CONSTITUTIONAL COURT

Judges

THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE TONIO MALLIA
THE HON. MR JUSTICE NOEL CUSCHIERI

Sitting of Monday 27th November 2017

Number: 1
Application Number: 10/14 AF

John Udagha Omeh

Vs

Attorney General, Commissioner of Police, Director General (Courts), Registrar of Criminal Courts and Tribunals

The Court:

Preliminaries

1. This is an appeal by plaintiff John Udagha Omeh from the judgement delivered by the First Hall of the Civil Court in its constitutional jurisdiction [the first Court] on the 31st January 2017 by virtue of which, that Court (i) upheld the preliminary plea raised by the respondents the Commissioner of Police, Director General (Courts) and the Registrar of the Criminal Courts and Tribunals by declaring that they are not the legitimate defendants in these

proceedings; (ii) rejected applicant's first request and declared that his right to a fair trial in terms of Article 39(6)(c) of the Constitution of Malta [the Constitution] and Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms [the Convention] has not been breached as a result of the legal assistance system provided by his legal aid lawyers or the legal aid system in general; (iii) rejected applicant's second request and declared that the order issued under Article 22(2) of Chapter 101 of the Laws of Malta by virtue of which the Attorney General was granted the discretion to decide whether the applicant is to be tried before the Criminal Court or before the Court of Magistrates was neither unconstitutional, nor was it in breach of Article 39 of the Constitution and Articles 6 and 7 of the Convention; (iv) upheld applicant's third request and declared that his right to a fair hearing in terms of article 6(1) read together with Article 6(3) of the Convention, has been breached in view of the fact that Maltese Law did not allow him to be assisted by a lawyer when he was being investigated by the police; (v) upheld the applicant's fourth request in part, by finding that a declaration to the effect that his rights have been breached, to be a just and effective remedy in view of the fact that it does not appear that the applicant suffered any substantive prejudice as a result of the said breach; with costs ordered to be borne as for one-third by the Attorney General and as for the remaining two-thirds by the applicant, provided that the costs of the preliminary plea raised by the Attorney General and the Commissioner of

Police and the costs of the Director General (Courts) and the Registrar of Criminal Courts and Tribunals to be borne by the applicant.

Merits

2. Applicant instituted these proceedings after being convicted in a trial by jury[1] of various offences relating to the importation into Malta, conspiracy to sell or deal in and possession of, dangerous drugs in violation of the provisions of Chapter 101 of the Laws of Malta. He was condemned by virtue of a judgement of the Criminal Court dated 13th January 2010, which was confirmed by the Court of Criminal Appeal on the 14th June 2012, to imprisonment for a term of twenty years and to payment of a fine of seventy thousand Euro (€70,000) and ordered the payment of the sum of one thousand nine hundred and nineteen Euro and forty two cents (€1,919.42) representing the court expenses and also ordered the forfeiture of all monies and other movable and immovable property pertaining to applicant, in favour of the Government of Malta.

3. Applicant claims that his fundamental rights enshrined in Article 39(6)(c) of the Constitution and Article 6(3)(c) were violated as a result of the deficiencies in the legal aid system which precluded him from having been afforded a proper and adequate defence in the criminal proceedings instituted

[1] Bill of Indictment Number 6/2009 in the names ***Republic of Malta vs John Udagha Omeh***.

against him that resulted in his conviction. He also maintained that he released a statement while in Police custody without having had the right to consult with a lawyer of his choice both prior to and during his interrogation, resulting in a breach of his fundamental right to a fair trial in terms of Article 39 of the Constitution and Article 6 of the Convention, for which breach applicant demanded an effective and adequate remedy. Finally, applicant contested, with reference to Article 39 of the Constitution and Articles 6(1) and 7 of the Convention, the discretion afforded to the Attorney General by virtue of the legal position resulting from the provisions of Article 22(2) of Chapter 101 at the time of his trial, which afforded the Attorney General the exercise of subjective, absolute and arbitrary discretion in the choice of whether the applicant would be tried before the Criminal Court or before the Court of Magistrates as a Court of Criminal Judicature and therefore deciding which punishment bracket would apply to his case.

4. By means of his reply, respondent the Attorney General contested applicant's allegations and claims as manifestly, legally and factually unfounded and maintained that contrary to his allegations, no breach of any of the provisions cited by applicant occurred in this case.

The First Court's Judgement

The first court arrived to its decision after having made the following considerations.:-

"Considers that by means of his application, the applicant John Udagha Omeh requests the Court to declare that his right to a fair hearing in terms of article 6 of the European Convention on Human Rights and article 39 of the Constitution have been violated due to the fact that he was not assisted by a lawyer during his interrogation by the police and consequently that he gave a statement without the assistance of a lawyer since at that time Maltese law did not afford him such a right. The applicant is also requesting the Court to declare that his right to a fair hearing in terms of article 6(3)(c) of the European Convention and article 39(6)(c) of the Constitution has been breached as he claims he was not provided with adequate legal assistance during the course of the criminal proceedings instituted against him. Lastly, he is requesting the Court to declare that the discretion granted by law to the Attorney General in terms of article 22(2) of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) to decide whether an accused person should be tried by the Court of Magistrates as a Court of Criminal Judicature or the Criminal Court is unconstitutional and violated his rights in terms of article 39 of the Constitution and articles 6 and 7 of the European Convention on Human Rights.[2]

"By way of remedy, the applicant requests the Court to provide him with all those remedies which are most effective and adequate, including by annulling and revoking the judgment delivered by the Court of Criminal Appeal on the 14th June 2012 in the name of **The Republic of Malta vs John Udagha Omeh**.

"The facts of the case are as follows. The applicant arrived in Malta on the 9th December 2007 aboard a flight from Tripoli. Upon arrival, he was intercepted by the Customs Department at the airport and a search of his luggage revealed that the applicant was carrying over 3 kilograms of cocaine, hidden beneath a false bottom in his luggage. The drugs were established to be 61.2% pure with a street value of approximately €299,644.

"The applicant claimed that he did not know that the luggage contained drugs. He was arrested and interrogated by the police wherein he released a statement declaring that he was a businessman and that when he arrived at the airport in Togo, from where he began his journey to Malta, he met an old friend by the name of Simon Oko who he claims told him was also on his way to Malta. The applicant claimed that Oko requested him to bring his luggage to Malta for him since he (Oko) had a problem with his ticket and could not make his flight. The applicant stated that Oko told him that upon arrival in Malta he would be contacted by a certain Chief Joe Uka to hand over the said luggage. The applicant also claimed that his friend told him the luggage contained only clothes and that when he opened it at the airport in Togo that is what he saw.

[2] The applicant does not mention article 6 in his application but written submissions were made by him to this effect.

"By means of a bill of indictment dated 9th March 2009, the applicant was charged with having:

1. "With another one or more persons in Malta or outside Malta, conspired for the purpose of selling or dealing in a drug in these islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and specifically of importing and dealing in any manner in the drug cocaine, and having promoted, constituted, organized and financed such conspiracy;

2. "Meant to bring or caused to bring or caused to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), contrary to the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta);

3. "Had in his possession a dangerous drug (cocaine) contrary to the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), so, however, that such offence was under such circumstances that such possession was not for the exclusive use of the offender;

"The applicant was convicted by the Criminal Court after a trial by jury. On the 13th January 2010, following a guilty verdict of 7 votes to 2 votes on all three counts, he was condemned to a term of imprisonment of 2 years and to a fine (*multa*) of €70,000 and was ordered to pay the sum of €1919.42 in court expenses. This judgment was confirmed by the Court of Criminal Appeal on the 14th June 2012.

"The Commissioner of Police, Director General (Courts) and the Registrar of Criminal Courts and Tribunals raised a preliminary plea contending that they are not the legitimate defendants in these proceedings.

"Franklin Calleja, Deputy Registrar, confirmed on oath that the choice of legal aid lawyers is within the remit of the Ministry for Justice. He explained that there are 17 lawyers who offer legal aid and that they are assigned to a case according to roster, depending on who is next on the list. He explained that in trials by jury, the legal aid lawyers appointed by the Court were only two up until 2011 - Dr Joseph Mifsud and Dr Malcolm Mifsud but that following Dr Joseph Mifsud's retirement in 2011, it is only Dr Malcolm Mifsud who represents defendants in trials by jury.

"The Court considers that the presence of the Comissioner of Police, Director General (Courts) and the Registrar of Criminal Courts and Tribunals is unnecessary in these proceedings and that consequently their plea should be upheld. It is evident from the acts of the case that the Director General (Courts) and the Registrar of Criminal Courts and Tribunals have nothing to do with the appointment of legal aid lawyers in each individual case in that it is simply a matter of appointing the lawyer who is next on the list.

"With regard to the Commissioner of Police, the Court considers that notwithstanding that the applicant complains of the fact that he gave a statement to the police before he was provided with assistance of a lawyer, the presence of the Attorney General in this proceedings is sufficient in view of article 181B of the Code of Organization and Civil Procedure (**Daniel Alexander Holmes vs L-Avukat Ġenerali et**, decided by the First Hall Civil Court in its Constitutional Jurisdiction on the 3rd October 2014[3] and **Aaron Cassar vs L-Avukat Ġenerali et**, decided on the 28th January 2016 and confirmed by the Constitutional Court on the 11th July 2016).

"With regards to the merits of the case, applicant claims a breach of his right to a fair trial in terms of article 39 of the Constitution and article 6 of the European Convention on Human Rights generally, and articles 6(3)(c) and 39(6)(c) specifically. He also claims a breach of article 7 of the Convention. The above mentioned articles read as follows:

> "*39. (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> "*(6) Every person who is charged with a criminal offence –*
> *(c) shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense;*

"<u>The Convention</u>

> "*6. (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> "*(3) Everyone charged with a criminal offence has the following minimum rights:*
>
> "*(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> "*7. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

[3] No appeal was filed from this part of the First Court's decision.

"As can be construed from the wording of the Constitution and the Convention, the right to legal assistance is linked to the right to legal aid where the circumstances of the applicant so merit.

"Before the Court of Magistrates as a Court of Criminal Inquiry, the applicant was asissted by legal aid lawyer Dr Mark Busuttil whilst during the trial by jury legal aid lawyer Dr Malcolm Mifsud was defence counsel. It is established in the case law of the European Court of Human Rights that there is no absolute right to choose one's own court-appointed legal aid lawyer. An individual who requests a change of legal aid lawyer must present evidence that the lawyer failed to perform satisfactorily (**Lagerblom v Sweden**, 14th January 2003).

"Legal assistance cannot be effective if a defendant lacks the time and facilities to take advise and prepare his case properly (**Goddi v Italy**, 9th April 1984). However, actual conduct of the defence is a matter between the accused and his lawyer. Nonethless, if the relevant authorities are alerted to manifest shortcomings on the part of the lawyer, they are required to act (**Daud v Portugal**, 21 April 1998). Undoubtedly, this also applies to legal aid lawyers. However, the state's obligation to intervene arises only where the failure to provide effective representation was manifestly or sufficiently brought to its attention (**Imbrioscia v Switzerland**, 24th November 1993) since only shortcomings which are attributable to the state authorities can give rise to a violation of article 6(3)(c) of the European Convention (**Tripodi v Italy**, 22nd February 1994).

"The applicant complains that his right to a fair trial was breached due to various shortcomings in the legal aid system. In his written submissions, the applicant clarifies that his complaint is directed at the system and not at the individual lawyers who assisted him before the Court of Magistrates or before the Criminal Court and the Court of Criminal Appeal.

"Specifically, the applicant complains of the restricted number of lawyers available to act as legal aid lawyers, the fact that they are assigned to a particular case without any reference being made to any specialisation which may be required in that case, that in the case of a trial by jury there is currently only one lawyer who offers his services as a legal aid lawyer, that the renumeration paid to legal aid lawyers is disproportionate to the committment required, and the fact that legal aid lawyers are paid by the Attorney General's Office. The applicant also complains of the fact that he was assisted by one lawyer before the Court of Magistrates and another when he was tried before the Criminal Court.

"The Court shall begin by considering those complaints directed at the legal aid system generally. From the acts of the proceedings before this Court and those of the criminal proceedings brought against the applicant, it is evident to the Court that the applicant never complained about any shortcomings committed by his court appointed lawyer, so much so that in his submissions he specifically states that his complaints are only directed at

the system. However, he fails to give concrete examples of how the system breached his rights, just as he fails to explain why his case merited a specialised lawyer.

"Whilst the Court agrees with the applicant that the right to a fair hearing includes the right to effective and proper legal assistance especially in view of the fact that in his specific case he faced a lengthy prison sentence, in order for the Court to find a breach of his rights, it was essential that the applicant present concrete proof of his claims that there were shortcomings in his defence brought about by the failure of the current legal aid system and that this was thus attributable to the state. In the case of **Rutkowski v Poland** (19th October 2000), the European Court stated that '*The obligation to intervene arises when the lawyer's failure has rendered the defence ineffective taking the proceedings as a whole.*' In the instant case this does not appear to have been so.

"In their book **Law of the European Convention on Human Rights**' (Second Edition), Harris, O"Boyle & Warbrick state:

> "*The right in Article 6(3)(c) is to 'practical and effective' legal assistance (Artico v Italy, 1980). But a state cannot be held responsible for every shortcoming of a lawyer acting for the defence. As stated in Kamasinski v Austria, it 'follows from the independence of the legal profession of the state that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed.' Because of the state's lack of power to supervise or control his or her conduct, a lawyer even though appointed by the state, is not an 'organ' of the state who can engage its direct responsibility under the Convention by his or her acts, in the way, for example, a policeman or soldier may (Alvarez Sanchez v Spain, 2001). Instead, the 'competent national authorities', who may be the courts or other state actors, 'are required by Article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention' (Kamasinki v Austria, 1980).*"[4]

"In the case of **Huseyn and Others vs Azerbaijan**, decided on the 26th July 2011, the European Court stated:

> "*In this connection, the Court reiterates that, under Article 6 § 3 (c) of the Convention, an accused is entitled to legal assistance which is practical and effective and not theoretical or illusory. This Convention provision speaks of "assistance" and not of "nomination": mere nomination does not ensure effective assistance since a lawyer may be prevented from providing such assistance owing to various practical reasons, or shirk his or her duties. A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. However, if a failure by legal-aid counsel to provide effective representation is manifest or is sufficiently brought to the authorities' attention in some other way, the authorities must take steps to ensure that the accused effectively enjoys the right to legal assistance (see Artico v. Italy, 13 May 1980, §§ 33-37, Series A no. 37,*

[4] Page 319.

> *and Kamasinski v. Austria, 19 December 1989, § 65, Series A no. 168). Moreover, where it is clear that the lawyer representing the accused before the domestic court has not had the time and facilities to organise a proper defence, the court should take measures of a positive nature to ensure that the lawyer is given an opportunity to fulfil his obligations in the best possible conditions (see, mutatis mutandis, Goddi v. Italy, 9 April 1984, § 31, Series A no. 76).*"

"Insofar as the applicant alleges that the legal aid lawyers appointed by the Court were inefficient, the applicant has not substantiated his claims with any examples of their failures. The applicant did not bring forward any proof of how the system failed him. Although the Court agrees that the current system leaves much to be desired, this does necessarily mean that in present case the system has effectively failed the applicant to the point that his right to a fair hearing has been breached. The Court refers to the above mentioned case of **Daniel Alexander Holmes vs Avukat Ġenerali et**, decided on the 16th March 2015, wherein the Constitutional Court held that the fact that the current system is not perfect and requires improvement does not necessarily mean that there has been a breach of fundamental rights.

"Regarding the applicant's complaint that there is only one lawyer to defend accused persons in trials by jury, it is established in the case law of the European Court of Human Rights that the defendant does not have the right to choose the legal aid lawyer assigned to him. In this case it does not appear that the lawyer appointed to defend the applicant did not have the required specialisation to take on the applicant's case, on the contrary, the fact that there is only one legal aid lawyer who is appointed to all those defendants who are granted legal aid when they are tried by jury effectively means that the lawyer appointed is an expert in the field. Once again, the applicant failed to show how the fact that the same lawyer is appointed as defence counsel in trials by jury where the defendant is granted legal aid has infringed his right to a fair hearing. The applicant has also failed to show what shortcomings arose from the fact that he was defended by one lawyer before the Court of Magistrates and another when he was tried before the Criminal Court. The Court reiterates that the right to free legal assistance does not include the right to choose the assigned lawyer and certainly does not require that the same lawyer be appointed during the criminal inquiry and during the actual trial.

"Finally, the court considered the applicant's complaint regarding the fact that legal aid lawyers are remunerated by the Attorney General's Office. The Court appreciates that justice must not only be done but must also be seen to be done. In these circumstances the Court considers that it would be more appropriate if legal aid lawyers were not paid out of the budget allocated to the Attorney General. However, the fact that the renumeration is so paid, does not mean that legal aid lawyers are in some way under the control of the Attorney General in a way that their integrity and independece would be put into doubt, necessarily giving rise to a breach of an individual's right to a fair trial. Both Dr Mark Busuttil and Dr Malcolm Mifsud testified that the Attorney General in no way interferes with their work as legal aid

lawyers and that they are in no way answerable to the Attorney General. Additionally, Adrian Tonna on behalf of the Attorney General's Office testified that legal aid lawyers are appointed by the Ministry for Justice and that the Attorney General is in no way involved in the choice of appointed lawyers. He also confirmed that legal aid lawyers do not report to the Attorney General in any way. The Court also notes that the renumeration that legal aid lawyers are paid is a fixed amount and so it is certainly not the case that the Attorney General has some sort of say as to what the lawyers should be paid for their services.

"As a result the Court finds the applicant's complaint is unfounded and ought to be rejected.

"**The discretion enjoyed by the Attorney General in terms of article 22(2) of the Dangerous Drugs Ordinance**

"The applicant also claims that his rights under article 39 of the Constitution and articles 6 and 7 of the Convention have been breached owing to the discretion granted by law to the Attorney General to choose to try him before the Court of Magistrates or the Criminal Court.

"At the time of the applicant's arrest, article 22(2) of the Dangeorus Drugs Ordinance read as follows:

> "*Every person charged with an offence against this Ordinance shall be tried in the Criminal Court or before the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the Attorney General may direct...*"

"The law did not provide established criteria to determine whether an accused would be tried before the Court of Magistrates as a Court of Criminal Judicature or the Criminal Court but rather the decision was taken by the Attorney General notwithstanding the fact that the punishment varies greatly from that which may be imposed by the Court of Magistrates (a maximum of 10 years imprisonment) and the Criminal Court (a maximum of life imprisonment). The pecuniary consequences also vary greatly.

"By virtue of recent amendments to the law (Act XXIV of 2014), persons who are charged with an offence against the Dangerous Drugs Ordinance have been granted the right of appeal, pending the criminal proceedings, to the Criminal Court, from the Attorney General's decision to submit them to trial before the Criminal Court. The amendments also oblige the Attorney General to exercise his discretion in accordance with established guidelines which have been included in the Forth Schedule of the Ordinance.

"This means that the law was only amended after the Court of Criminal Appeal's judgment confirming that of the Criminal Court against the applicant, and consequently, the applicant could not contest the Attorney General's decision to try him before the Criminal Court.

"In recent years the Constitutional Court has been called upon time and time again to cast judgment on the subject of the Attorney General's discretion, bestowed on him by the above quoted article 22(2) of the Dangerous Drugs Ordinance.[5] The matter was also the subject of the case **Camilleri v Malta** decided by the European Court in Strasbourg on the 22nd January 2013. Therefore, it can be said that case law on the matter is more or less established.

"The Court shall begin by considering whether the Attorney General's discretion breached the applicant's right to a fair hearing in terms of article 39 of the Constitution and article 6 of the Convention.

"The discretion bestowed on the Attorney General by virtue of the above mentioned article 22(2) of the Dangerous Drugs Ordinance most certainly had an implication on the maximum punishment which the applicant could receive, but the Attorney General's decision did not breach the applicant's right to a fair hearing. The Attorney General's discretion did not determine the innocence or guilt of the applicant, it only determined the court before which he was to be tried and consequently the applicable sentence. This means that all of the principles that are part and parcel of the right to a fair hearing were guaranteed independently of the decision of the Attorney General as both the Court of Magistrate and the Criminal Court are independent and impartial, they respect the principle of equality of arms and safeguard all the requirements which together make up the right to a fair hearing in terms of articles 39 of the Constitution and article 6 of the European Convention.

"In the case of **Godfrey Ellul vs Attorney General**, decided on the 27th April 2006, the Constitutional Court stated that article 6 of the Convention regulates the procedures before the court and not the way in which an accused person is brought before the court. The Court continued by stating:

> "*Sew quddiem il-Qorti Kriminali u sew quddiem il-Qorti tal-Maġistrati, min ikun mixli b'akkuża kriminali jkollu l-garanziji kollha li jrid dan l-artikolu u ma nġiebet ebda prova illi l-appellant kien imċaħħad minn xi waħda jew aktar minn dawn il-garanziji. Imkien f'dan l-artikolu ma tingħata garanzija illi l-prosekutur ma għandux ikollu diskrezzjoni bħal dik mogħtija lill-Avukat Ġenerali fl-art. 22(2) tal-Kap. 101. Din il-Qorti, għalhekk, bħall-ewwel qorti ma ssibx li kien hemm ksur ta' l-art. 6 tal-Konvenzjoni.*"

"The same conclusion was reached in the cases of **Repubblika ta' Malta vs Mario Camilleri** decided by the Court of Criminal Appeal on the 23rd January 2001 and more recently in the cases of **Joseph Lebrun vs Avukat**

[5] **Godfrey Ellul vs Avukat Ġenerali** (Constitutional Court, 27th April 2006); **Claudio Porsenna vs Avukat Ġenerali** (Constitutional Court, 16th March 2012); **Joseph Lebrun vs Avukat Ġenerali** and **Martin Dimech vs Avukat Ġenerali** (both decided by the Constitutional Court on the 16th December 2014), **Daniel Alexander Holmes vs Avukat Ġenerali** (Constitutional Court), 15th March 2015); **Jean Pierre Abdilla vs Avukat Ġenerali** (Constitutional Court, 16th May 2016); **Stephen Nana Owusu vs Avukat Ġenerali** (Constitutional Court, 30th May 2016) amongst others.

Ġenerali, decided by the Constitutional Court on the 16th September 2014 and **Stephen Nana Owusu vs Avukat Ġenerali**, confirmed by the Constitutional Court on the 30th May 2016 amongst others.

"Consequently, the Court finds that the discretion bestowed on the Attorney General by virtue of article 22(2) of the Dangerous Drugs Ordinance did not breach the applicant's right to a fair trial in terms of article 39 of the Constitution or article 6 of the European Convention.

"The applicant also claims that the discretion enjoyed by the Attorney General prior to the 2014 amendments was in breach of article 7 of the European Convention which provides that there shall be no punishment without law. The applicant bases his claim on the lack of forseeability of the applicable punishment, that the discretion was an absolute one, that the criteria on which the Attorney General based his decision was not established by the law and that consequently it was the Attorney General's discretion to determine the parameters of the applicable punishment.

"By virtue of article 7, the European Convention establishes the basic principle that it is only the law which can define a crime and impose a punishment – *nullum crimen sine lege nulla poena sina lege.* It follows that crimes and their consequences must be established by law in a way that one may know from the wording of the law what is prohibited by that same law (**Scoppola v Italy**, 17th September 2009).

"The First Hall Civil Court in its Constitutional Jurisdiction in the case of **Stephen Nana Owusu vs Avukat Ġenerali** of the 14th January 2015 referred to the study conducted by Professor J.J. Cremona in **The Rule of Law as a Fundamental Principle of the European Convention on Human Rights**[6] wherein he wrote:

> "*The link between foreseeability and the conferment of discretion is a crucial one. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference*. (...) *Arbitrariness is the precise antithesis of the rule of law. In fact the Court has considered that the principle of the rule of law in a democratic society requires a minimum degree of protection against arbitrariness.*"

"In the case of **Kokkinakis v Greece** (25th May 1993) the European Court stated the following about article 7 of the Convention:

> "*It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the*

[6] Prof J.J. Cremona 'Selected Papers 1990-2000' Vol. 2 'Human Rights and Constitutional Studies'

individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."

"In the case of **Mark James Taylor v United Kingdom** (3rd December 2002) the European Court held:

"*[-.] it has had occasion to stress in the context of its judgments under Article 7 that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege), from which it follows that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the domestic courts interpretation of it, what acts and omissions will make him liable and, it would add for the purposes of the instant case, what penalties can be imposed (see the Kokkinakis v Greece judgment of 25 May 1993, Series A no. 260-A, §52; Streletz, Kesllser and Krenz v. Germany [GC], nos.34044/96, 35532/97 and 44801/98, ECHR 2001- II, §50).*"

"In the case decided by the European Court in the names of **Camilleri v Malta**, the European Court found that article 120A(2) of the Medical Kindred Ordinance which was similar to article 22(2) of the Dangerous Drugs Ordinance before it too was amended in 2014, in that the Attorney General had an absolute discretion to decide whether to try an accused before the Court of Magistrates or the Criminal Court, breached article 7 of the Convention because '*it failed the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.*'

"The European Court held:

"*39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of the law was sufficiently clear and satisfied the requirements of accessibility and foreseeability at the material time.*

"*40. The Court finds that the provision in question does not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that section 120A (2) of the Medical and Kindred Professions Ordinance provided for the punishment applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A (2) of the above-mentioned Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of foreseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried.*

"*41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As*

acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

...

"*43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which would aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards (...)*

"*44. In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.*'

"*45. It follows that there has been a violation of Article 7 of the Convention.*"

"The Constiutional Court has established that the law must not be applied in abstract but to the concrete cases at hand. In the case of **Daniel Alexander Holmes vs L-Avukat Ġenerali et**, decided on the 16th March 2015, the Constitutional Court stated the following in reaction to the **Camilleri** judgment:

"*Jekk din hija l-interpretazzjoni prevalenti – biex ma nsejħulhiex korretta – tal-art. 7, u jidher ukoll illi hija l-interpretazzjoni adottata fis-sentenzi ta' dawn il-qrati wara Camilleri xejn ma jiswa li ngħidu illi l-attur kien jaf, qabel ma qatagħha li jwettaq ir-reat, li seta' jeħel minn sitt xhur sa għomru l-ħabs; jekk ma setax, f'dak il-waqt, ikun jaf jekk setax jeħel minn sitt xhur sa għaxar snin jew minn erba' snin sa għomru, mela ma kienx hemm il-prevedibilità li jrid l-art. 7 kif interpretat.*

"*Fil-verità iżda – għax il-liġi trid titħaddem fil-każ konkret u mhux fl-astratt – seta' jew ma setax jobsor l-attur illi l-gravità tar-reat minnu mwettaq la kienet żgħira u lanqas borderline, b'mod illi jekk jinqabad x'aktarx illi jitressaq quddiem il-Qorti Kriminali?*"

"In the case before the Court today, the applicant was caught red handed with over 3 kilograms of cocaine with a purity of 61.2% and having a street value of €299,644. Whilst it is true that the applicant only found that that he was going to be tried by the Criminal Court when he was formally charged, the seriousness of his crime cannot have had escaped him. By no stretch

of the imagination could the applicant be considered a 'borderline case' to the effect that he could have reasonably been under the impression that the crime merited that he be tried before the Court of Magistrates. Therefore, he could surely have forseen that he would be tried before the Criminal Court.

"The Court therefore concurs with the interpretation given by the Constitutional Court in the above mentioned case of **Daniel Alexander Holmes vs Avukat Ġenerali** amongst others and that therefore, the applicant's complaint in this regard should also be rejected.

"**Right to legal assistance during investigation and access to the police file**

"The applicant complains that his right to a fair trial in terms of article 39 of the Constitution and article 6 of the Convention was breached because at the time when he was interrogated by, and gave his sworn statement to, the police, Maltese law did not afford him the right to be assisted by a lawyer. The applicant also complains that he was not given access to his police file.

"The right to legal assistance at the pre-trial stage was introduced by means of Act III of 2002. However, the law only came into force in 2010 by means of Legal Notice 35 of 2010 which means that the applicant is correct in stating that when he gave his statement to the police, the law did not provide for legal assistance during pre-trial investigations, specifically during questioning, whether this was done by the police or by a Magistrate in his or her investgative role. Before questioning, suspects such as the applicant at the time, would be cautioned, that is, informed of their right to remain silent and that anything that they said could be written down and produced as evidence against them. At the time, no inferences could be drawn by the court during the trial from the silence of the accused during questioning.

"Insofar as the applicant's complaint is based on a breach of article 39 of the Constitution, it has been established by the Constitutional Court that article 39 applies to persons who have been charged with a criminal offence and so it does not apply to pre-trial proceedings such as the police interrogation. As a result the applicant's complaint cannot be held validaccording to article 39 of the Constitution.[7]

"Article 6(3)(c) of the European Convention provides that everyone who is charged with a criminal offence has the right to '*defend himself in person or through legal assistance of his own choosing.*' However, the applicability of article 6 of the Convention has been intrepreted by the case law of the European Court to include the moment when a person is charged with a criminal offence. Specifically, the Court has defined 'charge' for the purposes of article 6 of the Convention as '*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*' or some other act which carries '*the implication of such an*

[7] **Peter Joseph Hartshorne vs Avukat Ġenerali et**, decided by the First Hall Civil Court in its Constitutional Jurisdiction on the 30th May 2014 amongst others.

allegation and which likewise substantially affects the situation of the suspect' (**Corigliano v Italy**, 10th December 1982).

"The Court is therefore satisfied that the applicant's complaint is admissible in terms of article 6 of the European Convention.

"On the matter of the right to legal assistance in the pre-trial stage, in the case of **A.T. v Luxembourg**, decided on the 9th April 2015, the European Court held:

> "*62. The Court reiterates that although the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial before a "tribunal" competent to determine "any criminal charge", it may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see Salduz, cited above, § 50, and Panovits v. Cyprus, no. 4268/04, § 64, 11 December 2008). Furthermore, the right set out in paragraph 3 (c) of Article 6 is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph 1 (see Imbrioscia v. Switzerland, 24 November 1993, § 37, Series A no. 275, and Brennan v. the United Kingdom, no.39846/98, § 45, ECHR 2001-X*).
>
> "*63. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see Krombach v. France, no. 29731/96, § 89, ECHR 2001-II). 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 the case that there are compelling reasons to restrict that right. The Court specifies that even in such cases, denial of access to a lawyer must not unduly prejudice the rights of the accused under Article 6, and that 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). The Court found a violation of Article 6 §§ 1 and 3 (c) notwithstanding that the applicant had subsequently benefited from legal assistance and adversarial proceedings, having noted, in particular, that the restriction in question on the right to a lawyer had been based on the systematic application of legal provisions (see Salduz, cited above, §§ 56 and 61).*
>
> "*64. The fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or otherwise remanded in custody, whether interrogations take place or not. The Court emphasises in that respect that the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance, pointing out that discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence which the lawyer must be able to exercise freely (see Dayanan, cited above, §§ 31-33). Moreover, an accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the*

fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself (see Pavlenko v. Russia, no. 42371/02, § 101, 1 April 2010).

"*65. The Court has had occasion to reiterate that, first of all, a person "charged with a criminal offence" within the meaning of Article 6 of the Convention is entitled to receive legal assistance from the time he or she is taken into police custody or otherwise remanded in custody and, as the case may be, during questioning by police or by an investigating judge; secondly, while a restriction of this right may in certain circumstances be justified and be compatible with the requirements of that Article, any such restriction that is imposed by a systemic rule of domestic law is inconsistent with the right to a fair trial (see Simons v. Belgium (dec.), no. 71407/10, § 31, 28 August 2012, and Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, § 80, 24 October 2013).*

"*66. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000, and Ananyev v. Russia, no. 20292/04, § 38, 30 July 2009). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Salduz, cited above, § 59, and Yoldaş, cited above, § 51).*'

"....

"'*The applicant made detailed statements during the impugned police hearing. Although he denied all the charges against him and made no incriminating statements, the Court nevertheless emphasises that the investigation stage of criminal proceedings is of crucial importance as the evidence obtained at this stage determines the framework in which the offence charged will be considered (see Mehmet Şerif Öner v. Turkey, no. 50356/08, § 21, 13 September 2011).*"

"Recently in the case **Borg v Malta** (12th January 2016) the European Court had this to say:

"*56. 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).*

"*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. 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).

"*58. 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).*

"*59. The Court observes that the post-Salduz case-law referred to by the Government (paragraph 53 in fine) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of legal provisions allowing for such assistance or from an explicit ban in domestic law.*

"*60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, Salduz, cited above, § 56; Navone andOthers v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no.25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, Dayanan v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013).*

"*61. 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).*

"*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 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).*

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

"As has already been stated, prior to the above mentioned case of **Borg v Malta**, the European Court delivered many judgments on the subject of the right to legal assistance during police interrogation. In the past, the

Constitutional Court interpreted the right to legal assistance during the pre-trial stage restrictively, in that it only found application in cases where the accused was considered to have been a vulnerable person who had been prejudiced by the lack of legal assistance during interrogation or when giving a statement to the police (**Charles Steven Muscat vs Avukat Ġenerali,** delivered by the Constitutional Court on the 8th October 2012 amongst others).

"However, in view of the **Borg v Malta** judgment, the Constitutional Court has, most recently in the case of **Aaron Cassar vs Avukat Ġenerali et** (11th July 2016), despite standing by the more restrictive interpretation it had always given to the right to legal assistance during police interrogation, found that this restrictive interpretation is no longer teneble in light of **Borg v Malta**, wherein the European Court found that the mere lack of right to legal assistance during police interrogation amounted to a breach of article 6(1) read with article 6(3) of the Convention.

"In view of the above, this Court finds that the fact that Maltese law did not provide for the right of the accused to be assisted by a lawyer when he was interrogated by, and gave his statement to, the police, amounts to a breach of his fundamental right to a fair hearing in terms of article 6(1) read with article 6(3) of the Convention.

"With regard to the lack of access to his police file, the Court finds that the applicant did not specify in which way this amounted to a breach of his right to a fair hearing. It is an established principle that in order for the defendant to receive a fair trial, the principle of equality of arms must be respected. This means that '*each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-a-vis his or her opponent* (**A.B. v Slovakia**, 4th March 2003). In the present case, no allegations were made by the applicant to the effect that he was not afforded the right to present his evidence or to the cross examine the witnesses brought to testify by the prosecution. It follows therefore that the Court cannot find a breach of his right to a fair trial simply because of the fact that he was not given access to his police file.

"With regard to the applicant's request for an adequate and effective remedy for the above mentioned breach of his rights, the Court observes that in his sworn statement given to the police, the applicant had denied any knowledge of the fact that the suitcase which he had brought to Malta contained illicit drugs. The Court also observes that in this case the applicant was caught red-handed with over 3 kilograms of cocaine in his luggage. As a result, it does not appear that the applicant was found guilty on the basis of the content of the statement which he gave to the police. It is also worth noting that the applicant did not change his version of events throughout the criminal proceedings in question and as a result the Court certainly sees no reason why the sentence of the Criminal Court or that of the Court of Criminal Appeal should be annulled but that in the

> circumstances of the case a declaration that his right to a fair trial has been breached will serve as a just and effective remedy".

The Appeal

5. Applicant filed his appeal by means of an application dated 20th February 2017 where, for the reasons stated therein, he requested that the judgement delivered by the first Court on the 31st January 2017 be (i) confirmed in so far as the first Court upheld the appellant's third request and declared that this right to a fair hearing in terms of Article 6(1) read together with Article 6(3) of the Convention has been breached, and in so far as the preliminary plea raised by the aforementioned respondents was upheld; (ii) annulled and revoked in that part where the first Court rejected applicant's first request that his right to a fair trial in terms of Article 39(6)(c) of the Constitution and Article 6(3) of the Convention, was breached as a result of the legal assistance provided by his appointed legal aid lawyers or the legal aid system in general, and in that part where the first Court rejected his second request to declare the exercise of the discretion by the Attorney General in terms of Article 22(2) of Chapter 101 of the Laws of Malta unconstitutional and in breach of Article 39 of the Constitution and Articles 6 and 7 of the Convention, was rejected; and (iii) vary that part of the judgement where the Court declared that a mere declaration to the effect that applicant's rights protected by Article 6(1) read together with Article 6(3), were violated and grant him a proper and appropriate remedy, with costs of both instances against respondents.

6. The grievances raised by applicant in his appeal, in essence, are the following:- (i) he was not afforded an adequate and appropriate defence during the course of the criminal proceedings instituted against him. According to applicant, the legal assistance provided by his legal aid lawyers or the legal aid system established and provided by Maltese Law at the time of his trial did not satisfy the criteria required by the Constitution and the Convention to ensure that such legal defence is adequate and appropriate; (ii) the discretion afforded to the Attorney General by virtue of the legal position resulting from the provisions of Article 22(2) of Chapter 101 at the time of his trial, in the choice of whether the applicant would be tried before the Criminal Court or before the Court of Magistrates as a Court of Criminal Judicature and therefore which punishment bracket would apply to his case, must be deemed to be in violation of his rights as enshrined in Article 39 of the Constitution and Articles 6(1) and 7 of the Convention; (iii) the remedy awarded to applicant, consisting in the mere declaration that his rights under Article 6(1) when read together with Article 6(3), have been violated, cannot be held to be a just and effective remedy since the said breach constituted a substantive prejudice in his trial which brings about the illegality of his entire trial. Consequently, applicant claims that the judgement of "*both Courts*" should be deemed to be null and devoid of effect. (iv) Finally, applicant claims that the decision ordering him to pay a portion of the costs of the proceedings before the first Court is unjustified and, given that the same Court established that during the

criminal trial his fundamental rights had been breached, he should not be made to shoulder any costs of those proceedings which were in any event intended to obtain a declaration of such violation.

7. Respondent Attorney General, by means of a reply filed on the 3rd March 2017 and for the reasons set out therein, requested that the appeal filed by appellant be rejected and the judgement of the first Court confirmed.

The Grievances

8. This Court cannot but note that the applicant's appeal application is in essence an almost identical reproduction of his written submissions filed before the first Court, at least in so far as the heads of judgement appealed from are concerned. Since applicant does not in any manner identify why and where he disagreed with the considerations made by the first Court which led to the conclusions that form the object of this appeal, and simply reiterates the arguments already made before the Court of first instance, it is evident that his grievances are exclusively concerned with the appreciation of facts and interpretation of law made by the first Court with regard to the heads of judgement appealed from.

<u>The First Grievance</u>

9. The first Court rejected applicant's first request that his right to a fair trial in terms of Article 39(6)(c) of the Constitution and Article 6(3) of the

Convention were breached as a result of the legal assistance provided by his appointed legal aid lawyers or by the legal aid system in general.

10. As far as the first aspect of this grievance is concerned, it is observed that the Court of first instance found that applicant's claim was unfounded because he did not illustrate how his legal aid lawyers failed to provide him with an effective defence. In **Kamasinski v. Austria**[8], it was established that if the legal aid lawyer fails to provide effective representation, and this is manifest or is brought to the State authority's attention, then the State is under an obligation to intervene and rectify the failure:-

> "A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes … It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way".

11. Consequently, in this case where applicant manifestly failed to identify any specific failing of his Court-appointed lawyers both during the course of his criminal trial and in the acts of these proceedings, and also omitted to bring any alleged failure to the notice of the Courts hearing the criminal proceedings against him, this Court cannot but agree with the conclusion of the Court of first instance, that his complaint in this regard is unjustified.

[8] Decided on 19th December 1989, paragraph 65.

Indeed, after examining the acts of the criminal proceedings against applicant, this Court observes that applicant was always duly assisted for each and every hearing during the compilation of evidence proceedings, save for three hearings where in any event no witnesses were heard. Moreover, no less than two written applications were lodged on applicant's behalf requesting *inter alia* the release of his personal belongings. During the trial by jury applicant was also duly assisted by the Court-appointed lawyer who carried out cross-examinations of all witnesses produced, made oral submissions where required and also filed and defended an appeal from the judgement of the Criminal Court. Consequently there can be no question of any failure on the part of the Court-appointed lawyers in having undertaken those basic functions that real and effective assistance in terms of the Convention, require.

12. Above all, it is also significant to note that during the hearing of the 13th May 2014[9], applicant through his defence counsel registered the following declaration in the acts of the proceedings:-

> "… his grievances in this case are essentially directed at the legal aid system in general and definitely not against the particular lawyers assigned to this case".

13. In his written submissions and finally in his appeal application, applicant again expressly emphasized that this his complaint is directed at the system's

[9] Fol. 31.

failure to ensure adequate and specialised legal assistance worthy of the gravity and nature of the criminal offences with which he was charged, and not at the lawyers themselves. In the light of these express declarations, this Court cannot but conclude that applicant has unequivocally renounced to the request made in his appeal application for this Court to revoke the decision that his right to a fair trial in terms of the above-cited provisions of the Constitution and the Convention "*has not been breached as a result of the legal assistance provided by his appointed legal aid lawyers*[10]." Therefore this Court rejects this aspect of applicant's grievance.

14. Applicant also bases his first grievance on the allegation that he was not afforded a proper and adequate defence in the criminal proceedings taken against him as a result of the glaring deficiencies in the legal aid system provided by the State. Applicant attributes these deficiencies to various factors: while he had no right to choose the particular lawyer who would defend him in the proceedings, he was assigned two different lawyers for both stages of the criminal proceedings. Moreover, he complains that legal assistance is not assigned on the basis of the nature and complexity of the case at hand so that the limited number of legal aid lawyers meant that the State failed to ensure specialised and therefore adequate legal assistance worthy of the nature and gravity of the offences applicant was charged with.

[10] Page 23 of appeal application, paragraph 2, at fol, 171.

15. This Court agrees with the conclusion reached by the Court of first instance that the right enshrined by Article 39 of the Constitution and Article 6(3) of the Convention does not extend to the right of the accused who is assigned free legal assistance by the State, to choose the individual lawyer who is appointed to represent him. It is to be noted that the prevalent view of the European Court of Human Rights [European Court] in such cases suggests that there is no absolute right to choose a particular lawyer even when the applicant is in possession of financial means and does not intend to benefit from legal aid provided by the State, because the State must always remain entitled to regulate the standards of criteria, such as professional qualifications and conduct, required of lawyers practicing in its Courts. As such, the restrictions to this right are more pronounced when free legal aid is awarded under Article 6(3)(c). In fact, the exercise of the State's discretion in the appointment of legal aid lawyers is not generally construed as a violation of the right protected by the said Article 6(3)(c). In the judgement **Croissant v. Germany**[11], the European Court reiterated that the right to choose one's own counsel cannot considered to be absolute:-

> "… notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the Courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national Courts must certainly have regard to the defendant's wishes … However, they can

[11] Application No. 13611/88, decided 25th September 1992, cited in ***Open Society Justice Initiative: European Court of Human Rights Jurisprudence on the Right to Legal Aid.***

> override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice"[12].

16. In so far as concerning applicant's grievance related to the lack of specialisation of the Court-appointed lawyers within the context of the complexity of his case and the gravity of the charges brought against him, and the assignment of two different lawyers for the two separate stages of the criminal trial, it would be appropriate to refer to the judgement of **Mayzit v. Russia**[13], where the European Court, while finding no violation of Article 6, accepted the State authorities' argument that appointment of professional lawyers, as opposed to lay persons, served the interests of quality of the defence in view of the seriousness of charges and complexity of the case. The Court referred to the *Croissant* case and observed that Article 6(3)(c) guaranteed that proceedings against the accused would not take place without an adequate representation for the defence, but it did not give the accused the right to decide himself in what manner his defence should be conducted[14].

17. Above all, it does not result from the evidence produced before the Court of first instance, namely from the acts of the criminal trial against applicant, that applicant had put respondent on notice, at any stage of the

[12] Paragraph 29 of the judgement.

[13] Application No. 63378/00, decided 20th January 2005.

[14] In ***Ramon Franquesa Freixas v Spain***[14], the applicant complained that his rights according to Article 6(3)(c) during his trial were violated because he had not been assigned a lawyer specializing in criminal proceedings to defend him. The European Court retained that Article 6(3)(c) did not guarantee a defendant the right to choose which lawyer the Court should assign him.

criminal proceedings taken against him, of any shortcoming or prejudice arising from the assignment of his Court-appointed lawyers which might result in a possible infringement of his rights to effective legal assistance. This, the Court reiterates, is sufficient to find that there was no violation of Article 6(3)(c), particularly in the light of the fact that case-law of the European Court suggests that, in order for a violation of Article 6(3)(c) to occur in the event that errors in the conduct of the defence are not manifest, applicant must show that he had taken steps to bring the State's attention to these deficiencies[15].

18. Applicant also levelled grievance at the fact that remuneration of legal aid lawyers in Malta at the time of his trial was not only paltry and thus not commensurate to the responsibilities incumbent on legal aid lawyers, but also paid by the respondent Attorney General's Office. In applicant's view, the funding and payment by the office of the prosecutor of defence counsel's remuneration amounts in itself to a breach of one of the fundamental tenets of natural justice. While this Court does agree with applicant that the system whereby legal aid lawyers were appointed by the Court to represent accused persons in criminal trials was not ideal, it is not every failing that amounts to an infringement of fundamental human rights. Indeed, from the evidence brought[16] it does not result that, apart from issuing payment of remuneration,

[15] ***Twalib v. Greece***, Ref. No. 42/1997/826/1032, decided 9th June 1998

[16] Testimony of Adrian Tonna, fol. 33 and 34. See also testimony of Dr. Mark Busuttil and Dr. Malcolm Mifsud, a fol. 59 to 61, and 65, 66.

the respondent had any role in the choice of Court-appointed lawyers in criminal trials or instructed them in any way regarding the conduct of their work as Court-appointed lawyers. This Court therefore agrees with the conclusions reached by the Court of first instance in this respect, and finds that this aspect of applicant's grievance is also unfounded and must be rejected.

The Second Grievance

Breach of Article 7

19. Applicant disagrees with the decision of the Court of first instance which rejected his complaint that the discretion exercised by the Attorney General by virtue of the provisions of Article 22(2) of Chapter 101 as in force at the time of his criminal trial breaches his fundamental rights. In his appeal, applicant once again contests the absolute, subjective and arbitrary discretion that was afforded to the Attorney General by virtue of the obtaining legal position at the time of his trial in the choice of whether the applicant would be tried before the Criminal Court or before the Court of Magistrates as a Court of Criminal Judicature and therefore which punishment bracket would apply to his case, including whether applicant would face a maximum sentence of life imprisonment or of ten years imprisonment for the same offences. Applicant maintains that the exercise of this discretion by the Attorney General in his case, that resulted in the decision to issue of a Bill of Indictment against him,

was not subject to any procedural safeguards or censure by any Court and is arbitrary.

20. According to applicant, the determination by the Attorney General of the punishment for an offence without reference to stipulated legislation, rules or other specific criteria, breached the requirements of Article 39 of the Constitution and Article 7 of the Convention on account of its arbitrariness and the lack of foreseeability of the consequences of the relative decision, as well as his right to a fair trial by an independent and impartial tribunal in terms of Article 6(1) of the Convention.

21. Respondent argued that the seriousness of the crime committed by applicant was evident and, while referring to the most recent case-law of this Court, maintained that there was “absolutely no doubt” that applicant could have foreseen that he would be tried before the Criminal Court.

22. Regarding the first ground of this grievance relating to the violation of applicant’s right to a fair hearing based on Article 39 and Article 7, that is the arbitrariness of the respondent’s discretion and the lack of foreseeability of the consequences of the decision taken to try the case before one Court and not another with a consequential radical disparity in the punishment bracket,

reference is made to the text of the cited Articles applicant claims to have been breached. Article 7 of the Convention reads:-

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> "2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations".

23. Article 39(8) of the Constitution is in substance identical to Article 7 and consequently the interpretation afforded to applicant's grievance regarding the legality of Article 22(2) of Chapter 101 in terms of Article 7 of the Convention applies also to an interpretation of the same grievance under Article 39(8). It is unequivocally established in the jurisprudence of the European Court that Article 7 of the Convention, as is the case with other Articles of the Convention, rests on the notion of "legality" or "lawfulness", and thus requires the existence of a legal basis in order to create an offence and impose a sentence or a penalty, which legal basis must comprise qualitative requirements, in particular those of accessibility and foreseeability[17]. In **Kokkinakis v. Greece**, the Court held that when speaking of "law" Article 7 refers to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as

[17] ***Del Río Prada v. Spain*** (G.C.) Appl. No. 42750/09, decided on 21st October 2013.

unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability[18].

24. Article 7 requires that these qualitative elements must be satisfied as regards both the definition of an offence[19] and the penalty the offence in question carries[20] or its scope. Insufficient "*quality of law*" concerning the definition of the offence and the applicable penalty constitutes a breach of Article 7 of the Convention[21]. As to the requirements of accessibility and foreseeability of the legal basis for the *quantum* of the applicable penalty for offences with which an accused person is charged, the ***John Camilleri*** case established that these requirements were lacking in the discretion afforded to the Attorney General in the exercise of his powers in the context of Article 22(2) of Chapter 101. The European Court maintained that the provisions of this Article as they existed prior to the amendments that came into force in 2014 were lacking in the requirement of the foreseeability of the applicable sentencing standards in respect of offences against the Ordinance, because the standards of sentencing of such offences were set not by criteria defined by law, but by the Attorney General in his subjective and uncensored choice of forum for the trial of the offence. As such Article 22(2) was held to violate the requirements of Article 7.

[18] See also ***Tolstoy Miloslavsky v. the United Kingdom***; judgment of 13th July 1995.

[19] Vide ***Jorgic v. Germany.*** In the case at hand, it is not contested that the acts carried out by applicant constituted an offence defined by law at the time of commission.

[20] ***Kafkaris v. Cyprus*** (G.C.) Appl. No. 29106/04, decided on the 12th February 2008.

[21] ***Kafkaris v. Cyprus*** (G.C.), para. 150 and 152.

25. The principles expounded in the ***John Camilleri*** judgement were applied in various subsequent judgements of the national Courts in the context of criminal trials, where it was consistently held[22] that the discretion under scrutiny in the provisions of Article 22(2) of the Dangerous Drugs Ordinance as in force prior to the 2014 amendments infringed the requirements of Article 7. It was indeed declared that:-

> "*Is-sentenza ta' Camilleri v. Malta hi finali. Jidher li l-Istat aċċetta l-konklużjoni tal-qorti tant li emenda l-liġi (Att XXIV tal-2014). Din il-qorti m'għandhiex x'iżżid ma' dak li diħà qalet fis-sentenzi ta' Lebrun u Dimech…*".[23]

26. Such was the position taken until this Court, in its judgement in the case **Daniel Alexander Holmes v. Avukat Generali[24]**, in so far as the punishment bracket applicable to offences under the Ordinance is foreseeable, there can be no violation of the requirements of Article 7. The Court of first instance in its judgement of the 31st January 2017 decided to adopt the views expounded in the ***Holmes*** judgement and reject, for the same reasons, applicant's claim in this case that his rights enshrined in Article 7 were violated.

27. In view of this apparant departure from a series of local judgements which have afforded a consistent interpretation of Article 22(2) that is parallel

[22] Amongst which: ***Repubblika ta' Malta vs Rafal Zelbert*** (P.A. S.K. decided 16th May 2014) Ref. 103/2013; ***Mario Camilleri vs Avukat Generali*** (P.A. S.K. decided 9th July 2013) Ref. 84/2011; ***Repubblika ta' Malta vs Matthew Zarb*** (P.A. S.K.) decided 7th March 2014.

[23] ***Daniel Alexander Holmes vs Avukat Generali et*** – judgement in first instance, decided 3rd October 2014.

[24] 16th March 2015.

to that of the European Court, this Court sees the need to settle the matter once and for all. This is necessary mainly in order to avoid a lack of uniformity and consistency in the judgements of the national Courts on this matter. It is observed that, although the observations of the European Court in the ***John Camilleri*** case are correct and the discretion afforded to the Attorney General in terms of Article 22(2) of Chapter 101 does appear in the abstract to be arbitrary in so far as the criteria for the exercise of such discretion are not regulated by Law, an *ad hoc* analysis of the circumstances of each particular case is nonetheless always necessary in order to determine whether the element of arbitrariness in the exercise of such discretion results distinctively in the particular case under examination. In his appeal, applicant makes no particular mention of the requirement of accessibility in the assessment of the arbitrariness or otherwise of respondent's discretion in his case, so this criterion will not be considered by this Court in its judgement.

28. Consequently, in so far as the requirements of accessibility and foreseeability are concerned, the Court, in order to determine applicant's complaint about the element of arbitrariness, must in any event assess whether these were lacking in the discretion exercised by the Attorney General in terms of Article 22(2) of Cap. 101 in applicant's case.

29. The Court of first instance in its judgement of the 31st January 2017 decided to follow the considerations made in the ***Holmes*** judgement and conclude that, in this particular case, the law in Article 22(2) was sufficiently

clear so that applicant could easily have come to the conclusion that that upon the commission of the relative offence, he would be liable to anywhere between six months imprisonment and life imprisonment. The Court of first instance held that, in its view, the applicant should have been sufficiently aware of the gravity of the circumstances of the particular offence committed by him to be able to reasonably foresee that he would likely be tried before the Criminal Court and not before the Court of Magistrates.

30. This Court agrees with that decision: in this case applicant could be and could have been at any time, including at the time of commission of the offence, reasonably certain of the punishment bracket that would be applied in his case. He was caught red-handed importing into Malta no less than three kilograms of cocaine which resulted to have a purity of 61.2% and a street value of almost €300,000. Bearing these circumstances in mind, and taking account also of the fact that the criterion of the foreseeability and thus the lawfulness of the decision as required by the Convention and as considered in the ***Camilleri*** case must invariably be examined from the perspective of the particular merits of each case, applicant could reasonably foresee that he would be tried for his commission of the offence before the Criminal Court rather than of before the Court of Magistrates.

31. As such, the first Court's judgement, based as it is on the ***Holmes*** judgement, is correct in its conclusion that applicant should have foreseen that he would be tried before the Criminal Court in view of the particular

circumstances of his crime and that, consequently, the requirement of foreseeability required by Article 7 of the Convention is satisfied in this case. Moreover, this Court considers that the punishment bracket applicable to the crime applicant was charged with, was or should have been immediately discernible or foreseeable to him as being anything from six months imprisonment to life imprisonment, even without the exercise of respondent's discretion.

32. For these reasons, while this Court does not feel that it should depart in essence from the interpretation of Article 7 given by the European Court in the ***John Camilleri*** case, it cannot but underline the significance of the power of review of the domestic courts in the assessment of the particular criteria of accessibility and foreseeability in the light of the facts and circumstances surrounding each case of alleged violation of this Article. In the present case, this Court concurs with the conclusion of the court of first instance in its judgement and consequently finds no reason why it should disturb its findings in this context. This grievance is therefore unfounded and is being rejected.

Breach of Article 6

33. Applicant also claims that the Court of first instance wrongly found that Article 22(2) in his case did not violate his rights to a fair trial protected under Article 6 of the Convention. This Court does not find this grievance justified. As correctly held by the Court of first instance, the decision taken by the Attorney General to try applicant's case before the Criminal Court did not

impinge in any manner on the fairness or otherwise of the proceedings subsequently conducted by that Court which eventually pronounced itself on the charges brought against the accused.

34. This matter has been the subject of several judicial pronouncements which have consistently held that Article 22(2) of Chapter 101 is compatible with Article 6 of the Convention:-

> "Id-dritt ta' smigh xieraq li ghandu kull akkuzat mhux pregudikat bil-provvediment tal-artikolu 22 [2], u darba inhaget akkuza, il-process gudizzjarju hu protett bil-ligi li jiggarantixxi smigh xieraq ghall-akkuzat." **[PA[SK] Godfrey Ellul vs Avukat Generali]** [25] Il-Qorti Kostituzzjonali fl-istess kaz osservat hekk:
>
> > "Dan [l-artikolu 6] jirregola l-mod kif jitmexxa l-process quddiem il-qorti, u mhux il-mod kif jingieb quddiem il-Qorti. Sew quddiem il-Qorti Kriminali u sew quddiem il-Qorti tal-Magistrati, min ikun mixli b' akkuza kriminali jkollu l-garanzija kollha li jrid dan l-artikolu … imkien f' dan l-artikolu ma tinghata garanzija illi l-prosekutur m'ghandux ikollu diskrezzjoni bhal dik moghtija lill-Avukat Generali fl-artikolu 22 [2] tal-Kap.101."[26]
>
> "23.Ukoll fil-kawza **Repubblika ta' Malta vs Mario Camilleri**[27] l-Qorti tal-Appell Kriminali [Superjuri] osservat hekk:
>
> > "…. Din il-Qorti ma tistax tara kif, imqar remotament, id-deskrizzjoni li ghandu l-Avukat Generali skond l-artikolu 22 [2] imsemmi tista' tincidi fuq <u>l-indipendenza</u> taghha. Tasal kif tasal kawza quddiem din il-Qorti – bid-decizjoni ta' parti wahda, bil-kunsens taz-zewg partijiet jew minhabba dispozizzjoni espressa tal-ligi li torbot lill-partijiet fil-kawza – <u>l-indipendenza</u> ta' din il-Qorti hi marbuta <u>mal-mod kif inhi, skond il-ligi, komposta u kostitwita.</u> La <u>n-natura tal-kawza</u> li tingieb quddiemha u lanqas <u>kif</u> jew <u>min</u> igibha quddiemha ma jistghu remotament jincidu fuq tali indipendenza."[28]
>
> "24.Inoltre, kif osservat il-Qorti fil-kawza **PA[SK] Claudio Porsenna vs Avukat Generali**[29] it-terminu "decizjoni" fl-artikolu 6 jirreferi ghall-process li jsir quddiem qorti indipendenti u imparzjali meta persuna tkun tressqet

[25] Decided 5th July 2005, and confirmed by this Court.

[26] Decided 27th April 2006

[27] Criminal Court – App. 3/1998, decided 23rd January 2001.

[28] Underlining of that Court.

[29] Decided on the 16th March 2012.

> quddiemha mixlija b' reati, u mhux ghad-decizjoni li l-awtorita' kompetenti tkun hadet biex tressqu quddiem dik il-Qorti.[30]

35. In this case, applicant allege that he was not afforded a fair hearing not because of a defect in the *iter* of the proceedings instituted against him after he was charged before the Courts of criminal jurisdiction, but as a result of the decision of the respondent to try his case before the Criminal Court. However, such a decision, arbitrary as it may be, cannot be deemed to deprive applicant of a fair trial because the guarantees inherent in the right to a fair trial are not affected by such a decision which is, in effect, taken before the commencement of the actual trial itself. This decision is one that determines not the guilt or innocence of the accused person, but the forum which is to try that person's case and, thus, the applicable punishment bracket. The trial that eventually takes place in the chosen forum is guaranteed all procedural safeguards afforded by Article 6.

36. In **Claudio Porsenna v. Avukat Generali**[31], this Court made the following observations:-

> "Jista' jkun li l-ewwel Qorti ma fissritx bi preciz l-iskop tad-diskrezzjoni moghtija lill-Avukat Generali. Dan peress li jista' jinghad li l-Avukat Generali ma johrogx ordni sabiex persuna titressaq quddiem Qorti, izda biss jaghzel liema Qorti se jiggudikah wara li tkun gia` ttiehdet d-decizjoni li l-persuna tigi akkuzata b'reati marbuta mad-droga. Dan, pero`, xorta wahda ma jwarrabx il-fatt li l-Artikolu 6(1) imsemmi jirreferi ghall-istadju tal-interrogazzjoni u tal-process li jsir quddiem qorti meta xi hadd ikun tressaq quddiemha mixli b'reat.

[30] App.84/13 ***Joseph Lebrun vs Avukat Generali*** 17/9/2014

[31] Decided on the 16th March 2015.

> "L-ordni tal-Avukat Generali tinhareg qabel ma jinbeda l-process gudizzjarju proprju, u ma jolqotx il-process innifsu la tal-interrogazzjoni u lanqas tas-smigh li jrid dejjem isir fl-ambitu ta' smigh xieraq kif trid il-ligi.
>
> "F'kull kaz, tinghata meta tinghata tali ordni, din ma taffettwax il-htija tal-persuna akkuzata, u tipprexindi minn kull deliberazzjoni li twassal ghas-sejbien ta' htija jew liberazzjoni tieghu.
>
> "Wiehed irid jenfasizza wkoll hawnhekk li l-ordni tal-Avukat Generali tolqot biss decizjoni dwar quddiem liema Qorti jinstema' l-kaz ta' persuna gia` akkuzata. Li l-persuna jkollha kaz ghalxiex twiegeb ikun gia` gie deciz, u dak li jiddeciedi l-Avukat Generali hu biss is-sede li fih isir il-gudizzju".

37. The Court in that judgement also referred to its previous judgement in the names **Grech Sant v. Avukat Generali**[32] where, with reference to case-law of the European Court, it was held that Article 6 of the Convention guarantees only a fair trial as opposed to a fair penalty and as such the right to a fair trial remains unprejudiced whatever the outcome of the Attorney General's decision regarding choice of forum, saving the breach of other fundamental rights protected by other Articles of the Convention. For these reasons, this aspect of applicant's second grievance is unfounded and is therefore being rejected.

<u>The Third Grievance</u>

38. Applicant also felt aggrieved by the remedy awarded to him by the Court of first instance, which held that a mere declaration that his rights as protected by Article 6(3) read together with Article 6(1) of the Convention were breached should suffice. Applicant claims that a mere declaration does not

[32] Decided 8th February 2010.

amount to just satisfaction in his case, and he requested this Court to award him a proper and adequate remedy.

39. In its decision that a mere declaration that applicant's rights under Article 6 have been breached will serve as just satisfaction in this case, the Court of first instance observed that it does not appear that applicant was found guilty in his criminal trial on the basis of the content of the statement he released to the Police during interrogation. It also observed that, as already established, applicant was caught *in flagrante* importing over three kilograms of cocaine into Malta, although he denied that he knew of the drugs carried in his luggage.

40. Upon examining in detail that acts of the criminal proceedings taken against applicant, it is observed that in view of the undeniable discovery of a large quantity of drugs found hidden in applicant's luggage and an ostensible admission to the offence in a letter handwritten by applicant, his statement could not have been the only basis for the finding of guilt. In any event, applicant denied any knowledge of the drugs found hidden in his suitcase and did not contradict the version given in his statement at any moment during his trial.

41. In the circumstances, this Court concurs that applicant's statement, even though it was released without applicant having been afforded the right

to have access to legal assistance before releasing his statement, could not have prejudiced the fairness of the proceedings and thus agrees with the Court of first instance in its judgement that a declaration that applicant suffered a breach of his rights under Article 6 amounts to just satisfaction in this case.

42. For the above reasons this court considers this grievance to be unfounded and is consequently rejecting it.

The Fourth Grievance

43. Applicant complains finally that the apportionment of costs made by the Court of first instance in its judgement is unfair. He maintains that he should not have been made to pay a portion of the costs of the proceedings once the same Court found that his fundamental rights had been breached.

44. This Court cannot agree with applicant's reasoning. It results that applicant claimed an infringement of his rights to a fair hearing by virtue of three separate demands in his application before the Court of first instance. In its judgement, the said Court ruled in favour of applicant by finding a violation of the Convention in respect of only one of those demands while acceding also to his request for a remedy. Therefore, the order that applicant is to bear two-thirds of the costs of the proceedings in the first instance correctly reflects

the dismissal of applicant's other two demands and this Court consequently rejects this grievance as unfounded.

Decide

45. For these reasons, this Court disposes of applicant's appeal by deciding as follows:-

(1) It accedes to the request to confirm the judgement of the Court of first instance in so far as it upheld appellant's third demand and declared that his right to a fair hearing in terms of Article 6(1) read together with Article 6(3) of the Convention has been breached, and in so far as it upheld the preliminary plea raised by the respondents the Commissioner of Police, the Registrar of Criminal Courts and Tribunals and the Director General (Courts);

(2) It rejects the request to revoke the judgement of the Court of first instance in the part where it did not find a breach of Article 7 of the Convention, and consequently confirms the said judgement with regard to applicant's second request and consequently holds that applicant did not suffer a breach of his rights under Articles 6 and 7 of the Convention;

(3) It rejects applicant's request to revoke the said judgement in the part where it found that a declaration that applicant's rights under Article 6(1) read together with Article 6(3) constitutes just satisfaction;

(4) It confirms the judgement of the Court of first instance as to the remainder of the decision.

The costs of the proceedings before the Court of first instance are to remain as adjudged in the judgement of the court of first instance, while those of the proceedings on appeal are to be borne by applicant.

Giannino Caruana Demajo	Tonio Mallia	Noel Cuschieri
Acting Chief Justice	Judge	Judge

Deputy Registrar

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