CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

HON. JUDGE
ROBERT G. MANGION

TODAY, 30TH MAY 2019

Case No: 1
Application No: 63/2018

Analdo Andres Venghaus

vs.

Avukat Generali

The Court

Having seen **the application of Analdo Andrea Venghaus** filed on the 1st of June 2018, which reads as follows:

"That on the 31st July, 2015, the exponent was brought before the Court of Magistrates (Malta) as a Court of Criminal Inquiry presided by Magistrate Dr. Neville Camilleri under arrest by the Police (Inspectors Malcom Bondin and Jonathan Cassar), and charged of having:

"Associated himself with a person or other persons in these islands or outside these islands to sell and traffic in these islands medicine (cocaine), in breach of the dispositions of the Ordinance on dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, or promoted, constituted, organised or financed this association to import in Malta the drug cocaine and this in breach of Article 22 (1) of Chapter 101 of the Laws of Malta".

That on the 6th August, 2015, a decree was given by the same Court of Magistrates (Malta) as a Court of Criminal Inquiry, in virtue of which the said Court after having declared that the compilation of all the evidence brought against the accused had been closed, decided that there are sufficient grounds for him to be placed under a Bill of Indictment and consequently committed him to stand trial under that Act before the Competent Court, and directed that the records of the inquiry, together with the objects relating to the guilt, be transmitted to the Attorney General within the time prescribed by law.

That the above mentioned decree was given by the Court of Magistrates (Malta) as a Court of Criminal Inquiry in terms of Article 401(1) of the Criminal Code (Chapter 9 of the Laws of Malta).

That the said **Article 401(1)** of the Criminal Code, which deals with the time for the conclusion of the Inquiry, requires that the compilation of evidence be concluded within the term of one month which may, upon good cause being shown be extended by the President of Malta for further periods each of one month, each such extension being made upon a demand in writing by the court; provided that the said term shall not in the aggregate be so extended by more than three months; and in addition to this the said paragraph (1) of Article 401of the Criminal Code continues to provide that unless bail would

not have been granted, the accused is to be brought before the court at least once every fifteen days in order that the court may decide whether he should continue to be remanded in custody.

That **Article 401 (2)** which deals with the eventuality of when the accused is committed to be charged on indictment or is to be released, then provides that when the compilation of evidence is closed, the court shall decide whether or not there are sufficient grounds for the accused to be placed under bill of indictment. In the first case, the court shall commit the accused to be placed under that bill of indictment before the Criminal Court, and, in the second case, it shall order his release.

That the logic of all this is based on the fact that the Court can only decide conscientiously as to whether there are or are not sufficient grounds for the accused to be placed under a bill of indictment, even if all this is done on the basis of a "prima facie" examination, after that it would have collected all the evidence brought before it by the prosecution, and not beforehand. This examination which is to be made by the Court, albeit in its capacity as a court of inquiry, is of great importance, even the more so but not only, in those cases when the accused is still being held under preventive arrest, because in the eventuality that the Court were to decide that there are sufficient grounds for the accused to be placed under a bill of indictment, the same accused would be able to immediately obtain his release.

That for the avoidance of any doubt, the subsequent **Article 402 (1)** of the same Criminal Code then goes on to deal with the specific circumstance in which the suspension of the time for conclusion of the inquiry comes about according to Law, but none of the reasons therein listed apply to the applicant's case, and in fact at no stage was the application of this Article invoked either by the Court or by the prosecution. On the contrary, the Court of Magistrates (Malta) as a Court of Inquiry had declared that the compilation of all the evidence brought before it against the accused had been closed, and

furthermore decided that there are sufficient grounds for the accused to be placed under a bill of indictment.

That it is true that in terms of Article **405 (1)**, after the committal of the accused for trial, as aforementioned, and before the filing of the bill of indictment, upon a written demand of the Attorney General, is to further examine any witnesses **already previously heard**, or examine any **new** witnesses; and for this purpose the same respondent Attorney General shall, in terms of paragraph (2) of the same article of the law, transmit to the court the record of inquiry together with his demand in writing, stating the object in respect of which the examination or re-examination of the witnesses is to take place; and it is also true that according to Article 401 (3A) when the court has committed the accused for trial by the Criminal Court the court shall also adjourn the case to another date, being a date not earlier than one month but not later than six weeks from the date of the adjournment; and that the court shall also do likewise after having received back from the Attorney General the record of the inquiry and before returning the record to the same Attorney General.

However, the absolute and predominant rule remains to the effect that the law demands that the compilation of evidence be closed within a maximum period of one month which period may be extended for further periods of one month each up to a maximum and absolute period in the aggregate of another three months unless any reason for its interruption under article 402 (1) would be applicable; and the exceptional right of the respondent Attorney General to request the remission of the records of inquiry before presenting the bill of indictment is to be interpreted in a restrictive manner taking into account of the rule, and limited only to the re-examination of some witness already previously heard (that is to say, and as is being submitted by the applicant, in case there of need of some clarification or amplification) or else to the examination of some new witness (that is to say, and as it also being submitted by the applicant, in the case of some witness who would have been brought to the attention of the Attorney General after the closing of the compilation of

evidence but before the filing of the bill of indictment against the accused, which witness therefore could not have been produced by the prosecution and heard by the Court of Criminal Inquiry during the stage of compilation of evidence).

The law certainly does not allow for multiple retransmissions to be requested, much less multiple retransmission requests over the period of three (3) years in order that witnesses who would have been known to the respondent Attorney General from the very beginning be heard. In fact, Article 407 of the Criminal Code which refers to the period with which the compilation of evidence is to be concluded, in the case of the hearing of new witnesses, provides in the most clear manner that in the case mentioned in article 405, the compilation of evidence is to be closed within the time referred to the aforementioned article 401 (1) of the said Criminal Code, which time starts running from the day on which the Court would have received the records of proceedings.

It in fact results that to date the compilation of evidence against the applicant is still proceeding before the said Court, and at this time the records of the said compilation of evidence are transmitted to the Attorney General and the proceedings stand adjourned before the same Court of Magistrates for the sitting of the 11th July, 2018, at 09.00a.m. and the applicant is still being held under preventive custody at the Corradino Corrective Facility. Not only that but in fact to date that which the Court had ordered to be done in virtue of the above mentioned decree has not yet been done because to date the Attorney General has not issued any bill of indictment and the applicant has in fact not been committed for trial before the competent Court but is still undergoing compilation of evidence proceedings before the Court of Magistrates (Malta) as a Court of Criminal Inquiry.

That notwithstanding all this abuse of law on the part of the respondent Attorney General, and notwithstanding the fact that the prosecution had already declared that it had no further evidence to produce in the case on two

separate occasions, that is on the 19th July, 2017 and more particularly at the sitting of the 1st March, 2018, the respondent Attorney General is still insisting that the Court hears a certain person by the name of Valerie Cerello, apparently to give evidence in regard to capsules which were allegedly found by her whilst she was cleaning the guest room at the Rokna Hotel which had been occupied by Edgar del Valle Yendes Gonzalez, which witness is of a foreign nationality and who cannot be found by the same prosecution.

That as results from the minute of the sitting of the 22nd August, 2017, (at folio 301 of the records) which was held by the Court of Magistrates (Malta) as a Court of Criminal Enquiry, the applicant already had the opportunity to request that a Constitutional reference be made to this Honourable Court, which request was extensively argued in submissions tendered at the sitting of the 27th September, 2017, however this request has been rejected by the said Court in virtue of a decree given of the 11th October, 2017.

That as it also results from the minute of the sitting of the 30th May, 2018 held before the Court of Magistrates (Malta) as a Court of Criminal Enquiry, the defence whilst making reference to the minute of the previous sitting at folio 374 of the records, and whilst strongly maintaining all that which it had complained about at the said sitting, continued to state in addition that the fundamental right of the accused to a fair hearing within a reasonable time is being seriously prejudiced.

That from the above premises it is clearly and manifestly results that the applicant suffered, and is still suffering, a blatant breach of his fundamental right to a fair hearing within a reasonable time as is protected in articles 39 of the Constitution of Malta and 6 of the European Convention for the Protection of Human Rights and Liberties.

That this breach emerges from two factors:-

1. Firstly, because the above decree given by the Court of Magistrates as a Court of Criminal Enquiry on the 6th August, 2015 in terms of the aforementioned Article 401 (2) of the Criminal Code (Chapter 9 of the Laws of Malta) was untimely given, before the closing of the compilation of evidence, and is therefore null and void and without any effect at Law. In fact and as a state of fact the compilation of evidence is still ongoing almost three years after the giving of the said decree, with the various transmissions of the record which were made from that time to date, whilst the Law demands that the Court of Magistrates (Malta) as a Court of Criminal Enquiry pronounces itself on the *prima facie* grounding of the charges or otherwise **only** after the conclusion of the compilation of evidence and not before (except in the exceptional case contemplated in Article 405 (1), and this in the absolute interest of the applicant as the accused.

That the pronouncement by the court at such an early stage of the proceedings seriously prejudices the applicant as the accused since the accused will thereby be deprived of the opportunity to be released by the same Court on the basis of the *prima facie*, and is going to be constrained to face the bill of indictment which has yet to be brought against him by the Attorney General.

In fact the applicant was deprived of his right to a *prima facie* examination conducted in such manner which really ought to have been genuine at the true stage of the conclusion of the compilation of evidence which the same Court was in duty bound to ensure is duly carried out. This instead of the Court of Magistrates (Malta) as a Court of Criminal Enquiry adopting the position where, according to the said Court, as a Court of Criminal Enquiry, its hands are completely tied, and can do absolutely nothing other than to defer to all that which the Attorney General orders it to do, and so like Pontius Pilate washes its hands of any injustice occurring before its very eyes.

It is enough for one to make reference to the testimony *viva voce* given repeatedly during the course of three (3) whole sittings before the Court of Magistrates (Malta) as a Court of Criminal Enquiry at the stage of the late

continuation of the compilation of evidence by the main witness of the prosecution, a certain Edgar del Valle Yendez Gonzalez, notwithstanding every warning given to him, since according to what he himself declared, he wanted to have nothing further to burden his conscience. This testimony completely demolishes any case that the prosecution could ever have dreamt of having had as against the applicant, so much so that in truth and in view of that testimony it was and still remains the duty of the Attorney General to exercise his role as a true friend of the accused by himself ordering the discontinuation of all proceedings as against the applicant and his consequential immediate release as there would not remain the slightest shadow of proof of any criminal act on the part of the applicant if there ever was any such evidence, since it was only based solely on an evidently dubious statement made by the said Edgar del Valle Yendez Gonzalez who himself is facing separate criminal charges against him and made in not so nice circumstances which he himself described with great courage when he testified *viva voce* before the same Court.

Had the Court of Magistrates (Malta) as a Court of Criminal Enquiry the benefit of this evidence at the opportune stage before the conclusion of the compilation of evidence and the delivery of the *prima facie* decree, then the said Court would have conscientiously proceeded to forthwith order the immediate liberation of the accused. However, the applicant owing to the action of the respondent Attorney General who supposedly is considered to be the friend of the accused, was deprived from this right and consequently suffered an irremediable breach of his fundamental right to a fair hearing.

The applicant had also tried at various times to request the revocation *contrario imperio* of the above mentioned decree given by the Court of Magistrates (Malta) as a Court of Criminal Enquiry on the 6th August 2015, however without success; the first time in virtue of a application filed before the same Court of magistrates (Malta) as a Court of Criminal Enquiry on the 20th June 2017, however, after opposition made by the Attorney General as well as by the Commissioner of Police, the same request was denied by the

Court in virtue of a decree given on the 20th June 2017, since according to that court, the *prima facie* decree is a decree which is not revocable; and the second time in virtue of an application filed before the Criminal Court on the 4th July 2017, however after further opposition made by the Attorney General the same Criminal Court abstained from taking cognizance of the application since according to the same Court the request is not legally sustainable and was made on the basis of lack of information regarding that which article 401 of the Criminal Code provides and also because according to the same Court the said decree is not open to appeal.

That if this state of fact continues on without remedy, the said Court of Magistrates (Malta) as a Court of Criminal Enquiry will not in fact be in a position, on eventual true conclusion of the compilation of evidence, on the basis of all the evidence brought before it until that date, to decide that there are in fact insufficient reasons for the applicant be placed under a bill of indictment and thereby conscientiously and according to principles of justice, to order his immediate release.

2. Secondly, and without prejudice to the above, since the compilation of evidence is still ongoing now for a period of almost three (3) years, without any valid reason at law, and this is completely unacceptable also taking into account of the fact that the applicant is still being detained under preventive arrest at the Corradino Correctional Facility because he is not in a financial position to deposit the amount established by the Court of Magistrates (Malta) as a Court of Criminal Enquiry as a guarantee for his release from arrest and in fact the undersigned lawyers are acting on behalf of the applicant on a "*pro bono*" basis.

It is totally unacceptable to the respondent Attorney General to be allowed to request, as if it were nothing, one retransmission from another, for the purpose of the hearing of a foreign witness who to date cannot be found, but in regard to whom he himself was well aware as from the very beginning of the proceedings initiated against the applicant, but who took no responsible care

to produce her at the opportune stage of the compilation of evidence and in the time as required by law.

Because of all this unjustified and totally unacceptable delay, the applicant has suffered and is still suffering a breach of his fundamental right to be granted a fair trial within a reasonable time.

Therefore the applicant humbly requests this Honourable Court to declare and decide that in virtue of the decree given by the Court of Magistrates (Malta) as a Court of Criminal Inquiry of the 6th August 2015, in the case of The Police (Inspector Malcom Bondin and Jonathan Cassar) against Analdo Andreas Venghaus as well as in virtue of the continuation of the compilation of evidence in the same proceedings in excess of the time frame stipulated by the Criminal Code (Chapter 9 of the Laws of Malta) and in particular articles 401, 405 and 407 of the same code, now over the course of almost three (3) years, and secondarily and without prejudice to the above, by operation of articles 401, 405 and 407 of the Criminal Court, his right to fair hearing within a reasonable time protected under article 39 of the Constitution of Malta and article 6 of the European Convention for the Protection of Human Rights and Liberties has been breached and consequently provides those remedies and gives those orders, issues those acts and gives those directives which it deems fit to ensure compliance with the said dispositions under the article 39 of the Constitution of Malta and article 6 of the European Convention for the Protection of Human rights and Liberties."

Having seen the **reply by the Attorney General** filed on the 28th of June 2018 which reads as follows:

"That by means of his application, applicant is alleging a violation of his right to fair hearing as provided by article 6 of the European Convention and article 39 of the Constitution of Malta based on two complaints. The first complaint concerns the *prima facie* decree issued by the Court of Magistrates wherein it decided that there was enough evidence for applicant to be indicted and that

this decision according to applicant was premature since the compilation of evidence is still ongoing. The second complaint concerns an alleged delay in the criminal proceedings.

That exponent rejects as unfounded in both fact and law all the claims and pretensions made by applicant.

1. Preliminarily, respondent points out that according to both local and European jurisprudence, in order for the Court to conclude whether there is a violation of the right to a fair hearing as protected by article 6 of the European Convention for Human Rights and article 39 of the Constitution of Malta it is necessary that the judicial process is examined in its totality and that one should not examine only a part of the process. That moreover, Harris, O'Boyle & Warbrick in the book '***Law of the European Convention on Human Rights'*** they explain what constitutes a breach of the right to fair hearing and that in order to determine whether there was a violation of the right to a fair hearing one should examine the judicial process in its entirity. These authors state the following:

... the Court may nonetheless find a breach of the right to a 'fair hearing' on a 'hearing as a whole' basis. Thus in Barbera, Messegue and Jabardo v Spain, involving the prosecution of alleged members of a catalan organization for terrorist offences, the Court identified a number of features of the hearing that cumulatively led it to conclude that there had not been a 'fair hearing'. The Court referred to the fact that the accused had been driven over 300 miles to the court the night before the trial, the unexpected changes to the court's membership, the brevity of the trial, and above all the failure to adduce important evidence orally in the accused's presence as considerations that, 'taken as a whole', rendered the proceedings unfair contrary to Article 6(1).

That in the context of Malta, the European Court of Human Rights had the opportunity to pronounce itself in the case ***Dimech vs Malta*** (application

number 34373/13) decided on the 2nd of' April 2015 where the following was observed in paragraph 48 of the judgment:

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant's possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, ***given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature.*** *Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies. (Sottolinear u enfasi tal-esponent)*

That in this case the European Court for Human Rights declared that applicant's request was inadmissible because it was premature due to the fact that the criminal proceedings against applicant were still pending;

That in view of this case-law, since the criminal proceedings against applicant are still on-going, then the complaint brought forward by him cannot be considered at this stage and this is so also because applicant may be acquitted from the accusations brought against him. One asks how can applicant say that he is not going to have a fair hearing when the criminal proceedings against him have not yet been concluded?

That in view of all this , respondent is humbly inviting this Honourable Court to decline from exercising its constitutional jurisdiction in terms of Article 4(2) of Chapter 319 of the Laws of Malta.

2. That without prejudice to the above, regarding applicant's first complaint respondent immediately states that it's completely unfounded and it is evident that applicant is not familiar with how a criminal case is conducted in Malta and even less so with criminal law. This is stated because applicant is attacking the decree of *prima facie* by means of which the Court of Magistrates did not give a judgment on the guilt or otherwise of the accused

but only that at the level of *prima facie*, evidence was enough for applicant to be indicted. When the Court of Magistrates (as a court of Criminal Inquiry) pronounced itself on the *prima facie* on the 6th August 2015 it never stated that the compilation of evidence against applicant was concluded as very incorrectly stated by applicant. Above all, applicant does not have a fundamental right to decide himself whether a trial against him should continue or not but there the authorities, namely the Court and the Attorney General which have this role given to them by law. That article 405 (1)(2) of the Criminal Code lays down the procedure of how evidence should be compiled and how witnesses should be examined during the compilation. This article states the following:

405. *(1) After the committal of the accused for trial, and before the filing of the indictment, the court shall, upon the demand in writing of the Attorney General, further examine any witness previously heard or examine any new witness.*

2) The Attorney General shall, for such purpose, transmit to the court the record of inquiry together with the demand, stating therein the subject on which the examination or re-examination is to take place.

That therefore after the Court decides that there are sufficient grounds for committing the accused for trial on indictment before the competent court (the decree of the *prima facie*), and before the bill of indictment is filed, this article empowers the Attorney General to transmit the record of the inquiry to the Inquiring Court whereby he can request that the Court examines or re-examines the witnesses mentioned in the written demand (rinviju) with the aim that the evidence both in favour and against the accused is presented in the inquiry and to uncover the truth. The compilation of evidence is concluded when the Attorney General files the bill of indictment before the Criminal Court or when he transmits the record of the inquiry to the Court of Magistrates for judgment.

That the exponent points out that no further witnesses are examined in the proceedings when the Attorney General does not issue written demands and consequently files the bill of indictment before the Criminal Court or else transmits the record of the inquiry before the Court of Magistrates for judgment. In this case, the bill of indictment has not yet been filed in the Criminal Court and therefore the compilation of evidence against the accused has not been finalised. Moreover, since further evidence is required to be presented in the compilation, the Attorney General, by means of article 405 of the Criminal Code, requests the Court of the Inquiry to hear and compile the evidence.

That both before the Criminal Court and before the Court of Magistrates who is accused of a criminal offence has all the safeguards that are provided by the penal laws of our country and applicant in this case did not mention the reasons why he is not having a fair hearing. In this context as mentioned earlier the complaint of fair hearing should be examined in the totality of the proceedings and not at one isolated stage.

The insistence of the Attorney General to have the deposition of Valerie Cerello is based on the fact that this person allegedly found the drugs in issue and so her evidence is not only relevant but also important.

All this should be taken in the context that even the Attorney General has a right to a fair hearing and therefore even he has a right to ensure that the compilation of evidence is complete in order for him as the prosecutor before the Criminal Court to file the bill of indictment for the judgment of the jury and Court. It is worrying the statement made by applicant in his application when he states that the right to hear and examine the witnesses as requested in the written demands by the Attorney General is an “exceptional” right and should be interpreted in a very restrictive way and that this constitutes an abuse of law by the Attorney General.

Therefore there is absolutely no breach of any fundamental right in particular of article 6 of the European Convention and/or Article 39 of the Constitution.

3. That regarding the complaint on the unreasonable delays in the criminal proceedings it is accepted both in local and European jurisprudence that the factors which should be taken into account in determining whether there has been a breach of the right to a fair trial within a reasonable time are *l-komplessita' tal-kaz, l-agir tal-partijiet fil-kawza, l-imgieba ta` min ikun qed iressaq l-ilment, s-sehem ta' l-awtorita' jew awtoritajiet relevanti – f'dan il-kaz l-agir ta' awtorita' gudizzjarja fid-dewmien u fl-ahhar nett is-siwi ta` dak li l-parti ghandha x`titlef u tirbah mill-kaz taghha quddiem il-qrati –* ***Sydney Ellul Sullivan vs Kummissarju tal-Pulizija u l-Avukat Generali , 28/1/2013, Qorti Kostituzzjonali.***

   That it is accepted there is no time-limit which the Court must necessarily observe in the course of the proceedings because otherwise the interests of justice maybe prejudiced due to inconsiderate and excessive hastiness.

   That in order for this Honourable Court to seriously consider the request of applicant it must be proven by applicant not only that the proceedings are taking too long to conclude, but also that the delays are intended to cause undue disadvantages in the exercise of the rights granted by law.

   That applicant was charged under arrest before the Court of Magistrates (Court of Criminal Inquiry) on the 30 of July 2015 and accused of drug trafficking and three years following that the compilation is still ongoing. When considering the seriousness of the offences, three years is not an unreasonable or excessive period and when taken as a whole there were no manifest failures from the parties of the case and also there has been no evident delays by the Court.

   That in view of the above there is no violation of the fundamental rights of applicant.

With costs."

Having seen that the Court ordered that these proceedings be conducted in the English language;

Having seen the acts of the case together with all documentation presented;

Having heard all witnesses under oath;

Having seen the note of submissions of the applicant filed on the 5th of January 2019[1];

Having seen the note of submissions of the defendant filed on the 15th of February 2019[2];

Having heard the final oral submissions by legal counsel to applicant;

Having seen that the case was adjourned for today for judgement.

Relevant Facts.

That on the 30th of July 2015, the applicant was brought under arrest before the Court of Magistrates as a Court of Criminal Inquiry and charged of having associated himself with a person/s in these islands or outside these islands to sell and traffic in these islands cocaine in breach of the dispositions of the Ordinance on Dangerous Drug (Chapter 101) or promoted, constituted, organised or financed this association to import in Malta the drug cocaine.

It happened that on the 6th of August 2015, the Court of Magistrates as a Court of Criminal Inquiry delivered in terms of Article 401 of the Criminal Code (Chapter 9) a decree stating that 'having heard all the evidence adduced at the

1 Page 50.
2 Page 59.

preliminary examination held by this Court into the charge against the person charged, hold that there are sufficient grounds for the trial of the person charged on indictment, and consequently it commits him for trial before the competent Court, directing that the proceedings of the investigation, together with the material objects relating to the offence, be transmitted to the Attorney General within the time prescribed by law'[3]. This decree is referred to as the *prima facie* decree by which the Court of Criminal Inquiry shows that it is satisfied *prima facie* that there are grounds for the proceedings to continue against the accused.

Applicant's Constitutional Complaints

The applicant is challenging the *prima facie* decree on the basis that this was prematurely delivered, well before all the evidence has been compiled. He argues that had the Court of Magistrates as a Court of Criminal Inquiry heard all the evidence before delivering the *prima facie* decree it would have not delivered it especially after hearing the evidence given by Edgar del Valle Yendes Gonzalez. The second complaint of the applicant is based on the principle that all proceedings are to be delivered within a reasonable time. This complaint is not directed towards the Court of Inquiry but towards the defendant in these proceedings who is insisting on producing a witness who is not in Malta and cannot be traced – with one adjournment after the other left for this reason, even more when the prosecution declared in at least two sittings that it does not have any further evidence. Due to this, the inquiry is getting lengthier while applicant is kept at the Correctional Facility due to the fact that he does not have enough money to effect the deposit ordered by court. The applicant argues that due to these reasons, his right for a fair hearing under Article 39 of the Maltese Constitution and Article 6 of the European Convention are being breached.

- ***Attorney General's Plea - Totality of the Judicial Process***

3 Page 39 of the inquiry.

The Attorney General pleaded that the judicial process is to be examined in its totality and that one should not examine only a part of the process.

Although the Attorney General is correct in stating that judicial proceedings are to be examined in their totality, however one should not stop at that juncture. According to local case law as well as that of the European Court of Human Rights (hereinafter referred to as ECtHR), Articles 39 of the Constitution and Article 6 of the Convention do not impede the Court from investigating alleged breaches (actual or potential) before the judicial process is concluded. Both in accordance with the Constitution and under the European Convention as adopted in Chapter 319, any person can seek protection not only when his rights and his fundamental freedoms are being violated but even if they are likely to be violated.[4]

In **Arrigo and Vella v. Malta**[5] the ECtHR held that:

"The Court recalls that the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, i.e. once they have been concluded. However, it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see R.D. v. Spain, no. 15921/89, Commission decision of 1 July 1991, Decisions and Reports (DR) 71, pp. 236, 243- 244). The Court, noting that the criminal proceedings in question have not yet been completed, finds that the applicants' submissions do not disclose any such circumstances (see Putz v. Austria, no. 18892/91, Commission decision of 3 December 1993, DR 76-A, pp. 51, 64)."

In a more recent ECtHR judgement, namely **Dimech v. Malta** (Appl. No. 34373/13) decided on the 2nd of April 2015, the said Court reiterated that:

4 Article 46 (1) of the Constitution and Article 4 (1) of Chapter 319.
5 Appl. No. 6569/04 decided on the 10th of May 2005.

"1. The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, X. v. Norway, Commission decision of 4 July 1978, Decisions and Reports (DR) 14, p. 228; Bricmont v. Belgium, 7 July 1989, Series A no. 158; Papadopoulos v. Greece, (dec.), no. 52848/99, 29 November 2001; Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005."

In the judgement given on the 26th of April 2018 in the names " **Rosette Thake et noe vs Kummissjoni Elettorali et**" moghtija fis-26 ta" April 2018, this Court differently presided hold that : "Il-kwadru li johrog minn din il-gurisprudenza fl-assjem taghha huwa li meta l-proceduri li dwarhom isir l-ilment ikunu ghadhom ma ntemmewx, u ma jkunx ghadu maghruf kif se jkun zvantaggjat ir-rikorrent, il-procediment kostituzzjonali jista` jitqies intempestiv. Fl-istess waqt ilment dwar allegat ksur tal-jedd li jsir waqt proceduri li jkunu pendenti jista` jinghata konsiderazzjoni jekk id-dritt lamentat jkun x`aktarx ser jigi vjolat u jekk il-ksur ikun wiehed reali u imminenti."

Illi: "Dwar l-eċċezzjoni tal-intempestività, mill-ġurisprudenza tal-Qrati tagħna jirriżulta l-prinċipju fis-sens illi għalkemm huwa minnu li l-ħarsien tad-dritt ta' smigħ xieraq għandu jiġi evalwat fil-kuntest tal-proċeduri kollha, u għalhekk ikun prematur li wieħed jiddeċiedi fi stadju bikri tal-proċess, meta digà jkun hemm raġunijiet biżżejjed li fuqhom il-Qorti tkun tista" ssib li hemm leżjoni, m"ghandhiex toqgħod tistenna sakemm jintemm il-każ kollu jew tistenna li attwalment jiġi miksur il-jedd sabiex tiddeċiedi jekk hemmx leżjoni jew le." (Prim' Awla (Sede Kostituzzjonali) - **Johan Frederik Stellingwerf vs L-Avukat Generali u Il-Kummissarju tal-Pulizija** - 30 ta' Mejju 2018).

From the application as well as from the final submissions of the applicant, the alleged breach is based on the *prima facie* decree delivered by the Court of Magistrates as a Court of Criminal Inquiry on the 6th of August 2015, it is up till that moment that this Court is to consider whether a breach of applicant's fundamental right has materialised. Irrespective of what the Attorney General requested following the *prima facie* decree of the 6th August 2015, this Court finds no valid reason not to examine whether a breach has been committed at that stage of the judicial process. Consequently the Court rejects the first plea filed by the Attorney General and shall proceed to consider the alleged breach of the fundamental right to a fair hearing.

- ***The prima facie decree***

To understand the *raison d'etre* of the *prima facie* decree, one is to first understand what is the role of the court of criminal inquiry under Articles 401 and 405 of the **Criminal Code. Article 401** provides as follows:

"401. (1) The inquiry shall be concluded within the term of one month which may, upon good cause being shown, be extended by the President of Malta for further periods each of one month, each such extension being made upon a demand in writing by the court:

Provided that the said term shall not in the aggregate be so extended to more than three months:

Provided further that unless bail has been granted, the accused shall be brought before the court at least once every fifteen days in order that the court may decide whether he should again be remanded in custody.

(2) On the conclusion of the inquiry, the court shall decide whether there are or not sufficient grounds for committing the accused for trial on indictment. In the first case, the court shall commit the accused for trial by the Criminal Court, and, in the second case, it shall order his discharge.

(3) In either case, the court shall order the record of the inquiry, together with all the exhibits in the case, to be, within three working days, transmitted to the Attorney General.

(3A) Where the court has committed the accused for trial by the Criminal Court the court shall, besides giving the order mentioned in sub-article (3), adjourn the case to another date, being a date not earlier than one month but not later than six weeks from the date of the adjournment. The court shall also adjourn the case as aforesaid after having received back from the Attorney General the record of the inquiry and before returning the record to the Attorney General in terms of any provision of this Code.

(4) In deciding whether there are or not sufficient grounds for committing the accused for trial on indictment the court shall not consider any question of prescription or any plea as is mentioned in article 449(1)(d).

Article 405 provides that:

"(1) After the committal of the accused for trial, and before the filing of the indictment, the court shall, upon the demand in writing of the Attorney General, further examine any witness previously heard or examine any new witness.

(2) The Attorney General shall, for such purpose, transmit to the court the record of inquiry together with the demand, stating therein the subject on which the examination or re-examination is to take place.

The Constitutional Court examined in detail the articles of the Criminal Code in question in the case **Dr. Joseph Brincat pro et noe vs. Avukat Generali** (Appl. No. 40/2004) decided on the 23rd of November 2004:

"Din il-Qorti tosserva li skond l-Artikolu 401 l-kumpilazzjoni ghandha tinghalaq fi zmien xahar prorogabbli ghal raguni tajba mill-President ta' Malta ghal perijodu massimu ta' tlett xhur. F' dan iz-zmien il-kumpilazzjoni ghandha tinghalaq bil-Qorti Istruttorja tiddeciedi jekk hemm ragunijiet bizzejjed sabiex l-imputat jitqieghed t[ah]t att ta' akkuza; u wara tordna li l-atti jigu rimessi lill-Avukat Generali sabiex dan l-ufficjal jibda d-deliberazzjonijiet tieghu dwar jekk johrogx l-att tal-akkuza jew inkellha jordnax l-liberazzjoni tieghu fit-termini tal-Artikoli 432 u 433 tal-Kap.9

Waqt dan l-ezsercizju l-Avukat Generali ghandu l-fakolta' li jrrinvija l-atti lill-Qorti tal-Magistrati [Malta] bhala Qorti Istuttorja biex tisma' xhieda gia mismugha jew tisma xhieda godda fit-termini tal-Artikolu 405. Dan isir permezz ta' nota bil-mitkub, imsejjah Att tar-Rinviju. [...]"

Mill-premess ghandu jirrizulta car is-segwenti:
[1] Illi l-kumpilazzjoni ex lege bil-fors trid tinghalaq fiz-zmien xahar prorogat ghal massimu ta' tlett xhur;

[2] Illi mal-gheluq tal-kumpilazzjoni l-Qorti Istruttorja ghandha tiddeciedi fuq bazi prima facie jekk l-imputat ghandux jitqieghed taht att ta' akkuza;

[3] Illi f' dan l-istadju l-kumpilazzjoni tkun inghalqet u l-atti jkunu ntbaghtu lill-Avukat Generali;

[4] Illi meta l-atti jergghu jigu rinvijati lill-Qorti, il-kumpilazzjoni ma tergax tinfetah, fis-sens li l-Qorti Istruttorja ma tistax terga' tiddeciedi jekk ghadx hemm ragunijiet bizzejjed sabiex l-imputat jitqieghed that att ta' akkuza, jew tbiddel id-decizjoni taghha u tghid li l-imputat ghandu jigi liberat [discharged], kif lanqas tista' f' dak l-istadju titrasforma ruhha f' Qorti ta' Gudikatura Kriminali. F' dan l-istadju l-funzjoni tal-Qorti hija limitata biss biex timsa x-xhieda kif mitlub fl-att tar-rinviju, imma zgur mhux biex terga tinfetah il-kumpilazzjoni. Dan jispjega ghaliex, filwaqt li l-presenza tal-imputat hija mehtiega ad validitatem matul il-kumpilazzjoni sabiex il-gbir tal-

provi jsir kollu kemm hu fil-presenza tal-imputat, fl-istadju ta' rinviju s-smiegh tax-xhieda hemm indikati tista' ssir anke fl-assenza tieghu, purche' ikun debitament notifikat.

Il-kliem tal-ligi fl-Artikolu 405 huwa car u ma jhallix lok ghal dubju dwar il-funzjoni tal-Qorti Istruttoria f' dan l-istadju. Skond it-termini stretti ta' dan l-Artikolu din il-qorti ghandha l-funzjoni biss li tisma' xhieda li jindikati fl-Att tar-rinviju; u ma ghandha ebda seta' tkompli l-kumpilazzjoni oltre t-termini tar-rinviji, ghax il-kumpilazzjoni inghalqet defenittivament bid-decizjoni tal-Qorti fl-gheluq taghha. Konformament ma' dan il-Qorti [Corte Criminale] fil-kawza Rex vs Geraldo Ebejer deciza fl-4 ta' Mejju 1931 [Vol.XXVIII.IV.7] dwar il-funzjoni tal-Qorti Istruttorja fi stadju ta' rinviju osservat: "Venendo quindi gli atti riminadati dal Pubblico Prosecutore alla Corte di Istruzione ……. dovra ottemperare a quanto le fosse stato richiesto dal Prosecutore Pubblico….. Questa Corte non pote' fare altro, perche la competenza della stessa non puo estendersi oltre l' oggetto e lo scopo del rinvio giusta ghal articoli 404 [illum 405] … E la Corte di Istruzione fece bene ad ottemperarsi unicament a quanto le aveva richiesto il Prosecutore Pubblico". [sottolinear ta' din il-Qorti].

Illi l-vexata quaestio hija jekk f' dan l-istadju ta' rinviju l-Qorti Istruttorja, in forza tas-seghat moghtija lill-Magistrat Istruttur, fl-Artikolu 397 tal-Kap.9 tistax tordna l-arrest ta' persuna li mix-xhieda li tkun qed tisma f' dan l-istadju jidhrilha li jista 'jkun involut fil-kaz kemm bhala awtur kif ukoll bhala komplici. Din il-Qorti hasbet fit-tul fuq dan il-punt, ukoll ghaliex l-Imhallef sottoskritt, fl-esperjenza tieghu ta' Magistrat, esperjenza l-fatt frekwenti, li l-kumpilazzjoni tinghalaq fi zmien qasir fit-terminu legali, u l-kumpilazzjoni tissokta b' diversi rinviji sakemm eventwalment jigi l-atti jigu rinvijati bl-artikoli, jew inkellha l-Avukat Generali jiddeciedi li johrog l-att tal-akkuza.

Matul dawn ir-rinviji jinstemghu diversi xhieda, kemm dawk indikati mill-Avukat Generali, kif ukoll dawk imressqa mill-Pulizija, stante li fl-atti tar-rinviji l-Avukat Generali jinizzel li l-Qorti Istruttorja ghandha tisma "kull

prova ohra li ggib il-pulizija". Jigu nominati esperti tal-fotografija, u esperti forensici sabiex jezaminaw dokumenti u jghamlu r-rapport taghhom, kif ukoll jinstemghu rikorsi ghal helsien mill-arrest preventiv [bail], tibdil fil-kondizzjonijiet tal-bail u anke ghar-revoka tal-bail.

Illi in propositu l-Qorti hija tal-fehma li bil-mod kif inhuma mfasslin l-artikoli 401 sa 405 ma jhalli ebda dubbju li l-funzjoni tal-Qorti Istruttorja tispicca mal-gheluq tal-kumpilazzjoni, u fi stadju tar-rinviju l-funzjoni taghha hija limitata li taghmel dak li talab l-Avukat Generali, u fil-kaz fejn dan jindika li l-qorti ghandha tisma kull prova ohra li ggib il-pulizija, tisma din il-prova u anke tinnomina esperti ghal preservazzjoni ta' dik il-prova;"[6]

It is therefore clear from this constitutional judgement that the Court of Criminal Inquiry is to deliver a *prima facie* decree within one month; otherwise special permission is to be requested from the President of the Republic For the said decree to be delivered, there isn't the need for all evidence to be brought forward. What happens is that if the Magistrate is convinced *prima facie* from the evidence brought before him that the person charged can be charged on indictment than he issues the said decree. It is also very common that following this decree, the Attorney General would request, through retransmissions (*rinviji*), the hearing of further evidence for him to determine the best way forward. Therefore the role of the Court of Magistrates as a Court of Criminal Inquiry is limited to the collection of evidence and not to decide on whether the charged is to be found guilty or otherwise. It is imperative to make clear that the *prima facie* decree as its name holds is given on preliminary evidence, had it been otherwise, the decree will no longer be considered as *prima facie*.

The *prima facie* decree of the 6th August 2015 was delivered after the Court of Magistrates as Court of Criminal Inquiry heard a number of witnesses, namely Police Officers Brandon Gauci, Anthony De Giovanni, Johann

6 See also **Ir-Repubblika ta' Malta vs. Noel Zarb** (Appl. No. 3/2011) decided by the Constitutional Court on the 23rd of January 2014.

Micallef and Clayton Frendo. The statement of Analdo Andres Venghaus was presented as was the sworn statement of Edgar Del Valle Yendes Gonzalez released before Magistrate Josette Demicoli *a tempo vergine* and the statement given by Gonzalez before the police.

The *prima facie* decree was contested multiple times by the applicant, both before the Court of Magistrates as a Court of Criminal Inquiry as well as before the Criminal Court. The Court of Magistrates decreed on the 20th of June 2017 by 'Tichad it-talbiet kontenuti fir-rikors stante li mhux il-kompitu ta' din il-Qorti kif preseduta qua Struttorja li b'xi mod tista' taderixxi mat-talbiet fir-rikors promotur'.[7] On the 4th of July 2017 the applicant filed an application before the Criminal Court requesting the said Court to declare the *prima facie* decree null given that the inquiry is still on going. The Criminal Court on the 19th of July 2017 decreed as follows: 'illi bid-dovut rigward, it-talba tar-rikorrenti mhix legalment sostenibbli u saret a bazi ta' nuqqas ta' informazzjoni dwar dak li jipprovdi l-artikolu 401 tal-Kodici Kriminali. Din il-Qorti, m'ghandhiex ghalfejn tinoltra dwar dak li jipprovdi dan l-artikolu u l-artikolu l-ohra fis-Subtitolu II tat-titolu I tat-Tieni ktieb tal-Kapitolu 9 tal-Ligijiet ta' Malta. Tirrileva ukoll illi tali digriet mhux wiehed li minnu jista' jkun intavolat appell; Ghaldaqstant tastjeni milli tiehu konjizzjoni ulterjuri tieghu.'[8]

Following these applications, the applicant instituted this constitutional case and upon reading the note of submissions of the applicant, namely to decide whether 'the decree of 6th August 2015 was given prematurely and in breach of Article 401 (2) of the Criminal Code', the court notes that the applicant is requesting also this Court to decide upon the merits of the decree. It is settled case-law that the constitutional challenges should not be an attempt for a third appeal. In **Peter Paul Muscat vs. Mario Muscat pro et noe** (Appl. No. 37/2008) decided by the Civil Court, First Hall, in its Constitutional Jurisdiction on the 21st of January 2010 held that:

7 Page 284 of the inquiry.
8 Page 297 of the inquiry.

"Illi fir-rigward tar-rwol ta' din il-Qorti kif adita mir-rikorrent, din il-Qorti tibda billi tgħid li taqbel mal-intimati li l-funzjoni tagħha fl-istħarriġ tagħha tal-ilment kostituzzjonali jew konvenzjonali mressaq mir-rikorrent m'għandux jissarraf f'appell ieħor mis-sentenzi kontestati. Fuq dan, jaqbel ir-rikorrent ukoll. Din il-Qorti hija mogħtija s-setgħa li, f'każ ta' ilment dwar ksur tad-dritt fondamentali tal-persuna għal smigħ xieraq quddiem qorti indipendenti u imparzjali, tistħarreġ l-imġiba ta' kull Qorti oħra, imqar jekk tkun waħda ġerarkikament ogħla minnha. Iżda din is-setgħa wiesgħa hija limitata fis-sens li l-Qrati ta' ġurisdizzjoni kostituzzjonali m'għandhomx iqisu jekk il-Qrati mixlija bi ksur ta' jedd ta' smigħ xieraq ikkommettewx żball ta' liġi jew ta' fatt fid-deċiżjonijiet tagħhom."

It is not the function of this Court to determine whether the decree was given prematurely and in breach of Article 401 (2). What this court is going to consider is whether this decree breaches the fundamental rights of applicant as protected by Article 39 of the Maltese Constitution and/or Article 6 of the European Convention.

Article 39 of the Constitution sets down a number of principles which need to be adhered to namely that :-

"(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 -
(a) shall be informed in writing, in a language which he understands and in detail, of the nature of the offence charged;
(b) shall be given adequate time and facilities for the preparation of his defence;

(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 been titled to have such representation at the public expense;
(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
(e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(7) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court

made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this sub-article by reason only that it authorises any court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so however that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(10) No person who is tried for a criminal offence shall be compelled to give evidence at his trial.

(11) In this article "legal representative" means a person entitled to practise in Malta as an advocate or, except in relation to proceedings before a court where a legal procurator has no right of audience, a legal procurator."

Article 6 of the European Convention, similar to the above cited article, provides the principles which need to be safeguarded by the Court:-

"(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.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(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;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Applicant complains that he was deprived 'of the possibility of tendering full and meaningful submissions to that same court following the real and actual conclusion of the compilation of evidence by the respondent, in substantiation of his position to the effect that based on the full evidence compiled by the Court, there are not sufficient grounds to commit the applicant accused to stand trial [...]'[9]. This submission must be considered in light of the jurisprudence above mentioned together with the considerations put forward by the Court of Magistrates as a Court of Criminal Judicature in the case **Il-Pulizija vs. Giovanni Calcaterra** (No 1187/2013) decided on the 18th of December 2013:

"Illi din il-Qorti kif presjeduta thaddan il-principju li l-grad tal-prima faciae huwa grad li jrid jikkonvinci lil din il-Qorti Istruttorja, li in bazi ghall-provi prodotti sa' dak il-punt tal-eghluq tal-kumpilazzjoni tal-provi skont l-Artikolu 401(1) tal-Kodici Kriminali, l-elementi kollha tar-reat/i kontestati jkunu

9 Page 53.

jirrizultaw imqar fuq bazi ta' probabbilita. Din l-interpretazzjoni dwar it-tifsira tal-kuncett tal-prima faciae giet abbraccjata kemm mill-Qorti tal-Appell Kriminali Inferjuri fis-sentenza "Il-Pulizija vs Fatiha Khallouf" deciza nhar il-25 ta' Settembru 2001 kif ukoll aktar recenti mill-Qorti Kostituzzjonali fil-kawza "Mark Charles Kenneth Stephens vs. Avukat Generali" deciza nhar l-14 ta' Frar 2006, fejn inter alia inghad testwalment: -

g. Ghalkemm generalment jinghad li l-Qorti Istruttorja, fl-istadju kontemplat fl-imsemmi Artikolu 401(2), tiddeciedi fuq bazi prima facie, dan ma jfissirx li d-decizjoni hija wahda "superficjali". Ifisser biss li, jekk ikun hemm provi mressqa mill-prosekuzzjoni li a bazi taghhom l-imputat jista' jinstab hati ta' reat fil-kompetenza tal-Qorti Kriminali, anke jekk hemm provi ohra li jistghu igibu fix-xejn dawk il-provi, il-Qorti Istruttorja ghandha xorta wahda tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza – ghax altrimenti l-Qorti Istruttorja tkun qed taghmel apprezzament tal-provi li jispetta biss lill-Qorti Kriminali jew lill-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali. Pero` huwa certament fil-kompetenza tal-Qorti Istruttorja li tara jekk hemmx il-presupposti fattwali kollha tar-reat addebitat (jew ta' xi reat kompriz u involut f'dak addebitat), cioe` li l-elementi kollha tar-reat ikunu jirrizultaw imqar fuq bazi ta' probabbilita`". (emphasis added by this Court)

Applicant's constitutional complainst is based on his claim that contrary to what happened in his case, the Court of Criminal Inquiry had to first hear all evidence, give the applicant the opportunity to make submissions and than pass on to provide a *prima facie* decree under Article 401 of the Criminal Code.

It is clear from the wording of the relative law and from the jurisprudence on the subject under discussion, that the *prima facie* decree is not a declaration of guilt; the *prima facie* decree is a declaration that on the evidence put forward at that early stage which should not exceed one month into the proceedings, the Court is of the opinion that the accused may be found guilty of a crime for which all elements of that crime are present on grounds of

probability and not beyond reasonable groudn. It might happen that there will be evidence which eventually will overturn this probability, however it is not for the Court of Criminal Inquiry to decide upon that, it is the duty of the Criminal Court or Court of Criminal Judicature which is to examine such evidence and reach its final conclusion after the applicant in these proceedings is given the opportunity to cross-examine witnesses, summon his own witnesses and make his final submissions.

As pointed out by Jonathan Cassar while giving evidence before this Court on the 27th of November 2018 'in no case the evidence is all brought forward before the prima facie'[10]. This also means therefore that not even the prosecution was given the opportunity to produce all its evidence and make its submissions before the court gave its decree. This is even made clear upon reading the court minutes (verbal) of the 6th of August 2015 wherein the prosecution asked the court to appoint court experts. The delivery of the prima *facie decree* is not based upon the full evidence and final submissions but is based upon preliminary evidence as already explained above.

As stated in the decree of the 6th of August 2015, the decree is based on preliminary evidence, therefore the applicant will be given the opportunity to file his submissions at the right moment in the proceedings. The Court agrees with the Attorney General's submission that it is not for the applicant to decide whether a trial against him should continue or otherwise, it is up to the Court and the Attorney General to so determine.

The law under which the *prima facie* decree complained of was pronounced is in actual fact a sort of safety valve for the protection of persons who are accused by the Police when there is no *prima facie* evidence to support the accusation. That is why the law imposes a very short term of one month within which the Police have to convince the Court that on a *prima facie* basis tha accused committed tha alleged crime. If from the evidence produced within one month the Court is not convinced that there is the probability that

10 Page 47.

the accused committed the alleged crime, then the accused shall be released. The Court is bound to base its *prima facie* decree on the evidence produced at that very early stage of the proceedings.

In view of the above considerations, the court finds that there was no breach of Article 39 of the Maltese Constitution and/or Article 6 of the European Convention. Consequently accedes to the second plea of respondent and rejects the first claim of applicant

- ***Lengthy inquiry***

One of the main elements to be analysed when challenging lengthy proceedings is whether that delay was or is a reasonable one. The ECtHR had on multiple occasions determined what are the parameters to establish whether judicial proceedings were concluded within a reasonable time.

In **Buchholz v. Germany** (Appl. No. 7759/77) decided on the 6th of May 1981 the ECtHR held that "49. *The reasonableness of the length of proceedings [...] must be assessed in each case according to the particular circumstances. In respect of criminal matters, the Court has, for this purpose, had regard, inter alia, to the complexity of the case, and to the conduct of both the applicant and the competent authorities...",* "70. *[...] the importance of what was at stake for the applicants in the litigation*" was also added by the ECtHR in **Gast & Popp v. Gemany** (Appl. No. 29357/95) decided on the 25th of February 2000[11]. The Court of Justice of the European Union held "*that the list of relevant criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is prima facie too long (see, in particular, Der*

11 See also **Gordeyev v. Russia** (Appl no. 40618/04) decided by the ECtHR on the 5th of February 2015.

Grüne Punkt – Duales System Deutschland v Commission, paragraph 182 and the case-law cited).”[12]

It is imperative to point out that the reasonable test does not identify any specific time frame within which criminal proceedings are to be concluded, nor is there one particular circumstance which determines what is reasonable. All circumstances must be taken together to determine whether the delay in proceedings was reasonable or otherwise.[13]

In **Anton Camilleri vs. Avukat Generali** (Appl. No. 71/2010) the Constitutional Court held on the 1st of February 2016[14] that:-

"Dwar it-tifsira tal-kuncett ta’ ‘zmien ragjonevoli’, l-Qrati taghna wkoll esprimew ruhhom u sostnew illi t-terminu fih innifsu ghandu element qawwi ta’ diskrezzjonalita` li jhalli f’idejn il-gudikant jiddetermina jekk fic-cirkostanzi partikolari tal-kaz, iz-zmien perkors sakemm il-persuna allegata tkun giet gudikata, kienx ta’ tul tali li jeccedi dak li hu jew ghandu jkun normalment accettabbli f’socjeta` demokratika. Dan ifisser illi kull kaz ghandu jigi ezaminat fid-dawl tac-cirkostanzi specjali tieghu."

In the light of the above jurisprudence, is there unreasonable delay in the case under examination? To answer this question, the Court analysed the sittings held before the Court of Magistrates as a Court of Criminal Inquiry. Thirty three (33) sittings were held prior to the date when this consitutional case was instituted during which witnesses where produced before the Court in twenty (20) of these sittings; in one sitting the interpreter was not available; in two (2) sittings the expert witness could not appear before the court; in five (5) sittings no witnesses were summoned and five (5) sittings starting from the 1st of March 2018 onwards for the testimony of Valerie Cerello but did not

12 C-50/12P, **Kendrion NV v. European Commission** decided by the CJEU on the 26th of November 2013, para 96-97.

13 See ***Francis Said vs. L-Avukat Ġenerali*** (Appl. No. 30/2007) decided by the Constitutional Court on the 12th of February 2010.

14 See also **Omar Osman Omar et vs. Avukat Generali** (Appl. Nru 29/2013) decided by the Constitutional Court on the 6th of February 2015.

appear becasue she could not be traced. In the sitting held on the 18th of April 2018 it was made clear by the prosecutor that they are insisting that this witness is heard by the court as she is a lead witness given that she was the chambermaid that found the drug capsules in the hotel room of Edgar del Valle Yerdes Gonzalez. Up to this stage the court does not see any unreasonable delay given that the prosecution barely wasted any sittings. Furthermore, it must be noted that the prosecution, same as the accused, have the right to put forward its witnesses who it deems necessary and thus this court has no *vires* to prohibit the prosecution from summoning a witness that it considers essential to build up its case.

What the court finds however, and this might be one of the consequential effects of not finding Valerie Cerello, is the fact that she was only mentioned for the first time by the Attorney General in the retransmissions (*rinviji*) on the 13th of November 2017[15], that is the 21st retransmission by the Attorney General. From the examination of the criminal inquiry, this Court observes that the name of Valerie Cerello appeared for the first time from the documents presented and witnesses summoned on the 30th of July 2015. It was well known by the prosecution that Ms. Cerello was a foreigner with no ties to the Maltese islands, therefore the level of diligence exercised by the prosecution had to be higher than that usually exercised when a witness is Maltese with ties in Malta. Therefore the cause of delay in the criminal proceedings is not a result of 'an unknown' witness, but can be attributed to negligence from the part of the Attorney General that, during the retransmission stages, failed to act diligently and expeditiously as required by law and by the special circumstance of the case.

In **Omar Osman Omar et vs. Avukat Generali**[16] the Constitutional Court [17] held that:-

15 Page 355 of the inquiry.

16 **Omar Osman Omar et vs. Avukat Generali** (Appl. Nru 29/2013) decided by the Constitutional Court on the 6th of February 2015.

17 See also **Il-Pulizija vs. Robert Agius** (Appl. No. 93/2017) decided by the Constitutional Court on the 29th of March 2019.

"... hija flokha l-osservazzjoni li l-fatt li r-rikorrenti kienu inghataw il-liberta' provvizorja, izda baqghu arrestati minhabba li ma setghux jissodisfaw il-kundizzjonijiet monetarji [...], ma jezentax lill-prosekuzzjoni jew lill-intimat mill-obbligu taghhom li jassiguraw li minn naha taghhom ma jkunx hemm dewmien inutili kif irrizulta lampament f'dan il-kaz li sehh, ghax ghandu jkun car li ghall-iskopijiet tal-Artikolu 6 tal-Konvenzjoni u l-Artikolu 39 tal-Kostituzzjoni dak li hu relevanti huwa l-fatt tad-detenzjoni u mhux ir-raguni li ghaliha r-rikorrenti kienu baqghu mizmuma taht arrest preventiv. La darba dawn baqghu detenuti allura l-obbligu da parti tal-Istat li jassigura l-ispeditezza fit-tmexxija tal-proceduri kriminali jirrizulta aktar car u impellenti. L-ispeditezza, fis-sens ta' dewmien irragjonevoli, fil-proceduri gudizzjarji, partikolarment f'dawk ta' natura kriminali, huwa rekwizit li ghandu jigi osservat f'kull kaz, anke meta l-akkuzat ma jkunx mizmum taht arrest preventiv, *multo magis* meta dan ikun mizmum taht arrest preventiv tul il-proceduri.

45. Izda f'dan il-kaz u ghall-finijiet tal-Artikolu 6 tal-Konvenzjoni, ghalkemm il-fatt tad-detenzjoni kellu jittiehed in konsiderazzjoni, u minkejja li, kif fuq spjegat, mhijex daqstant relevanti r-raguni ghad-detenzjoni, daqs il-fatt fih in-nifsu, izda l-fatt li r-rikorrenti Oman Osman kien talab il-helsien mill-arrest preventiv wara li kien ilu izjed minn sena arrest, [...] dawn il-fatturi ghandhom relevanza ghall-finijiet tar-rimedju."

In criminal proceedings the *dies a quo* start running from the moment the person is made aware of the charge that is being brought against him, as it is from that moment the he has an interest for the charge to be determined and concluded.[18] The reasonable time is measured till the moment ("*dies ad quem*") the uncertainty caused by the pending proceedings have been concluded. This therefore happens when there is a judgement or when the time for appeal has lapsed.[19]

18 ***Dobbertin v France*** (Appl. No. 13089/87) decided by the ECtHR on the 25th of February 1993, §38.
19 ***Angelucci v. Italja*** (Appl. No. 12666/87) decided by the ECtHR on the 19th of February 1991 § 15.

Stephanos Stavros in ***The guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*** opines that "*the right to a speedy trial has traditionally been perceived as protecting two basic rights of the accused. First the accused should not for an unduly long period remain in a state of uncertainty about his fate or be subjected to a series of disabilities normally associated with the initiation of criminal proceedings. Secondly speedy proceedings are designed to safeguard the right of the accused to mount an effective defence; the passage of time may result in the loss of exculpatory evidence*". Delay in proceedings creates, in the persons accused, uncertainty as to whether he is going to be found guilty or innocent and what the future holds for him. As has been pointed out above as well as in the case **Abdoella v. The Netherlands** decided by the ECtHR on the 25th of November 1992, what needs to be taken into account is "*What was at stake for the applicant"* as a consequence of the procedure as well the detention. T

After examining all the acts of the case, the Court is of the view that in the particular circumstanes of this case, the length of time the prosecution is taking to produce Valerie Cerello as witness cannot be considered reasonable. Said witness is not resident in Malta, has left the Islands years ago and the Prosecution has no clue where she is presently residing. The rights of the prosecution have to be balanced against the rights of the accused who is still under preventive custody pending the outcome of the judicial proceedings.,

In view of the above the Court rejects the third plea of the Attorney General and finds that the delay in proceedings before the Court of Criminal Inquiry is breaching the right of applicant for a fair hearing within a reasonable time..

- ***Compensation***

In this regard reference is made to the judgment quoted above **Anton Camilleri vs. Avukat Generali** (Appl. No. 71/2010) which confirmed the judgment delivered in first instance on the 22nd of April 2015 which held that:-

"La l-Kostituzzjoni u lanqas il-Konvenzjoni ma jfissru x'imisshom ikunu l-effetti ta' proċedimenti kriminali meta jinstab ksur tal-element tas-smigħ xieraq fi żmien raġonevoli. Xi kittieba juru l-fehma li "*It would seem to ensue from this provision that, if the reasonable time has been exceeded and, consequently, the determination can no longer be made within a reasonable time, the proceedings would have to be stopped and the civil action and the criminal charge be declared inadmissible. However, in the Strasbourg case law a more flexible view has been adopted: 'an excessive length of criminal proceedings can in principle be compensated for by measures of the domestic authorities, including in particular a reduction of the sentence on account of the length of procedure'. ... in criminal procedures the public interest in the prosecution and conviction of the criminal may be so great that the prosecution should not be stopped for the sole reason that the reasonable time has been transgressed: another, more proportionate compensation should be awarded to the victim of the transgression*" [Van Dijk, van Hoof, van Rijn, Zwaak *op. cit.* paġ. 611];

Illi dwar il-kwestjoni tal-kumpens li jitħallas f'każ ta' sejbien ta' ksur tal-artikolu 6 tal-Konvenzjoni, jibda biex jingħad li l-għoti ta' kumpens huwa fakultativ [K. Reid *A Practitioner's Guide to the European Convention on Human Rights* (3rd Edit, 2007) § III-001, paġ. 603 – 4], għaliex dikjarazzjoni li seħħ ksur tal-jedd ta' smigħ xieraq waħedha tista' sservi sakemm rimedju bħal dak jista' jitqies bħala wieħed effettiv u effikaċi li jiżgura lill-parti mġarrba r-*restitutio in integrum* tal-jeddijiet tagħha [Kost. **11.8.2003** fil-kawża fl-ismijiet ***John Buġeja vs L-Avukat Ġenerali et]***. Min-naħa l-oħra, jekk kemm-il darba l-Qorti tqis li jkun xieraq li tagħti lill-persuna mġarrba xi sura ta' kumpens dan m'għandux ikun eżerċizzju ta' komputazzjoni ta' danni bħalma jsir, per eżempju, fi proċess ċivili normali. Ingħad mill-Qrati tagħna li "*kawża kostituzzjonali għal dikjarazzjoni ta' leżjoni ta' dritt fondamentali*

m'għandhiex tiġi konvertita f'kawża għal danni akwiljani. Meta jiġi riskontrat dewmien skont l-artikolu 6, ir-rimedju għandu jkun, bħala regola, kumpens konsistenti f'danni morali li jkunu jirrispekkjaw id-dewmien inġustifikat, u dan indipendentement min-natura tal-kawża jew il-valur tal-proprjeta' in kontestazzjoni, u bla preġudizzju għad-danni materjali ossija reali li dak id-dewmien seta' effettivament ikkawża" [Kost. **3.2.2009** fil-kawża fl-ismijiet ***Gasan Enterprises Limited vs Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar***];

After considering the criteria used by the ECtHR and by our national courts[20], this court is of the view that for the violation of the applicants' right for a fair hearing within a reasonable time the appropriate remedy is for the applicant to be compensated for moral damages. After considering all the particular circumstances of this case, the Court establishes the sum of two thousand, five hundred euros (€2,500) by way of compensation to applicant for moral damages as a result of the breach of his fundamental right as established above.

Decide

For these reasons the Court decides this case as follows:

1. Rejects the first plea of the Attorney General and finds that the application filed by applicant is not premature and that this Court should exercise its powers granted by law to hear the case.

2. Accedes to the second plea of the Attorney General and rejects the first part of the applicant's request; and finds that the decree given on the 6th August 2015 by the Court of Magistrates (Malta) as a Court of Criminal Inquiry and

20 See **Henry Cassar vs. Avukat Ġenerali** decided by the Civil Court First Hall (Constitutional Jurisdiction) on the 27th of February 2009 and **Francis Said vs. Avukat Ġenerali** decided by the Constitutional Court on the 12th of February 2010.

the subsequent proceedings as a result of that decree are not in breach of applicant's fundamental rights.

3. Rejects the third plea of the Attorney General and accedes to the second part of applicant's request; finds that the length of time the prosecution is taking to produce Valerie Cerello as witness before the Court of Magistrates (Malta) as a Court of Criminal Inquiry in the proceedings against applicant is in breach of applicant's right to a fair hearing within a reasonable time protected under article 39 of the Constitution of Malta and under article 6 of the European Convention for the Protection of Human Rights and Liberties.

4. Orders the Attorney General to pay applicant the sum of one thousand and five hundred euros (€1,500) by way of compensation for the violation of the right to a fair trial within a reasonable time.

   One third of the costs of these proceedings are to be borne by applicant, while the remaining two thirds are to be borne by respondent.

   Read.

Hon. Robert G. Mangion
Judge

Lydia Ellul
Deputy Registrar