CONSTITUTIONAL COURT

JUDGES

THE HON. CHIEF JUSTICE JOSEPH AZZOPARDI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE NOEL CUSCHIERI

Sitting of Friday 5th October 2018

Number: 17

Application number: 61/16 AF

The Police
(Superintendent Dennis Theuma)
(Inspector Johann Fenech)

v.

Austine Uche and Kofi Otule Friday

Preliminary

1. This is an appeal application filed by the Attorney Genaral against a judgment [the appealed judgment] delivered by the Civil Court, First Hall in its constitutional competence [First Court], on the 24th May, 2017, in reply to a reference from the Court of Magistrates (Malta) as a Court of Criminal Inquiry [Magistrates Court], that there has been a violation of the right to a

fair hearing protected by Article 39 of the Constitution of Malta [the Constitution] and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[1] of the accused persons after having considered that the accused were not notified with or given the opportunity to reply to the Attorney General's application filed on the 23rd May, 2016.

Merits

2. The following is a summary of the facts that led to the reference of the First Court. The accused, Austine Uche and Kofi Offule Friday were to stand trial by jury on the 1st of June, 2016. On the 23rd of May, 2016, the Attorney Genaral filed an application before the Criminal Court, asking for an adjournment and for the authorization to produce three witnesses before the Court of Magistrates as well as the appointment of an another expert to carry out the same assignment previously carried out by the appointed expert, Dr. Martin Bajada.

3. The Criminal Court acceded to the Attorney Genaral's requests by virtue of a decree given on the 24th of May, 2016, and ordered that the acts

[1] Incorporated into our legal system by virtue of an Act entitled European Convention [Chapter 319 of the Laws of Malta]

of the proceedings be remitted to the Court of Magistrates for the purpose of the hearing three witnesses and the appointment of a different expert.

4. The accused Kofi Otule Friday filed an application before the Criminal Court on the 27th May, 2016, asking for the revocation *contrario imperio* of its decree contending that this decree was given in breach of Article 406(4) of the Criminal Code. On the 1st June, 2016, the Criminal Court abstained from taking cognizance of his request on the grounds that the records of the proceedings were still before the Court of Magistrates. Kofi Otule Friday filed the same application before the the Court of Magistrates but during the sitting of the 8th June 2016his application was dismissed because that Court held that it could not overturn a decision of the Criminal Court.

5. During the sitting of the 9th June, 2016, before the Court of Magistrates, the accused requested a referral to the Constitutional Court on the grounds that as they were not notified with the application they would be denied a fair trial. They contended that the decree of the Criminal Court given on the previous day, which decision was endorsed by the Court of Magistrates, was in breach of Article 406(4) of the Criminal Code, and considering that they had not been notified with the Attorney Genaral's application they did not have the opportunity to reply to same

prior to the Criminal Court's decision on the application. The accused argued that this was in violation of the Constitution of Malta and of the Convention.

6. By virtue of a decree delivered on the 15th June, 2016, the Magistrates Court referred the issues raised by the defence to the First Court.

Appealed Judgment

7. For a better understanding of this jugment the appealed judgment is being reproduced in its entirety:

> "Having seen the constitutional reference made by the Court of Magistrates (Malta) as a Court of Criminal Inquiry in the records of the inquiry in the aforementioned names, dated 15th June 2016, whereby the referring court acceded to the request made by the applicants qua defendants Austine Uche and Kofi Otule Friday for a constitutional referral as contained in the minutes of the sitting of 9th June 2016. In this sitting it was minuted as follows:
>
> > "*Pray this Honourable Court to refer the matter to the First Hall of the Civil Court in its Constitutional Jurisdiction on the basis that they would not be able to have a fair trial as the decision of the Honourable Criminal Court of the 24th May 2016 which was endorsed by this Court yesterday goes counter to the provisions of the Criminal Code Chapter 9 of the Laws of Malta particularly against the dispositions of Section 406 sub section 4 as none of the witnessed to be heard fall within the parameters of that sub section and the request to appoint an additional expert does not fall within the remit of the said Article 406 of the Criminal Code.*
> >
> > *Both the accused are also humbly asking the Court to order this referral due to the fact that both accused were not informed and were not notified with*

the Attorney General's application filed in the Criminal Court on the 23rd of May 2016 prior to the decision taken by the Criminal Court on the 24th of May 2016 and thus both the accused were denied the right to file a reply and make the relevant submissions and thus also in breach of the principle of equality of arms and in breach of a fair trial.

Dr. Mifsud and Dr Debono inform the Court that this reference is requested on the basis of Article 39 of the Constitution of Malta and Article 6 of the European Convention of Human Rights."

"Having seen the written reply filed by the Attorney General which reads as follows:

1. "That it is not the role of this court under its constitutional jurisdiction to act like a court of review over other courts as to whether they have correctly applied the ordinary law or otherwise in their decisions. It follows that the Court of Magistrates (Malta) as a Court of Criminal Inquiry was mistaken when it resorted to the procedure of the constitutional reference to request this Court to respond to the question whether the Criminal Court committed a wrong interpretation of **article 406 (4) of Cap 9 of the Laws of Malta** when it acceded to the Attorney General's demand for the hearing of further witnesses subsequent to the issue of the bill of indictment.

2. "That in any case, the alleged violation of fair hearing mentioned in this reference is completely premature at this stage, given that the criminal proceedings are still ongoing. It is constant case-law that the aptness of court proceedings can only be determined by examining the proceedings as a whole *viz.* once these have been concluded. Indeed, the accused cannot claim victim status at this juncture, because until now no court has found them guilty of the charges proferred against them, they are still presumed to be innocent and the onus of proof for their conviction is based on the standard of beyond reasonable doubt.

3. "That the merit of the alleged violation is rather unclear because the accused failed to show how the fairness of their hearing is going to be effectively impaired or prejudiced by the simple reason that the Criminal Court allowed additional testimonies. For all it's worth the competent criminal courts may still go for the acquittal of the accused notwithstanding the fresh evidence. One should neither exclude the sheer possibility that the fresh evidence, particularly the appointment of an additional court expert, might actually be more favorable to the accused rather than to the prosecution. Thus the lack of clarity of the alleged prejudice and the odds of discharge of the accused at the conclusion of the criminal proceedings renders this constitutional reference more untimely.

4. "That this is even more so, when considering that the accused have at hand a range of ordinary remedies which may enable them to confront the consequences of the Criminal Court's decree. The accused may raise a formal plea before the Criminal Court to question the admissibility of the fresh evidence tendered by the '*new'* witnesses in terms of the proviso to

article 449 of Cap 9 of the Laws of Malta and they may also lodge an appeal before the Court of Criminal Appeal in terms of **article 499(1) of Cap 9 of the Laws of Malta** regarding any decision about the admissibility of evidence. Moreover, during the trial by jury, the accused may voice all their concerns and express all their submissions regarding the fresh evidence. Finally, subsequent to the verdict and the definitive judgment of the Criminal Court, if complainants are found guilty of the charges, they also have the right to contest the interlocutory decree of the Criminal Court whereby additional evidence was allowed and also challenge the definitive judgment before the Court of Criminal Appeal.

5. "That considering the early timing of the reference as well as the speculative nature of the prejudice asserted by the accused, the ordinary remedies available to the complainants and the possibility of filing a constitutional application after that the criminal proceedings are extinguished, it is deemed appropriate, that this Court dismisses the alleged violation from the outset.

6. "That as to the merits of the reference, respondent believes that there is nothing to show that the accused did indeed suffer a violation of any of their rights to a fair hearing within the meaning of the law. Interpretation of penal law falls within the tasks of the courts of criminal jurisdiction and it is not this Court's mission to substitute its own interpretation for that of the Criminal Court. As upheld in many judgments, this Court cannot itself assess the facts which have led a national court to adopt one decision rather than another; otherwise, it would disregard the limits imposed on its action. This Court's sole task in connection with the right of fair hearing is to examine complaints alleging that the ordinary courts have failed to observe specific procedural safeguards laid down in **article 39 of the Constitution** and/or **article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms**.

7. "That in this case the constitutional reference fails to identify how the Criminal Court's authorization for fresh evidence ahead of the trial by jury breaches any one of the procedural safeguards contemplated in the **Constitution** or **European Convention**.

8. "That with specific reference to the issue of admissibility of evidence, it is well-known case-law that it is not the constitutional courts' task to decide whether witnesses were properly admitted as evidence in terms of domestic law, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. Therefore the fact that in this case the Criminal Court authorized the production of further evidence before the Court of Magistrates (Malta) as a Court of Criminal Inquiry is not in itself in breach of the **Constitution** or **European Convention**.

9. "That besides this, there is nothing wrong or against the **Constitution** or **European Convention** if fresh evidence is allowed to be brought in a pending criminal case, if such evidence is necessary in the interests of justice. After all the scope of criminal proceedings is to shed light on the truth. The same applies also under the **Criminal Code**, because the Criminal Court is empowered under **article 436(1)(c)** to do, whatever it may, in its

discretion, deem necessary for the discovery of the truth. Furthermore the possibility to gather new evidence is allowed not just before the court of criminal inquiry or the court of first instance but even before the Court of Criminal Appeal as per **article 506**.

10. "That actually, it is not the mere production of new evidence that is forbidden in terms of the **Constitution** or **European Convention** but the denial for the accused to adequately and properly challenge and question any witness produced against him. To this end, there is no reason whatsoever to believe that the accused will not be given enough opportunity to prepare themselves, to counter-examine all witnesses brought against them, to contest any exhibited documentation or to make any submission or argument which their defense council deem appropriate. Therefore the accused are grossly mistaken when they argued in the minuted declaration before the Court of Magistrates (Malta) as a Court of Criminal Inquiry that the production of new evidence is going to create an obstacle to their defense. Likewise they are not correct in stating that the rule of the equality of arms is going to be infringed just because the Criminal Court authorized the production of fresh evidence.

11. "That linked to the previous paragraph, it is true that constitutional law grants various rights and advantages to the accused, but amongst these there is not listed the right to block the prosecution from bringing new evidence when such is required for the expediency of justice and truth.

12. "That insofar as the accused complained about the fact that the Criminal Court hastily authorized the Attorney General's demand for fresh evidence before giving them time to reply, the respondent submits that the Criminal Court acted in accordance with the provisions of **article 406(1)** of **Cap. 9 of the Laws of Malta**, which article does not require the Court to hear the other party to the proceedings. It has to be emphasized that this right to request the examination of new witnesses after the filing of the indictment is a right available to both the prosecution and the defence. If the Attorney General (as was the case in these proceedings) or the accused file a request in terms of this article, and the Criminal Court deems it expedient, in pursuit of the discovery of truth, that the requested witnesses be heard, the Criminal Court has the authority by law to order the hearing of such witnesses by the Court of Magistrates. Notwithstanding the above, however, considering the many options mentioned in paragraph four of this reply which are still at the disposal of the accused to challenge the legality of the decree of the Criminal Court, it cannot be said that the accused will not be given the chance to make his submissions or that they will remain unheard about their assertion on the legality of the new witnesses in terms of **article 406(4)** of **Cap. 9 of the Laws of Malta**.

13. "That respondent wishes to conclude by citing an abstract in the Maltese language from a judgment of the First Hall Civil Court (Constitutional Jurisdiction) in the names of ***Emmanuel sive Leli Camilleri vs. Il-Kummissarju tal-Pulizija et*** delivered on the 8th of October 1999 (later confirmed by the Constitutional Court on the 20th December 2000) which sounds pertinent for this case, "*jista' jkun li, għall-ħarsien tad-drittijiet*

espressament imsemmija, ikun meħtieġ li jitħarsu drittijiet oħra li ma nsibuhomx f'interpretazzjoni litterali u stretta ta' l-artikoli relevanti. Għidna wkoll, iżda, li dan ma jfissirx li l-akkużat għandu dritt fondamentali għal kull vantaġġ li jwassal għall-ħelsien tiegħu, jew li d-dritt tiegħu għal smigħ xieraq ikun imxejjen, jew ma jkunx dritt "effettiv" jew "utli", jekk ma jinħelisx mill-akkuży miġjuba kontrieh. Fl-argumenti miġjuba sa issa ir-rikorrent għadu ma weriex li l-iżvantaġġ li jrid jimponi fuq il-prosekuzzjoni, billi jċaħħadha mid-dritt li tressaq dik ix-xiehda li jidhrilha meħtieġa, huwa meħtieġ, mhux biex ir-rikorrent jinħeles mill-akkuży, iżda biex ikollu smigħ xieraq".

"Therefore for the above stated reasons and for other reasons which might arise during the hearing of the case, respondent humbly requests this Honorable Court to reply to the constitutional reference transmitted by the Court of Magistrates (Malta) as a Court of Criminal Inquiry, by stating that the accused have no victim status for the time being and that in any case so far they have not suffered any violation of their right to a fair hearing.

"The costs relating to this procedure should be borne by the accused *in solidum*.

"Having ruled during the sitting of the 12th October 2016 that the acts of the criminal proceedings in the names of **The Police (Superintendent Dennis Theuma and Inspector Johann Fenech) vs Austine Uche and Kofi Otule Friday)** should form part of acts of these proceedings.

"Having seen the note of submissions filed by the Attorney General.

"Having heard the final oral submissions by Dr Joseph Mifsud and Dr Alfred Abela on behalf of the applicants.

"Having seen all exhibited documents and the records of the proceedings.

"Having considered that the facts that emerge from the case are as follows. The applicants Austine Uche and Kofi Otule Friday were expected to stand trial by jury on the 1st of June 2016. On the 23rd of May 2016, the Attorney General filed an application before the Criminal Court requesting an adjournment of the hearing of the trial to a later date and for the Court to forward the records of the proceedings to the Court of Magistrates (Malta) as a Court of Criminal Inquiry in order to allow the production of three new witnesses and to appoint a new expert to replace the original court expert in accorance with articles 406(1) and 436(3)(c) of the Criminal Code.

"By virtue of a decree dated 24th May 2016, the Criminal Court acceded to the above request. The defendants were not notified of the Attorney General's application, and so were not in a position to reply before the Court's decree. The Criminal Court directed that the acts of the

proceedings be transmitted to the Court of Magistrates (Malta) as a Court of Criminal Inquiry to hear the new witnesses and to appoint a new expert.

"The applicant Kofi Otule Friday filed an application before the Criminal Court on the 27th May 2016 requesting the Court to revoke its decree *contrario imperio*. He argued that the Attorney General's request should not have been acceded to because it was not permissible in terms of article 406(4) of the Criminal Code. The Criminal Court abstained from taking cognizance of the request in view of the fact that the records of the proceedings were before the Court of Magistrates (Malta) as a Court of Criminal Inquiry.

"During the sitting of the 8th of June 2016 the applicant Kofi Otule Friday requested the Court of Magistrates (Malta) as a Court of Criminal Inquiry to revoke the Criminal Court's decree of the 24th May 2016. However, this application was dismissed by the Court since it found that it was not within its remit to do so since the acts of the case were sent to it by the Criminal Court following the decree dated 24th May 2016.
The present constitutional proceedings were referred to this Court by the Court of Magistrates (Malta) as a Court of Criminal Inquiry to determine whether the right of the applicants to a fair hearing in terms of article 39 of the Constitution and article 6 of the European Convention on Human Rights has been violated. The applicants claim that their right to a fair hearing has been breached in view of the fact that (i) the Criminal Court's decree dated 24th May 2016, endorsed by the Court of Magistrates (Malta) as a Court of Criminal Inquiry, goes counter to the provisions of article 406(4) of the Criminal Code and (ii) due to the fact that they were not notified of the Attorney General's application, requesting the Court to admit new evidence, filed before the Criminal Court on the 23rd May 2016.

"The Constitution provides that:

> *"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."*

"The Convention provides that:

> *"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."*

"The Attorney General contends that the claim of a violation of the applicants' right to a fair hearing is completely premature at this stage given that the criminal proceedings against the applicants have not yet been concluded.

"The present decision is pursuant to a constitutional reference by the Court of Magistrates (Malta) as a Court of Criminal Inquiry, in accordance with article 46(3) of the Constitution, which requires the referring court to refer to the First Hall, Civil Court in its Constitutional Jurisdiction any question which arises in relation to the fundamental rights and freedoms of the applicant. Reference is made unless the referring court deems that the question raised is merely frivolous or vexatious. Consequently, this Court cannot refer the matter back to the referring court simply because the criminal proceedings in questions are still ongoing. It is precisely because a question concerning an alleged breach of human rights was raised during the criminal proceedings that the constitutional reference was necessary.

"The Court refers to the constitutional reference in the names of Repubblika ta' Malta vs Carmel Camilleri dated 22nd February 2013 where the Constitutional Court stated that:

> "*dan il-każ inbeda b'referenza mill-Qorti Kriminali, li waqqfet l-ismigħ quddiemha sakemm ikollha t-tweġiba għal dik ir-referenza. Ma setgħetx għalhekk l-Ewwel Qorti ma tweġibx għar-referenza billi tistenna sakemm jingħalaq il-proċess kriminali.*"

"The same was reiterated by the First Hall, Civil Court in its Constitutional Jurisdiction in the case of Il-Pulizija vs Clayton Azzopardi of the 15th July 2016:

> "*Kif hu saput din ir-referenza qed isir a bazi ta' l-artikolu 46(3) tal-Kostituzzjoni ta' Malta, li ghalhekk jimporta lil Qorti referenti, f'dan il-kaz il-Qorti tal-Magistrati Bhala Qorti ta' Gudikatura Kriminali, qieset li taghmel wara li wasslet ghal konkluzzjoni li t-talba in ezami ma kienetx wahda la frivola jew vessatorja. Rizultat mod iehor kien iwassal ghal cahda minn naha tal-Qorti referenti. Dan il-punt waħdu ġja jinċidi sew fuq din il-vertenza ta' intempestivita` mressqa mill-Avukat Ġenerali. Illi ssegwi għalhek li l-Qorti referenti ħasset ukoll dak li hu l-import ta' dan l-allegat ksur.*"

"Whilst it is true that the European Court of Human Rights generally holds that the proceedings must be seen as a whole in order to determine whether there has been a breach of the right to a fair hearing, this principle does not apply to proceedings which originate as a constitutional reference, but to those applications which are filed independently, notwithstanding the fact that criminal proceedings have not been concluded.

"The Attorney General also contends that this Court should dismiss this reference in view of the fact that the applicants did not exhaust all ordinary remedies which were at their disposal. However, as correctly stated by the Constitutional Court in the case of The Police vs Nelson Arias delivered on the 28th September 2012:

> "*This first grievance may be summarily disposed of by this Court because this same Court as presided has already held that when a constitutional question comes before the First Hall Civil Court not by way of an application by a complaining party but by way of a reference by the referring Court itself then the First Hall Civil Court has no discretion to decline giving a reply to the questions referred to it by the referring Court. Where the first Court was wrong, therefore, is not where it affirmed its competence to take cognizance of the case but where it held that it had a discretion to decide whether to decline or not from exercising its constitutional competence. It clearly did not have such discretion and was bound to reply to the questions referred to it by the referring Court. This grievance is therefore being rejected.*"

"The Court cannot but agree with the conclusions of the Constitutional Court in the above-mentioned case. Consequently, the Attorney General's contention that the Court should decline to reply to the refering Court's question due to the fact that the applicants had ordinary remedies at their disposal is also being rejected.

"This constitutional reference concerns the applicants' right to a fair hearing in terms of article 39 of the Constitution and article 6 of the European Convention on Human Rights. The applicants' first contention is that the Criminal Court's decision to accede to the Attorney General's request to admit new evidence in the form of three new witnesses and appoint a new court expert to replace the one previously appointed by the Court, breaches their right to a fair hearing in view of the fact that the Criminal Court's decision falls foul of article 406(3) of the Criminal Code.

"It is clear from the wording of the reference made in view of the complaint raised by the applicants that what is being requested is for this Court to review the decision taken by the Criminal Court as manifested in its decree dated 24th May 2016. However, it is an established principle in the jurisprudence of the Constitutional Court that it is not the role of this Court to review the decisions of other courts to determine whether or not there has been a misapplication of the law.

"As explained by the Constitutional Court in the case of Mark Lombardo et vs Kunsill Lokali tal-Fgura et, of the 8th January 2010:

> "*Din il-Qorti tibda biex tirrileva li hi ma tistax u m'ghandiex isservi bhala Qorti tat-tielet istanza, u m'ghandiex tirrevedi l-proceduri ta' quddiem il-Qrati Ordinarji jew l-analizi tal-fatti li dawn ikunu ghamlu, biex sempliciment*

timponi l-opinjonijiet taghha flok dawk tal-Qrati Ordinarji. Din mhix il-funzjoni ta' din il-Qorti (u anqas tal-Prim Awla fil-kompetenza taghha kostituzzjonali). Li trid tara din il-Qorti huwa jekk id-decizjoni tal-Qrati Ordinarji, fil-kuntest tal-fattispecie ta' dan il-kaz, ittiehditx b'mod li gew lezi d-drittijiet fundamentali tar-rikorrenti."

"The same Court in the case of J.E.M. Investments vs Avukat Ġenerali dated September 2011 reiterated:

"*23. Illi kif tajjeb osservat il-Prim'Awla (Sede Kostituzzjonali), u fuq dan jaqblu l-intimati u anke s-socjetà rikorrenti, id-dritt ghas-smigh xieraq ma jiggarantix il-korrettezza tas-sentenzi fil-meritu izda jiggarantixxi biss l-aderenza ma' certi principji procedurali (indipendenza u imparzjalità tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament tas-sentenza fil-pubbliku) li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja. Il-funzjoni tal-Qorti, fil-gurisdizzjoni Kostituzzjonali taghha, m'hijiex illi tirrevedi s-sentenzi ta' Qrati ohra biex tghid jekk dawn gewx decizi 'sewwa' jew le, izda hija limitata ghall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea.*

"24. Effettivament il-Qorti Ewropea dwar Drittijiet tal-Bniedem dejjem sostniet li:

*a. "The question whether proceedings have been 'fair' is of course quite separate from the question whether the tribunal's decision is correct or not. As the Commission has frequently pointed out under its so called "fourth instance formula", it has no general jurisdiction to consider whether domestic courts have committed errors of law or fact, its function being to consider the fairness of the proceedings". (**Application 6172/73, X v. U.K**.)*

"In the case of Emmanuel Camilleri vs Avukat Ġenerali of the 28th June 2012, the Constitutional Court stated:

"*Illi huwa opportun hawnhekk li l-Qorti taghmel referenza ghal ktieb ta' **Jacobs and White**, The European Convention on Human Rights, Third Edition, fejn f'pagna 140, l-awturi jikkummentaw fuq l-hekk imsejha "**fourth instance" doctrine**, u l-kuncett zbaljat li jezisti dwar is-sistema tal-Konvenzjoni Ewropea. Il-Qorti qed tislet minn dan il-ktieb dawn il-principji:*

"1. The Court has no jurisdiction under Article 6 to reopen domestic legal proceedings or to substitute its own findings of fact or national law for the findings of domestic courts.

"2. The Court's task with regard to a complaint under Article 6 is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Convention.

"3. Unlike a national court of appeal, it is not concerned with the questions whether the conviction was safe, the sentence appropriate, the award of damages in accordance with national law, and so on.

> ***"4. And a finding by the Court that an applicant's trial fell short of the standards of Article 6 does not have the effect of quashing the conviction or overturning the judgement, as the case may be.***
>
> ***"5. The Court calls this principle the 'fourth instance' doctrine, because it is not to be seen as a third or fourth instance of appeal from national courts.***"

"The Court also refers to the recent decision delivered by the First Hall, Civil Court in its Constitutional Jurisdiction in the names of Emanuel Camilleri vs Spettur Louise Calleja et of the 29th September 2016:

> "*Illi l-Qorti tibda biex tgħid li huwa stabbilit li bil-kliem 'smigħ xieraq' wieħed jifhem li l-proċess ġudizzjarju jkun tmexxa b'ħarsien tar-regoli stabiliti fil-Konvenzjoni. Għalhekk, is-setgħat ta' din il-Qorti fil-kompetenza li fiha tressqet quddiemha l-kawża tar-rikorrent mhuwiex dak li tagħmilha ta' qorti ta' appell fuq il-Qrati ta' kompetenza kriminali li quddiemhom instema' l-każ tar-rikorrent u li taw is-sentenzi li minnhom jilminta. F'dan ir-rigward, xogħol din il-Qorti huwa dak li tara li ma seħħx ksur ta' xi jedd imħares mill-Konvenzjoni, u mhux li tara jekk is-sentenzi tal-qrati l-oħra li dwarhom jilminta r-rikorrent qatgħux sewwa l-mertu li kellhom quddiemhom.*"

"Lastly, as the European Court of Human Rights regularly states,

> "*it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention*" (Garcia Ruiz v Spain, 21st January, 1999).

"In conclusion, the Court finds that it cannot consider what the applicants are asking of it as it would simply be reviewing the decision taken by the Criminal Court regarding the interpretation of article 406(3) of the Criminal Code. If the applicants feel that the Criminal Court's decision is based on a wrong interpretation of the law, they are free to take up the legal tools available to them in order to challenge the decision taken, but not by claiming a breach of their right to a fair hearing as a result of an alleged misapplication of the law.

"The applicants also claim a breach of their right to a fair hearing, namely the principle of 'equality of arms' in view of the fact that the Criminal Court reached its decision of the 26th May 2016 without first notifying them of the Attorney General's application and thus denying them the right to reply to the same application.

"The principle of 'equality of arms' requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent (Foucher v

France, 18th March 1997, amongst others). It requires that a fair balance be struck between the parties.

"In the case of Huseyn and Others v Azerbaijan (26th July 2011) the European Court stated the following:

> "*That right means, inter alia, the opportunity for the parties to a trial to present their own legal assessment of the case and to comment on the observations made by the other party, with a view to influencing the court's decision.*"

"In the present case the Court finds that the fact that the Criminal Court did not notify the applicants of the request made by the Attorney General to admit new evidence, and that therefore they were not given the opportunity to reply to this request, does in fact breach the rights of the applicants to a fair hearing. The Attorney General requested the Criminal Court to refer the proceedings to the Court of Magistrates (Malta) as a Court of Criminal Inquiry to hear three new witnesses and appoint a new court expert. The Criminal Court reached its decision without giving the applicants the opportunity to reply to the Attorney General's request with a view of influencing the Court's decision. This Court cannot ignore the fact that the Attorney General's request has serious implications for the applicants and that consequently, they should have been afforded the right to reply to the request before the Criminal Court reached its decision.

"As a result, the Court finds that there has been a breach of the principle of 'equality of arms' and consequently a breach of the applicants' right to a fair hearing in terms of article 39 of the Constitution and article 6 of the European Convention on Human Rights."

The Appeal

8. Basically, the appeal of the Attorney General is based on two grievances: [1] that the reference is untimely since the determination of the issue as to whether there has been a breach of the fundamental right to a fair hearing can only be reached on an examination of the whole proceedings after these have been concluded and, [2] that the lack of

opportunity for the accused to reply to the application prior to its decision by the Criminal Court does not constitute a breach of the above fundamental human right.

First Grievance

9. The Attorney Genaral's first grievance is that the First Court should not have found that the indicted persons' right to a fair hearing had been violated as the criminal proceedings instituted against them had not yet been concluded and no judgment has been pronounced in their regard. Reference was made in particular to the judgment of the Constitutional Court given on the16th March, 2011, in the names **Morgan Ehi Egbomon v. Avukat Generali** to substantiate the argument that the referral requested by the indicted persons and acceded to by the First Court was untimely. The Attorney Genaral clarified that *"… the lack of clarity of the alleged prejudice and the odds of discharge of the accused at the conclusion of the criminal proceedings renders this constitutional reference more untimely.".* Established case-law required a court to examine the alleged violation in the light of the entire proceedings.

10. The Attorney Genaral also submitted that the indicted persons had various other ordinary remedies and options available to them to challenge

the decree of the Criminal Court of the 24th May, 2016. The fact that the attempt by Kofi Otule Friday to overturn that decree by means of an application *contrario imperio* had not succeeded, does necessarily mean that he had no further remedies available. In the light of this consideration it would have been proper to resort to these ordinary remedies instead of immediately instituting constitutional proceedings, made with a view to obtaining a fresh review of the matter.

11. In his reply the Attorney Generali indicates the remedies available to the accused at this stage of the criminal proceedings. He submits that:

> "These remedies are as yet, untapped and include the summons of a formal plea before the Criminal Court to question the admissibility of the fresh evidence tendered by the 'new' witnesses in terms of the proviso to article 449 of Cap 9 of the Laws of Malta and also an appeal before the Court of Criminal Appeal in terms of article 499(1) of Cap 9 of the Laws of Malta relating to any decision about the admissibility of evidence. Moreover, during the trial by jury, there is nothing which prevents the indicted persons to voice their concerns and express all their submissions regarding the fresh evidence. Finally, subsequent to the verdict and the definitive judgment of the Criminal Court, if the indicted persons are found guilty of the charges, they also have the right to challenge the interlocutory decree of the Criminal Court of the 24th May 2016 whereby additional evidence was allowed and also challenge the definitive judgment before the Court of Criminal Appeal."

12. The Attorney General submits further that the complaints made by the indicted persons, including wrong application of Article 406 of the

Criminal Code, are an unwelcome intervention in the function of the criminal courts which are the courts vested with jurisdiction in matters regarding penal law.

13. He also submits that the First Court's reference to the judgments **Republic of Malta v. Carmel Camilleri** and **The Police v. Nelson Arias** is inappropriate. In the latter case the Attorney Genaral had requested the First Court to confirm that the indicted persons had no victim status, that there was no breach of their right to a fair hearing in view of the fact that proceedings had not yet been concluded and that they had efficient ordinary remedies to which the indicted persons could have availed themselves before instituting constitutional proceedings.

14. The Attorney Genaral does not agree with the First Court's consideration that it could not refrain from deciding that the alleged violation was untimely once this was raised through a constitutional reference. In a recent judgment given by this Court on the 13th February 2017 in the case in the names of **The Police v. Clayton Azzopardi,** and which concerned a judgment given by the First Court in its constitutional jurisdiction upon a reference made by the accused pending criminal proceedings, this Court had agreed with the Attorney Genaral's submissions that, given that the criminal proceedings were still pending at

the time the referral was made, the accused could not be deemed to have suffered a breach of his right to a fair hearing.

Second Grievance

15. In short by virtue of this grievance the Attorney Genaral contends that the lack of opportunity to reply to his request for new evidence did not constitute a breach of the interdicted persons' right to a fair hearing. He argued that the Criminal Court's decree of the 24th May, 2016, had not determined any civil rights and obligations or a criminal charge. The First Court had failed to identify how the decree had violated any particular procedural safeguard guaranteed by the Constitution or by the European Convention.

16. On the basis of the above considerations, the Attorney Genaral is requesting this Court to vary the appeal judgment by *:-*

> **"…..REVOKING** …. that part where it replied to the referring court that there has been a breach of the right to a fair hearing protected by article 39 of the Constitution and article 6 of the European Convention on Human rights in view of the fact that the indicted persons were not notified with or given the opportunity to reply to the Attorney General's application of the 23rd May 2016; and instead, the Constitutional Court is requested to reply to the constitutional reference transmitted by the Court of Magistrates (Malta) as a Court of Criminal Inquiry, by stating that the indicted

> persons have no victim status for the time being and that in any case they have not suffered any violation of their right to a fair hearing under article 39 of the Constitution and article 6 of the European Convention on Human Rights. The costs relating to this procedure should be borne by the indicted persons in solidum.".

17. In their oral submissions the accused gave the reasons why, according to them, the Attorney General's appeal should be rejected and the appealed judgment be confirmed.

The Court's Considerations

18. The Attorney Genaral's ground of appeal lies primarily with the lack of victim status of the indicted persons at this stage of the criminal proceedings and secondly, that there has been no breach of Article 39 of the Constitution and Article 6 of the Convention.

19. Firstly this Court affirms that the fact that constitutional proceedings have been instituted as a result of a reference from another Court, not being the First Hall Civil Court, does not constitute a legal obstacle to the raising successfully of the plea that the proceedings are untimely where the proceedings before the referring Court are still pending.[2]

[2] Vide amongst others the **Police v. Clayton Azzopardi** [Supra]

20. Secondly, this Court observess that it is established caselaw of the European Court that in order to assess the fairness of proceedings, the latter must be examined as a whole.[3] The admissibility and assessment of evidence will not be scrutinised by the European Court which has frequently held that this is a matter within the domestic jurisdiction of the national court.[4] It has stated that its competence is restricted to the determination of the fairness of the domestic proceedings taken as a whole, together with the manner in which evidence has been taken.[5]

21. Our Courts have followed this same principle and the Court of Criminal Appeal in its judgment of the 5th December, 2013, in the names **The Republic of Malta v. Anna-Maria Beatrice Ciocanel** clearly asserted that:

> "It is a well established principle that as a rule questions relating to fair trial are to be addressed upon an assessment of the trial as a whole and that it is only at the conclusion of such trial that a proper assessment of whether there has been a fair trial can be made".

[3] Judg. of 20 November 1989, Kostovski Case; judg. of 27 November 1990, Windisch Case; judg. of 19 December 1990, Delta Case; Ap. 4991/71, 18 July 1973. Vide also **Christopher Bartolo v. Avukat Generali** decided today the 5th of Octoher by this Court
[4] Judg. of 12 July 1988, Schenk Case; judg. of 20 November 1989, Kostovski Case; judg. of 27 November 1990, Windisch Case; judg. of 19 December 1990, Delta Case.
[5] Ibid.

22. This Court in a judgment, cited also by the appellant, in the case **Morgan Ehi Egbomon v. Avukat Generali** decided on the 16th March 2011 affirmed the above princple in the following terms:

> "'Ghalhekk, sewwa qalet l-ewwel qorti illi, qabel ma jkun sar u ntemm it-process penali, ikun prematur illi jsir minn din il-qorti l-ezercizzju li jrid l-appellant, kemm ghax l-appellant ghad ghandu ghad dispozizzjoni tieghu rimedji u l-mezzi ta' harsien kollha li jaghtih il-process penali - u ghalhekk ghad ghandu ir-rimedji that il-ligi ordinarja - u kif ukoll ghax din il-qorti ghadha ma tistax tqis it-process penali kollu kemm hu – ghax ghadu ma sarx - biex tkun tiste' tghid kienx hemm ksur tal-jeddijiet fundamentali, mhux f'episodju izolat, izda fil-kuntest tal-process meqjus kollu kemm hu u bl-applikazzjoni in concreto tad-dispotizzjonijiet tal-ligi attakkati';[6]

23. Also in its judgment of the 27th November, 2017, in the names **Gordi Felice v. Avukat Generali**[7], this Court observed that as in the case of **Dimech v. Malta** [8]decided by the ECHR on the 4th April, 2015, the proceedings had not been concluded. In the latter case, the European Court had confirmed that proceedings must be examined in their entirety in order to decide whether there has been a violation of the right to a fair hearing. This principle was asserted again this Court's judgment of the 5th January, 2016, given in the case in the names **Tyrone Fenech et v. Malta**.

[6] Para 19.
[7] Cons.3/15 decided 27 November, 20 – Vide comparative analysis of case law of the ECHR made by this Court.
[8] deciz fit-4 ta' April 2015.

24. In its judgment of the 3rd June, 2010, in the names **Gafgen v. Germany**[9], the European Court declared that:

> "164. In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, inter alia, Khan, cited above, §§ 35 and 37; Allan, cited above, § 43; and the judgment in Jalloh, cited above, § 96). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, Khan, cited above, §§ 35 and 37).".

25. From the above is results manifestly clear that in order to decide whether the indicted persons have suffered a breach of their right to a fair hearing they must wait for the final judgment before raising their complaint. In the case at issue, the request made by the accused is premature since at this stage the Court is not in a position to consider their complaint in the light of the entire proceedings to assess its influence upon the final verdict. It may be that at the end of the trial the indicted persons are not found guilty or if found guilty, the evidence requested to be produced by the Attorney Genaral would not be crucial or decisive to a final guilty verdict.

[9] App. 22978/05.

Also, it may be that the fresh evidence to be produced is invalidated through cross-examination made by the defence of the indicted persons. It may be that the indicted persons file an appeal from a guilty verdict and take the opportunity to appeal from the decision of the Criminal Court to allow fresh evidence.

26. In his application of the 23rd May, 2016, filed before the Criminal Court, the Attorney Genaral explained that the Inquiring Magistrate had given a brief to Dr. Martin Bajada to extract the contents of four (4) mobile phones and the Court of Magistrates (Malta) as a Court of Criminal Inquiry had given Dr. Bajada yet another brief to retrieve information from mobile phone service providers. For the reasons stated in his application, whilst emphasizing his preoccupation that the prosecution's case would otherwise be prejudiced in view of the the recent judgment given in the case in the names **Joseph Chetcuti Bonavita v. Avv. Beppe Fenech Adami et noe**[10], the Attorney Genaral requested the Criminal Court to appointment another expert to carry out the two briefs Dr. Martin Bajada had been given and to allow representatives of two mobile service providers to confirm on oath the information submitted by them to Dr. Martin Bajada.

[10] Judg. Court of Appeal in its Superior (Civil) Jurisdiction, 29th April, 2016.

27. It appears to the Court that the new brief and the new evidence may not be so new after all to the proceedings and that they may simply be a repetition of that which already constitutes part of the proceedings but presented by different persons. In this case the defence of the accused may not be affected at all. However this can be assessed only after the brief has been carried out by the new expert, after the two representatives have tendered their evidence and only after this evidence is examined in the light of the entire proceedings. Furthermore consideration must also be given to the principle that the aim of the criminal proceedings is to establish the truth.

28. The same consideration is applicable to the evidence required of the third witness to be summoned to present the relative authorisation warrants for the 'controlled-delivery' operation. The necessity of summoning this witness has arisen in view of the recent judgment in the names **Ir-Repubblika ta' Malta v. Godfrey Gambin u Adel Mohammed Babani**[11] where the accused were acquitted from the criminal charges after the prosecution had failed to present the authorisation warrants according to a long-standing practice accepted by the courts who had until then accepted the practice as necessary to ensure confidentiality. In that case the failure to prove the legitimacy of the controlled-delivery was used

[11] Judg. Criminal Court, 24th May, 2016.

by the defence in their case before the jury as giving rise to suspicion on the legality of the conduct of the police regarding that operation and the Court itself had directed the jury to consider this in the light of the best evidence rule.

29. In the present case, it will be necessary to consider the indicted persons claim of a breach of their right to a fair hearing when a final judgment has been given. It is only at that final stage and in the light of the entire proceedings that the constitutional courts may truly and validly assess whether the presentation of the authorisation warrants have effectively violated or not their right to a fair hearing.

30. In view of the above, the Court considers the ground of appeal to be justified and is accordingly accepting it as valid.

31. In the light of the above considerations, it is no longer necessary to take further cognisance of the second ground of appeal.

Decision

For the above reasons, the Court accepts the appeal filed by the Attorney General, and accordingly revokes that part of the appealed judgment

which declared that there has been a violation of the rights of the accused persons protected by article 36 of the Constitution and article 6 of the Convention and instead, declares that at this stage of the criminal proceedings no such violation can be identified.

The costs of the proceedings before the First Court and before this appellate Court are to be borne by both the accused persons in solidum.

Joseph Azzopardi
Chief Justice

Giannino Caruana Demajo
Judge

Noel Cuschieri
Judge

Deputy Registrar
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