COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE

MAGISTRATE DR. NATASHA GALEA SCIBERRAS B.A., LL.D.

Case Number: 557/2009

Today, 30th August 2017

The Police
(Inspector Victor Aquilina)

vs

Sean Anthony McGahern
(ID 65502(L))

The Court,

Having seen the charges brought against the accused Sean Anthony McGahern, 33 years of age, son of Patrick and Irene nee` Clemets, born in Brighton (UK) on 15th April 1975, residing at No. 12, 'The Valley', Flat 12, Triq Guze Miceli, Gzira and holder of Maltese identity card number 65502(L);

Charged with having on these Islands on 17th June 2008 and the previous months:

a) Cultivated the plant cannabis in terms of Section 8(c) of Chapter 101 of the Laws of Malta;

b) Had in his possession the whole or any portion of the plant cannabis in terms of Section 8(d) of Chapter 101 of the Laws of Malta, which drug was found in circumstances denoting that it was not intended for his personal use;

c) Had in his possession the resin obtained from the plant cannabis or any preparations of which such resin formed the base in terms of Section 8(a) of Chapter 101 of the Laws of Malta.

Having seen the records of the case, including the order of the Attorney General in virtue of subsection two (2) of Section 22 of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), for this case to heard by this Court as a Court of Criminal Judicature;

Having heard the parties declare that they were exempting the Court, as presided, from hearing all evidence tendered before the Court, as differently presided;

Having heard the Prosecution declare that it had nothing further to add after adducing its evidence and the final oral submissions made by the defence.

Considers that:

The facts of this case in brief were as follows: On 17th June 2008, police from the Drug Squad executed a search warrant issued against the accused at 12, 'The Valley', G. Miceli Street, Gzira. Upon their arrival, they found a certain Alison Aquilina and her mother and during the search conducted in the said residence, on the ledge of the bedroom's window, they found six pots, which they suspected to contain cannabis plants, of different sizes.[1] Alison Aquilina was arrested and escorted to Police Headquarters for further investigations.

In terms of the report drawn up by Pharmacist Mario Mifsud[2], the analysis carried out on the plants in documents 430/08/02 to 430/08/03 yielded a negative result, whereas the plant in document 430/08/01, the weight of which amounted to 5.43 grams (without roots), was a cannabis plant. The substance *Tetrahydrocannabinol* was found in the said plant and the purity of the plant for the said substance was of about 3.4%.

[1] *Vide* deposition given by WPS 12 Andrea Grech (a fol. 13 to 14 of the records), Inspector Saviour Baldacchino (a fol. 15 and 16 of the records) and PC 599 Clive Mangion (a fol. 17 and 18 of the records).
[2] Exhibited a fol. 22 of the records of the case.

Alison Aquilina released a statement on 17th June 2008, which she confirmed on oath before the Inquiring Magistrate in terms of Section 24A(12) and (13) of Chapter 101 of the Laws of Malta on 18th June 2008.

The accused released a statement on 12th August 2008.

Considers further that:

As held above, the accused released a statement in August 2008 and thus at a time, when Maltese law did not provide to an arrested person, the right to obtain legal advice prior to being interrogated. This right came into effect on 10th February 2010 by means of Legal Notice 35/2010.

In the judgement delivered by the European Court of Human Rights on 12th January 2016, in the case **Mario Borg v. Malta**, it was held that:

"*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).*

"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).

"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).

"....

"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).

"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).

"6. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

In the judgement delivered by the Court of Criminal Appeal on 25th February 2016, in the names **Il-Pulizija vs Joseph Camilleri**, where appellant contested the admissibility of the statement which he released in 2002, on the ground that, at the time, the law did not provide the right to legal assistance prior to his interrogation, the Court after referring to the decision above cited and also to another case **Aleksandr Vladimirovich Smirnov vs Ukraine**, decided on 13th June 2014, stated as follows:

"*... allura jidher illi r-regola hi li l-Artikolu 6(1) abbinat ma' l-artikolu 6(3)(c) jitlob li jkun hemm dritt ta' avukat fl-istadju tal-investigazzjoni tal-pulizija, sakemm ma jigix ippruvat li hemm ragunijiet impellenti ghaliex dan id-dritt ghandu jigi ristrett. Illi allura meta l-ligi domestika teskludi dan il-jedd u dan b'mod sistematiku billi ma ikunx hemm disposizzjoni ad hoc li taghti dan il-jedd lil persuna arrestata, ikun hemm il-periklu li isehh lezjoni tad-dritt tal-persuna akkuzata ghal smiegh xieraq anke f'dawk il-kazijiet estremi fejn ma ikun hemm l-ebda dikjarazzjoni inkriminanti f'dawn l-istqarrijiet. Illi fil-kaz deciz quddiem il-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fl-ismijiet Navone vs Monaco, nstab li kien hemm lezjoni billi l-akkuzat ma kellux jedd ghall-assistenza ta' l-avukat matul l-interrogazzjoni similment billi l-ligi tal-pajjiz ma kenitx tippermettieha.*

(ara ukoll Yesilkaya vs Turkey – 59780/00 08/12/2009, Fazli Kaya vs Turkey – 24820/05 17/09/2015).

Dan il-jedd gie anke estiz fil-kaz fejn l-akkuzat kien gie moghti il-jeddijiet kollha vigenti skont il-ligi ta' pajjizu inkluz allura il-jedd tieghu ghas-silenzju u fil-fatt huwa kien ezercita dan il-jedd u ma wiegeb ghall-ebda mistoqsija lilu maghmula. Il-Qorti xorta wahda sabet li kien hemm vjolazzjoni ta' l-artikolu 6(3)[3] *u dan ghaliex ma kienx ikkonsulta ma' avukat biex ifissirlu il-jeddijiet tieghu skont il-ligi dwar id-dritt tieghu ghas-silenzju u id-dritt li ma jinkriminax ruhu b'dan ghalhekk illi l-Qorti implikat illi t-twissija moghtija mill-ufficjali investigattiv ma hijiex bizzejjed.*"

The Court of Criminal Appeal further held that:

"*Illi allura hija fis-setgha ta' din il-Qorti u dan qabel ma jigi determinat il-process gudizzjarju kontra l-appellanti illi twarrab dik l-evidenza illi tmur kontra il-garanziji moghtija kemm fil-Kostituzzjoni kif ukoll il-Konvenzjoni ghal harsien tal-jedd ghal smiegh xieraq tal-persuna akkuzata. Fil-fatt dan il-jedd gie indikat fid-decizjoni tal-Qorti Ewropeja fil-kaz Dimech vs Malta*[4] *fejn f'dak il-kaz ghalkemm il-Qorti ma setatx tasal biex tistabbilixxi jekk kienx sehh lezjoni ta' l-artikolu 6 tal-Konvenzjoni billi l-proceduri penali kienu ghadhom ma intemmux, madanakollu sahhqet:*

"…. it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legal assistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose."

In this case, the Court of Criminal Appeal considered that although appellant had not replied to all the questions put to him throughout his interrogation, yet he had replied to some questions, which replies, the Court of First Instance had taken into consideration in order to find the accused guilty. In view of the judgements to

[3] Hawnhekk il-Qorti rreferiet ghal kaz fl-ismijiet Dayanan vs Turkey, deciz fit-13 ta' Ottubru 2009.
[4] 34373/13, deciz fit-2 ta' Lulju 2015.

which it referred, the Court of Criminal Appeal held that this could not be done and decided that appellant's statement was inadmissable.

In its judgement of 6th October 2016 in the case **Il-Pulizija vs Jason Cortis**, the Court of Criminal Appeal, as differently presided, upheld the judgement above cited and proceeded to discard the content of a statement that had been released by the accused in May 2005 "*u dan fuq il-premessa illi ma kellux il-beneficcju tal-assistenza legali waqt li mizmum taht arrest minkejja li l-ligi vigenti f'dak iz-zmien kienet teskludi l-jedd ghal tali assistenza*".

Furthermore, in its judgement of 1st December 2016, in the names **The Republic of Malta vs Chukwudi Samuel Onyeabor**, the Court of Criminal Appeal in its superior jurisdiction, after making reference to the judgement delivered by the European Court of Human Rights **Borg vs Malta**, above cited, and to other judgements delivered by the Constitutional Court[5], held as follows:

"*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).*

...

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.

[5] 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.

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 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."

In view of the judgements above cited, in the present case, since the accused was not given the right to obtain legal advice prior to his interrogation, the Court is not considering his statement as admissible evidence.

Considers further that:

As held above, Alison Aquilina released a statement to the police on 17th June 2008, which statement she subsequently confirmed on oath before the Inquiring Magistrate. However, it also results from the records of the case that said Aquilina did not give her deposition during these proceedings, although she did appear before the Court during the sitting held on 23rd October 2012 when, however, the accused failed to appear.

In its judgement delivered on 26th May 2003, in the case **Il-Pulizija vs Pierre Gravina**, the Court of Criminal Appeal held as follows:

"*Issa, huwa principju generali li "…ix-xhieda ghandhom dejjem jigu ezaminati fil-Qorti u viva voce" (Artikolu 646(1), Kap. 9). Ghal din ir-regola, pero`, hemm certi eccezzjonijiet li jipprovdi ghalihom l-istess Artikolu 646 fis-subartikoli li jigu wara s-subartikolu (1). Hemm ukoll l-eccezzjoni tad-deposizzjoni mehuda in segwitu ghall-hrug ta' ittri rogatorjali bil-procedura traccjata fl-Artikolu 399 tal-Kodici Kriminali, procedura li giet ritenuta applikabbli anke ghal kawzi sommarji (ara Il-**Pulizija v. Angelo Grima** App. Krim. 18 ta' Ottubru, 1952), u li fil-prattika giet ukoll applikata mill-Qorti Kriminali f'xi kazijiet wara l-hrug tal-att ta' akkuza. U hemm l-eccezzjoni ta' meta xhud jinstema' f'daru minhabba mard jew xjuhija (Art. 647, Kap. 9). Jigi osservat li anke fil-kaz ta' xhieda permezz ta' rogatorji u ta' xhieda li jinstemghu f'darhom, l-imputat jew akkuzat ghandu dejjem il-jedd li jkun presenti waqt is-smigh tax-xhud jew li jahtar rappresentant tieghu ghal waqt tali smigh – Art. 647(3) u 399(2). L-ewwel sentenza tal-Artikolu 30A tal-Kap. 101 taghmilha cara li dak l-Artikolu qed jipprovdi ukoll eccezzjoni, pero` mhux eccezzjoni ghar-regola kontenuta fl-Artikolu 646(1) tal-Kodici Kriminali izda ghar-regola kontenuta fl-Artikolu 661[6] ta' l-istess Kodici. Minn dan isegwi, li*

[6] Section 661 of the Criminal Code provides that: "

anke meta l-prosekuzzjoni tkun trid taghmel uzu minn dikjarazzjoni guramentata mehuda skond l-imsemmi Artikolu 30A, ir-regola ghandha tkun li min ikun ghamel dik l-istqarrija ghandu jingieb fil-qorti biex l-imputat jew akkuzat ikun jista' jikkontroezaminah dwarha. ... bhala regola, min ikun ghamel tali stqarrija guramentata ghandu jingieb il-qorti ghall-fini ta' kontroll da parti tal-akkuzat jew imputat. F'dan is-sens ukoll esprimiet ruhha l-Qorti Ewropea fil-kawza ***Kostovski v. Netherlands*** *(20 ta' Novembru, 1989) meta qalet li d-dritt ta' akkuzat li jikkonfronta xhud migjub kontra tieghu*

does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage in the proceedings.[7]"

Fil-kaz in dizamina Mentosa la gie prodott mill-prosekuzzjoni fil-qorti peress li kien telaq minn Malta definittivament, u anqas ittiehdet id-deposizzjoni tieghu permezz tal-procedura tar-rogatorji. L-ewwel qorti, ghalhekk, kellha tiskarta l-istqarrija guramentata tieghu u mhux, kif effettivament ghamlet, tistrieh in parti fuqha…".

In that case the Court also held that:

"*Ghal kull buon fini l-Qorti tosserva li l-gurisprudenza tal-Qorti Ewropea ma teskludix l-ammissibilita` ta' stqarrijiet maghmula minn persuni li in segwitu qatt ma jingiebu bhala xhieda fil-process. Dak li dik il-Qorti tara biex tiddetermina jekk kienx hemm jew le smiegh xieraq hu jekk dawk l-istqarrijiet <u>kienux l-unika prova kontra l-akkuzat, jew kinux altrimenti prova determinanti biex huwa jinstab hati</u>*." [emphasis added by this Court]

Similarly in its judgement delivered on 8th April 2010, in **<u>Ir-Repubblika ta' Malta vs Matthew-John Migneco</u>**, the Criminal Court held that:

"*S'intendi, dana l-Artikolu 30A tal-Kap. 101 irid dejjem jinqara fid-dawl tad-disposizzjonijiet generali tal-Kodici Kriminali (eccetwat l-Artikolu 661 tal-istess*

[7] (1990) 12 E.H.R.R.434, para. 41.

Kodici, li ghalih l-Artikolu 30A jaghmel deroga espressa). Issa, l-Artikolu 549(4) (u ma jistax ikun hemm dubju li l-intervent ta' Magistrat taht is-subartikoli (12) u (13) tal-Art. 24A tal-Kap. 101 hija forma ta' inkjesta dwar l-in genere b'modalitajiet kemm xejn differenti mehtiega ghall-finijiet tal-istess Kap. 101) u 646(2) tal-Kap. 9 huma cari fil-portata taghhom: id-deposizzjoni regolarment moghtija fl-inkjesta dwar l-in genere ... tista' tingieb bhala prova, u mhux sempliciment ghall-finijiet ta' kontroll, basta, pero`, li x-xhud jingieb ukoll fil-qorti biex jigi ezaminat viva voce ... hlief jekk ix-xhud ikun mejjet, ikun barra minn Malta jew ma jkunx jista' jinstab… (ara l-proviso tas-subartikolu (2) tal-imsemmi Artikolu 646)."

On the basis of the above mentioned judgements, it therefore follows that since Aquilina was not produced as a witness by the Prosecution in these proceedings, with the result that the accused was precluded from confronting and therefore controlling said witness through her cross-examination and furthermore, in view of the fact that once the statement released by the accused is being considered as inadmissible for the reasons above provided, Aquilina's statement as confirmed on oath would certainly constitute determining and decisive evidence in finding the accused guilty of some of the charges in this case, the Court cannot consider said statement as confirmed on oath by Aquilina as admissible and is, therefore, discarding its content.

Having made the above considerations in terms of admissible proof, the evidence left for the Court to consider consists of the finding of a cannabis plant in a residence in Gzira. As held above, during the search in the said residence, the accused was not present, but there were Alison Aquilina and her mother. Short of any other evidence adduced by the Prosecution, considering further that at the time of the search, the residence was occupied by third parties, the Court cannot conclude, beyond any reasonable doubt, that the plant in question was cultivated by accused. For the same reasons, the Court deems that neither has charge (b) been proved to the degree required by law. As regards charge (c), once the statement of the accused and Aquilina's statement on oath have been discarded as inadmissible, there is no other evidence to support a finding of guilt.

Conclusion

For these reasons, the Court is finding the accused not guilty of the charges brought against him and acquits him thereof.

Orders the destruction of the plants exhibited and returned by Pharmacist Mario Mifsud with his report, as soon as this judgement becomes final and definitive and this, under the supervision of the Court Registrar, who shall draw up a proces verbal documenting the destruction procedure. This document shall be inserted in the records of these proceedings within fifteen days from such destruction.

Natasha Galea Sciberras
Magistrate