



**COURT OF MAGISTRATES (MALTA)
As a Court of Criminal Judicature**

**MAGISTRATE
Dr. Victor George Axiak LL.D. Dip. Tax**

The Police (Inspector Sarah Magri)

Vs

Nicolae Materinca (ID. 0071922A)

Today, 13 January 2020

The Court,

Having seen the affidavit of PC 407 K. Scicluna wherein it is stated in the Maltese language that:

“On 19 September 2016, at around 11.15 AM, while I was on duty at St. Julian’s Police Station, I was approached by John Cassar ID. 3526164M and informed that early that morning, at around 7.30 AM, as he was driving along Triq San Andrija, Swieqi, roughly opposite Bonello Petrol Station, coming from St. Julian’s towards the Coast Road, as he was driving slowly in a traffic jam, he was involved in a traffic collision when the driver of a vehicle with registration number ACC918 (of a black colour) hit him in the rear of the vehicle and sped off.

Following a search that I conducted in the Police System I identified the owner of the vehicle with registration number ACC918 as being Materinca Nicolae from St. Paul’s Bay. I sent him a letter requiring his attendance to St. Julian’s Police Station in connection with this investigation.

On 21 September 2016 Nicolae Materinca ID. 71922A attended St. Julian's Police Station. Before any discussions related to this police report, I granted him the rights afforded by law including the right to legal assistance that was however refused by the accused. Mr. Nicolae Materinca confirmed that he was driving along Triq San Andrija on the day in question at around 7.30 AM and he admitted that he was involved in the above mentioned collision and that also sped off following the incident.

When Mr. Materinca was asked why he had fled the scene of the incident he replied that he had never been involved in a traffic incident and he sped off as he was scared. When asked as to why he was scared, the accused replied that he didn't know why.

I informed Mr. Nicolae Materinca that the Police were going to file charges against him in connection with the hit and run as well as causing involuntary damages.

*Nothing further to add.*¹

Having seen that during the sitting of 25 October 2017, with regard to the concluding paragraphs of the affidavit of PC 407 K. Scicluna, counsel for the defence requested clarification from the Prosecutor as to whether the right of access to a lawyer granted to the accused as well as the subsequent waiver by the accused were laid down in writing or not and whether such right of access was granted in a language that the accused could understand.

Having seen that during the said sitting, the Prosecutor and counsel for the injured party replied that the accused was not under investigation and neither was he under arrest and therefore the right of access to a lawyer was not even required in terms of law.

Having seen the note filed by the accused on 27 November 2017 whereby *inter alia* the accused submitted that:

- the accused had attended St. Julian's Police Station upon the Police's request;
- the accused's statement, referred to in the affidavit, is the only proof that the prosecution can bring in this case given that the injured party did not identify the driver of the vehicle in question;

¹ The affidavit is in the Maltese language and there appears to be no English version in the court file even though in the sitting of 5 October 2018 the Court had ordered that proceedings are to be conducted in the English Language. The Court has therefore taken the liberty to translate such affidavit itself for the purpose of this decree.

- the accused is not a Maltese citizen and is not fluent in the English language and informed his counsel that contrary to what is stated in the affidavit he was not the driver in question and in fact he had explained to the Police that the driver was actually his cousin;
- the accused was considered a suspect by the Police given that he was requested to attend the Police Station having been identified as the owner of the vehicle in question following the hit and run incident;
- Article 355AU(1) of Chapter 9 of the Laws of Malta makes it clear that the right of access to a lawyer is competent both to accused persons and to suspects and applies irrespective of whether they are deprived of liberty or not;
- according to Article 355AUA(6) of Chapter 9 of the Laws of Malta, when the accused refused legal assistance the Police should have recorded this fact in writing in the manner referred to in such article. This was not carried out. The accused also attached a sample of the formula usually used by the Police to record such waiver;
- since the waiver was not recorded in terms of law, it cannot be said that such waiver was given in an “*unequivocal manner*” and “*attended by the minimum safeguards commensurate to its importance*” (Paskal vs Ukraine – ECtHR 15 September 2011)
- therefore his right of access to a lawyer was not granted to him in accordance to law and therefore his statement and any part of the affidavit referring to his statement ought to be expunged from the records of the case.

Having seen the note filed by the Commissioner of Police on 12 October 2018 whereby *inter alia* it was submitted that the police officer in question should be summoned to testify on the matter raised by the defence and moreover that it was clear from the record of the sitting held on 5 October 2018 that the accused understands the English language.

Having seen the record of the sitting held on 5 October 2018.

Having heard the testimony of PS (formerly PC) 407 K. Scicluna given during the sitting of 7 October 2019.

Having considered that the accused himself had informed the Court during the sitting held on 5 October 2018 that although he does not understand the Maltese language, he understands the English language. Thereupon the Court had ordered proceedings to be continued in the English language.

Having considered that during his testimony given on 7 October 2019, PS 407 K. Scicluna testified that he could not recall whether there were any witnesses at the time

that he was taking down the accused's statement and moreover he had informed him of his rights verbally.

Having considered that according to *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, the said Directive “*applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.*”²

Having considered that according to the said Directive:

- this “*also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons*”³
- “*Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.*”⁴
- “*Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*

(a) before they are questioned by the police or by another law enforcement or judicial authority;

² Directive 2013/48/EU, Art. 2.1

³ *Ibid.* Art. 2.3

⁴ *Ibid.* Art. 3.1

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.”⁵

- *“Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:*

(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and

(b) the waiver is given voluntarily and unequivocally.”⁶

- *“The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.*”⁷

Having considered that the said Directive was transposed into Maltese law under Sub-Title IX of Title I of Part I of Book Second of the Criminal Code.

Having considered that according to the relevant provisions of the Criminal Code:

- the suspect is defined as *“a person who is **detained** or **arrested** by the Executive Police or any other law enforcement or judicial authority where such person has not been charged before a court of justice of criminal jurisdiction and who is being questioned by the Executive Police or any other authority as aforesaid in relation to any criminal offence”*⁸
- *“This Sub-title applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the Executive Police or by any*

⁵ *Ibid.* Art. 3.2

⁶ *Ibid.* Art. 9.1

⁷ *Ibid.* Art. 9.2

⁸ Criminal Code. Art. 355AT. (2)(a)

other law enforcement or judicial authority, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty."⁹

- *"Where the person **detained** chooses not to seek legal assistance the Executive Police, investigating officer or any other law enforcement or judicial investigating authority shall record this fact in writing in the presence of two witnesses and thereupon questioning may proceed immediately. It shall not be admissible for the prosecution to comment during any proceedings before a court of justice of criminal jurisdiction on the fact that the suspect or the accused person did not avail himself of the right to legal assistance in the course of his detention under arrest."*¹⁰

Having considered that the right to legal assistance is of such fundamental importance that the accused or suspected person may only waive it in limited circumstances.¹¹ The ECtHR has strictly restricted waiver and has emphasised the importance of providing safeguards. In *Pishchalnikov v. Russia*¹² the applicant having been interrogated without a lawyer had confessed to taking part in criminal activities. During subsequent procedures, he refused legal assistance. He was then assigned a legal aid counsel and during the interrogation conducted in his lawyer's presence, he retracted his statements. He was convicted of various offences on the basis of the statements made upon his arrest. The ECtHR found that it was unlikely that the applicant could have reasonably appreciated the consequences of being questioned without legal assistance. It therefore found a violation of Article 6 of the ECHR because there had been no valid waiver of the right. The ECtHR noted that:

"neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...; Kolu v. Turkey, no. 35811/97, § 53, 2 August 2005, and Colozza v. Italy, 12 February 1985, § 28, Series A no. 89). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have

⁹ *Ibid.* Art. 355AU. (1)

¹⁰ *Ibid.* Art. 355AU. (6)

¹¹ ECtHR, *A.T. v. Luxembourg*, No. 30460/13, 9 April 2015, para. 59. This case involved the directive on the right to access a lawyer.

¹² ECtHR, *Pishchalnikov v. Russia*, No. 7025/04, 24 September 2009, paras. 77–78.

foreseen what the consequences of his conduct would be (see Talat Tunç v. Turkey, no. 32432/96, 27 March 2007, § 59, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003) ... The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly waive his rights and respond to interrogation. However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.”

Having considered that as held by the ECtHr in the said judgement, for safeguards to be effective, a waiver must: (i) be established in an unequivocal manner; (ii) be attended by minimum safeguards commensurate to its importance; (iii) be voluntary; (iv) constitute a knowing and intelligent relinquishment of a right; and (v) if implicit from the accused’s conduct, it must be shown that the accused could reasonably have foreseen the consequences of his/ her conduct.

Having considered that the abovementioned Directive leaves it up to Member States to adopt the relevant procedure necessary to record the waiver (whether or not the waiver is made in writing or orally) as well as the circumstances under which such waiver is given.

Having considered that in accordance with Article 355AU. (6) of the Criminal Code: *“Where the person **detained** chooses not to seek legal assistance the Executive Police, investigating officer or any other law enforcement or judicial investigating authority shall record this fact in writing in the presence of two witnesses and thereupon questioning may proceed immediately. It shall not be admissible for the prosecution to comment during any proceedings before a court of justice of criminal jurisdiction on the fact that the suspect or the accused person did not avail himself of the right to legal assistance in the course of his detention under arrest.”*

Having considered that in accordance with Article 355AU (1) of the Criminal Code the right to legal assistance is afforded by the State to **suspects** or accused persons in criminal proceedings *“**from the time when they are made aware** by the Executive Police or by any other law enforcement or judicial authority, by official notification or otherwise, **that they are suspected** or accused **of having committed a criminal offence**, and irrespective of whether they are deprived of liberty.”*

Having considered that in this case the accused having been identified by the police as the owner of the vehicle in question, was sent a letter requesting him to attend St. Julian's Police Station *"in connection with this investigation."*¹³ There is no doubt in the Court's mind that the accused was being treated as a suspect at that point in time even though he was not deprived of liberty. This notwithstanding Maltese legislator opted to define a "suspect" as a person who is **"detained or arrested"** and being questioned by the relevant authorities in relation to any criminal offence before being charged in Court. In this particular case, the person was neither detained nor arrested but for all intents and purposes was still being considered as a "suspect" within the meaning (though not defined) and context of the Directive 2013/48/EU. Not so under the narrow definition in Art. 355 AU(6) of the Criminal Code. It is true that the right to legal assistance is also afforded to persons (other than the suspect or the accused person) *"who in the course of questioning by the Executive Police ... become suspects or accused persons"* (Art. 355 AU(4)) but even this possibility is restricted by the narrow interpretation of "suspects" as it requires that a person who is being questioned by the Police suddenly becomes "detained" by mere operation of the law given that to become a suspect it is necessary to be "detained" – a legal quirk if there ever was one!

Having considered that the Maltese legislator also requires that the procedural safeguards mandated by the Directive in relation to the waiver of the right to legal assistance (which safeguards are established by Member States in accordance with their laws) are only competent to persons "detained", as per Article 355AU (6) of the Criminal Code.

Having considered that although the term "suspect" is not defined in the Directive, it is clear that the right to legal assistance, of being informed of such right as well as the procedural safeguards in relation to a waiver of such right is afforded to suspects even though they are not deprived of liberty as this arises in the Directive itself (Art. 2.1). Indeed Art. 355AU(1) of the Criminal Code also provides for this but this is then contradicted by the definition of "suspect" under 355AT. (2)(a).

Having considered that, in contrast, Art. 534A of the Criminal Code under Title VI of Title I of Part I of Book Second of the Criminal Code that deals with the rights of suspects and accused to be informed of their rights (including the right to legal assistance) – which transposed into Maltese law *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings* – provides that the provisions of that title *"shall apply to a person from the time that he is made aware by the Executive Police that he is suspected of having committed an offence (hereinafter in this title referred to as the "suspect") ..."*

¹³ Fol 5

Having considered that the interplay between Art. 355AU(1), Art. 355AU(6) and Art. 355AT(2)(a) of the Criminal Code is such that taken *ad litteram* would deprive persons suspected of having committed a criminal offence of their rights (including the right to legal assistance) and the relevant procedural safeguards simply because they have not been formally detained or arrested.

Having considered that this goes against the spirit of Directive 2013/48/EU which should have been transposed accurately and in full by the Maltese legislator by 27 November 2016. Therefore since implementation has not occurred in an accurate manner, the Court must seek to give effect to the provisions of the directive by means of the EC doctrine of indirect effect (also known as the obligation of harmonious interpretation) and must therefore interpret national law in the light of the EC directive.

Having considered that therefore it is expedient for the Court to interpret the definition of “suspect” under Art. 355 AT(2)(a) to include not just suspected persons who have been detained but also suspected persons who are questioned at the Police Station having gone there voluntarily. It is also expedient for the Court to extend the procedural safeguards in relation to waivers under Art. 355AU(6) of the Criminal Code to persons who are not detainees.

Having considered that in so doing, the Court shall therefore consider that when the Police officer in question informed the accused of his right to legal assistance and the latter allegedly refused such right, the Police should have recorded this fact in writing in the presence of two witnesses before starting the questioning. Failure to do so quite simply means that the waiver was neither established in an unequivocal manner nor was it attended by minimum safeguards commensurate to its importance and was therefore not valid.

Having considered that there also serious doubts as to whether the Police officer in question informed the accused of his rights using “*clear and sufficient information in simple and understandable language*”. It seems to the Court that given that the accused was not conversant in the Maltese language it was all the more imperative for the Police officer to adhere strictly to the procedural safeguards (such as for instance by making it clear in writing in the presence of two other witnesses that the accused could understand the content of the right concerned and the possible consequences of waiving it) not least to prove in any subsequent criminal proceedings that these were indeed adhered to!

Decide

For these reasons the Court:

- 1. Declares that by failing to adhere to the provisions of Article 355 AUA(6) of the Criminal Code the Prosecution also breached the provisions of Article 355 AUA(1) of the Criminal Code in relation to the right to legal assistance and that therefore the accused was deprived of this right without legal justification.**
- 2. Orders that the statement given by the accused as well as any reference to such statement including in the affidavit of PS 407 is to be struck off and expunged from the acts of the case.**

**(sgd.) Dr. Victor George Axiak
Magistrate**

**Mario Azzopardi
Deputy Registrar**