CONSTITUTIONAL COURT

JUDGES

THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE ANTHONY ELLUL

Sitting of Monday 13th July 2020

Number: 2

Application number: 63/18 RGM

Analdo Andres Venghaus

v.

Attorney General

The Court:

1. By application filed on the 1st June 2018 the applicant complained of a breach to his fundamental right to a fair hearing during the inquiry, after on the 30th July 2015 he was charged in Court with association with other persons to sell cocaine. He requested the 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 The Police (Inspector Malcolm Bondin and Jonathan Cassar) against Analdo Andres 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 Criminal Court, his right to a 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, issue those acts and gives those directives which it deems fit to ensure compliance with the said dispositions under article 39 of the Constitution of Malta and article 6 of the European Convention for the Protection of Human Rights and Liberties".

2. The respondent replied giving reasons why applicant's claim should be rejected.

3. By judgement delivered on the 30th May 2019 the first Court decided:-

"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 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".

4. The applicant appealed the judgement by application filed on the 13th June 2019. He complained that the first judgement:

> *"(i) acceded to the second pleas of the Attorney General and rejected the first part of the applicant's request; and found that the decree given on the 6th August 2015 by the Court of Magistrates (Malta) as a Court of Criminal Inquiry and the subsequent proceedings as a result of that decree are not in breach of applicant's fundamental rights; and*
>
> *"(ii) having rejected the third plea of the Attorney General and acceded to the second part of applicant's request; found 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, it did not then proceed to provide an effective remedy in favour of the Applicant"*.

5. The applicant requested this Court to revoke that part of the judgement which upheld the second plea of the Attorney General and instead to declare that the decree delivered on the 6th August 2015 and the subsequent proceedings breached his fundamental right to a fair hearing within a reasonable time as protected by Article 39 of the Constitution and Article 6 of the European Convention for the Protection of Human Rights. He further requested this court to provide an effective remedy whilst confirming a part of the judgement that ordered the respondent to pay one thousand five hundred euro (€1,500) to provide an effective remedy.

First complaint.

6. The appellant claims that the decree delivered on the 6th August 2015 by the Court of Magistrates (Malta) as a Court of Criminal Inquiry and the subsequent hearing of more witnesses, are in breach of his right to a fair hearing. He claims that:-

i. In terms of Article 401 of the Criminal Code, the court decides on whether there are sufficient grounds for committing the accused for trial or indictment, on the conclusion of the inquiry.

ii. On the 6th August 2015 the inquiry had not been concluded. The inquiry is concluded once all evidence is produced, and not simply on the basis of the evidence produced by the prosecution during the first hearing.

iii. In this case the decision was pronounced prematurely since the Prosecution had further relevant witnesses to produce as evidence. He claims that the Court should have continued with the inquiry and if necessary ask for an extension for the conclusion of the inquiry.

iv. After the decree delivered on the 6th August 2015, the Attorney General is simply summoning witnesses that were already known to him. The witnesses are not *'new witnesses'* (Article 405 of the Criminal Code) as they were already known to the Prosecution.

7. The first Court stated:

"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 ground. 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'. 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 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".

8. According to Article 401(1) of the Criminal Code:-

> "*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.*
>
> "*(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 orders 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*".

9. The appellant is contesting the manner in which the Court of Magistrates (Malta) as a Court of Criminal Inquiry applied this provision of law. In his original application the appellant referred to the main witness Edgar del Valle Yendez Gonzalez who gave a statement to the police and subsequently confirmed it on oath in front of a duty magistrate. Appellant argued:-

> *"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 Inquiry 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 himelf 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 before the same Court.*
>
> *"Had the Court of Magistrates (Malta) as a Court of Criminal Inquiry 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"*.

10. The inquiry stage of the proceedings is not the actual trial of the accused. In the inquiry, the Court hears the report of the police officer on oath, examines the accused (without oath), and hears evidence in support of the report. The compilation proceedings are not the actual trial. No judgement is delivered. The court merely decides on whether or not there are sufficient grounds for the accused to be committed to trial.

11. The Court refers to the judgement delivered by this Court in **Mark Charles Kenneth Stephens v. Advocate General** on the 14th February 2006:

> *"F'gheluq il-kumpilazzjoni – u ghalhekk meta issa kienu nstemghu l-provi mressqa mill-prosekuzzjoni ... – dik il-Qorti waslet fl-istadju li tiddeciedi jekk hemmx jew le "ragunijiet bizzejjed biex l-imputat*

> *jitqieghed taht att ta' akkuza" (Art. 401(2), Kap. 9). ... . **il-Qorti Istruttorja m'ghandhiex tuzurpa l-funzjoni ta' Qrati ohra ta' Gustizzja Kriminali**. Dak li huwa kien qed jitlob li l-Qorti Istruttorja tiddeciedi fl-istadju kontemplat fl-Artikolu 401(2) kien jekk kienx hemm il-presupposti fattwali li a bazi taghhom jista' jinghad li hemm "ragunijiet bizzejjed" biex huwa jitqieghed taht att ta' akkuza".*

12. The same reasoning was made in the judgement **The Police v. Joseph Cassar Galea** delivered on the 11th April 1984 by the Court of Criminal Appeal:

> *"Il-Qorti tal-Maġistrati bħala Qorti ta' Istruttorja għandha primarjament il-funzjoni li tiġbor il-provi u tiddeċiedi jekk hemmx raġunijiet biżżejjed biex l-imputat jitqiegħed taħt att ta' akkuża. Għalhekk essenzjalment għalkemm f'ċertu sens trid bilfors tidħol fil-meritu tal-każ kif jgħid il-Professur Sir A. Mamo, fin-noti tiegħu (Vol. III, p. 122) "this court is not a court of trial but a court of enquiry. In other words its function is not that of "deciding" on the merits of the charges brought before it with a view to convicting and sentencing the accused person, but that of collecting and conserving the evidence and computing the record which may eventually serve as the basis for the trial before the Criminal Court"*.

13. Then in the judgement **Il-Pulizija v. Joseph Lebrun** delivered on the 9th February 2007, this Court gave a clear and precise explanation of what happens when the Court of Magistrates (Malta) as a Court of Criminal Inquiry decides that prima facie there are sufficient grounds for the person charged to be committed trial:-

> *"14. Fid-dawl ta' dan li ghandu kif inghad, ghalhekk, meta l-Qorti Istruttorja tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza, galadarba d-decizjoni hija wahda fuq bazi prima facie **u minghajr ma jkun ittiehed kont tal-provi mressqa mid-difiza anke jekk dawn ikunu hekk tressqu fl-istadju tal-istruttorja, ma jistax jinghad li dik id-decizjoni hija "decisive for the determination of the criminal charge"**. Dik id-decizjoni la tidhol fil-meritu u anqas tista' tincidi fuq il-meritu – dejjem, s'intendi jekk il-gudikant ma jkunx esprima ruhu b'tali mod li jkun qal aktar minn dak li kien mehtieg li jghid. Huwa proprju ghalhekk li, fuq rinviju ghall-gudizzju*

maghmul mill-Avukat Generali skond l-Artikoli 370(3) jew 433(5) tal-Kodici Kriminali, l-istess Magistrat li jkun iddecieda li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza jista' in segwitu jiddeciedi fil-meritu.

14. "Issa, jekk il-Qorti Istruttorja tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza – decizjoni li, kif rajna, ma hijiex "decisive for the determination of the criminal charge" – l-Avukat Generali, li lilu l-legislatur afda bir-responsabbilta` tal-prosegwiment tal-prosekuzzjoni fil-kaz li jkun, jista' jaghmel wahda minn erba' affarijiet. Huwa jista' ma jaqbilx mal-Qorti Istruttorja – wara li jezamina l-atti, u possibilment anke fid-dawl ta' provi ohra li huwa jkun gabar skond l-Artikolu 435(1) tal- Kap. 9, huwa jista' jkun tal-fehma li ma hemmx effettivament ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza. F'dan il-kaz huwa l-istess Avukat Generali li jordna l-liberazzjoni ("discharge") ta' l-imputat, jaghmel dikjarazzjoni f'dan is-sens fil-Qorti Kriminali (Art. 433(1)) u jibghat rapport lill-President ta' Malta bir- ragunijiet ghala jkun mexa hekk (Art. 433(4)). Jista' wkoll – din hi t-tieni linja li l-Avukat Generali jista' jiehu – jidhirlu li ghandu bzonn li l-Qorti Istruttorja tigborlu aktar provi, u ghalhekk jipprocedi skond l-Artikolu 405(1). Jekk l-Avukat Generali jkun tal-fehma li l-attijiet ta' l-istruttorja jkunu difettuzi, huwa jista', skond l-Artikolu 432(2) tal-Kodici Kriminali, jibghat l-attijiet lura lill-Qorti Istruttorja biex din jew tibda mill-gdid il-kumpilazzjoni (jekk id-difett ikun wiehed radikali) jew biex l-atti jigu kkoregguti, u l-Qorti Istruttorja ghandha hamest ijiem zmien biex taghlaq il- kumpilazzjoni gdida jew tikkoregi l-atti skond il-kaz. Fl-ahharnett – ir-raba' option – l-Avukat Generali jista', flok jippresenta att ta' akkuza quddiem il-Qorti jirrinvija ghall- gudizzju quddiem il-Qorti tal-Magistrati skond l-Artikoli 370(3) jew 433(5) gja msemmija. Huwa evidenti li ebda wahda minn dawn id-decizjonijiet ta' l-Avukat Generali – decizjonijiet eminentement prosekutorjali – ma jiddeterminaw b'xi mod l-akkuza jew akkuzi kontra l-imputat. Anke fil-kaz li l-Avukat Generali jipprezenta nolle prosequi quddiem il-Qorti Kriminali skond l-Artikolu 433(1) gja msemmi, il-liberazzjoni hija "discharge" u mhux "acquittal" u ghalhekk il-persuna hekk illiberata tibqa' dejjem soggetta "...ghall-procedura mill-gdid, li tinbeda regolarment quddiem il-Qorti tal-Magistrati, kull meta jinqalghu provi godda..." (Art. 434)".

15. The said judgements are a confirmation that appellant's reasoning is not legally correct. The witness Edgar del Valle Yendez Gonzalez confirmed on oath the statement that he gave to the police wherein he implicated the accused. Irrespective of what he later said when he testified during the inquiry, a decision on the merits of the case will only

be made in the subsequent trial. The magistrate presiding the inquiry does not decide whether the accused is innocent or guilty of the charges. For example during the sitting of the 9th May 2017 the witness said that what was written in the statement were the police ivestigating officer's words since he never admitted to the importation of drugs into Malta. However, the issue concerning the credibility of the witness is a matter to be decided upon during the trial and not the inquiry stage.

16. On the 30th July 2015 appellant was charged in Court with having associated himself with others to sell cocaine in Malta in breach of the provisions of the Ordinance on Dangerous Drugs Ordinance (Chapter 101). The next sitting was held on the 6th August, 2015 during which witnesses were heard and documentary evidence filed. At the end of the sitting the Court decided that there were sufficient grounds for committing the person charge for trial on indictment.

17. In this particular case it is evident that the Court, after the police officer confirmed the report on oath and having considered the evidence produced during the sitting of the 6th August 2015 in support of the report, was satisfied that *prima facie* there were sufficient grounds for committing the accused for trial. The law does not state that before the Court makes such a decision, all the prosecutions's evidence must have been heard.

18. From the *proces-verbal* of the sitting of the 6th August 2015, it is evident that the Court decided to close compilation of evidence. It is also evident that the Prosecution had further evidence. In fact during that same sitting, the Prosecution made a request for the appointment of a fingerprint expert. The Court postponed the decision for the following sitting.

19. This notwithstanding even if for arguments sake the Court prematurely concluded the compilation of evidence since the Prosecution had more evidence to produce, the appellant did not make any convincing arguments that he has been prejudiced. In an application filed in the Criminal Court on the 4th July 2017, appellant argued that the inquiry had been terminated prematurely and such a fact:

> *"…. jippreġudika serjament lir-rikorrent bħala imputat billi l-istess imputat ser jiġi pprivat mill-opportunita' illi jiġi liberat mill-istess Qorti u sejjer ikun kostrett illi jiffaċċja l-att tal-akkuża illi għad trid tinġieb kontra tiegħu mill-avukat ġenerali jekk kemm-il darba l-istess digriet ma jiġix revokat minn dina l-Onorabbli Qorti"*.

20. However to date all the evidence that was introduced after the decree delivered on the 6th August 2015, in no way changes the decision that there are sufficient grounds for the appellant to be put on trial. The fact that the witness Edgar Del Valle Yendes Gonzales gave a different version to the one he gave to the police and confirmed on oath in front of the Magistrate, in no way means that the accused should not be committed to trial. That is a matter to be considered during the trial.

21. During the sitting of the 6th August 2015 the investigating police officer, together with four of his colleagues, gave evidence. Furthermore, the *proces-verbal* number 610/2015 was exhibited.

22. In this case the appellant is not contesting that on the 6th August 2015 there were sufficient grounds for the Court to commit the accused for trial on indictment, but that the inquiry was terminated prematurely since the Prosecution had more evidence.

23. Furthemore, the Court does not agree with the appellant's interpretation of Article 405 of the Criminal which states:

> *"(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****"*.

24. The words *'any new witness'* does not only apply to witnesses that were unknown to the prosecution on the date of the conclusion of the inquiry. It is referring to witnesses that were not heard during the inquiry, irrespective of whether or not the prosecution knew about them.

25. The fact that all the evidence is not heard within the maximum three month period established by Article 401, does not mean that no further evidence can be introduced. In this respect Article 405 of the Criminal

Code is clear. The appellant is claiming that the law imposes a maximum period of three months for the collection of all evidence, and after that period only new witnesses that were unknown to exist at the time of the inquiry. In Article 405 of the Criminal Code the law imposes no such limitation. Appellant's reasoning is neither reasonable. Frequently it is not possible to have collected all the evidence within the maximum three months where for example experts appointed by the Court would as yet not have filed their reports. Adopting appellant's line of thought would mean that relevant and important evidence would not be admissible due to the time constraint. However, Article 405 confirms that the appellant's reasoning is incorrect.

Second complaint.

26. Appellant's second complaint deals with the compensation of one thousand five hundred euro (€1,500) as compensation for the delay in producing Valerie Cerello as a witness. In his appeal application he states:

> *"Whilst the Applicant appreciates that the First Court ordered the Attorney General to pay Applicant the sum of one thousand and five hundred euros (€1,500) by way of compensation for the aforementioned violation of the right to a fair trial within a reasonable time, yet this token compensation alone does not constitute an effective remedy in favour of the Applicant.*
>
> *"This Honourable Constitutional Court is hereby asked to appreciate the very real fact that following the appealed judgement delivered by the Honourable First Hall of the Civil Court in its Constitutional*

> *Jurisdiction on the 30th May 2019, the position of the Appellant is in reality no better (possible financial considerations apart) than when he instituted these constitutional proceedings on the 1st June 2018 (now just over 1 year ago). He still finds himself in the same limbo, facing a helpless and toothless (ex admissis !)" Court of Magistrates (Malta) as a Court of Criminal Inquiry, and completely at the mercy and unfettered discretion of the Respondent Attorney General"*.

27. The Attorney General argued that the real obstacle for the finalisation of the compilation of evidence is due to the fact that the witness Valerie Cerello has left Malta and her whereabouts are unknown. He also said that this witness found the drugs and therefore her evidence is relevant and important. Furthermore, the remedy granted by the first Court is justified and reasonable.

28. The Court referred to the judgement **Anton Camilleri vs Avukat Ġenerali** (71/2010) delivered on the 22nd April 2015 and said:

> *"After considering the criteria used by the EctHR and by our national courts, this court is of the view that for the violation of the applicant's 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"*.

29. However, in the conclusive and binding part of the judgement the Court condemned the respondent to pay the sum of one thousand five hundred euro (€1,500) for moral damages. Although this is an evident mistake, no appeal was made with respect to this sum. In fact the

appellant requested the Court to confirm that part of the judgement and to grant further remedies.

30. The acts of the criminal proceedings show that:

i. On the 30th July 2015 appellant was charged in Court under arrest. On the same date the Attorney General in terms of Article 22(2) of the Dangerous Drugs Ordinance (Chapter 101) ordered that the appellant is charged in front of the Criminal Court and charged with the breach of provisions of that law.

ii. During the sitting of the 15th October, 2015 the witness PC760 Christopher Saliba said that his colleague Police Sergeant 635 had received a phone call informing him that at the Rokna Hotel while the maid Valerie Cerello, who works at the hotel, was cleaning two rooms, she found a number of white capsules in the wardrobe.

iii. It was on the 18th August 2017, i.e. nearly two years later, that for the first time the Advocate General requested the Court (in terms of Article 405 of the Criminal Code) to hear Valerie Cerello as a witness with regards to the capsules she found while cleaning one of the rooms occupied by Edgar Del Valle Yendes Gonzalez at the Rokna Hotel.

iv. The whereabouts of Valerie Cerello are unknown.

31. In the judgement **The Police v. Silvio Zammit**, this Court said:

> *"Filwaqt illi huwa minnu li l-Qorti tal-Maġistrati bħala Qorti Istruttorja hija prekluża milli tiddikjara magħluqa l-istadju tal-provi tal-prosekuzzjoni, dan ma jfissirx illi l-istess prosekuzzjoni tista' tabbuża mill-iter proċesswali. Bla dubju, xejn ma jista' jwarrab il-fatt illi l-kumpilazzjoni tax-xhieda quddiem il-Qorti riferenti ilha għaddejja aktar minn ħames snin. Għalkemm huwa assodat in materja ta' dewmien għall-finijiet tal-artikolu 6 li jista' jkun hemm ċirkostanzi fejn dak it-tul ta' żmien ukoll jitqies li huwa raġonevoli, bħal meta fil-każ ikun komplikat u jkun jeħtieġ investigazzjoni dettaljata u akkurata u kumpilazzjoni ta' ħafna xhieda, fil-każ tal-lum ma tressqet l-ebda prova li d-dewmien sabiex jitressaq l-aħħar xhud huwa kawża ta' xi wieħed minn dawn il-fatturi"*.

32. In the Court's opinion the Advocate General has had adequate time to locate the witness. Nearly five years have passed since the appellant was charged, and the witness Cerello has still not been heard. The Prosecution had knowledge of this witness from the beginning of the investigation. No explanation was offered as to why the witness was not summoned before.

33. To date it has not been shown that the Advocate General has issued a bill of indictment. It is a fact that a one time payment of €1,500 to be paid as moral damages, is an extremely small consolation for the appellant.

34. Unfortunately, Article 405 of the Criminal Code provides the Attorney General with the opportunity to prolong as much as he wants the stage of the proceedings whereby evidence is collected prior to the issue of a bill of indictment. In this respect the Court of Magistrates (Malta)

as a Court of Criminal Inquiry has unfortunately no means of control and restraint.

35. In the case **Joseph Lebrun v. Avukat Generali** (41/2013/1) decided on the 26th May 2014, this Court held:

> *"Il-verità hi illi daħlet il-prassi – ħażina – illi l-prosekuzzjoni tmexxi l-każ bil-lajma, kultant tresaq xi xhud, kultant xi prova oħra u kultant lanqas biss tidher għas-seduta – bħallikieku din hija biss ħaġa fakoltativa – u hekk il-kumpilazzjoni li jmissha tintemm fi żmien ta' ġimgħat tieħu s-snin.* ***Kulħadd jaqbel li din hija prassi ħażina u ma huwiex meħtieġ intervent leġislativ biex tinbidel, iżda xorta jibqa' jsir l-istess.*** *L-argumenti mressqa mill-Avukat Ġenerali f'dan l-aggravju juru illi lanqas dak l-uffiċjal għadu ma jrid jifhem u jammetti li din hija prassi li għandha tinbidel, u minnufih"*.

36. In that case the first court imposed a daily fine of €10 up to the date that the Attorney General issues the bill of indictment.

37. The manner in which the Attorney General is repeatedly invoking Article 405 of the Criminal Code leaves much to be desired and it is high time that his absolute discretion is circumscribed once and for all by the necessary amendments in the law.

38. To date the Prosecution has not provided any information as to what attempts have been made to trace the witness. It is crystal clear that the Prosecution has absolutely no idea of the whereabouts of the witness. In fact, the *proces-verbal* of the sitting of the 11th July 2018 states:

> *"Għal kull buon fini l-Prosekuzzjoni tagħmel referenza għal rekwiżit (1) tar-rinviju tal-Avukat Ġenerali hawn fuq imsemmi, u għal darb'oħra tiddijkara li din ix-xhud ma tistax tinstab"*.

39. The Attorney General cannot keep on prolonging this matter any further. After the decree delivered on the 6th August 2015, the Attorney General has for the past five years repeatedly made use of Article 405 of the Criminal Code to bring forward more evidence against the appellant. The process has been slow and certainly frustrating for the appellant. The Attorney General has certainly had ample time to produce the best evidence, and this Court cannot permit further procrastination. An effective remedy is necessary in order to dissuade the Attorney General from continuing with this unfair conduct.

40. Therefore, the Court will change the judgement of the first Court by imposing a thirty (30) day time limit from today for the Attorney General to issue a bill of indictment against the appellant. In default the Attorney General will be condemned to pay further compensation to the appellant for delay in the sum of fifty (€50) euro *per diem* from the lapse of the thirty days up to the day when the bill of indictment is issued.

For these reasons the Court decides the appeal by rejecting the first complaint and upholds the second complaint, and alters the judgement of the First Hall delivered on the 30th May 2019 by:-

i. Establishing a fixed time limit of thirty (30) days from today for the Attorney General to issue the bill of indictment against the appellant;

ii. In default to pay the appellant the sum of fifty euro (€50) *per diem* from the lapse of the thirty (30) days up to the day that the Attorney General issues the bill of indictment, with interest. The compensation liquidated by the first court in favour of the appellant, is also due.

The rest of the judgement is confirmed. Judicial costs relating to the appeal are at the charge of both parties in equal shares.

Mark Chetcuti Chief Justice	Giannino Caruana Demajo Judge	Anthony Ellul Judge

Deputy Registrar
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