COURT OF CRIMINAL APPEAL

His Honour Chief Justice Silvio Camilleri – President
Hon. Mr. Justice David Scicluna
Hon. Mr. Justice Joseph Zammit McKeon

Sitting of Thursday, 1st December 2016

Bill of Indictment No. 5/2015

The Republic of Malta

v.

Chukwudi Samuel Onyeabor

The Court:

1. This is a judgement regarding an appeal filed by the Attorney General following a judgement delivered by the Criminal Court on the 17th March 2016 in respect of preliminary pleas filed by the said Chukwudi Samuel Onyeabor.

2. Chukwudi Samuel Onyeabor was charged by means of a Bill of Indictment filed by the Attorney General on the 9th March 2015 with having, with criminal intent, with another one or more persons in Malta or outside Malta, conspired for the purposes of selling or dealing in a drug (Cocaine) in these Islands in breach of the provisions of the Dangerous Drugs Ordinance, (Chapter 101 of the Laws of Malta), or promoted, constituted, organised or financed such conspiracy.

3. By means of an application of appeal filed on the 22nd March 2016, the Attorney General requested that this Court vary the decision given by the Criminal Court on the 17th March 2016 in that it reverses it in the part where that Court upheld the first preliminary plea and declared the statement released by the accused as inadmissible, and confirms it as to the rest.

4. By means of his statement of defence filed on the 26th March 2015, the said Chukwudi Samuel Onyeabor submitted as his first preliminary plea that all statements written or verbal made to the police should be declared inadmissible since the police, upon the accused being arrested and before being interrogated, did not give him the opportunity to consult with a lawyer.

5. This Court will now refer to that part of the appealed judgement in respect of which the Attorney General is seeking a reversal:

> "The **first plea** of the accused deals with the inadmissibilty of the statement released by the accused to the police. The accused was interviewed by the police on the 4th February, 2008. At the time of the interview, the person interviewed had no right to consult a lawyer of his choice. This came into being by virtue of Legal Notice 35 of the year 2010 on the 10th day of February of that same year. Through the following years there were a number of landmark cases where this concept evolved. The most relevant one was the case in the names: "Charles Steven Muscat v. Avukat Generali decided by the Constitutional Court on the 8th October, 2012. This particular case laid down the parameters of why, how and when the person interviewed could claim that the fact of the non-consultation of a lawyer could be deemed to have a negative impact on his or her legal position, leading to a breach of the right to a fair hearing.
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> "In the circumstances of this case under review, the accused, who has dual Nigerian and Dutch citizenship, asked for a lawyer to be present. This results from a reading of his statement released to the local police. Of course, he was informed that such a right did not exist in our system but he had the right to be silent. It results that he was never arrested either in Nigeria or in the Netherlands. Consequently, what was happening to him here was totally alien to him and he did not have the comfort of somebody who explained to him what happens in such a case where a person finds himself under arrest in a foreign country. On these grounds alone, it is obvious that the plea raised by the accused must be upheld.
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> "Apart from the foregoing this Court is making reference to the decision of the European Court of Human Rights of the 12th January, 2016 in the names: "Borg (Mario) v. Malta". This Court considers this case a landmark judgement when it comes to the right of the accused to consult a lawyer of his choice prior to his being interviewed by the investigating authority (in our case the police). This Court held that:

" '57. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective", article 6.1 requires that as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right...'

"In this case there appear to be no compelling reasons to restrict this right.

"Then again in paragraphs 61 and 62 of that judgement, the ECHR made the following comments:

" '61. ...the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent.

" '62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systematic restriction applicable to all accused persons. This already falls short of the requirements of article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see *Salduz*, cited above, par 52, 55 and 56).'

"In the light of the above this Court is of the opinion that the first plea of the accused is to be upheld and consequently the statement of the accused released to the police is inadmissible and is not to be produced in Court or a copy be given to the jurors."

6. The Attorney General's grievance, as stated, is in respect of respondent's first plea which was upheld by the first Court. The Attorney General submits:

"That applicant points out that the statement was released by the accused on the 4th February 2008, i.e. prior to L.N. XXXV of 2010, which brought into effect Article 355AT of the Criminal Code. Hence, for all intents and purposes, this statement was validly released according to the law. The accused was 30 years of age back then, was duly cautioned according to law prior to releasing his statement, and opted to voluntarily release the statement after he was apprehended almost *in flagrante delicto* pursuant to a 'controlled-delivery' operation. Moreover, in his statement, not only does the accused not 'incriminate' himself, but moreover he categorically denies any drug-related or other criminally-sanctionable activity. As a matter of fact it also transpires from said statement (page 6 of same) that Mr. Onyeabor informed the interviewer (the then Police Inspector Norbert Ciappara) that he had 'useful information' he could provide the Police, if only he be allowed to consult a lawyer. Upon being informed that Maltese law did not cater for that, Mr. Onyeabor decided not to divulge any information. Hence, in such a scenario, it emerges crystal-clear that Mr. Onyeabor was perfectly aware not only of his rights but also of what was going on in the interview room and the legal implications of his statement. Hence, as a state of fact, Mr. Onyeabor was not a vulnerable person when he released his statement, explicitly availed himself of the right not to incriminate himself in said

statement, and said statement was hence perfectly valid for all intents and purposes of law.

"The appellant will not refer to the *Alvin Privitera*, *Esron Pullicino*, and *Mark Lombardi* cases, wherein the courts considered the issue of vulnerability and age of the interviewee, and instances where the statement constituted the sole proof against the accused. However, cases such as *Charles Stephen Muscat vs The Attorney General*, (08.X.2012), *Joseph Bugeja vs the Attorney General* (14.1.2013), *The Police vs Tyron Fenech* (22.11.2013), and *The Police vs Amanda Agius* (22.11.2013) further explained that a number of factors had to be taken into consideration when considering the admissibility or otherwise of the statement.

"The First Honourable Court, in its decision subject to this appeal, based its decision to deem Mr. Onyeabor's statement as inadmissible on the judgment of the European Court of Human Rights of the 12th January 2016 in the *Case of Borg v. Malta*. Whilst it is perfectly true that *Borg vs Malta* maintained that no reliance can be placed on the assertion that the interviewee was duly cautioned and that failure to grant access to a lawyer, prior to interrogation, for any reason/s other than "compelling" ones amounted to a breach of Article 6 of the Convention, nowhere does *Borg vs Malta* declare Mr. Borg's statement as inadmissible. Indeed, Article 6 of the Convention does not lay down rules for the admissibility of evidence. This clearly falls within the realms of national / domestic law. Obviously, in line with its obligations under the Convention and national law and other international instruments, the State is bound to ensure that everyone charged with a criminal offence is afforded a fair trial, however it is up to the State to establish its procedural requirements.

"In appellant's view, since the statement released by Mr. Onyeabor on the 4th February 2008 was released in perfect conformity with the applicable law at the time, this should be admissible during the trial together with the other evidence, obviously subject to the Criminal Court and defence counsel's right to make any submissions they deem fit as to the merits and circumstances of same. As appellant will delve further in his oral submissions before this Honourable Court, the statement of the accused should not be deemed inadmissible *a priori*, as this was validly and legally released by Mr. Onyeabor. It might be worth noting that Section 349(2) of the Criminal Code clearly provides that the omission of precaution, formality, or requirement by a Police Officer when acting within the scope of Book Second, Part 1, Title I of the Criminal Code shall <u>not</u> be a bar to admissibility of evidence to which such precaution, formality, or requirement relates. Now in this case, there was not even an omission of precaution, formality, or requirement, but the statement was released in perfect conformity with the law. Hence such statement should, in terms of law, be admissible as evidence during the trial. Appellant will obviously expand on this argument during oral submissions before this Honourable Court.

7. The matter relating to access to a lawyer at the interrogation stage has been often debated by our Courts. Now, in **Borg vs Malta**[1] the European Court of Human Rights stated precisely the following:

> "1. Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008).
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> "2. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz*, cited above, § 55).
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> "3. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (ibid., § 56).
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> "....
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> "4. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see *Salduz*, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).
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> "5. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see *Salduz*, cited above, §§ 52, 55 and 56).
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> "6. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

[1] 12th January 2016.

8. Following this judgement, our Constitutional Court has once again considered the issue on a number of occasions[2]. In **Carmel Saliba vs L-Avukat Ġenerali** decided by the Constitutional Court on the 16th May 2016, that Court stated:

> "17. Għalkemm din il-qorti temmen u ttenni illi l-interpretazzjoni minnha mogħtija fil-każ ta' Charles Stephen Muscat u sentenzi oħra mogħtija wara hija interpretazzjoni korretta u proporzjonata billi tilqa' għal abbużi min-naħa tal-prosekuzzjoni u tħares id-drittijiet ta' persuna akkużata b'reat kriminali, jidher li din l-interpretazzjoni – għallinqas fejn il-proċess kriminali jkun intemm – illum ma għadhiex aktar tenibbli fid-dawl tas-sentenza fuq imsemmija ta' Borg v. Malta mogħtija dan l-aħħar mill-Qorti Ewropea.
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> "18. Din il-qorti għalhekk illum hi tal-fehma li ma jkunx għaqli li tinsisti fuq l-interpretazzjoni li kienet tat fil-każ ta' Muscat, għalkemm ittenni li għadha temmen illi hija interpretazzjoni korretta, proporzjonata u ta' buon sens.
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> "19. Is-sentenza ta' Borg iżda għandha tinqara wkoll fid-dawl tas-sentenza l-oħra, ukoll fuq imsemmija, tal-istess Qorti Ewropea fil-każ ta' Dimech[3] fejn il-qorti tenniet illi trid tqis il-proċess fl-intier tiegħu biex tara kienx hemm smigħ xieraq, u għalhekk, fejn il-proċess kriminali, bħal fil-każ tallum, għadu għaddej, trid tistenna li jintemm il-proċess biex tqisu fl-intier tiegħu biex tara kienx hemm smigħ xieraq.
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> "20. Madankollu, fil-każ tallum il-qorti hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija tal-attur għax tqis illi, fiċ-ċirkostanzi, in-nuqqas ta' għajnuna ta' avukat ma kienx nuqqas li ma jista' jkollu ebda konsegwenza ta' preġudizzju għall-attur billi fl-istqarrija tiegħu l-attur ammetta l-ħtija. Fiċ-ċirkostanzi huwa xieraq illi, kif qalet l-ewwel qorti, ma jsir ebda użu mill-istqarrija fil-proċess kriminali.
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> "21. Dan ma jfissirx illi l-istqarrija ttieħdet bi ksur tad-drittijiet fundamentali tal-attur; fid-dawl ta' dak kollu li ngħad fuq, partikolarment is-sentenza ta' **Dimech** il-ksur iseħħ jekk u meta jsir użu mill-istqarrija fil-proċess kriminali. Anzi, meta tqis illi fl-istqarrija l-attur ta informazzjoni utli biex jistgħu jinqabdu terzi li jittraffikaw id-droga, il-pulizija kellha raġuni tajba biex tinterroga lill-attur minnufih biex tikseb din l-informazzjoni kemm jista' jkun malajr.
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> "22. Għalhekk il-qorti sejra tilqa' dan l-aggravju fis-sens biss li tgħid illi ma kienx hemm ksur tad-dritt tal-attur għal smigħ xieraq meta tteħditlu l-istqarrija, iżda, biex ma jseħħx dak il-ksur waqt il-proċess kontra l-attur, ma hijiex sejra tħassar l-ordni tal-ewwel qorti għat-tneħħija tal-istqarrija mill-inkartament tal-proċess...."

[2] See, for instance: **Carmel Saliba vs L-Avukat Ġenerali**, 16th May 2016; **Stephen Nana Owusu vs L-Avukat Ġenerali**, 30th May 2016; **Malcolm Said vs Avukat Ġenerali et**, 24th June 2016; **Aaron Cassar vs L-Avukat Ġenerali et**, 11th July 2016.
[3] Q.E.D.B. 2 ta' April 2015, rik 34373/13.

9. It is clear from this judgement that while in **Borg vs Malta** criminal proceedings had been concluded, in **Saliba** the Constitutional Court decided that the accused's statement should be expunged.

10. In the present case, respondent Onyeabor was interrogated by the Police without having been granted access to a lawyer – notwithstanding his request for a lawyer, which was denied and this as at the time there was "a systemic restriction applicable to all accused persons". Respondent thus made a statement on the 4th February 2008 without such legal assistance.

11. In **Aaron Cassar vs L-Avukat Ġenerali et**, decided by the Constitutional Court on the 11th July 2016, where the accused's statement to the Police did not contain any incriminating declarations which could in any way prejudice him – while the contrary would appear to be the case here – that Court concluded that in view of what was decided in **Borg vs Malta**, the mere fact of a denial of legal assistance in the pre-trial stage constituted a breach of Article 6(1) of the Convention read in conjunction with Article 6(3):

> "8. Iż-żamma tal-bilanċ neċessarju bejn id-diversi interessi involuti (tal-individwu, tal-komunità, tal-amministrazzjoni tal-ġustizzja) fit-twettiq tal-ħarsien tad-drittijiet fondamentali tal-individwu għandu jimmilita kontra s-sejbien ta' vjolazzjoni tal-Konvenzjoni – ħaġa serja fiha nfisha – meta ma jkun hemm ebda konsegwenzi ta' preġudizzju fuq min iqis lilu nnifsu (mingħajr ma neċessarjament ikun hekk) bħala "vittma". Din fl-aħħar mill-aħħar kienet il-motivazzjoni ta' din il-qorti fis-sentenza ta' Charles Steven Muscat *v.* Avukat Ġenerali[4] u sentenzi oħra li ġew wara, li ma sabux ksur tal-jedd għal smigħ xieraq meta min ikun ta stqarrija mingħajr ma kellu l-għajnuna ta' avukat ma jkun ġarrab ebda preġudizzju minħabba f'hekk.
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> "9. Madankollu, għalkemm din il-qorti temmen u ttenni illi l-interpret-azzjoni minnha mogħtija fis-sentenzi fuq imsemmija hija interpret-azzjoni korretta u proporzjonata illi tilqa' għal abbużi min-naħa tal-prosekuzzjoni u tħares id-drittijiet ta' persuna akkużata b'reat kriminali, jidher li din l-interpretazzjoni – għallinqas fejn il-proċess kriminali jkun intemm – illum ma għadhiex aktar tenibbli fid-dawl tas-sentenza ta' Borg v. Malta imsemmija mill-ewwel qorti, li tqis il-fatt biss ta' nuqqas ta' għajnuna ta' avukat bħala ksur tal-art. 6(1) moqri mal-art. 6(3) tal-Konvenzjoni."

12. Nor has appellant Attorney General adduced any "compelling reasons" which may have justified denying respondent Onyeabor access to a lawyer at the interrogation stage.

13. While the statement in question of the accused has not been shown to be in violation of the conditions for the admissibility of an accused's statement as

[4] Constitutional Court, 8th October 2012.

laid down in article 658 of the Criminal Code, nevertheless, for the reasons stated above, the denial of the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons must today be held to be in violation of the conditions for the admissibility of an accused's statement.

14. For these reasons the Attorney General's appeal requesting the reversal of that part of the judgement delivered by the Criminal Court on the 17th March 2016 in the names **The Republic of Malta vs Chukwudi Samuel Onyeabor** whereby that Court upheld the first preliminary plea and declared the statement released by the accused as inadmissible, is denied and judgement is confirmed. Orders that the record be remitted to the Criminal Court for the continuation of proceedings against the said Chukwudi Samuel Onyeabor.