Criminal Court

The Hon Mr Justice Giovanni M. Grixti LL.M., LL.D.

Bill of Indictment No 11/2017

The Republic of Malta

vs

Lamin Samura Seguba.

The 11 of June, 2020

The Court;

Having seen Bill of Indictment numbered 11/2017 against Lamin Samura Seguba and accused with:

In the First Count, of having, on the 7th December 2014 and during the previous months, rendered himself guilty of producing, selling or otherwise dealing in the whole or any portion of the plant Cannabis (excluding its medicinal preparations) controlled under the provision of Part I, First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when he was not in

possession of any valid and subsisting production, sale or dealing authorisation granted in pursuance of the said law;

In the Second Count: of having on the 7th December 2014 and during the previous months, rendered himself guilty of having in his possession (otherwise than in the course of transit through Malta or the territorial waters thereof) the whole or any portion of the plant Cannabis (excluding its medical preparations) in that such possession was not for the exclusive use of the offender;

In the Third Count: of having on the 7th December 2014 and during the previous months, rendered himself guilty of being in possession of the whole or any portion of the plant Cannabis, being a drug specified and controlled under the provisions of Part 1, First Schedule of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) when not in possession of any valid and subsisting import or possession license or authorisation from the President of Malta granted in pursuance of the said law, and was not authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) or by other authority given by the President of Malta, to be in possession of this drug in terms of Regulation 9 of the said Regulations, and was likewise not in possession of a valid prescription in terms of the said Regulations;

Having seen the note of preliminary pleas of the accused filed in the registry of this court on the 20th November, 2017;

Having heard oral submissions by learned counsel to accused and learned counsel to the Attorney General;

Having seen the urgent application of the Attorney General of the 14th June, 2019 requesting suspension of delivery of the judgement

on the preliminary pleas to hear new submissions with regard to the issue of declarations and statement of the accused released without legal assistance during the pre-trial stage and this in light of then recent jurisprudential developments on the matter namely the judgement of the European Court of Human Rights *Case of Farrugia v. Malta (Application no. 63041/13) of the 4 June 2019*;

Having seen the records of the case;

Considered:

1. That the first preliminary plea raised by the accused with regard to this bill of indictment refers to his statement and any declaration released to the Police during his arrest:

"In the first place the invalidity, and consequently the exclusion from the evidence of any declaration, including written statements to the Police, which accused may have made to the Police in connection with this case since any such declarations and/or written statements were not made in accordance with the law, that is to say after the accused had consulted a lawyer and/or in the presence of his lawyer as well as the presence of a lawyer when an accused makes a declaration to the police are essential for such declarations to be deemed valid and may be brought in evidence".

2. The records of the case show that on the 7th of December 2014, accused Lamin Samura Seguba released a statement to the Police while under arrest for investigation on the alleged crimes merits of the bill of indictment. This statement is exhibited as Doc PG3 at fol 13 *et seq* of the compilation of evidence before the Courts of Magistrates (Malta) as a Court of Criminal Inquiry now forming part of the records of the case before this Court. This statement was exhibited by Inspector Pierre Grech, the same officer

that interrogated the accused, before the Court of Criminal Inquiry on the 11th of December 2014;

3. The said Doc. PG3 states that it is a statement by Lamin Samura Seguba detailing his particulars and is signed by Inspector P. Grech, the accused and PC 349 J. Farrugia and contains the following and only caution preceeding the contents of the statement: "**Caution given by Police Inspector Pierre Grech in the presence of PC349 J. Farrugia: You do not have to say anything unless you wish to do so, but what you say may be given in evidence**". The end of the statement is sealed with the following declaration: "**I declare that I gave this statement voluntarily, without any promises, threats or intimidation and after having read this statement myself, I declare that it is the true content of my statement and I do not wish to add or remove anything from it. I am also choosing to sign"**. (Bold characters inserted by this Court and not included in the original document). This declaration is again signed by Inspector Grech, the accused and PC349 J. Farrugia;

4. The records also show that on the 11 of December 2014 Inspector Pierre Grech exhibited document marked Doc PG9 "Declaration regarding refusal of legal advice" which states the following:

"Today 07/12/2014 I Lamin Samura Seguba holder of ID Card 9000595A was arrested in connection with DRUGS offences and informed by Inspector Herman Mula that I have the right to be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding (1) one hour. / I am declaring that I'm refusing to exercise that right"

This document is signed by Inspector Herman Mula, the accused, PC 365 Malcolm Griscti and PS 891 Oscar Baldacchino and dated the 7 of December 2014;

5. The caution reproduced above was again put to the accused in the second question asked by Inspector as to whether he understood that caution. The third question in the statement document refers to the Letter of Rights when the Inspector asks whether accused confirms and was given the said Letter of Rights to which question accused answers in the affirmative;

6. This matter has been the subject of numerous decisions by the Courts of these Islands in their various competences including the Constitutional Court and the European Court of Human Rights in Strasbourg. It is the subject of evolution from a judicial perspective which ranges from a long standing situation prior to 2002 where the only rights afforded to a suspect were the right to remain silent and that anything stated may be brought as evidence against such accused to the present legal right to be assisted by a lawyer from the moment of arrest through the interrogation process during the pre-trial stages. The lawyer's presence, however, is subject to the non intervention of same during the interrogation but that will not form the subject of today's debate as it is irrelevant to the resolution of the plea under examination;

7. The right of access to legal assistance is presently regulated by article 355AUA of the Criminal Code, Chapter 9 of the laws of Malta promulgated by means of Act LI of 2016 with the object of transposing Directive 2013/48/EU of the European Parliament and of the Council dated 22 October 2013. Act LI substituted the former provisions regulating the right to legal assistance prevailing at the time, namely article 355 AT introduced by means of Act III of

2002 and brought into full effect not before 2010 by means of Legal Notice 35 of that year with the established date of coming into force as the 10 of February 2010. This provision read as follows:

> **355AT (1) Subject to the provisions of subarticle (3), a person arrested and held in police custody at a police station or other authorised place of detention shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour. As early as practicable before being questioned the person in custody shall be informed by the Police of his rights under this subarticle.**

8. Attached to this right, however, was the condition pertaining in then article 355 AU where, having made use of the right to seek legal advise as aforesaid, the Court of Magistrates or the jury may draw inferences where the accused failed to mention any facts relied on in defence during the proceedings. It must be stated that this indeed created an anomolous situation in that the only person who could explain the right of inference to the accused was the police inspector himself and there was no guarantee that the suspect would have understood all his rights and the legal consequences emanating from the choice at that particular moment. Indeed, for the suspect to have consulted a lawyer or legal procurator on the meaning of the right of inference would tantamount to have been given the maximum one hour right of legal assistance the consequence of which brings into play the right of inference. All that, however, changed with the coming into force of Act LI of 2016 as stated above;

9. In his submissions, accused made reference to a judgement of the Constitutional Court **Christopher Bartolo vs Avukat Generali u l-Kummisarju tal-Pulizija** of the 5 October, 2018 and to that of the Court of Criminal Appeal **Il-Pulizija vs Claire Farrugia** of the 20 November 2018. The Attorney General, and as stated in his note of

the 14 June 2019 is relying on the judgement of European Court of Human Rights in the case **Farrugia v. Malta** of the 4 June 2019;

10. This Court is of the opinion that legal certainity of one's rights is a fundamental prerequisite and for this reason makes reference to a judgement of the Court of Criminal Appeal of the 3 April, 2019 **Ir-Repubblika vs. Rio Micallef et** the merits of which are very similar to the case at hand. This judgement confirmed a decision of the Criminal Court which had upheld a request of the accused to expunge their statements and any declarations that they had made from the acts of the proceedings prior to the coming into force of Act LI of 2016. By way of background to this case, and because it presents a particular interest, the Criminal Court had initially, and prior to 2016, turned down the same request by the accused made in their prelimiary pleas. Following a decision of the European Court of Human Rights in the case **Borg v. Malta** (Grand Chamber 2 January 2016), the accused made an application for a reconsideration of the Court's previous decision. This in itself created an exception to the rule on preliminary pleas subjected to a specific time frame from receipt of the Bill of Indictment but was accepted by the Criminal Court which found in favour of the accuseds' application and declared as inadmissable all written and verbal declarations made by them in the pre-trial stages of the proceedings;

11. The Court also makes reference to principles emanating from a judgement of the Constitutional Court **Il-Pulizija vs Aldo Pistella** of the 14 December 2018 (Rik 104/2016/1). Those judgements, however, are part of the legal evolution on the subject matter at hand which is presently led by the Farrugia v. Malta case cited above which seems to reverse the *quid juris* back to the time of the judgement of the Consititutional Court in the names Charles

Steven Muscat vs. Avukat Generali of the 8 October 2012 of which the European Court of Human Rights was highly critical as being based on a very restrictive interpretation of its judgement in the case of Salduz v. Turkey;

12. The Farrugia v. Malta case essentially states that not all statements given by suspects in the pre-trial proceedings in the absence of legal assistance should be expunged from the records. The court needs to follow a number of criteria before deciding on such a request among which whether the accused was a vulnerable person, the age of the accused and whether that statement was the only evidence adduced. This Court now finds itself in a situation where it could have acceded to a request or a plea such as the present and must now decide in an opposite manner the next day even where there results "a systematic breach of pre-trial proceedings". Legal uncertainty for an accused may potentially be conducive to a breach of a fair hearing. It is the opinion of this Court that there needs to be a strong degree of certainty in such circumstances and not to hold a trial within a trial to examine whether a statement, for instance, is the only evidence produced by the prosecution;

13. Indeed the rules as provided in Directive 13/48 cited above should be the yardstick to which all pre-trial proceedings should be subjected without making any difference with regard to the vulnerability or otherwise of the suspects, their age and other criteria. In the case at hand, the accused was offered legal assistance consisting of a maximum one hour colloquial with a lawyer or legal procurator and subject to the right of inference if he does take up such offer. This Court is not aware of what made the accused decide to not take up that offer. Perhaps he decided that it would have been useless to talk to a lawyer for one hour over the phone or face to face and not having the lawyer by his side during

the interrogation proper and this is precisely another reason why certainty of rules and rights is of utmost importance;

14. The Court therefore upholds the first plea raised by the accused and orders that the statement of the accused given on the 7 of December 2014 and exhibited as Doc PG3 at folio 17 *et seq* of the records be expunged and that no reference can be made by any witness of the prosecution to any verbal or written declaration made by the accused from the moment of his arrest;

15. The second plea raised by the accused reads as follows:

> **In the second place, and consequent to the upholding of the first plea above mentioned, the nullity of the whole Bill of Indictment in the aforementioned names since as appears from the same Bill of Indictment all the Counts are solely and uniquely based on statements or declarations which accused may have had made and therefore not legally made and thus not valid and therefore may not be brought in evidence.**

16. In his oral submissions before this Court, learned counsel to the accused explained the basis of this plea and stated that; "*if the Court accepts this plea and confirms that the statements which accused made to the police are not to be produced in evidence then the second plea follows. And in actual fact in the second pleas and consequent to the upholding the first plea above mentioned the nullity of the whole bill of indictment in the above mentioned names since it appears from the same bill of indictment all the counts are solely and uniquely based on statements or declaration which accused may have made and therefore not legally made, and this not valid, and therefore may not be brought into evidence."*

17. Following an examination of the narrative part of the Bill of Indictment, it is immediately evident that the Attorney General

states in no unequivocal terms that following a find of substance suspected to be drugs accused admitted to be the owner of same and released a statement to that effect. This does not mean, however, that based on this declaration, the Bill of Indictment is necessarily void even after the decision of this Court on the first plea namely that such declaration and statement must be expunged from the proceedings. It is for the jury to decide on the evidence presented during the trial in full observance of the decision of this Court to remove any statement and declaration of the accused made to the Police in the pre-trial stage. The Bill of Indictment is in that respect filed in accordance with Title III, Part I of Book Second of the Criminal Code. The Court therefore does not uphold the second plea raised by the accused;

18. In the third plea, accused alleges the nullity of the Third Count of the Bill of Indictment and reads as follows:

> **In the third place, without any prejudice to the above mentioned two pleas, at any rate the nullity of the Third Count of the Bill of Indictment since this is based on the same facts as those narrated in the Second Count of the Bill of Indictment and since this Count is not an alternative one to the Second Count it is null and void as no one can be found guilty twice of the same crime based on the same facts.**

19. From an examination of the second and third count of the Bill of Indictment, the charge in the second count is one of possession of the whole or any portion of the plant Cannabis in circumstances that denote that it was not for his exclusive use or as is otherwise commonly known as aggravated possession in legal jargon. The Third count is one of possession of the said plant without the aggravating circumstance and it is therefore abundantly obvious that the third count is alternate to the second count. Failure to

indicate that the third or any other counts are alternative to other counts does not render the Bill of Indictment null and void and it is for the presiding judge in the trial by jury to instruct the jurors on the meaning of alternate counts before their deliberations;

20. The accused also seems to invoke the *ne bis in idem* rule in stating that since the second and third count relate to the same facts he can not be tried twice on those same facts. It is a reality and not at all uncommon, that the same facts may give rise to a breach of more than one provision of the law. That is not to say, however, that in such case the *ne bis in idem rule* as enshrined in the Constitution and in the Criminal code applies. The rule applies in those circumstances where a person is charged on the same facts in a second or subsequent proceeding/s. This plea is therefore being denied;

21. The fourth and last plea raised by the accused also refers to the third count in the Bill of Indictment and reads as follows:

> **In the fourth place, without any prejudice to the above mentioned three pleas, the nullity at any rate of the Third Count of the Bill of Indictment since the applicable legal provisions for the facts mentioned uner the Third Count of the Bill of Indictment are not those found in Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) on which the Third Count of the Bill of Indictment is based but those found in Chapter 537 of the Laws of Malta which was promulgated much before the filing of the Bill of Indictment in the aforementioned names, and therefore applicable to this case through the rules of *ius superveniens*.**

22. Possession of the whole or any part of the plant Cannabis, whether under aggravating circumstances or otherwise is regulated

by Chapter 101 of the laws of Malta. Article 8 of the said chapter renders such possession a crime wheras article 22 then deals with the appropriate punishment depending on whether the case is tried before the Magistrates' Courts or the Criminal Court and the nature of the possession. Article 4 of Chapter 537 of the laws of Malta, promulgated by means of Act I of 2015 provides that where a charge of possession of the drug cannabis of less that three point five grams shall be tried in accordance with the Commissioners for Justice Act and subject to a penalty between fifty and one hundred euro;

23. The situation is analogous to that where the facts attributed to an accused in a Bill of Indictment give rise to both an alleged delict and also a contravention or contraventions. Whereas a charge proferred against an accused is triable before the Criminal Court and a contravention is triable before the Court of Magistrates as a Court of Criminal Judicature or in the case of an offence triable before the Commissioner of Justice, it does not follow that where a contravention or any other minor offence must be tried separately before the relevant Court or Tribunal. In such cases, and since a charge triable before the Criminal Court has been proferred against the accused, all other alleged minor offences may be included in the Bill of Indictment for the purposes of conducting one trial and no nullity of the Bill of Indictment can therefore be contemplated. This plea is therefore being dismissed;

24. In conclusion, therefore, the Court upholds the first plea raised by the accused in his note of preliminary pleas and dismisses the second, third and fourth plea. Consequently orders that no reference to the statement or statements of the accused or any verbal declaration he may have made to the Police in the pre-trial stage be made of during the trial, that such statement or

statements, namely Doc PG3 and PG 9 be removed from the records of the case. Furthermore, since the narrative in the Bill of Indictment refers to the statement voluntarily released by the accused, orders the removal of such narrative from the said Bill of Indictment and this as a consequence of upholding the first plea raised by the accused.