FIRST HALL OF CIVIL COURT (CONSTITUITIONAL JURISDICTION)

HON. JUDGE TONI ABELA LL.D.

Sitting of Thursday, the 30th day of July, 2020

Case number 3

Application number 86/20TA

Elton Gregory Dsane

vs

L-Avukat ta' l-Istat

Il-Qorti:

Having seen the application of Elton Gregory Dsane of the 19th May 2020 by means of which he premised and demanded the following:

> "That on the 30th April 2019 he came to Malta on holiday to attend the Lost and Found Music Festival accompanied by one person, Lewis Lindsay-Gunn arriving on flight number FR3882 together with numerous other United Kingdom nationals attending this same festival;
>
> That on the flight he was seated solely near his friend Lewis Lindsay-Gunn, with whom he had planned and booked the holiday, he booked their flights and he also booked their accommodation. Elton Gregory Dsane booked his flight tickets back in February 2019 and his accommodation on the 17th April

2019 and he was to reside at an apartment in Saint Paul's Bay. **(Doc EG 1 and EG2)**;

That upon his arrival at Malta International Airport, together with a number of travellers on that flight, he was stopped and searched for possible illegal substances. He was detained in a holding area, with a group of another four persons, three of which he did not know. One of these included Usamah Hajjaj, who would eventually be charged with him as a co-accused. No drugs were found on him or the other persons and neither in their luggage and all the five individuals were then informed that they were going to be taken to the local hospital, Mater Dei, for a body scan. They were transported to Mater Dei in two vehicles, four in one vehicle (van) and another in a separate vehicle (car).

That upon their arrival at Mater Dei, the officials on duty detected human excrement in the back of one of the vehicles and as a result, crime scene officers were called in to analyse the matter. This resulted in the finding of capsules containing illegal substances in the excrement, specifically three drugs, MDMA, Cocaine and Ketamine.

That all detained persons were subsequently arrested and subjected to DNA tests in order to identify who of the five was involved in the importation and possession of the said drugs found in the police van. The DNA results matched the excrement with two Usamah Hajjaj and Elton Gregory Dsane. The following day, on the first (1st) of May, two (2) of the detained persons, specifically the applicant Elton Gregory Dsane and third party Usamah Hajjaj were informed that their DNA matched the DNA on the excrement and that legal proceedings would be immediately taken against them.

That the applicant requested the right to appoint a lawyer and this was refused, however he was offered the right to legal assistance and was put in touch with legal aid lawyer Dr Christopher Chircop who, notwithstanding the gravity of the situation and the serious charges they were facing, with potentially a maximum of life imprisonment as a punishment, opted to speak to him on the telephone and did not go down to the Police Headquarters where he was detained in person. It is pertinent to highlight that our laws provide for the right of disclosure, therefore in other words one had the right to identify what material evidence the police had against the detained persons. Dr Chircop gave the advice that they were not to answer any of the questions which the police would be asking them during interrogation. The applicant abided with these instructions. One is to acknowledge that we are here speaking about a foreigner in a foreign country arrested for the first time, being faced with these serious allegations, with limited information as to what was going on and no communication with anyone whatsoever.

The applicant appeared in front of the Court of Magistrates and was assisted by a different lawyer from the one he had consulted only a few hours before, Dr Simon Micallef Stafrace, who advised him of the seriousness of the accusations and the potential long period of incarceration he was facing and in turn gave him the legal advice to admit the charges.

The charge sheet (**Doc EGD3)** was never given to him, and the charges were never explained to him and he was never made aware that his charge sheet contained ten charges against him. The applicant felt he had no option but to admit all the charges. He was sentenced to four years of incarceration and given a fine of one thousand euro (€1000.00).

Following his conviction, he spent the first night at Mount Carmel Hospital as a result of his agitation, the next day he was transferred to Corradino Correctional Facility and was placed in Division 6 due to lack of space for a whole 10 days. He was given the right to do one phone call during all this period but he had no credit to do so. During this period his mother was calling the Prison everyday but she was told that she could not speak to him and that coming down to Malta would not have meant that she could see him. He was then transferred to Division 12 where he spent six to seven days, during which period he did communicate with his family by using credit given to him by another inmate. His mother came down to Malta on the middle of May and tried to set up an Appeal on the punishment, however she was informed that the appeal period had lapsed;

As a result of the above circumstances Elton Gregory Dsane did not manage to appoint a lawyer of his choice to appeal this conviction within the stipulated period.

Elton Gregory Dsane was subsequently transferred to Division 4 where he met co-accused Usamah Hajjaj who informed him that he had appealed the decision since they had admitted to accusations/charges which individually they never committed;

<u>The Charges he was faced with were the following:</u>

The applicant and the other British national (Usamah Hajjaj) whose DNA matched the drugs detected in the human excrement were both arraigned before the Court of Magistrates as a court of criminal judicature and faced the same accusations on the same charge sheet represented by the same legal aid lawyer, namely with having, on the 30th April, 2019, and/or the previous days, on these Islands:

1. associated and / or conspired with other persons, in Malta and outside Malta, for the purpose of selling, importing, or to deal in any way in the drugs (MDMA) in these Islands, or promoted, constituted, organised or financed such organisation;
2. imported or caused to be imported the psychotropic and restricted drug (MDMA) without due authorisation;
3. had in his possession the psychotropic and restricted drug (MDMA) without a special authorisation in writing by the Superintendent of Public Health, which drug was found under circumstances denoting that it was not intended for his personal use;

4. associated and / or conspired with other persons, in Malta and outside Malta, for the purpose of selling, importing, or to deal in any way in the drugs (Ketamine) in these Islands;
5. imported or caused to be imported the psychotropic and restricted drug (Ketamine) without due authorization;
6. had in his possession the psychotropic and restricted drug (Ketamine) without a special authorisation in writing by the Superintendent of Public Health, which drug was found under circumstances denoting that it was not intended for his personal use;
7. rendered himself an accomplice by inciting or strengthening the determination of another to commit a crime, or promised to give assistance, aided or rewarded after the fact, in the importation, or caused to be imported, or took any steps preparatory to import any dangerous drug (Cocaine) into Malta;
8. together with another one or more persons in Malta or outside Malta, conspired, promoted, constituted, organised or financed the conspiracy with other person/s to import, sell or deal in drugs (Cocaine), in these Islands;
9. imported, or caused to be imported, or took any steps preparatory to import any dangerous drug (Cocaine) into Malta;
10. Had in his possession the drugs (Cocaine) which drug was found under circumstances denoting that it was not intended for his personal use.

That, by judgment delivered on the 1st May, 2019 by the Court of Magistrates (Malta) as a court of criminal judicature, upon a guilty plea, appellant was found guilty as charged and condemned to a term of imprisonment of four (4) years and to the payment of a fine of one thousand euro (€ 1,000). **(EGD4)**

That the other co-accused Usamah Sufyaam Hajjaj filed an appeal in front of the Court of Criminal Appeal, during which appeal, after evidence was brought forward that proved beyond reasonable doubt that the proceedings brought against both accused were flawed, the Attorney General declared that;

It was fully aware of the evidence presented before this Honourable Court, it is not objecting to the position taken by the defence with regard to the first, second and third grievance as found in the defence's appeal application and agrees with the defence that after this Honourable Court hears submissions from both parties on the fourth grievance of the defence, it should proceed to review the punishment given by the First Court in order to determine whether it truly reflects the facts of the case …

The Court in its decision delivered on the 27th February 2020, declared that;

It results to the satisfaction of the Court that there is reasonable doubt as to the charge sheet was actually explained to the accused. The Court is not satisfied that prior to his admission the appellant knew each individual charge he was admitting too

Also it appears that what the appellant said particularly that he admitted to the charges because he was told that he would face a prison sentence of 8 to 10 years and if he admits he will get a reduced punishment is also likely because the legal aid lawyer too said that he explained to the appellant the fact that if he registers an early plea of guilt there would be a reduction in punishment

…

It also transpires from evidence given by the forensic experts namely Gilbert Mercieca and Dr Marisa Cassar that the DNA was only found on the capsules of the drug Cocaine and MDMA and not on the capsule of ketamine and this collaborates the evidence given by the appellant that he had nothing to do with the drug (Kethamine).

The Court thus feels in the light of the above that it should nullify the judgement given in relation to the appellant …it should base its decision on the bases of the witnesses heard before her … consequently it decides not to find guilt to those charges relating to the drug Ketamine and on the basis of this should order a temperament on the punishment awarded by the first court.

…

Thus the Court has no alternative but to annul the appealed judgement and this on the basis that the judgement is incorrect as contemplated in article 428(5) of the Criminal Code…

…

The Court directs the Court of Magistrates so as to ascertain that the admission that the accused puts forward is done after being ascertained that he understood the nature of and seriousness of each individual charge so that similar circumstances to the one under examination do not arise

At the same time the Court directs the legal aid lawyers so as to make use of the new Directive that was transposed into our local legislation so as to make use of the new directive that was transposed into our local legislation namely the right to disclosure so that he will be in a better position to advice his clients.

It also directs the legal aid lawyers to acquaint themselves with the Directive regarding the right to legal aid (even though not transposed into our legal system though the transposition date has passed) namely EU Directive 2016/1919. It is imperative for the legal aid lawyer to explain each individual charge to the accused person so that he may know whether he should register a guilty plea or not. The question of reduction of punishment should only come into play once the accused considers pleading guilty and should not be used as an instrument so that proceedings are cut short. They should ascertain that the accused is really guilty of each offence attributed to him and not get a general admission to everything that the prosecution charges the accused person with.

And thereafter declared;

The appellant not guilty of the first, fourth, fifth, sixth and eight charges and guilty of the second, third, seventh, ninth and tenth charges and condemns him to a term of imprisonment of eighteen months and to the payment of a fine 'multa' to the sum of eight hundred euros. **(Doc EGD5)**

The Court of Criminal Appeal therefore annulled the decision against Hajjaj which was identical in content and gravity to the one meted out to applicant Elton Gregory Dsane. This Constitutional application is therefore based on the fact that due to the various inconsistencies in the proceedings he faces, his fundamental human right for a free and fair trial was breached.

That the following factors taken together, that is –

- The fact that they were not given the due legal assistance they were entitled to;
- The fact that their lawyer did not make use of their right of disclosure;
- The fact that they were charged together when it was abundantly clear that they were not travelling together, therefore increasing the accusations;
- The fact that both accused were given the same legal counsel notwithstanding that this could have given rise to a conflict of interest;
- The fact that they were charged with offences that they did not commit;
- The fact that the charges were not individually explained to the accused;
- The fact that they admitted to charges that they did not commit;
- The fact that they admitted to charges that they certainly did not commit is evidence of the fact that these were not understanding the nature of the charges proffered against them;
- The fact that the Police did not disclose all the information (DNA) to the presiding Magistrate for him to deliver a properly informed sentence/punishment;
- That their legal aid lawyer did not pursue the possibility of an appeal;

Violate the applicant's fundamental human rights to a fair trial as enshrined in Article 6 of the European Convention of Human Rights and in Article 39 of the Constitution of Malta.

Arising and about the above in further explanation:

<u>The fact that applicant did not file an Appeal</u>;

1. The applicant is a UK national, and this was his first time in Malta. He had no relatives, acquaintances or friends in Malta and could not communicate with his friend who accompanied him. This was also the first time that he had any issues with the Law. Upon his condemnation he felt unwell and in fact he was transferred immediately to Mount Carmel Hospital where he spent the night. Later the next day in the afternoon he was sent to Corradino Correctional Facility and placed in Division 6 (whilst the other person accused with him was placed in

Division 4). The former is a maximum security division and one cannot communicate with anyone outside the Division. During the days spent in this division, (circa nine days), he could use the telephone once a day but he had no money and thus could not communicate with his parents. After those nine days he was moved to Division 12 where he spent approximately 20 days. During this time, he was given credit by an inmate and he contacted his family for the first time since the beginning of this ordeal. His lawyer did not go to see him in prison to explain his rights regarding a possible appeal, he did not know, till that point in time, that he had admitted to crimes he evidently did not commit but wanted to appeal the sentence. In prison he was given the impression/misinformed that his appeal period was of 21 days. His mother came down on the 17th May 2019 and approached a lawyer regarding a possible appeal but she was informed that the period had already lapsed.

He found about the issue of the charges he had never committed and realised that his legal aid/assistance had let him down and pushed him to admit to crimes he never committed, only after he was moved to Division four (4), after spending 20 days in Division 12, where he met the other co-accused Usamah Hajjaj and discussed the case and the appeal.

Till this day he had never seen the charges proffered against him to which he had admitted and he had never seen of been given a copy of the Court decision.

It is to be stressed that an appeal to the Court of Criminal appeal might have provided redress to breaches of the CRIMINAL LAW committed against him. But an appeal to the Court of Criminal Appeal was not the proper way of addressing the several specific breaches of his human rights, like failure to give the applicant a copy of the charge sheet, failure to disclose to the Magistrates Court material evidence, failure to provide him with efficient legal assistance and several other violations of his fair-trial rights. These are properly addressed by proceedings for constitutional redress, and not by an ordinary criminal appeal.

Failure to exhaust ordinary remedies (an appeal) cannot be imputed against the applicant: (1) because the circumstances explained above made it virtually impossible for him to exercise these remedies, and (2) because the breaches of human rights he is complaining of are properly redressed by constitutional proceedings, not by an ordinary appeal.

In **Vamvakas v. Greece,** the ECtHR held that the absence of a lawyer during an appeal constituted a breach of Article 6 of the Convention, and hence, did not accept the defense of the State that the applicant did not exhaust the ordinary domestic remedies before filing a case in front of the ECtHR, which case was filed after the 6 months from the date the decision was taken had elapsed.

In this case, the applicant had applied for a state lawyer to represent him in front of the Greek Court of Cassation, the appointed lawyer did not show up for the sitting that was held on the 25th of February 2010 and the appeal was rejected by the Court of Cassation on the basis of non-appearance. The applicant only got news of this outcome on the 18th of October 2010, since he was still in prison. The ECtHR, with reference to the above, and keeping in mind the fact the applicant was in prison held that;

> *La Cour note que le Gouvernement reproche au requérant un manque de diligence, soutenant notamment à cet égard qu'il n'a pas pris contact à temps avec son avocat ou avec le greffe de la Cour de cassation et qu'il ne s'est pas informé de l'issue de la procédure, de sorte que le délai de six mois n'aurait été dépassé. Toutefois, la Cour ne peut pas souscrire au raisonnement du Gouvernement. En effet, elle relève que le requérant était à l'époque détenu à la prison de Grevena, qu'il dit avoir reçu l'assurance de son avocat commis d'office qu'il le représenterait à l'audience et qu'il ne s'est pas vu signifier ou notifier l'arrêt de la Cour de cassation.*

Breaches of his fundamental human rights.

1. It arises abundantly clear from the above and from a large number of aspects highlighted, that applicant was not given the legal assistance that he required and which was necessary and appropriate in the circumstances.

2 (i) The applicant requested to be assisted by his own lawyer. This request was denied on the basis that he had already been given the possibility to speak to a lawyer over the phone and that he had no money to pay for a lawyer of his own choice. The applicant explained that he had money through the use of his card (in police possession at that stage) or through his family. This opportunity was refused to him and it is submitted that the Police had no right to prohibit him from nominating his own legal counsel to ensure the appropriate legal representation. It is his fundamental right to be assisted by a lawyer of his own choice and not by a lawyer engaged by the State who, with all due respect, evidently had no time to attend the Police Headquarters and assist the applicant when he was in dire need of such assistance.

2 (ii) The applicant was not assisted by a lawyer, whether of his own choice or not, during his interrogation on the 30th April, 2019. As stated previously, the lawyer assigned to him by the State did not bother to attend at the Police Headquarters notwithstanding the seriousness of the charges. It is evident from the statement of the applicant that he did not refuse to have a lawyer present during such interrogation.

2 (iii) That, the lawyer who had spoken to him over the phone was not present to assist him when he was subsequently arraigned in Court. A

different lawyer, who he naturally did not know and with whom he had never consulted, turned up in Court to deal with the case.

2 (iv) That the lawyers provided to the accused gave different and conflicting advice, one advised him not to cooperate and say anything whilst the other advised him to admit (even to offences he had nor committed) as explained above.

2 (v) It is evident that none of these lawyers availed themselves in the interest of the Plaintiff accused at that stage, to the Right of Disclosure, view the material evidence available to the Police as was applicant's right according to section 534AF(2) of the Criminal Code, a right which would have avoided this mess he has now found himself in. It is therefore assumed that their advice was based solely on information given to them by word of mouth from the Police, whichever way the advice was wrong. The Police in this case were in possession of statements of third parties related to this case as well as DNA results related to applicant's case. This would have led to the proper advice being given to the Plaintiff.

2 (vi) The applicant was, during the proceedings in Court, given the same lawyer assigned to his co-accused when it was evident that their defences could have been conflicting. The applicant ended up entering a guilty plea as a result of this confusion and is now suffering the consequences of not having been appropriately represented and advised.

All this is clearly in breach of Article 6 (3) of the Convention, most notably Article 6 (3) (a) (b) and (c);

> *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law:*
>
> *a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> *a) To have adequate time and facilitates for the preparation of his defence;*
> *b) To defend himself in person or through legal assistance of his own choosing or, if he has sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*

The ECtHR reasoned in **Czekalla v. Portugal,** No 38830/97, that;

> *… the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective, assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused.*

The jurisprudence of the ECtHR also delved into the elements of the effectiveness of the legal assistance provided, as an indispensable

element to guarantee a fair trial. Thus, it was argued in **Ocalan v. Turkey**, No 46221/99 that the accused has to have access to a lawyer, and for such access to be effective, the number and length of lawyer's visits to the accused must be sufficient.

In **Mattoccia v. Italy,** Application, a reference was made to a principle that was already established in the case **Kamasinski v. Austria,** wherein it was stated that;

> *The provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process; in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him.*

Also, in the case Rybacki v. Poland, Application No 52479/99, the ECtHR held that;

> *… although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (Poitrimol v. France, 23 November 1993, § 34, Series A no. 277-A, and Demebukov v. Bulgaria, no. 68020/01, § 50, 28 February 2008).*

The court went further in arguing that these elements should also be present during preliminary investigation;

> *Thus, Article 6 - especially paragraph 3 - may be relevant before a case is sent for trial, at the preliminary investigation stage, if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case seen as a whole*.

The Court also explained that the communication between client and lawyer should be open and honest, and this therefore implies that there is sufficient time for discussion between the accused and his lawyer.

> *This privilege encourages open and honest communication between clients and lawyers as an important safeguard of one's right to defence.*

The Court observed that if a decision is based on statements made by applicants in a period were the access to a lawyer is not guaranteed, in the sense of the Convention, then this decision breaches the Fundamental Human Rights of the accused;

The Court notes that it has not been argued that the fairness of the proceedings was vitiated by reason of the prosecution's reliance on, for example, incriminating statements made by the applicants in the period between May and November, namely when the applicant could not benefit from unsupervised legal advice.

2. The fact that applicant was charged with the other accused when they were not together and travelled separately albeit on the same plane.

The Police were aware that both accused did not plan and travel to Malta together. The accused had declared this in their statements, the police confirmed this through the statements that they obtained from the other three arrested persons who they did not charge. As per attached document applicant booked solely for himself and his friend Louis Lindsay-Gunn the travel itinerary and also booked solely for himself and his friend the accommodation **(Doc EGD2)**. Notwithstanding this fact, the Police, wrongly opted to accuse them together in order to increase the charges against them of complicity.

3. The charges filed against the applicant were not the ones he should have been charged with. The police charged the applicant with ten accusations, accusations which today it has resulted, he should never have faced.

4 (i) The applicant faced charges for crimes he did not commit. He never imported Cocaine and or MDMA and therefore he should never have responded to the charges numbered 1 (Conspiracy to import MDNA), 2 (importation of MDNA), 3 Possession of MDMA, 4 (associated and /or conspired to import Ketamine), 7 (accomplice to sell cocaine), 8 (conspiracy to import cocaine), 9 (importation of cocaine) and 10 (possession of cocaine). He should have never been charged with these accusations and neither to answer for them. This has now transpired abundantly clear from the Court of Appeal decision in the Hajjaj case above referred.

4 (ii) The applicant was not afforded the proper legal aid which would have, if properly assisted, explained the nature of each independent charge as is the obligation arising out of the EU Directive 1919/2016, and not encouraged to admit to all charges, to cut corners and close off proceedings as well highlighted by the Court of Appeal above referred.

4 (iii) The applicant never understood the charges he was being faced with due to the failures of the legal aid system. Had it not been for such failure the accused would have never admitted to eight charges he did not commit. Clearly the admission is the result of the failure of the system which infringed on his right to a fair trial.

The ECtHR, in the case **Pelissier and Sassi v. France**, Application No 25444/94 found that the fundamental human rights of the applicants were

breached when they were convicted of an offence different from the one charged. It reasoned that;

> *The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.*
>
> *…the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.*
> *…*
> *In the light of the above, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed.*

5. The Police failed to disclose all the information which they had in hand, **before they charged the two individuals**, notably the results of their DNA tests which had led them not only to identify who of the five persons arrested had excreted the capsules with drugs but also had identified which accused imported which drug and its quantity.

This information, withheld by the Prosecution, violated the accused right to a fair trial and amounts to a breach of Article 6 of the Convention. The Court in its decision could not act correctly not having been furnished with the correct material facts.

> *In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy*[1]

6. The failure of the Police to disclose this crucial information misguided/misled the Magistrate in the punishment he gave the accused on more than one count. The Magistrate sentenced the accused on ten accusations and not on the two he should have responded for and on those two which the/he thought he was filing an admission on. Furthermore, the Police did not declare the proper quantity of drugs imported by the accused (58 grams of MDMA) but informed the Court that the drugs amounted to circa 100 grams so much

[1] https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf (16 May 2020)

so that the Magistrate quoted this amount in his decision, which amount influenced the punishment given to the accused. This lack of information vitiated the admission and violated his fundamental human right.

That it is being submitted that the guilty plea entered by the applicant was highly vitiated and in violation of his fundamental human rights. Such guilty plea, being a consequence of the facts aforementioned, should be reconsidered and the proper punishment given based on the directions of the Court of Criminal Appeal in the parallel case of Hajjaj above referred.

7. The applicant makes reference, by way of analogy to article 515 of Chapter 9, which lays down that the Prime Minister may, *upon an application may to him by a person convicted on indictment or without such application if he deems fit, at any time either (a) refer the whole case to the Court of Criminal Appeal and the case shall be treated as an appeal to that Court by the person convicted.*

   This provision was introduced back in 1967 when practically all criminal accusations were brought forward through an indictment. This proviso was precisely drafted for situations similar to the one this court has in front of it, however with the change of time and indictments being reserved to more serious accusations this provision was not updated however the spirit of the legislator behind it remains the same. The possibility for the Court of Appeal to consider unappeased injustices.

Therefore applicant, whilst filing this Constitutional application as a result of the violations of his human rights arising from the judgment delivered by the Court of Magistrates as a Court of Criminal Judicature on the 1st May, 2019, humbly requests that this Honourable Court to give the appropriate remedies including the reversal of part of the judgment and the reduction of the punishment in line with that established by the Court of Criminal Appeal in the parallel Hajjaj proceedings delivered on the 27th February 2020."

Having seen the answer of the Advocate for the State wherein was stated the following:

"Illi r-rikorrenti qieghed jilmenta li inkisrulu l-jeddijiet fundamentali tieghu fil-proceduri kriminali fl-ismijiet ***The Police (Inspector Kevin Pulis u Inspector Mark Anthony Mercieca) vs. Elton Gregory Dsane u Usamah Sufyaan Hajjaj)*** deciza mill-Qorti tal-Magistrati fl-1 ta' Mejju 2019.

Illi l-esponent se jsemmi brevement il-fatti relevanti ghal din il-vertenza qabel ma jaghmel l-eccezzjonijiet tieghu kemm dawk ta' natura preliminari kif ukoll dawk fil-mertu.

Illi jigi rilevat li r-rikorrent tressaq b'arrest quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fl-1 ta' Mejju 2019 fejn gie akkuzat b'reati li jirrigwardaw pussess u traffikar ta' droga fost akkuzi ohra. Ir-rikorrent tressaq flimkien mal-ko-akkuzat l-iehor Usamah Sufyaan Hajjaj.

Dakinhar stess li tressaq il-Qorti, ir-rikorrent irregistra **ammissjoni** ghall-akkuzi kollha migjuba kontrih u dan wara li l-Qorti fehmet lir-rikorrenti l-konsegwenzi kollha li tali ammissjoni ggib maghha. Ir-rikorrent inghata mill-Qorti zmien skont il-ligi sabiex jirrikunsidra dik l-ammissjoni u jirrizulta li r-rikorrent ikkonferma l-ammissjoni tieghu. F'dik is-sitwazzjoni l-Qorti tal-Magistrati ma kellhiex ghazla ohra hlief li fid-dawl tal-ammissjoni tar-rikorrent hi tghaddi biex taghti s-sentenza kif fil-fatt ghamlet permezz tas-sentenza tal-1 ta' Mejju 2019 fejn ikkundannat kemm lir-rikorrent kif ukoll lil Usamah Sufyaan Hajjaj ghal erba' snin prigunerija u multa ta' elf Euro. Gara li l-ko-akkuzat l-iehor Usamah Sufyaan Hajjaj appella mis-sentenza u permezz tad-decizjoni datata 27 ta' Frar 2020 il-Qorti tal-Appell Kriminali hassret is-sentenza tal-Ewwel Qorti u minflok ikkundannat lil Hajjaj tmintax-il xahar prigunerija u 800 Euro multa. Matul il-proceduri r-rikorrent kien dejjem assistit minn avukat.

Illi fis-sustanza, l-lanjanza tar-rikorrent hija li hu ghandu jinghata l-istess trattament li inghata lil Usamah Sufyaan Hajjaj u b'hemm ikollu riduzzjoni tal-piena karcerarja inflitta ruhu.

Illi l-esponent jirrespingi dawn l-allegazzjonijiet bhala infondati fil-fatt u fid-dritt stante li, kif ser jigi spjegat aktar 'l isfel, l-ebda agir tal-esponenti ma kiser jew illeda xi dritt fundamentali tar-rikorrenti liema eccezzonijiet qed jinghataw minghajr pregudizzju ghal xulxin.

1. Illi qabel xejn jigi rilevat li ghalkemm din il-kawza hija wahda dwar jeddijiet fundamentali tal-bniedem kif sanciti mill-Kostituzzjoni ta' Malta u mill-Konvenzjoni Ewropea, ir-rikorrent fit-talba finali ma jindikax ezattament liema huma l-artikoli li gew allegatament vjolati. Madanakollu, l-esponent qieghed jassumi li l-lanjanza tirrigwarda allegat vjolazzjoni tal-jedd ghal smigh xieraq peress li huwa dan il-jedd li jissemma' fil-premessi.

2. Illi *in linea* preliminari jinghad li m'hemm l-ebda dubju li r-rikorrenti naqas milli juza rimedju ordinarju effettiv li taghtih il-ligi u cioe` <u>appell</u> mis-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali datata 1 ta' Mejju 2019. Galadarba l-ilment inevitabbilment jolqot is-siwi u l-legalita` ta' sentenza li nqghatet kontra r-rikorrenti u galadarba rikorrenti ma appellax minn dik is-sentenza jirrizulta car li r-rikorrenti ma uzax rimedju ordinarju effettiv u cioe` li jigi intavolat appell fil-Qorti tal-Appell Kriminali. Huwa inutli li issa r-rikorrenti jigi bl-argument li l-Qorti kienet zbaljata fid-decizjoni taghha meta dan l-izball kellu jigi mqajjem u deciz semmai quddiem il-Qorti tal-Appell. Huwa inutli wkoll li r-rikorrent igib numru ta' ragunijiet (skuzi) sabiex jiggustifika ghalfejn m'appellax.

   Ghalhekk din l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-poteri taghha taht il-Kapitolu IV tal-Kostituzzjoni u dan ai termini tal-Artikolu

46(2) tal-Kostituzzjoni u l-proviso ghall-Artikolu 4 (2) tal-Kap. 319 tal-Ligijiet ta' Malta *stante* non-ezawriment ta' mezzi ordinarji ta' rimedju.

3. Illi l-esponent jirrileva wkoll li r-rikorrent b'din il-kawza qieghed effettivament jistieden lil din l-Onorabbli Qorti taghmel apprezzament mill-gdid tal-process kriminali u terga' tidhol fil-mertu tal-process kriminali u ghalhekk taghmilha ta' Qorti tat-Tielet jew Raba' Istanza. Il-jedd ghal smigh xieraq ma jiggarantixxi l-ebda dritt li akkuzat ikollu xi rimedju quddiem qorti tat-tielet grad wara s-sentenza tal-Qorti tal-Appell Kriminali u ghalhekk m'huwiex il-kompitu ta' din l-Onorabbli Qorti li tistharreg mill-gdid il-konkluzjoni li waslu ghaliha il-Qrati penali. L-esponenti jissottometti illi r-rikorrent qed jittenta jasal *tramite* l-procedura odjerna fejn ma rnexxilux jasal quddiem il-qrati muniti b'gurisdizzjoni kriminali. Ghalhekk kull tentattiv sabiex dawn il-proceduri jintuzaw b'dan il-mod jikkostitwixxi uzu hazin u abbuz ta' dina l-procedura straordinarja.

4. Illi dwar il-jedd ghal smigh xieraq, bhala regola, meta wiehed japprezza jekk is-smigh ta' proceduri gudizzjarji humiex xierqa jew le, wiehed m'ghandux ihares biss lejn xi nuqqasijiet procedurali li jokkorru imma lejn jekk fl-assjem taghhom, il-proceduri kienux jew le kondotti b'gustizzja fis-sostanza u fl-apparenza (ara Perit Joseph Mallia vs. Onor. Prim Ministru et deciza mill-Qorti Kostituzzjonali fil-15 ta' Marzu 1996).

   F'din il-qaghda l-jedd ta' smigh xieraq invokat mir-rikorrenti, fil-generalita` tal-kazijiet, jidhol biss (i) meta ma jkunx hemm tribunal indipendenti u imparzjali, (ii) meta jkun hemm dewmien ingustifikat waqt is-smigh tal-kawza, (iii) meta jkun hemm nuqqas ta' access lill-qrati, (iv) meta s-smigh jissokta fl-assenza tal-parti fil-kawza, (v) meta ma jkunx hemm equality of arms bejn il-partijiet kontendenti fil-kawza, (vi) meta parti ma tinghatax id-dritt li tinstema' (audi alterem partem) u/jew li tressaq il-kaz taghha kif imiss u (vii) meta s-sentenza tinghata minghajr motivazzjoni.

   Illi sabiex jigu applikati l-elementi tas-smigh xieraq iridu bilfors jitqiesu l-fatturi processwali partikolari tal-kaz, b'mod illi biex wiehed jiddetertmina jekk kienx hemm ksur tal-jedd ghal smigh xieraq, wiehed irid iqis il-process kollu kemm hu, maghduda maghhom l-imgieba tal-Qorti li tkun u kif ukoll ta' kif l-interessi tal-persuna mixlija kienu mressqa u mharsin mill-istess qorti (ara *Fenech vs Avukat Generali* deciza fl-4 ta' Awwissu 1999 – Vol.LXXXIII.i.213). Wiehed ma jistax u m'ghandux jiffoka fuq bicca biss mill-process shih gudizzjarju biex minnu, jekk isib xi nuqqas jew ghelt, jasal ghall-konkluzjoni li ta' bilfors sehh ksur tal-jedd tas-smigh xieraq (*Pullicino vs. Onor. Prim Ministru et* deciza fit-18 ta' Awwissu 1998 – Vol. LXXXII.i.158).

   Dan attiz, ghandu jirrizulta bl-aktar mod kategoriku u manifest li l-ilment imressaq mir-rikorrent f'din il-kawza ma jaqa' taht l-ebda whda mic-cirkostanzi msemmija hawn fuq. Fl-ebda hin u fl-ebda mument ir-rikorrenti ma gie trattat b'mod differenti u lanqas ma jirrizulta li gie mcahhad minn xi dritt li meta wiehed ihares lejn il-proceduri fit-totalita` taghhom jista' jikkonkludi li ma kienx hemm smigh xieraq. Anzi, jirrizulta

li l-partijiet kellhom access ugwali ghall-Qorti, u kull parti kellha l-opportunita` li tressaq il-kaz taghha.

5. Illi fl-ispecifiku dan il-jedd ma giex vjolat ghaliex:

a) Meta r-rikorrent gie arrestat mill-pulizija inghata d-drittijiet kollha skont il-ligi inkluz li jitkellem ma' avukat qabel ma gie interrogat kif fil-fatt ghamel tant li kellem lil Dr. Christopher Chircop.

b) Il-fatt li r-rikorrent gie akkkuzat flimkien ma' Usamah Hajjaj hija prerogattiva tal-pulizija/prosekuzzjoni u certament dan wahdu ma jammontax ghal vjolazzjoni ta' xi jedd konvenzjonali.

c) Matul il-proceduri fil-Qorti, ir-rikorrent kien dejjem assistit minn avukat Dr. Simon Micallef Stafrace. Ma hemm l-ebda dubju li jekk ir-rikorrent kellu xi diffikulta` dwar dak li kien qieghed jigri fil-Qorti jew ma fehmx xi haga kellu kull opportunita` jitkellem u jikkonsulta mal-avukat tieghu kif fil-fatt ghamel.

d) Ir-rikorrent instab hati mill-Qorti tal-Magistrati wara li hu stess irregistra **ammissjoni** liema ammissjoni giet ikkonfermata minnu wara li l-Qorti taghtu zmien bizzejjed biex jirrikonsidraha skont il-ligi. Naturalment ladarba r-rikorrent minn jeddu ammetta l-htija tieghu huwa kien qieghed jassumi responabilita` tad-decizjoni tieghu u fl-istess hin irrimetta ruhu ghal kull decizjoni dwar piena li l-Qorti setget tasal ghaliha (ara f'dan is-sens ***Il-Pulizija vs. Joseph Scerri*** moghtija mill-Qorti tal-Appell Kriminali fit-22 ta' Novembru 2007). Hekk kif jinghad fil-massima Latina, ***confessus pro iudicato est, qui quodammodo sua sententiae damnatur***, li tradott ghall-Malti jfisser, li min jammetti l-htija tieghu quddiem qorti, huwa stess ikun qieghed jikkundanna lilu nnifsu u fl-istess waqt jiddetta s-sentenza tieghu. Marbut ma' dan, mill-atti processwali ma jidhirx li r-rikorrent jew l-avukat tieghu ghamlu xi ilment formali jew oggezzjona ghall-mod kif tmexxiet il-kawza fil-konfront tieghu jew li ikkontesta l-arrest anzi kollox juri li hu nghata l-garanziji u d-drittijiet kollha skont il-ligi.

e) Illi s-sentenza li nghata Usamah Hajjaj mill-Qorti tal-Appell Kriminali tas-27 ta' Frar 2020 ma taghmilx stat fil-konfront tar-rikorrent galadarba kull kaz irid jigi evalwat u deciz skont ic-cirkostanzi u l-provi partikolari li mhux necessarjament japplikaw l-istess ghaz-zewg ko-akkuzati. Il-Qorti tal-Appell Kriminali waslet ghad-decizjoni taghha wara li apprezzat u evalwat l-akkuzi u l-provi li tressqu limitatament kontra Usamah Hajjaj u dan l-ezercizzju m'ghamlitux mar-rikorrent galadarba hu m'appellax mis-sentenza appellata. Ghalhekk mhux bilfors dak li gie applikat ghal Usamah Hajjaj awtomatikament japplika ezatt ghas-sitwazzjoni ghar-rikorrent.

f) Illi r-rikorrent qieghed jikkritika wkoll il-fatt li bhala avukat kellu wiehed minn tal-Ghajnuna Legali. Pero` anke hawn ma jirrizultax li l-avukat tal-ghajnuna legali li gie assenjat lir-rikorrent b'xi mod abdika mill-obbligu tieghu li jassisti kif mistenni lir-rikorrent waqt il-proceduri kriminali jew li gab ruhu hazin waqt il-process jew li ha decizjonijiet hziena li kienu ta' hsara ghall-pozizzjoni tar-rikorrent. L-Istat m'huwiex responsabbli ghal kull nuqqas imwettaq mill-avukat tal-ghajnuna legali (ara ***Kasaminski vs. L-Awstrija*** deciza fid-19 ta' Dicembru 1989). L-imgieba tad-difiza hija materja ta' bejn l-avukat u l-patrocinat tieghu (ara ***Czekella vs. Il-Portugall*** tal-10 ta' Ottubru 2002).

g) Illi jibqa' l-fatt li jekk r-rikorrent ma qabilx mas-sentenza tal-Qorti jew hassu aggravat, hu seta' dejjem jappella minnha sabiex tkun il-Qorti tal-Appell Kriminali li tirrevedi kwalunkwe aggravju li seta' kellu. Bid-dovut rispett, jekk l-Avukat tal-Ghajnuna legali ma uzufriwixxiex mill-possibilita` li r-rikorrent jappella mis-sentenza tal-Qorti tal-Magistrati din hija kwistjoni li jrid jaraha r-rikorrent u l-avukat tal-ghajnuna legali koncernat u ma' hadd iktar.

h) Ir-rikorrent ma jistax jippretendi li juza dawn il-proceduri biex jipprova jahrab minn kundanna li giet imposta b'mod legittimu fil-konfront tieghu.

6. Illi ghalhekk ma hemm l-ebda ksur tal-Artikolu 6 tal-Konvenzjoni Ewropeja u l-Artikolu 39 tal-Kostituzzjoni u fid-dawl tas-suespost l-allegazzjonijiet u t-talbiet tar-rikorrent ghandhom jigu michuda bl-ispejjez kontra tieghu.

7. Salvi eccezzjonijiet ulterjuri.

8. Bl-ispejjez."

The Court has reproduced the above answer in Maltese since this was the only version available up to the time to deliverance of this Court decision.

Having seen that by order of the Court during the sitting of the 1st June 2020, the acts of the proceedings of the Criminal Appeal number 142/19CSH, in the names of The Police –vs -Elton Gregory Dsane, were formally annexed to these proceedings;

Having seen all the documents exhibited during the course of these proceedings;

Having taken cognizance of all witnesses adduced by both parties;

Having read the respective written notes of observation submitted by both parties;

Having heard the oral submissions of counsels to the parties during the sitting of the 2nd of July 2020;

Having seen that these proceedings were adjourned for final judgement for today.

Point of facts

1. The applicant came to Malta on the 30th April 2019 for a holiday, amongst others to attend to a musical festival by the name of Lost and Found Music Festival. He arrived in Malta by flight number FR3882 along with a number of other passengers. They were coming from UK.

2. On landing in Malta he was withheld, along with a number of other passengers, amongst them a certain Usamah Hajjaj. They were withheld under suspicion that they were in possession of drugs or other similar substances. Not having found any drugs or substances on their person, they were taken to Mater Dei by the Police for further inspection. It

transpired, that on their way to Mater Dei Hospital, two of them defecated. It turned out to be the applicant and the said Usamah Hajjaj. Applicant had his hands soiled with human faeces. From further medical examination, the presence of illegal substances of MDMA, Cocaine and Katemin were detected. After, they were interrogated and each of them released statement (vide pgs 19 to 24 of Criminal proceedings).

3. Following the above mentioned string of events, applicant and the said Usamah Hajjaj were eventually arraigned to Court on the 1st of May 2019. Ten accusations were brought against them (see list of accusations a' fol 4 and 46).

4. After having taken advice from their legal Counsel, who was assigned to both of them according to the legal aid system, they entered a guilty plea on all counts of the accusations. Consequently, by a decision of the Court of Magistrates (Malta) As a Court Of Criminal Judicature dated 1st May 2019 presided by Magistrate Ian Farrugia, they were found guilty as charged and condemned, each of them, to a term of four (4) years imprisonment and each to the payment of a fine of one thousand euros (€1000). The punishment was as a result of a plea bargaining on the condition, that accused register an admission on all counts proferred against them.

5. Notwithstanding having admitted to all accusations, Usamah Hajjaj entered an appeal before the The Court Of Criminal Appeal on the 16th May

2019 on grounds very similar to those that are being premised by the applicant in these procedures (see a' fol 33 of acts of Criminal Appeal). By judgement of the 27th February of 2020, that Court varied the original judgment for reasons therein contained by reducing the term of imprisonment to eighteen months and the fine to eight hundred euros (€800).

6. Applicant came to know about the judgment of Appeal after he was transferred to Division 4. He met the said Usamah Hajjaj and who discussed his appeal with him. The Court understands, that this meeting took place after the said Judgement of the Court of Appeal had been delivered on the 27th Febuary 2020, so much so that applicant introduced the present procedures on the 19th May 2020.

Points of Law

7. The Court observes that respondent rightly submits in his reply, that applicant fails to state with exactness in his demand the articles of the Constitution and the Convention allegedly breached. However as respondent rightly observes, this can be deduced from the premises of the application, in that applicant refers to a breach of article 39 and 6 of the Constitution and Convention respectively (see page 8).

8. It would have been desirable had these articles been mentioned with clarity in the demand, however, failure to mention them has no serious procedural consequence as long that these articles were mentioned or

identifiable in the application. Therefore, insofar that the application does not refer to other articles of the Constitution or the Convention, this Court is going to consider the legal aspects of this application in the light of alleged breach of articles 39 and 6 respectively. In other words the right to a fair trial.

9. On the other hand respondent, apart from pleas into the merits of the case, also pleads, that this Court should decline from exercising it's power under article 46(2) and article 4(2) of the Constitution and Convention (Chap 319) respectively, since applicant had other adequate remedies at his disposal, namely an appeal to The Criminal Court of Appeal from the Decision of the Courts of Criminal Judicature of 1st May 2019.

Considerations of the Court

10. The circumstances of the case are somewhat exceptional in that,the applicant is serving a four year term of imprisonment which was originally also meted out to the other co-accused, Usamah Hajjaj. They were both accused with the same offences and assisted by the same lawyer. Both admitted all accusations. However, Usamah Hajjaj appealed and his term of imprisonment was reduced to one and a half years from four years. The lawyer that represented Hajjaj in Appeal is now the same lawyer appearing for the applicant in these proceedings.

Exhaustion of ordinary remedies

11. In the Decision of the **Constitutional Court in the names of Maria sive Marthese Attard pro et -vs- Policy Manager tal-Malta Shipyards et of the 11th April 2011** the court summed up the principles on the requisite of exhaustion of ordinary remedies in the following manner:

"(a) L-esistenza ta' rimedju iehor trid titqies fil-kuntest tal-allegat ksur tad-dritt fondamentali. Ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza dak il-ksur. Fl-istess waqt, m'hemmx ghalfejn li, biex jitqies bhala effettiv, ikun jirrizulta li r-rimedju sejjer jaghti lir-rikorrent success garantit. Huwa bizzejjed li jintwera li jkun wiehed li jista' jigi segwit b'mod prattiku, effettiv u effikaci.

"(b) Meta jidher car li jezistu mezzi ordinarji disponibbli biex jikseb rimedju ghall-ilment tieghu, ir-rikorrent ghandu jirrikorri ghal dawk il-mezzi, qabel ma jirrikorri ghar-rimedju kostituzzjonali, u huwa biss wara li jkun fittex dawk il-mezzi jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza rrimedju kostituzzjonali.

"c) Ghandha torbot id-diskrezzjoni tal-Qorti biex tqis jekk ghandhiex twettaq is-setghat taghha li tisma' kawza ta' natura kostituzzjonali, sakemm ma tingiebx xi raguni serja u gravi ta' illegalita', ingustizzja jew zball manifest fl-uzu taghha.

“(d) Ma hemm l-ebda kriterju pre-stabbilit dwar luzu ta’ din id-diskrezzjoni, ghaliex il-kriterju rilevanti huma l-fatti u c-cirkostanzi tal-kaz de quo. Mela fil-konsiderazzjoni ta` dawn il-fatti u cirkostanzi, huwa accettabbli grad ta` flessibilita` minn naha wahda u formalizmu mill-inqas min-naha l-ohra. Fit-twettieq tad-diskrezzjoni li din il-Qorti ghandha skond il-ligi, ma hemm xejn assolut u lanqas awtomatizmi propju ghaliex iccirkostanzi partikolari ta` kull kaz jibqa` l-kriterju rilevanti.

“(e) In-nuqqas wahdu ta’ tehid ta’ mezzi ordinarji mir-rikorrent mhuwiex raguni bizzejjed biex Qorti ta’ xejra kostituzzjonali tiddeciedi li ma tuzax is-setghat taghha li Kopja Informali ta' Sentenza Pagna 22 minn 32 Qrati tal-Gustizzja tisma’ l-ilment, jekk jintwera li l-mezzi ma kinux tajbin biex joffru rimedju shih lir-rikorrent.

“(f) In-nuqqas ta’ tehid ta’ rimedju ordinarju – ukoll jekk seta’ kien ghal kollox effettiv biex jindirizza lilment tar-rikorrent, minhabba l-imgieba ta’ haddiehor, m’ghandux ikun raguni biex il-Qorti ma tezercitax is-setghat taghha li tisma` l-ilment kostituzzjonali tarrikorrent.

“(g) L-ezercizzju minn qorti (tal-ewwel grad) tad-diskrezzjoni taghha bla ma tistharreg il-materja necessarja li fuqha tali diskrezzjoni ghandha titwettaq, jaghti lil qorti tat-tieni grad is-setgha li twarrab dik id-diskrezzjoni.

“(h) Meta r-rimedju jaqa’ fil-kompetenza ta’ organu iehor jew meta s-smigh tal-ilment tar-rikorrent sejjer iwassal biex l-indagni gudizzjarja u l-process l-

iehor tas-smigh tar-rimedju ordinarju jkunu duplikazzjoni ta' xulxin, il-qorti kostituzzjonali ghandha ttendi lejn ir-rifjut li tuza s-setghat taghha kostituzzjonali, sakemm l-indagni gudizzjarja tal-kaz ma tkunx, min-natura taghha, ixxaqleb izjed lejn kwistjoni kostituzzjonali.

"(i) Fuq kollox, l-uzu tad-diskrezzjoni ghandha tigi ezercitata bi prudenza, u b'mod li fejn jidher li hemm ksur serju ta' drittijiet fondamentali jew anke fejn sejjer ikun hemm ksur ta` dawk id-drittijiet, allura l-Qorti ghandha xxaqleb lejn it-twettiq ta' dawk is-setghat. " (see also the following Court Decisions: **Qorti Kostituzzjonali tal-31.5.1999 fl-ismijiet Zahra vs Awtorita' tal-Ippjanar (Kollez. Vol:LXXXIII.i.179); Qorti Kostituzzjonali tas-27.2.2003 fl-ismijiet Sammut vs Awtorita' tal-Ippjanar et; Qorti Kostituzzjonali tal-5.4.1991 fl-ismijiet Vella vs Kummissarju tal-Pulizija et (Kollez. Vol:LXXV.i.106); Qorti Kostituzzjonali tal-14.5.2004 fl-ismijiet Axiaq vs Awtorita' Dwar it-Trasport Pubbliku; Qorti Kostituzzjonali tal-31.10.2003 fl-ismijiet Mediterranean Film Studios Limited vs Korporazzjoni ghall-Izvilupp ta' Malta et; Qorti Kostituzzjonali tal-25.6.1999 fl-ismijiet Spiteri vs Chairman Awtorita' tal-Ippjanar et (Kollez. Vol: LXXXIII.i.201); Qorti Kostituzzjonali tas-6.1.2006 fl-ismijiet Melita Cable p.l.c. vs L-Avukat Generali et; Qorti Kostituzzjonali tas-7.9.2007 fl-ismijiet Chircop vs Il-Kummissarju tal-Pulizija et; Qorti Kostituzzjonali tas-27.2.2009 fl-ismijiet Xuereb et vs Direttur tax-Xogholijiet et; Qorti Kostituzzjonali tal-15.1.1991 fl-**

ismijiet Balzan vs Prim Ministru et; Qorti Kostituzzjonali tal-14.6.1995 fl-ismijiet Briffa vs Kummissarju tal-Pulizija).

12. As regards the doctrine of exhaustion of ordinary remedies at domestic law level the European Court For the Protection of Human Rights had this to say:

"the Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see ***the Akdivar and Others v. Turkey judgment of 16 September***

1996, Judgments and Decisions 1996-IV, pp. 1210-11, §§ 68*)".* (Taken from **V. v United Kingdom of 16th December 1999 *(Application no. 24888/94)*** *)*. In substance the position of the ECHR is very similar to that adopted by local Courts.

13. From a close examination of the present application, the applicant anticipated this procedural hurdle and submits that:

"Ghandu jigi emfasizzat illi appell quddiem il-Qorti tal-Appell Krminali taghti rimedju ghal ksur tal-LIGI KRIMINALI kommessi kontra tieghu. Izda appell quddiem il-Qorti tal-Appell Kriminali ma kienx il-mod xieraq sabiex setghu jigu indirizzati l-ksur differenti u specifici tad-drittijiet tal-bniedem, bhan-nuqqas ta' ghotja ta' charge sheet, in-nuqqas li tigi mghoddija lill-Qorti tal-Magistrati kull evidenza materjali, in-nuqqas li r-rikorrent jinghata assistenza legali efficjenti u bosta vjolazzjonijiet ohra tad-drittijiet fundamentali tieghu ghal smiegh xieraq. Illi dawn huma indirizzati effikacjament permezz ta' proceduri ghal rimedju Kostituzzjonali, u mhux b'rimedju ordinarju ta' appell kriminali".

14. This Court, however, is of the firm conviction, that the Court of Criminal Appeal is an appropriate forum to determine such complaints and is well equipped with the appropriate tools of law to provide an adequate remedy, as indeed it has done in the Appeal of Usamah Hajjaj, albeit, consequent to a plea bargaining agreement reached between the parties

and endorsed by the Court of Appeal or so it seems (vide pg 173 of acts of Appeal).

15. The Court of Criminal Appeal annulled the first judgement. But notwithstanding that parties had come to a settlement on the mitigation of punishment, the Court, did nonetheless feel the need to reflect obiter on matters such as:

(1) the reasonable doubt that the charge sheet was actually not explained to accused;

(2) was not convinced that the accused knew the meaning of each individual charge before registering an admission;

(3) that accused was not appropriately assisted in line with requirements of a number of dispositions of the law, amongst others EU Directive 2016 2016/1919 notwithstanding that this directive has not as yet been transposed;

(4) and that no request for a disclosure was made either at interrogation stage or at any other stage of the proceedings during trial. It must be said that the police were in possession of evidence that would have exculpated Hajjaj from most of the accusations.

16. The Court notes, that much of the complaints contained in the application of Appeal of Usamah Hajjaj are very similar, and at times

identical, to those that are being levied by the applicant in the present proceedings. This meaning, that applicant's contentions that the Criminal Court of Appeal is not in a position to provide a remedy as adequate as that that could be obtained by a Constitutional action, is unfounded.

17. Furthermore the Court reaffirms the principle, that a Constitutional action is an action *in subsidium.* The legal *raison d'etre* behind this principle aims at avoiding to undermine ordinary domestic remedies. It is meant to avert the risk of having the whole legal system that provide for ordinary remedies falling flat on its face due to non-exhaustion of such ordinary remedies. A constitutional action is in its very nature exceptional.

18. From the above observations one would be led to think, that the natural and logical conclusion that follows is that the demands of the applicant to these procedures should be dismissed. However, although the general rule is that a Constitutional action should only be entertained after exhaustion of ordinary effective remedies, exceptions to this rule do exist, albeit in very limited circumstances.

19. These Courts have had occasion to express themselves on this procedural aspect of constitutional actions. Failure to exhaust an ordinary remedy, even if it is an effective remedy, the cause of which failure is attributable to a third party, should not be good enough reason for the Court to decline to exercise it's powers under the Constitution or Convention. What is more, these Courts also sustain that the discretionary powers of

the Court are to be exercised with prudence and caution in such a manner, that were it appears that serious and grave breach of a fundamental human right is at hand, the Court is to decide in favour of using that discretion to protect that right and not of declining to do so.n (vide supra **Constitutional Court in the names of Maria sive Marthese Attard pro et -vs- Policy Manager tal-Malta Shipyards**).

20. This Court is convinced that this case, presents an exceptional circumstance. The set of circumstances surrounding it, are such, that justice demands that the complaints of the applicant (the allegation that his fundamental rights under article 39 and 6 of the Constitution and the Convention has been breached) deserve to be examined by this Court. What is more, the fact the Attorney General, in the case of Usamah Hajjaj, impliedly recognised, that a miscarriage of justice had been committed as per his declaration during the sitting of the 20th February 2020, this in it's self is an enough good reason for this Court to exercise the power entrusted to it by the proviso to section 46 (2) of the Constitution and section 4(2) of Chapter 319 of the Laws of Malta.

21. Lastly ECHR decisions are to the effect, that in order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision. (vide **Hadjianas Tassiou v. Greece, app: 12945/87 of 16th December 1992**). The Magistrate's Court was not put in position,

notwithstanding the applicant registered an admission, to consider, amongst others, whether to exercise it's discretion in terms of article 253(2) of the Criminal Court as explained underneath.

22. Furthermore, it is unfortunate that our legal system does not provide for a retrial of Criminal Judgement, as in Civil matters under article 811 of Chapter 12 of the laws of Malta. Not even in the case of miscarriage of justice arising from facts that become known after the term of appeal has elapsed.

Merits of the case

23. In the decision in the **Civil Court in the names of Emmanuel Camilleri -vs- Spettur Louise Calleja et, per Justice Joseph R. Micallef of the 29th of September 2016** the Court had this to say: "... ... d-dritt għal smigħ xieraq ma jiggarantix il-korrettezza tas-sentenza fil-mertu, iżda jiggarantixxi biss l-aderenza ma' ċerti prinċipji proċedurali (indipendenza u imparzjalita' tal-Qorti u tal-ġudikant, audi alteram partem u smigħ u pronunċjament tas-sentenza fil-pubbliku) li huma konduċenti għall-amministrazzjoni tajba tal-ġustizzja. Il-funzjoni tal-Qorti, fil-ġurisdizzjoni Kostituzzjonali tagħha, m'hijiex illi tirrevedi s-sentenzi ta' Qrati oħra biex tgħid jekk dawn ġewx deċiżi 'sewwa' jew le, iżda hija limitata għall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea".

24. The Court has already established that the substance of the complaints of applicant refer to the alleged breach of his fundamental human rights under sections 39 and 6 of the Constitution and the Convention (Chap 319 of the laws of Malta).

25. At this stage the Court must again state that it is unfortunate, that the application does not spell out in its demands with exactness to which specific sub articles of articles 39 and 6 of the Constitution and Convention is applicant referring to. However, from what this Court could glean from the application itself from the evidence produced and final written submission of both parties the Court has come to this conclusion:

26. As regards article 39 of the Constituition the relevant subsections are the following:

1) Whenever any person is charged with a criminaloffence 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 be entitled to have such representation at the public expense;

As article 6 of the Convention the relevant subsections are the following:

(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.

…… ……. …… …… …… …… …… …… …… …… …… …… …… …… …… ……

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.

27. By and large, these articles are a reflection of each other and provide very similar minimum of rights that must be adamantly respected by the State in criminal matters. Against all popular perception, the protection of human rights does not spring from the Constitution or the Convention. Fundamental human rights have long been in existence before Society recognised their existence and provided for them formally and positively by codification.

28. Indeed, the United Kingdom and the State of Israel, jealously guard these rights, notwithstanding that they do not have a written Constitution. These documents are but guarantors of having in place within the domestic legal domain the appropriate legislative structures or judicial and doctrinal pronouncements safeguarding these rights and to oversee that these rights are effectively protected and respected (vide for example articles 392A(3), 534A, 534AB and 534AF of the Criminal Code or the number of Court Decisions on these rights). In a way this connects to the doctrine of exhaustion of ordinary remedies.

29. Furthermore the Court from the very outset reiterates that "id-*dritt għal smigħ xieraq ma jiggarantix il-korrettezza tas-sentenza fil-mertu, iżda jiggarantixxi biss l-aderenza ma' ċerti prinċipji proċedurali (indipendenza u*

imparzjalita' tal-Qorti u tal-ġudikant, audi alteram partem u smigħ u pronunċjament tas-sentenza fil-pubbliku) li huma konduċenti għall-amministrazzjoni tajba tal-ġustizzja. Il-funzjoni tal-Qorti, fil-ġurisdizzjoni Kostituzzjonali tagħha, m'hijiex illi tirrevedi s-sentenzi ta' Qrati oħra biex tgħid jekk dawn ġewx deċiżi 'sewwa' jew le, iżda hija limitata għall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea" (vide **Constitutional decision dated 30th September 2011 in the names of J.E.M. Investments Limited vs Avukat Ġenerali** et).

30. After having examined all the evidence adduced, the Court is particularly concerned with the following aspects:

31. The right of the accused to be properly informed with clarity and precision with what he is being *accused*, free from haste to expedite proceedings accompanied with alluring plea bargaining, particularly were foreigners are involved. Plea bargaining (*non contendere* plea) only makes sense after a sober examination of the charges.

32. That in a system entrenched in the adversarial and accusatorial tradition (as distinct from the prosecutorial system), the prosecution is at law bound, not only to produce evidence that may exculpate the accused, but more essential, to disclose all relevant salient information pertinent to the charges in every case, independently from the fact that the accused admits to all charges. Better to suffer restrain of liberty pending trial, than

be condemned for offences not committed consequent to a hasty admission.

33. Accused should be placed in a clear position to know to what charges he is admitting to. Revelation of all the material facts, will also enable the Magistrate to discover, notwithstanding a blanket admission, whether the accused, admitting to all the offences as charged were in fact reasonably committed by him. This aspect of the matter acquires particular importance in the light of what article 392A(3) of Chapter 9 of the Laws of Malta lays down: *"Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the court shall, notwithstanding the confession of the accused, order the trial of the cause to be proceeded with as if the accused had not pleaded guilty".*

34. That an accused is entitled from the moment of his arrest, to an adequate and effective legal assistance. This comprises the entitlement to have a lawyer of his own choice, particularly when he has the financial means.

35. It is clear that applicant was in a similar position of Usamah Hajjaj. Applicant in these proceedings, entered an admission even as regards drugs that Hajjaj possessed, when it seems he had nothing to do with at least two of them (Cocaine and MDMA). Furthermore, in the light of the medical reports (vide page 93 of these proceedings) and particularly that

of Mr. Gilbert Mercieca (vide page 113 of these proceedings), both exhibited for **the first time** before the Court of Appeal, it transpires, that not all of the three substances mentioned in charges were necessarily connected to the applicant. Applicant had outrightly denied all accusations levied against him during interrogation stage albeit on advice of legal aid lawyer per telephone conversation (vide his statement at page 83 of these proceedings).

36. The European Court of Human Rights has pronounced itself on the matters being considered in this application. That Court explains that Article 6 (3) (a) furnishes the accused with the right to be informed not only of the "cause" of the charges, in other words the acts he is alleged to have committed, but also of the "nature" of the offence, that is, the legal classification given to those acts (vide **Mattoccia v. Italy app: 23969/94, 25th July 1994** and see also **Penev v. Bulgaria, app: 20494/04 of 7th January 2010**).

37. Applicant was accused of having been in association or conspiring with other persons, namely Usamah Hajjaj. From the evidence produced during these proceedings and those presented before the Criminal Court Appeal it transpired that applicant was indeed on the same flight of the said Hajjaj and going to the same musical event. In his affidavit, applicant insists, that he was travelling with a certain Lewis Lyndsy-Gunn and that during the flight he was sitting next to this person. During these

proceedings this declaration was left unchallenged and applicant was not cross-examined (vide affidavit of applicant at pg 149).

38. After weighing the evidence adduced during these proceedings, this Court is convinced that the reasoning of the Court of Criminal Appeal is equally applicable to applicant to these procedures: that reasonable doubt exists as to whether the charge sheet was actually explained to the applicant. This meaning, that when applicant admitted to all charges he was not aware of the nature of the offences he was being charged with.

39. The plea bargaining that took place during the first and only sitting of the trial on the 16th of July 2019 and which even went as far as to suggest the extent of the punishment, has to pass the test of conforming with the minimum requirements of the law and mainly:

A) the bargain is to be accepted by the accused **in full awareness** of the facts of the case and the legal consequences and in a genuinely voluntary manner;

and

B) the content of the bargain and the fairness of the manner in which is reached between the parties is to be subjected to sufficient judicial review (vide **Natsvlishvili and Togonidze v. Georgia app: 9043/05 of the 24th**

April 2014 and **Navalny and Ofitserov v. Russia app: 46632/13/28671/14 Court of third session 2312/2016).**

40. The last requirement acquires utmost importance under maltese law in the light of what article 392A(3) of the Criminal sets down (vide supra). It cannot be reasonably said, that the applicant was fully aware of what were the consequences of the charges, particularly those of being in possession of Cocaine and MDMA. The manner by which the whole trail was managed and conducted, one can hardly say with peace of mind, that there was sufficient judicial review, when not all the facts of the investigations were known. This is particularly worrying in the light of the evidence that surfaced for the first time during Appeal proceedings of Hajjaj. It seems that the reports of the experts could not have been available at the time of the trial, though the Inspector Kevin Pulis had caught wind of what were the findings of these experts by permission of the enquiring Magistrate (see further hereunder). This is being said because it transpires that the expert reports were definitely concluded, that of Marisa Cassar on the 10th of December 2019 (vide pg 109 and 110 pg Criminal proceedings) and that of Gilbert Mercieca on the 20th of January 2020 (vide pg 150 and 151 of Criminal procceedings). The Court must remind that the decision of the Magistrates Court was pronounced on the 1st of May 2019, a good seven months from the reports mentioned bearing the above dates.

41. However this evidence was so compelling, that the Attorney General, in the appeal of Usamah Hajjaj, agreed to a substantial mitigation of punishment. This evidence was of neutral nature and consisting of mere establishment of the facts, in such a manner that had the appeal been lodged by applicant, there would have been no reasonable cause for the Attorney General not to act in the same manner and for the Court to reach the same judgement.

42. Had all the information been revealed comprehensively to the legal aid counsel and to the Magistrate, it would have possibly enabled the applicant to exonerate himself or be exonerated by the Magistrate from some of the charges. As a rule, Article 6(1) of the Convention, and this can also be comfortably said as regards article 39(1) of the Constitution, requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (vide **Rowe and Davis vs the United Kingdom app: 28100/95 of the 16th of February 2000**). This is an essential cog in the wheel of the adversarial system and forms part of the set of constitutional principles that all together guarantee a fair trial.

43. As regards the manner that admission of the accused consequent to a plea bargaining, this Court conscientiously thinks it pertinent to refer to article 392B(5)(a) and (b) of the Crminal Code which lays down:

"5) (a) The accused and the Attorney General may request the Criminal Court to apply a sanction or measure or, where provided for by law, a combination of sanctions or measures, of the kind and quantity agreed between them, and to which the accused can be sentenced.

(b) If the court is satisfied that the sanction or the measure, or the combination of sanctions and measures requested, as provided for in paragraph (a), is one which it would been lawful for it to impose upon conviction of the offence for which the accused has pleaded guilty, the court shall proceed to pass the sentence indicated to it by the parties declaring in its judgement that the sentence being awarded is being so awarded at the request of the parties".

44. The Police are prosecuting officers and not the Attorney General. From what this Court could gather, the Attorney General was in no way involved in any plea bargaining that had taken place on the 1st of May 2019.

45. As to effective legal assistance, Inspector Kevin Pulis, during the sitting of 3rd October 2019, declares *"….from my end I filed a request ….in the inquiring Magistrate to allow us to speak to the relevant Court experts nominated was of importance before the arraignment of this Case."* (vide pg 61 tergo of Appeal proceedings). Notwithstanding the importance of the information obtained from these experts, no mention of them was made to the Magistrate. During the trial stage, Inspector Kevin Pulis took the witness stand only to state under oath the nature of the charges and explain

the circumstances that justified arraignment under arrest of the accused (vide pg 5 of Criminal proceedings). Nothing else was mentioned.

46. This Court fails to understand the haste and hurry by which the Police arraigned within matters of hours. Applicant was stopped at the airport on the 30th April 2019 at around midnight (vide deposition of Inspector Kevin Pulis at pg 156 tergo). Before midday the next day, judgement was delivered. This Court finds it hard to ignore the fact that applicant was a foreigner. In the early hours of the same day of arraignment, he was taken to Mater Dei for further investigations and afterwards interrogated and spent what remained of the rest of the night under arrest. In the morning, he was taken to court were he admitted to **all** accusations. Immediately afterwards, applicant was again taken to hospital because he was in a state of agitation.

47. Applicant states: *"I asked to speak to a lawyer, they told me they will be providing me one by Legal Aid although I insisted I had the money to pay for it or my parents could have paid for it."* (vide statement of applicant at pg 149 of these proceedings). On the other hand Inspector Kevin Pulis on the witness stand, somewhat nebulously states: *"He told me that he wants a lawyer and I told him as already said in my testimony that he can't bring a lawyer from UK because some of them mentioned, I am not sure if it was appellant to be correct and they want a lawyer from Uk but I told him here we are and it is a maltese lawyer, And I told him if you're not going to*

*tell me I have to choose heqq to give you legal aid."(*vide pg 172 of these proceedings).

48. It does not transpire applicant was presented with the list of lawyers from were to choose (Vide dok KP at pg 173 of these proceedings). Article 355AU (4) clearly lays down that *"Once a request for legal assistance is made, the suspect or the accused person shall be provided with a list of lawyers drawn up by the Chamber of Advocates and the Chamber of Legal Procurators and submitted on a yearly basis to the Executive Police and to any other law enforcement and judicial authority, from which the suspect or the accused person may select a lawyer of his own choice. Alternatively, the suspect or the accused person may elect to be assisted by the Advocate for Legal Aid in which case the Advocate for Legal Aid shall assign a lawyer for this purpose."*

49. Before the interrogation started and that is early in the morning, applicant along with another four persons, consulted Dr. Christopher Chircop (legal aid) per telephone, and was assigned Dr. Simon Micallef Stafrace (legal aid), for the trial. The latter lawyer was assisting both accused. Had all the facts been clearly explained to their lawyer, in all probabilties he would have been put in a position to make the appropriate considerations, amongst others, whether there existed conflict interest to represent both accused at the same time or whether they should collectively admit to all accusations.

50. Although they were accused together, the individual surrounding facts were not the same, particularly as to who was in possession of which substance at the time of the arrest. It has been frequently said, that the right to have a lawyer is principally to have an effective defence. (Vide **Ibrahim and others -vs- Uk ECHR Grand Chamber of 13th September 2016**). A lawyer who is oblivious to certain facts renders his assistance possibly ineffective for all purposes of the law. The Court recalls that during the procedures before the Criminal Appeal of Usamah Hajjaj, the Attorney General, by his own declaration, during the sitting of 20th February 2010, impliedly accepted that there was a clear miscarriage of Justice. This meaning, that it would be incongrously unjust, were this Court to retain that the fundamental human rights of the applicant above were not breached in the light of the reasons mentioned in this decision.

51. Inview of the above the Court is convinced that applicant's fundamental human rights under article 39(1) and subsections (6) and (9) of the same article of the Constitution and article 6(1) and subsections (a) and (c) of the same article of the Convention have been breached.

52. The Court has pondered and thought about the nature of the measure possibly available as an effective remedy in the circumstances. Articles 46 (2) and 4(2) of the Constitution and Convention respectively entrust the Court with the powers to make any orders, issue such writs and give such directions as it may consider appropriate for the purpose of

enforcing, or securing the enforcement of the relative provisions. This power has always been considered as giving the Court a wide discretion and aiming at an effective remedy. This applies also in the instances were there is a lacuna in the law. Apart from what has been said above, the Court considers that in criminal proceedings the law does not unfortunately provide for a retrial.

53. In the **Decision per Justice Joseph R. Micallef in the names of Emmanuel Camilleri -vs- Spettur Louise Calleja of 29th September 2016** the Court had this to say:

"Illi l-Qorti tqis li s-setgħat li hija tista' twettaq biex tara li ma jseħħx ksur ta' xi jedd fundamentali jew li twaqqaf qagħda li tkun jew tista' tkun ta' ħsara għat-tgawdija ta' xi jedd bħal dak jestendu wkoll għall-għoti ta' rimedji dwar atti u proċedimenti ġudizzjarji, wkoll dwar sentenzi mogħtijin matulhom. Kemm hu hekk, ingħad (fil-qafas ta' proċedimenti ta' xejra kriminali) li "Kieku ma kienx għaż-żewġ ċirkostanzi u raġunijiet li sejrin jissemmew u li jimmilitaw kontra r-rikorrent, il-Qorti ċertament ma kenitx sejra tillibera għal kollox lir-rikorrent, imma kienet tordna 'new trial' għax il-kamp tar-'redress' mogħti mid-dispożizzjoni ampja tal-art. 47(2) tal-Kostituzzjoni jidher li jippermetti anke direttiva simili, u kif qal il-Privy Council fil-kawża Borg Olivier vs Buttigieg (il-kawża tal-gazzetti fl-isptarijiet) mal-'human rights' m'għandhomx isiru skerzi, lanqas minimi".

54. In view of the above, this Court only finds it just, that the punishment inflicted by the The Court of Magistrates (Malta) As A Court of Criminal Judicature in the names of Il-Pulizija (Spettur Louise Calleja) -vs- Elton Gregory Dsane and Usamah Sufyaan Hajjaj of the 1st of May 2019 be varied in the sense, that the period punishment of four years imprisonment vis a vis the applicant , be reduced to one year six months.

Decision

Now therefore, in view of the above, the Court is deciding on the demands of applicant in the following manner:

It accedes to the demand of applicant insofar, that as a consequence of the infliction of imprisonment for a term of four (4) years in the Decision of the Courts of Magistrates (Malta) as a Court of Criminal Judicature in the names of Police Inspector Kevin Pulis -vs- Elton Gregory Dsane et, of the 1st of May 2019, his fundamental human rights as protected by aricle 39(1) and subarticles (6) and (9) of the same article of the Constitution and article 6(1) and subarticles (a) and (c) of the of the Covention (Chapter 319 of the Laws of Malta), were breached.

Orders the variation of the Court Decision above mentioned as regards the applicant, limitedly to the punishment of imprisonment and consequently **orders** that the term of imprisonment in that decision be reduced from four (4) years to one (1) year six (6) months.

Orders further, that applicant be released after having served the said period of imprisonment of one (1) year six (6) months.

Copy of the Decision is to be notified to the Speaker of House of Representatives and the Registrar of the Criminal Courts and Tribunals for all intents and purposes of the Law.

Expenses to these proceedings to be borne by defendant Advocate for the State.

Hon. Mr. Justice Toni Abela

Deputy Registrar