and proceeded to take swabs from the empty can.

He concluded:

“The purity of Cocaine in the yellow liquid was found to be approximately 33%.”

In another task completed and presented as Dok GS2 (at folio 272), he further concluded that the number of doses that could be extracted from the cocaine found was three thousand nine hundred (3,900) doses; and that the seven hundred eighty (780) millimetres juice equivalent to seven hundred eight (780) grams had the global value of fifty nine thousand two hundred and eighty Euros (€59,280).

On his **Dr Martin Bajada** presented Dok MB being an examination of the contents of the mobile phone seized from the accused as Dok PG5.

Letters Rogatory were sent to Germany and duly executed by the German authorities. They were translated in part by **Helga Debono Buttigieg**, and the rest by **Eike Forge**.

The witnesses here heard by the German authorities were Robert ZBI, Anya Leeks, and Peter Dorre.

Thus **Robalt** testified that on the 2nd February, 2009, he was together with a colleague controlling a consignment going from Argentina to Great Britain. According to the x-ray image, a tin container with a suspicious toxic substance resulted. He stated that on opening the container he detected a viscous fluid on which he executed a drug test and it tested positive for cocaine. The consignment label read “Express Mail Centre” and was sent from Argentina to be delivered in Malta. He seized the said parcel

according to Section 94 of their Criminal Code, and compiled the documents, administrative declaration, seizure report, mail report, postal stamping certificate. The witness further stated that everything was sent to Anya Leeks at Custom Investigation Office, Frankfurt.

On her part, **Anya Leeks** confirmed she was handed over the consignment of Air Way Bill number EE001280908AK containing circa five hundred (500) grams of cocaine solution by Customs Officer Michael Robalt. This was stored in a separate secure place. Later all was handed to Chief Customs Security Peter Dorre by Customs Officer Karl Christian Aver Aver.

On this part **Peter Dorre** stated he was the Customs Investigating Officer within the Custom Investigation Office of Frankfurt at the Main Airport Narcotic Section. He stated that he was on duty on the 2nd of February, 2009 when an Airway Bill number EE001280909AR of circa five hundred (500) grams of cocaine solution was delivered to him for additional processing by Custom Officer Karl Christian Aver of the mentioned office.

He said that the consignment, therefore the drug, was located in a separate, lidded, secure space. Also that after the hand-over, the consignment was opened for processing - therein were a t-shirt, a bag of tea, and a teacup made of wood. Also in the container was a thick liquid substance. A narcotic drug test of the type “ESA” was carried out by

the same witness and this tested in his words “*indisputably positive for cocaine*” (folio 253).

He added that according to the post mark the consignment was posted from Buenos Aires, Argentina, telephone number 1133011230. On the other hand, the receiver was Sow Abdulai, of Flat 3, 4, Electron Trio, Carini Street, Santa Venera HMR016, Malta, telephone number 35699097903.

He further added that a telephone conversation with the Attorney General Doktor Korner of the District Attorney’s Office, Frankfurt, at Main, resulted in endorsing consignment of the incriminating narcotic to the criminal prosecution in Malta.

He stated that he also spoke with a Mr Joseph Brincat of the Head of Investigations, Customs Division of Malta, and forwarded by email a report of the consignment.

On the 4th February, 2009, Inspector Pierre Grech of the Malta Police Force arrived at the Main Airport, Frankfurt, Germany, and witness continues that the narcotic and investigation dossier were handed to Inspector Pierre Grech.

The witness further stated that he stayed at the departures gate until Inspector Pierre Grech departed on a direct return flight to Malta, flight number KM329.

He reiterated that the consignment was stored in a separate, lidded, secure place from the 2nd of February till it was handed over to Inspector Pierre Grech.

Later on in the course of these proceedings, additional Letters Rogatory were presented by Prosecuting Officer, again duly transmitted. The execution thereof was also translated this time by **Eike Foerg** who presented two reports because of corrections in dates in his first translation.

The second Letters Rogatory confirmed that all three German witnesses above-mentioned – Anya Leeks, Michael Robalt, and Peter Dorre, were all cautioned according to German Law. With regards to the significance of the oath administered, they all confirmed under oath the statements rendered by them beforehand and above reproduced.

Mr Joseph Brincat the Comptroller of Customs also gave evidence in these proceedings. He confirmed that on the 2nd of February 2009, at that time heading the Investigation Customs, he was contacted by Peter Dorre of the German Customs in Frankfurt. He was informed by his German counterpart that during a routine check on parcels, a parcel containing a suspect tin – suspect in the sense that it was tampered with, was found. On opening the tin, the contents thereof tested positive for cocaine. The witness thus contacted the Maltese Police with this information, namely Inspector Pierre Grech who confirmed that the Maltese Police were interested in conducting a controlled delivery. He thus proceeded to make the necessary arrangements for Inspector Pierre Grech to proceed to Frankfurt so he takes delivery of the packet and bring it over to Malta.

Under cross-examination he stated that the addressee (if he recalled well) was a Sow Abdulai. He exhibited the email received from the German authorities with the results of their investigations, Dok JB folio 507.

The Prosecution also presented in evidence two statements release by the accused dated 7th and 8th February, 2009 respectively. Accused later on chose to confirm on oath both statements in front of the Inquiring Magistrate according to Section 24A(12)(13) of Chapter 101 of the Laws of Malta. Suffice it to point out at this stage, that the Inquiring Magistrate who received said sworn declaration was the same undersigned Magistrate, dealing with the case now as a Court of Criminal Judicature.

In the sworn statement wherein again he was duly cautioned, he stated by confirming his mobile number. He confirmed that he had arrived in Malta by boat in 2005 and was granted refugee status in 2007. He previously lived in Hal Far and Marsa, at the time of the statement resided in Bormla. He further stated he worked in the construction area but not on a full-time basis. He confirmed that in his country he was a footballer and though he wanted to further his profession, no club in Malta was ready to employ him on full-time and pay. Asked if he ever lived in Santa Venera, he answered in the negative, adding however that he knew one friend whom he had met in Marsa who also resided there. He added that though he had never been inside his friend's flat, he had asked him to help him out by waiting for the postman outside his flat

and pick some post for him. This friend further told him that he was going abroad and could not collect the post himself. This friend also told him that he was going to bring a packet with a football jersey and juice this friend also gave him a photocopy of his identity card to show to the postman so as to pick the package.

On being questioned he answered that his friend had indicated to him (from outside) his flat, his place of residence. He said that though his friend's real name was Abdullah, he called him Mohammed. He continued by stating that his friend had phoned him to his knowledge from abroad. He thus went in front of that flat where this Abdullah lived and waited for about an hour. When he was about to leave he saw the postman approaching. He himself asked the postman if he had a parcel to deliver and proceeded to show the identity card copy to him. At this stage the postman went to this office to discuss the matter with his boss. He returned later and handed the package to him after signing a paper.

Accused continued to recount that he proceeded to Hamrun by bus, then on foot to the Marsa Open Centre, negating that he met any friend on the way or even speaking to an African guy on the way. He was stopped by the police once on the way to the Open Centre and was duly arrested. He further added that the police also proceeded to arrest one of the two black guys who were walking close to him, insisting he did not know this 'boy' (folio 11).

He denied ever having dealt in drugs or sell, transport, or even as little as touch drugs. Asked if Abdullah was doing

something wrong in Malta he answered that he had an idea that he was doing something wrong so he did not befriend him, though he did not know what this something wrong actually was.

Asked if he believed that anyone was going to post a can of peaches, he answered he did not understand English. He added that he (Abdullai) had not told him that the package was coming from South America.

Asked by the Inquiring Magistrate his duration in Malta, he answered since 2005. Asked if he went to supermarkets, he answered in the affirmative.

Asked about the contents of the drugs, he answered that had he known that Abdullai was involved in “*something bad*” (folio 14) he would have never shown the identity card to the postman to take charge of “*something bad*”. He insisted Abdullai had told him the parcel contained a jersey and juice.

Asked if he knew when this Abdullai was returning to Malta, he answered that he had no knowledge of this. He added that he had seen Abdullai last when he was given the photocopy and was instructed to keep the parcel with him till his return. Abdullai would collect it since he knew where accused lived, adding it was the first time he collected a parcel for him, and insisted that he had no knowledge of any wrong doing. This he insisted about all through.

On further being asked he said that he knew Abdullai for one month, two weeks – six weeks, and met him at the Marsa Open Centre. Abdullai had told him he was from

Sudan. He added he did not have his mobile number or ever phoned him, just that they met at the Centre. He knew however that his mobile number started with 7. He confirmed that he would recognise the number if he saw it; also that he had sent text messages to Abdullai. He confirmed it was the first time in his life that he was involved in anything drug related. He was again warned that he was under oath, acquiescing that he understood that.

Viva voce accused confirmed that he released two statements at the Police Headquarters which he later confirmed on oath in front of the Presiding Magistrate acting as the Magistrate on duty, according to Section 24A(12)(13) of Chapter 101 of the Laws of Malta. He also confirmed that echoed by Defence Counsel that he was offered no legal assistance. He was at the time of the interrogation twenty-five (25) years of age. He confirmed he came to Malta from Libya on a boat as premised, adding that at the time he was arrested he was in employment and had gained his freedom (refugee status). At that time he had been living in Cospicua.

About Abdullai he confirmed he was a friend he met in Marsa at the Open Centre. He reiterated that this Abdullai had asked him to wait for a package, as otherwise he would miss a flight. Abdullai also gave him a photocopy of his identity card. He reaffirmed that this Abdullai had informed him that the package was to contain a football jersey and juice. He also confirmed that he took receipt of this package on Saturday February, 2009; as also that it was Abdullai who had shown him his place of residence - a flat. Abdullai also instructed accused, according to his

decision, that he was to wait for the postman and show him the identity card.

Again he recounted that he waited outside the indicated flat, Santa Venera for an hour, and about the time he was thinking of leaving the postman appeared. He showed him the photo (identity card photocopy), as also his document, at which point this postman informed him he had to check with the office (about delivery of the package). Accused further said that thus he waited there for the return of the postman for about thirty (30) minutes. This postman gave him the package to which delivery he signed. He then went off by bus to the Marsa Open Centre, adding that he wanted to greet a friend before going home. He added that the package was not heavy and that he did not open the same. He had been instructed by Abdullai to keep the package with him and give it to Abdullai on the latter's return.

He also confirmed that he stopped and got off the bus at Hamrun and on foot proceeded to Marsa. At one point the police stopped him when he was opposite the Cassar Shipyard. They proceeded to arrest him and another "*black guy*" (folio 563), whom he categorically stated he did not know. They took both of them to the Police Headquarters.

He confirmed all that was above summarised and reproduced regarding contents of his two sworn statements.

Saliently he negated any knowledge of contents of the parcel, insisting that he was never involved in drugs and that he was only taking delivery thereof in the name of this Abdullai.

Under cross-examination he confirmed he knew Abdullai for six weeks, in his words “*one month two weeks*” (folio 579), knowing he is Sudanese, at least that’s what he thought. On being shown the photocopy of the identity card the same accused presented to the police officer which seems to be issued in the Netherlands, the accused said nothing. He insisted that Abdullai showed him his place of residence and that he waited outside since the common door was locked. He also said that the dates when he was to wait for the postman were indicated to him by Abdullai himself, indicating the delivery to be Friday or Saturday, not mentioning any time. He insisted he did not check or know the country of origin and that the contents according to him were a football jersey and juice.

Concluded all the evidence reproduced the Court heard oral submissions.

Considers:

First and foremost, with reference to the Court verbal at folio 550, following the objection raised by Defence Counsel, regarding to Section 24A(12) of Chapter 101 of the Laws of Malta, the objection registered by Defence Counsel was due to the fact that as results from the records of the case the judging Magistrate and the Magistrate who received the sworn statement, were one and the same, *ergo* the undersigned.

Court here makes reference to the word of the Law in Section 24A(12)(13) reading:

“

24A(12) In the course of any investigation of an offence against this Ordinance, the Executive Police may request a magistrate to hear on oath any person who they believe may have information regarding such offence; and the magistrate shall forthwith hear that person on oath.

(13) For the purpose of hearing on oath a person as provided in subarticle (12) the magistrate shall have the same powers as are by law vested in the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) as a Court of Criminal Inquiry as well as the powers mentioned in article 554 of the Criminal Code; provided that such hearing shall always take place behind closed doors.”

It is therefore very clear that the powers vested in the Magistrate so called on duty, usually conducting an “*ingenere*” is vested with **all (Court emphasis)** powers granted to a Magistrate sitting in a Court of Criminal Inquiry, whose one primary function is gathering and conserving evidence and in the name of Justice secure the truth. In the course of an Inquiry a sitting Magistrate does and should ask questions that lead to the finding of the truth – the real facts, more so when the witness is unclear,

reluctant, or plainly excited because of his presence in Court. Therefore, the sitting Magistrate participates actively in the compilation of evidence and such powers of Inquiry are *ex lege* extended to the sworn statement taken under Section 24A(12)(13) of Chapter 101 of the Laws of Malta.

Defence Counsel must be aware of the various judgments sanctioning this position in view of the fact that the Magistrate receiving the evidence on oath **never** pronounced any *prima facie* decision with regards the arrest or arraignment of the accused. The function of the Magistrate at that stage was to secure under oath the statement of the accused and **any further** information the accused volunteers or is arrived at during this procedure.

It would render the whole exercise totally irrelevant and ineffective if the Magistrate at the stage of receiving the statement under oath, faced with rampant inconsistencies allow this without further investigations and clarifications to continue.

The Court also draws the attention of Defence Counsel to the probatory value established by Law to a statement under oath so received (by a Magistrate) as re-affirmed in Section 30A of Chapter 101 of the Laws of Malta, by keeping in mind that in this case it is the very accused who confirmed his statement on oath.

Further considers:

The first charge proffered against the accused is that of conspiracy to sell or deal with the drug cocaine.

A lot of landmark judgments and papers have been handed explaining the necessary elements to prove this crime.

Paul Marcus in a paper entitled “*Criminal Conspiracy : The State of Mind Crime – Intent, Proving Intent, Anti Federal Intent, College of William and Mary Scotland Scholarship Repository*)” describes this likewise:

“The crime of conspiracy, unlike other substantive or inchoate crimes, deals almost exclusively with the state of mind of the defendant. Although a person may simply contemplate committing a crime without violating the law, the contemplation becomes unlawful if the same criminal thought is incorporated in an agreement. The state of mind element of conspiracy, however, is not concerned entirely with this agreement....The conspiracy consists not merely in the agreement of two or more but in their intentions.”
(page 627)

In the case in the names “*The Police vs Deguara Simon*” the Magistrates Court in a judgment dated 11th June, 2010, said the following about conspiracy, citing also judgments of our Superior Courts:

1. *Regarding the best case regarding this point, the Court refers to a decision handed by the Court of Criminal Appeal on the 5th of March, in the names “The Republic of Malta vs Steven Caddick and Philip Walker”, the Court said this:*

2. *This Court is not resting on this case alone but further refers also that the case “The Republic of Malta vs Godfrey Ellul” decided on the 17th March, 2005, wherein the Court said this:*

“This Court has examined actually the sworn statement released by Philip Magri and the evidence he tendered during the jury trial and states that from such there is no result of anyand agreement of the means with what the appellant and Magri had to proceed to sell or traffic in dangerous drugs. We read in Archbold:”

“The essence of conspiracy is the agreement. When two or more agree to carry out their criminal intent, the very plot is a criminal act itself. Mulcahy v R (1868) L.R. 3 H.L. 306 at 317; T 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 versus R. (1844) 5 St.Tr.(N.S.) 1.’

‘The agreement may be proved in the usual way or by proving circumstances from which the jury may presume

it; R versus Parsons (1763) 1 W.Bl. 392; R versus 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 versus Brisac (1803) 4 East 164 at 171, cited with approval in Mulcahy versus R (1868) L.R. 3 H.L. 306 at 317."*

3. *More recently, (2nd November, 2009), the Court of Criminal Appeal (Superior) again revisited this point.*

"The whole point is, however, that we are here dealing with a conspiracy where there must be the meeting of at least two minds.. In order to reach such a 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."

Most certainly the accused *ex admissis* admitted that in the name of his friend Abdullai received on the latter's instructions the parcel that in his mind contained a football t-shirt and juice. This only because he wanted to do a favour for his friend. He denies any knowledge of the contents and had agreed anything in this regard.

Considers:

That it is the opinion of the Court that the presence alone of the accused at the place of delivery, does not lead to prove the element of intention and agreement, that is to satisfy the formal element to constitute and prove the crime of conspiracy. In truth there is no concrete evidence pointing to the knowledge of the accused as regards to the contents of the parcel, this can only and really be presumed for reasons later on referred to.

Nor does an examination of Dr Martin Bajada's report result in any connection necessary to provide any evidence to link to the intent and agreement: to conspire.

Therefore, the Court agrees with Defence Counsel that the crime of conspiracy in drugs does not result.

The second charge proffered against the accused is that of importation or that the accused took any steps preparatory to importing a dangerous drug (cocaine) in Malta.

Here the formal and material elements of the crime must be proved, the *mens rea* and *actus reus* must exist so the intention to actually import drugs or any preparatory acts to this importation of the actual drug must exist – in this case the drug cocaine.

The Law here speaks of ‘any steps preparatory’, an open qualification and encompasses acts which accused underwent, agreed and connived to lead to the importation.

As premised the facts resulting were that accused took delivery of the decoy package – in his mind containing an Argentinean football t-shirt and juice. It results that he repeatedly stated he had no knowledge of the real nature of this juice. The agreement resulting from this case between Abdullai not the addressee Sow, and accused, is only that accused was to collect in lieu of his friend Abdullai a package. Albeit, though it appears to the Court that the receipt of juice by post is very strange at best, considering that this product is quite prolific in our supermarkets, but this on its own hardly leads and points to the unequivocal guilt of the accused. Again no trace of anything to the contrary result from Dr Martin Bajada’s report.

The Court would also premise at this stage that Prosecution stressed, asking repetitive questions, about the fact that Obi was seen by the policeman following him, talking to another person in Marsa, referred to by the accused as ‘the black guy’.

The accused denies any knowledge of this guy. On their part the Prosecution failed to bring forth, if it had any,

evidence of any links between this guy and the accused! In fact, from the records of the case, the ‘black guy’, although also arrested with the accused, is nameless and pictures nowhere.

Therefore even the crime of importation or preparatory acts thereto have not been proved and therefore acquits accused also from this charge.

The last charge proffered against the accused relates to possession with intent - that is the possession of an illegal drug in the hands of the accused, which was not thus held for his personal use.

One has to remember that the case in examination originates from a controlled delivery, therefore as is usually the case in a local controlled delivery, a decoy drug was delivered, the original already forming part of the Magisterial Inquiry. Thus when accused took possession of the packet supposedly containing the drug, in actual fact he was taking possession of an innocuous substance.

Our Criminal Court of Appeal in the judgment “*The Police (Inspector Neil Harrison) vs John Borg*” decided on the 23rd July, 1997, stated when considering what amounted to possession that this meant that the person in whose possession the drug is found had to be in some type of effective control of the drug. So unless evidence to the

contrary is provided by accused to the level of probability, the Law presumes that the possessor knew of the drug, that the possessor had knowledgeable possession of the drug.

In the case “*Pol vs Marzouki Hachemi Beya bent Abdellatif*” decided by the Criminal Court on the 16th February, 1998, the Court, noticing that the drug laws do not qualify (as in other local legislations) the importation and possession by the word “knowingly” said that although the legislator did not use the qualification of the word “knowingly”, here we are dealing with crimes of a voluntary nature (*colpa*) as distinct to the involuntary ones (*dolus*). It pointed out that surely the legislator had no intention of punishing who unknown to him is carrying drugs in his luggage. It stressed however that by application of Article 26(1) of Chapter 101 of the Laws of Malta, a person in possession of drugs or who would have imported drugs in Malta, is presumed to be in such possession or to have so imported “**knowingly**”. That is, that the person knew of the object’s existence, and also that the object was drugs, thus knowing he was in possession of or importing drugs, saving proof to the contrary to the level of probability and within the limitations specified in Article 26(2) (of the same Ordinance).

It is the opinion of the Court, someone apprehended through the operation of a controlled delivery, therefore in possession of decoy drugs, cannot plead that the object in his actual possession in time of his apprehension is an

uncontrolled substance. No controlled delivery should be effected with the use of the real drug for the very simple reason that it might go very wrong!!

However, and here again the Court refers to what was above stated when dealing with the charge of importation, the question in this case revolved around the knowledge of the accused, since the Prosecution still has to convince the Court that such knowledge existed on the part of the accused. Inversely, it is the accused who has to disprove his knowledge, if he so chooses to contest to the level of probability.

Therefore, here again the Court finds difficulty in imputing any guilt on the part of the accused since no other evidence, except his taking possession of the drug (decoy) in the name of a third person exists. The intentional element of possession, the “knowing” is very absent. Thus also acquits the accused from this last charge brought against him.

Therefore the Court, considering all that above premised, again reiterates that the simple taking of possession of the parcel does not on its own suffice to arrive at the required level of proof to sustain guilt. On a basis of probability, the Court does consider that accused could have offered to collect a parcel for his friend, also considering the camaraderie that refugees breed amongst them placed

together, at length in an Open Centre, therefore as premised, acquits him of all charges proffered.

< Final Judgement >

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