17436/09

ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

THE SUPREME COURT OF APPEAL

Second Criminal Section

Public hearing on 13/03/2009

Judgment no. 1084/09

General register no. 40584/2007

consisting of the following panel:

Dr **Giuliano Casucci**	Judge President
Dr **Antonio Prestipino**	Judge
Dr **Domenico Gallo**	Judge
Dr **Antonio Manna**	Judge
Dr **Giovanni Diotallevi**	Judge

Handed down the following

JUDGMENT

regarding the appeal presented by Attorneys **Roberto Tricoli** and **Gianfranco Viola** from the court district of Palermo, in the interests of **Vito Roberto Palazzolo**, born in Terrasini (Palermo) on 31/07/1947, against the judgment that had been handed down by the Appeal Court of Palermo First Criminal Section on the 11 July 2007.

Having heard the report from Judge **Domenico Gallo** on the proceedings conducted in a public hearing.

Having heard the Public Prosecutor Dr **Carmine Stabile's** arguments in closing, which concluded by calling for the rejection of the appeal;

Having heard defence counsel, Attorney **Giovanni Aricò** registered with the court district of Rome and Attorney **Roberto Tricoli**, who concluded their argument for the acceptance of the appeal,

The Court notes:

CONDUCTING OF THE PROCEEDINGS

With judgment handed down on 11 July 2007, the Appeal Court of Palermo confirmed the sentence previously handed down by the Court of Palermo on 5 July 2006, which had been appealed by the **Vito Roberto Palazzolo,** sentencing the accused to nine years imprisonment for the charge originally identified as participation in a Mafia type association.

The Court of Palermo firstly rejected the exception to declare the contested judgment null and void in terms of articles 521 and 522 of the Criminal Procedure Code, due to the defect in the notification, referring that no change in the fact had been found, since the payment of a contribution made by Palazzolo to the money laundering operation established by **Bernardo Provenzano**, historical boss of the Mafia organisation called "Cosa nostra", could not be considered a different fact from the one under contention, as it involved an activity that could certainly be traced to the charges that had been brought against the accused, of having been part of a Mafia association called "Cosa nostra".

The Court had further rejected the exception of non usability with regard to the statements made by the state witness **Antonino Giuffrè**, which had already been raised in the First Order hearing and re-proposed as a reason for the appeal, concerning the correct interpretation of the regulation that passed into Law no. 45 dated 13 February 2001, with specific reference to the rule of probatory usability of statements made by state witnesses beyond the six months from the start of their collaboration. In this regard, the Court noted that article 16 quarter, section 9 established an exception of probatory exclusion, which as such, was not relevant to the extension by analogy. The rule therefore only related to statements made by state witnesses to the Public Prosecutor and to the Judicial Police, and could not find application with reference to the testimony given during a hearing, in accordance with the rules on cross-examinations.

Going on to the merits, the Court of Palermo rejected the censure presented in the motion for appeal on the point of the non-existence of the fact. Specifically, with reference to the *ne bis in idem* problem, the Court in taking note of the accused's acquittal judgment, handed down by the Court of Rome on 28/3/1992, recognised that the conduct of participation in a Mafia association being challenged had to be considered from the 29 March 1992 onwards. Nonetheless, it noted that the judgment handed down by the Supreme Court of Appeal on 9/1/2004, which had annulled the

judgment handed down for review against Palazzolo during the precautionary session, had recognised that “it was possible to refer to previous elements, which were indicative of the accused’s participation in a Mafia association during a subsequent period”. The same judgment excluded those aspects that had “already been the subject of evaluation in a cognitive session” from being taken into consideration yet again. In this regard, the Court specified that statements made by the state witnesses did not fall under this preclusion, in that they had been made much later than the 28 March 1992. It therefore concluded that these new elements of proof, even though relating to facts previous to the judgment, could certainly be taken into consideration with reference to events and conduct subsequent to 1992. Besides which, the preclusion of judgment could not prevent an independent evaluation of the historical facts referring to the period covered by the judgment, unless a limitation of inadmissibility had been imposed by the free persuasion of the Judge. It followed that specific historical facts (referred by the state witnesses) can be turned to account in order to ascertain and evaluate the conduct which had been ascribed to the accused, subsequent to the period covered by the judgment.

The Court therefore recalled the statements made by several state witnesses during the First Order hearing, from which it emerged that Palazzolo had been in contact with the leaders of “Cosa nostra” from the eighties, and that he had made a significant contribution during a series of illegal transactions money laundering considerable amounts of money in Switzerland, that had originated from drug and cigarette trafficking, mainly on behalf of **Riina**. Further elements of proof were taken from the statement made by the witness **Franco Olivieri**, who had been Palazzolo’s cell mate in Switzerland and who had been taken into his confidence. The Court therefore concluded that based on the numerous converging statements of several state witnesses, Palazzolo was indicated as a “man of honour” from the Cinisi Family, formally affiliated to “Cosa Nostra”, and had links with Mafia members at the highest level. All that remained therefore was to check whether Palazzolo continued to belong to “Cosa nostra” during the period that was not covered by the judgment. In this regard, while the Court noted that the accused had resided in South Africa for many years, it stated that these circumstances did not necessarily mean that the accused had withdrawn from the Mafia association, taking into account the records acquired from the file on the proceedings. The Court then went on to refer to the difficult rogatory procedures conducted in South Africa, and specifically to the testimony given by Hans Klink, by the

South African Police Inspector Peter Viljoen, and the testimony subsequently given in Italy by Inspector Abraham Smith. The Court went on to note that the reliable statements given by Viljoen and Smith, as well as the documentation on file, constituted a distressing picture made up of various episodes of conditioning and corruption that Palazzolo had put in place to influence the outcome of investigations against him, stating that the observations made by the witnesses were confirmed by a series of proceedings on file or by investigations that had been manipulated to fail. Besides which, a specific probatory episode clearly emerged that was indicative of Palazzolo's participation in the criminal association "Cosa nostra": this refers to the fact that in 1996 the accused had provided hospitality to **Bonomo and Gelardi,** who were fugitives from justice. The Court went on to note that the statements made by the state witnesses **Brusca** and **Mazzola** confirmed that **Bonomo's** flight to South Africa presupposed that the abovementioned Mafia member was certain to find hospitality and assistance from a man that was close to him and quite influential in that country, and that this was in fact Palazzolo. The Court then went on to examine the statements made by the state witness **Antonino Giuffrè**, someone that was very close to **Bernardo Provenzano**, from whom he had learned of the relations between the latter and Palazzolo. Specifically, that Palazzolo had co-operated with Provenzano in certain business projects, among them the international trading of meat, the acquisition of vast tracts of land in South America, as well as a transaction directed at acquiring a shareholding in a German insurance company, which were to be realised through the investment of capital gained by illegitimate means. The Court held that **Giuffrè's** statements were to be considered intrinsically reliable and confirmed by the numerous converging elements of proof, including telephone interceptions and audio surveillance. The Court noted further that the statements made by state witness **Brusca**, who had spoken about a temporary interruption in relations between Palazzolo and the leaders of "Cosa nostra", excluding the fact that Palazzolo had been expelled from the organisation, corresponded with those made by **Giuffrè**, providing further support to the Prosecution's argument. Finally, the Court also discussed the question relating to the legal qualification of the facts.

In this regard, the Court observed that over the years, Palazzolo had certainly been asked to provide hospitality to the two fugitives from justice, **Bonomo** and **Gelardi**, and to guarantee **Bernardo Provenzano** a secure money laundering channel overseas for the organisation's dirty money: in both circumstances, Palazzolo made himself available, providing "Cosa nostra" with what the organisation needed in that specific context. The

Appeal Court therefore redefined the facts that the First Order Judge had considered as external association in a Mafia association, to participation in the actual association, and confirmed the sentence that had been handed down.

The accused, through his Defence counsel challenged this judgment, raising four points in this regard.

The first reason proposed that established Law and procedural regulations had been violated rendering the judgment null and void, with regard to article 16 quater of Legislative Decree no.8/91, introduced under article 14 of Law 45/2001. In this regard, the Defence re-proposed the question of the non usability of the statements made by the state witness **Antonino Giuffrè**, and the illegal nature of the relevant order dated 4/5/2005 that had admitted the evidence. Reference was made to the case law debate regarding the non usability of later statements made by states evidence and assumed that no “hearing indemnity” could ever be cited in order to override the provisions of the law in question, which as was well known, was explicitly directed at containing the “uncontrollable” spread of this phenomenon of so-called state’s evidence, which risked becoming an element of proof lacking any bearing to procedural regulations.

In the second reason, the applicant alleged the violation of the Law, with reference to the exclusion of judgment provided for under article 649 of the Criminal Procedure Code.

In this regard, the applicant recalled the acquittal judgment for the crime under article 416 bis of the Criminal Code, handed down by the Court of Rome on 28 March 1992, and the judgment of the Supreme Court of Appeal in the precautionary measures hearing on the 9/1/2004, assuming that the Court of Palermo had essentially evaded the principles of law established in this judgment when they admitted the possibility of taking into consideration historical facts going back to the period covered by the judgment and calling on the principle of the Judge’s free persuasion. With reference to this allegation, it was argued that the principle of the Judge’s free persuasion could not be used as a motivational loophole directed at contravening procedural regulations. The applicant argued therefore that a clear violation of the exclusion of the judgment had taken place, in that the Court had taken into consideration as significant elements of proof for the purposes of reconstructing the accused’s conduct, statements made by several state witnesses examined during the proceedings, in the period subsequent to the acquittal judgment of 1992, which referred to circumstances going back to a period well before the 28/3/1992. It was argued that the arguments proposed by the regional Court were irrational, in that it firstly considered Palazzolo an associate of the Mafia on the basis of

certain charges in this regard going back to the very early eighties, and subsequently went on to consider an absurd prosecution regarding the permanent nature of the association, in relation to a crime that had never been proven. It was argued finally, that the cancellation of the previous judgment had in fact laid open the entire life of Vito Roberto Palazzolo to judgement, in clear violation of the second judgment provided for under article 649 of the Criminal Procedure Code.

The third reason made reference to the alleged violation and defect in the legitimacy of the motivation offered, with regard to article 416 bis of the Criminal Code and 192 of the Criminal Procedure Code. In this regard, it was argued that the regional Court had unjustifiably bypassed the insurmountable evidence of Palazzolo's uninterrupted physical distancing from Sicily. The fact that the Court had held that the applicant's thirty year absence "did not appear indicative of Palazzolo's withdrawal from the Mafia association", constituted a clear distortion of the evidence. The applicant argued that the considerations made by the Court were illogical, on the point regarding the filing of criminal proceedings against him in South Africa, in that the filing could merely have constituted elements of a mistaken and improbable investigative scenario put in place, rather than elements of confirmation. The conclusions reached by the Court were also disputed on the point of proof that the accused had allegedly provided hospitality in 1996 to the fugitives from justice **Bonomo** and **Gelardi.** Specific arguments were put forward relating to the Appeal Court's line of reasoning, by way of a re-examination of the probatory material, with the conclusion that from records of the proceedings, it clearly emerged how Palazzolo had only had sporadic contact with the above Bonomo and Gelardi, before the orders for their precautionary arrest were issued. According to the Defence, the total suspension of this sporadic contact from May 1996 demonstrated the inexistence of any stable relationship and similar structure with regard to the applicant and the "Cosa nostra" organisation.

It further argued that the judgment should be challenged due to the lack of motivation in the section where it maintained that **Bonomo** and **Gelardi** had re-entered South Africa after the 21 May 2006, without having passed through border posts, as this conclusion was totally out of context with the records of the proceedings. It then went on to observe that any possible hospitality provided to the two people in question, could at the most be traced to the provisions of article 378 of the Criminal Code, and never to those under article 416 bis.

With reference to the statements made by the state witness **Antonino Giuffrè**, the applicant denounced the unjustified accusatory progression of the statements made by the above witness, who for nearly three years from the start of his cooperation, had never mentioned Vito Roberto Palazzolo, and complaints were made regarding the Court's omission in addressing the specific arguments raised by the Defence on this point. Further complaints were made that the Court had not provided any reply to the complaints raised in the motion of appeal, with regard to the generalised, imprecise and vague nature of **Giuffrè's** statements, which had not been able to indicate a single element of concrete proof that would allow for checking to be done against what had been stated. In this regard, the applicant reiterated the circumstances that form the subject of the witness' statements and other associated elements of proof, including audio surveillance done in November 2001, and some telephone interceptions, emphasising the lack of concrete elements of proof, which would have had any distinguishing significance in relation to Palazzolo.

The applicant argued further against the interpretation provided by the regional Court in relation to the statements made the state witness **Giovanni Brusca**, who had indicated that Palazzolo had already broken off all contact with Mafia circles in the mid eighties, arguing that the Court should have backed down due to the lack of a specific provision for expulsion from the Mafia organisation.

Finally, it was argued that the conclusions reached by the judgment being challenged, according to which Palazzolo had maintained contact with relations in the Mafia, appeared to be mere petitions to principle, without adequate motivation, and even contradictory in relation to the records of the proceedings.

With the fourth reason, the applicant argued the lack of decisive proof been given, complaining about the rejection of the request to partially reopen the hearing, whereby in order to demonstrate the legitimacy of the Defence action undertaken to protect Palazzolo's position, the Defence asked that a communication made by the Diplomatic Legal Section of the Ministry of Foreign Affairs to Mrs Maria Rosaria Palazzolo, be obtained, together with a communication sent to Mrs Palazzolo from the Federal Office of Justice in Bernes.

MOTIVATION FOR THE DECISION

The appeal is unsubstantiated.

Regarding the first reason, which refers to the extension of the rule of non usability in accordance with article 16 quater of Legislative Decree no.8/91, introduced under Law no.45/2001. The question was the subject of intense case-law debate, in which a clear direction emerged with regard to the rule of non usability involving statements made by state witnesses after more than one hundred and eighty days, where this found application only to statements made outside of cross-examination, and was therefore not applicable to the statements made during the course of a hearing (cfr Supreme Court of Appeal Section 5, judgment no. 46328 hearing on 06/11/2007 (filed 12/12/2007) Rv. 237979; Section 1 judgment mo. 35368 hearing on 13/06/2007 (filed 21/09/2007) Rv. 237616; Section 6 judgment no. 27040 hearing on 22/01/2008 (filed 03/07/2008) Rv. 241006).

This direction has found final confirmation in a very recent decision by the Combined Sections (judgment 1149 of 2009), where an in-depth examination on the subject was made, noting that:

"Article 16 quater of Law no. 82 dated 15 March 1991, introduced under article 14 of Law no. 45 of 2001, as has already been noted, stipulated that statements made by states evidence must be made within one hundred and eighty days from the expression of their intention to cooperate (Section 1); that the statements must be documented in an "informative memo on the content of the cooperation" (Section III); that in the above memo, the person making the statement must certify, inter alia, that he has no knowledge of any further information on other facts or circumstances concerning the subjects of the organisation that were spoken about (Section IV); and finally that the statements referred to under sections 1 and 4 made to the Prosecution or to the Judicial Police beyond the period provided under section 1, cannot be evaluated for the purposes of proving the facts stated in them, against any person other than the deponent, except for cases where this no repetition (Section 9). The purpose of this series of regulations is obviously to guarantee and ensure as far as possible, that a correct evaluation is made regarding the intrinsic reliability of statements made by state witnesses, and the genuineness of the statements, thus avoiding that these undergo negative influences over the passage of time, or that they could deliberately be issued in certain predetermined moments by the state witness (so-called statements made by

clockwork). The legislature has in fact established that the longer the passage of time between the expression of intent to cooperate and the statements made, the greater the risk of unreliable cooperation been given for purposes other than those of mere judicial proof.

This purpose was made evident not only through a reading of the indicated regulations, but also from the statements made by various political figures during the course of parliamentary sessions.

It is worth underlining however that the format of the regulations, presented on the 11 March 1997 by the Ministers of Justice and Internal Affairs at the time, was radically different. The original formulation of the regulations, in fact, introduced the new procedural tool of the “informative memo on the content of the cooperation”, which had to be drawn up within one hundred and eighty days, and represented an essential prerequisite for benefiting from extenuating circumstances, protection measures and mitigation in sentences related to active disassociation conduct. There was no provision made for the non usability of the statements made by states evidence after the one hundred and eighty days from the expression of their intent to cooperate.

In fact, it was considered that the risk of not attaining the benefits provided under the law for said cooperation could constitute a strong incentive in relation to the timing of the statements.

During the course of parliamentary work however, it was decided that these sanctions were not sufficient to achieve the desired result, and therefore after presenting certain amendments, the regulation was drawn up and approved in its current format, stipulating the sanction of non usability in proceedings with regard to later statements made by states evidence, obviously considering these to be more incisive, and besides affecting the personal position of the state witnesses, impacting also on the proceedings and especially, the stage in which proof is formulated and acquired. This certainly involves a unique regulation, because it seems that it does not take due account that the state witness’ delay in rendering certain statements could undoubtedly create risks, in relation to the genuineness of the statements, and could be influenced by objectives that have nothing to do with the requirements of justice, but instead be determined by apprehension, or rather fear, due to the fact that whoever is about to be charged is still free, and could therefore be seriously compromised by an imprecise recollection of certain facts and circumstances, resulting from a reconstruction of events that are often quite complex and not entirely complete, and sometimes even mistaken, irrelevant or

lacking in certain circumstances that were quite serious and had been omitted during the initial interrogations.

This uniqueness, especially in the cases where it is interpreted to the fullest extent of absolute non usability of later statements made by state witnesses, in fact threatens to result in serious doubts regarding its constitutionality from the viewpoint of reasonableness, as has been noted by authoritative sources, because as we have already stated, the regulation is not limited to providing a sanction – on the level of the bilateral relationship with the Government – in respect of the state witness who unlawfully violates his obligations, but rather prevents the Judge from making use of the content of the statements that could have unparalleled value for the purposes of proving facts that have significant criminal relevance.

On the above premise, and generally for a more accurate interpretation of Section IX of the abovementioned article 16 quater of decree no.8 dated 15 January 1991, which became Law no.45 of 2001, it should be said that this panel of Judges holds that the provisions of the above regulation constitute a premise for non usability relating to, or rather limited to the trial stage, and are partial because they make exceptions for cases of unrepeatability.

(...) It certainly does not fall in the category of the so-called pathologic non usability.

The assumption that the statements made by state witnesses after one hundred and eighty days cannot in fact be considered *contra legem,* because procedural law does not prohibit the collecting of these statements in respect of the Prosecution and Judicial Police.

On the contrary, it is legitimate to consider that the Prosecution has a duty to hear a state witness who intends making his statement later, not only because the statements made are fully effective against the witness himself, even when they may favour others, given that the non usability is sanctioned only with regard to statements made *contra alios*, but also because there is no doubt that they can, and in fact should be used as a starting point for investigations into the serious facts that they refer to, from the moment that the later interrogation of the state witness is perfectly legitimate, and as has been stated, therefore calls on the power-duty of the Prosecution to carry out checks on the content of the statements against the accused, as was explained by the Supreme Court of Appeal (Supreme Court of Appeal, First Criminal Section, 20 September 2006, 35710, Prosecution in Arangio Mazza proceedings, rv 234898).

Besides which, what has been stated finds support in the consideration that the non usability makes it impossible for the Judge to use the proof of a specific fact because it has come about in violation of an explicit ban, but this obviously does not impact the fact as a representation of reality, but rather the means by which the fact has been documented; **consequently, not only can this fact constitute the subject of investigations that are necessary for full verification, but it can also be the subject of subsequent proof assumed in a lawful context (on the point see Supreme Court of Appeal, First Criminal Section, 19 September 1997 – 21 January 1998, no. 949); so that with reference to the case in point, there can be no doubt that the statements made by the state witnesses, that were not usable during the trial stage because they had been made too late during the course of the preliminary investigations, can constitute the subject of verification in the hearing-interrogation of the witness – as they have been routinely received during the cross-examination of the parties.**

On the other hand, if we did not follow this interpretation, there would be serious doubt regarding the constitutionality of the regulation, as it would violate article 112 of the Constitution, which imposes the mandatory exercising of criminal prosecution by the Prosecution.

Neither can any recognition be given to the assumption of absolute non usability under the abovementioned section IX of article 16 quater, due to the violation of basic legal principles, because in terms of our procedural law, it is totally lawful, and in fact only right, to receive and use statements made by state witnesses, which are valid as proof – even though these must be evaluated according to the criteria stipulated under article 192 sections III and IV of the Criminal Procedure Code, nor can the statements made later by states evidence be in a position to cause serious and irreparable prejudice to the Defence's rights, from the moment that these have been taken on according to the rules set down for these kinds of act during the preliminary investigation stage.

The truth is that section IX of article 16 quater introduces partial non usability into our legal system, in the sense that it is subjectively directed, given that it cancels the effects of the act in respect only of certain recipients within a weaker context (this expression has been used by authoritative sources), in the sense that it does not interfere with the intrinsic origins of the act, but rather emphasises only the violation of a temporal rule, and therefore, for this reason cannot be identified as pathologic, but rather seems closer to a physiological type of non usability, associated with the functional separation of the

stages in the proceedings, or to be more precise, to the relative non usability. This last conclusion has been reached following an accurate literal interpretation of the regulation under discussion, which makes it clear how the non usability under discussion besides being partial, as stated, is also relative, in the sense that will be explained hereunder. (...) Authoritative case law has in fact being constant in upholding that the sanction of non usability in terms of article 16 quater section IX finds application only for statements made outside of cross-examinations, and therefore not for those made during the course of the hearing, and this also taking into consideration the fact that if the witness' collaboration becomes evident during this stage of the proceedings, the witness will be allowed in terms of article 16 quinquies section III of Legislative Decree no.8 of 1991, to benefit from the extenuating circumstances consequent to his collaboration, even though the "informative memo on the content of the cooperation" is lacking, and will only be drawn up subsequently (see Supreme Court of Appeal, Fifth Criminal Section, 6 November 2007 no. 46328, Galletta and others, rv. 237979; also Supreme Court of Appeal, First Criminal Section, 13 June 2007 no. 35368 Attorney General in D'Arma and others, rv. 237616, and Supreme Court of Appeal, Fifth Criminal Section, 13 March 2002, no. 18061 Bagarella L. and others, rv 221912)".
In the light of these authoritative and indisputable lessons from the Combined Sections, the argument relating to the non usability of the statements made during the hearing by state witness **Antonino Giuffrè** is rejected.

With regard to the second reason, with reference to the exclusion of judgment, this argument is also unsubstantiated in that it is based on an ideological superfetation of the value of the judgment, which finds no basis in our legal system. Judgment actually crystallises and makes the "legal truth" indisputable in relation to a specific charge and a specific subject, but does not cancel or impact on historical facts, nor does it forbid the Judge from knowing the historical facts, where the existence of a judgment would preclude new verification of the "legal truth" for different purposes. The Combined Sections in fact noted that: "It is legitimate to take on factual circumstances collected during the course of other criminal proceedings as independent elements of proof, even when these have concluded with the handing down of irrevocable acquittal judgments, because the preclusion of the judgment only forbids the exercising of criminal prosecution for the fact-crime that formed the subject of that judgment, but has nothing to do with possibility of a renewed evaluation of the probatory records acquired during

the proceedings that have been concluded, once it has been established that these probatory records could be relevant in verifying different crimes from the ones that judgment has been handed down on. And in fact, the inadmissibility of a second judgment for the same crime does not prevent the same historical facts or specific aspects of these from being taken into consideration, so as to freely evaluate them for the purposes of proof relating to a different crime than the one that judgment was passed on, given that what become irrevocable is the legal truth of the fact-crime, and not the reality of the historical fact" (Combined Sections, judgment no.2110 of 23/11/1995 hearing (filed 23/03/1996) Rv. 203765).

Consequently, no argument can be made against the line of reasoning followed by the Judges in this case, who have taken into consideration circumstances that were referred by state witnesses, relating to historical facts that happened in a period prior to 28 March 1992, and from which it emerged that Palazzolo was in contact with the leaders of "Cosa nostra", with whom he cooperated in managing illegal business dealings. As the Combined Sections have shown, the truth of the historical fact is certainly not made irrevocable by the judgment, according to which Palazzolo was acquitted of the charge of participation in a Mafia type association.

These circumstances, being historical facts, emerging in a period subsequent to the accused's acquittal judgment, could certainly have been made known to the presiding Judges, and used – as happened in the case in point – to better understand and evaluate the accused's conduct with regard to the facts that took place in a period subsequent to 28 March 1992, and for which he has been called to respond during these proceedings.

With regard to the third reason which made reference to the alleged violation and defect in the legitimacy of the motivation offered, we need to begin by reconfirming the now widely accepted case law regarding the lack of motivation, which has been restated several times even by the Combined Sections, according to which the investigation of legitimacy regarding the motivation given for a decision has well-defined boundaries, given that the verification required of the Supreme Court of Appeal is limited (by the specific wishes of the legislature) to checking on the existence of a logical point-by-point argument on the various aspects of the decision being challenged, without the possibility of checking the appropriateness of the reasoning adopted by the presiding Judge to substantiate his opinion, or whether this complies with what has been acquired during

the proceedings. The illogical nature of the motivation as a violation, must be clear, that is to say of such significance that it is perceptible *ictu oculi*, with the verification of legitimacy in this regard being limited to instances of macroscopic proof, with no relevance given to inconsistencies in reasoning that are not obvious, or glaring, or absolutely incompatible with other passages in the reasoning taken from the text of the order being challenged, and considering as inapplicable the deductions made by the parties, which even if they have not been specifically refuted, are logically incompatible with the decision adopted, provided that the rationale for the reasoning has been explained in a logical and adequate manner. It follows that the reasons for an appeal based on a different prospective of the facts or on other explanations formulated by the applicant, even though plausible and equally logically substantiated to those accepted by the Judge, cannot be lawfully admissible (cfr. Supreme Court of Combined Sections 24/1999 Spina, rv. 214794; Combined Sections 12/2000 Jakani 216260).

On the basis of these clear principles of law, the third reason for the appeal presented by Palazzolo is rejected.

Even though formally arguing the violation of law and defect in the legitimacy of the motivation, the reason is clearly a reiteration of the defence that was extensively and thoroughly rejected by the Appeal Court Judges, and apart from contending the point in fact in the judgment under appeal, by relating it only to an evaluation of the elements of proofs and to a selection of reasons that were considered suitable to justify the decision, that is activities that fall within the context of the discretionary powers of the presiding Judge, whose opinion is final, if upheld, as in the case under examination, by adequate and appropriate motivation that is free of logical-legal defects.

In this regard, the objections regarding the Appeal Court Judge's failure to take into consideration Palazzolo's thirty year break from Sicily definitely constitute censure of the facts. The presiding Judges have not ignored these circumstances, but have interpreted them differently to the Defence, maintaining that they are not decisive elements of proof in excluding the accused's participation in the "Cosa nostra" Mafia organisation, in the light of the substantive probatory elements that were acquired from the files. Similarly, there is also censure of the facts, which would require a different interpretation of the probatory material, with regards to the objections to the considerations made by the Appeal Court on the subject of evaluating the investigations conducted against Palazzolo in South Africa, on the matter of evaluating the actual methods by which hospitality was provided by Palazzolo to the two Sicilian fugitives from justice Bonomo

and Gelardi, on the matter of evaluating the statements made by state witnesses Antonino Giuffrè and Giovanni Brusca, and in the interpretation of the recordings on file from the telephone interceptions and audio surveillance.

With regard to the fourth reason, this is inadmissible, because it is clearly unsubstantiated. In point of fact: "the failure to acquire an element of proof may be inferred during a hearing, in accordance with article 606, section 1, paragraph d) of the Criminal Procedure Code, when this involves a "decisive element of proof", or a probatory element sensitive enough to determine a totally different outcome from the one taken, but not when the results that the party proposes obtaining can lead – when compared with other reasons that have supported the decision – only to a different evaluation of the elements legitimately acquired within the context of the preliminary investigation hearing". (Supreme Court of Appeal Section 6, judgment no. 37173 of 11/06/2008 hearing, (filed 30/09/2008) rv. 241009). In the case in point, the inferred proof was directed exclusively at demonstrating the legitimacy of the Defence's activities carried out to defend Palazzolo's position, and therefore cannot have any impact on the evaluation of the accused's responsibility with regard to the crime ascribed to him.

In terms of article 616 of the Criminal Procedure Code, when the appeal is rejected, the appellant must be ordered to pay the costs of the proceedings.

FOR THIS REASON

The appeal is rejected and the applicant is ordered to pay the costs of the proceedings.
Thus decided in Chambers on the 13 March 2009.

The Judge compiling the document	The Judge President
(Dr Domenico Gallo – signed)	(Dr Giuliano Casucci – signed)

[Stamp: Filed with the Registrar's Office on 23 April 2009. Signed The Chancellor – Piera Esposito. Round stamp Supreme Court of Appeal]