THE CRIMINAL COURT

The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Bill of indictment number 1/2018

The Republic of Malta

vs

Mamadi KEITA

15 th December 2020

The Court,

1. Having seen the bill of indictment filed by the Attorney General in records of these proceedings against **Mamadi KEITA**, son of Kaba and Nutenebe born in Guinea on the 1st September 1985 and residing in Marsa, holder of Police number 08B/007, wherein the Attorney General premised as follows : -

FIRST (1st) COUNT
Possession of the resin obtained from the plant Cannabis, under circumstances denoting that this was not intended for his own personal use

The Facts of the Case:

That, on the eleventh (11th) October of the year two thousand and fifteen (2015), the Drug Squad Police received confidential information that a Nigerian male with a dark complexion, wearing a red top and riding a bicycle was going to be in possession of a large amount of drugs in Marsa on that day;

That, following such information, Drug Squad Police repaired to Marsa where in fact, in Giuseppi Zammit Street, they noted a man – who was later identified to be the accused **Mamadi Keita** - wearing a red top, riding a bicycle and carrying a paper bag. Since the appearance of this man matched the confidential information received, the Police stopped the accused, who in turn jumped off his bicycle, dropped the paper bag he was carrying and tried to run away, where he was subsequently arrested by the Police. From preliminary investigations, the substance found in the paper bag dropped by the accused was suspected to be the dangerous drug Cannabis;

That, consequently, a Magisterial Inquiry was launched and a search was affected both upon the accused's person and also at his residence in Marsa. Although no drug related items were found inside his residence, a laptop and two phones belonging to the accused were seized and handed over to the Court-appointed experts for further investigations. Moreover, the amount of three hundred and ten Euro (€310) were found on the person of the accused whilst the amount of one thousand, eight hundred and fifteen Euro (€1,815) were found inside his residence;

That, analysis carried out by the Court-appointed expert on the substance found in the paper bag that had been in the possession of the accused **Mamadi Keita** resulted that such substance was in fact the resin obtained from the plant Cannabis, which tested positive for the substance tetrahydrocannabinol, in the total amount of nine hundred, seventy seven point ten (977.10) grams with a purity of six point five per cent (6.5%) and a total street value ranging between fourteen thousand, six hundred and

fifty six Euro and fifty cents (€14,656.50) and twenty nine thousand, three hundred and thirteen Euro (€29,313);

That, the accused **Mamadi Keita** was subsequently interrogated where he voluntarily released a statement on the twelfth (12th) of October of the year two thousand and fifteen (2015). He stated that the drugs found did not belong to him but had been given to him by an unknown Arab man at the Marsa Open Centre in order for the accused to pass them on to an unknown third party;

That, moreover, when the accused **Mamadi Keita** was asked whether he was employed or not, he stated that he earned thirty five Euro (€35) a day but however he did not work every day;

That, owing to the nature of the circumstances as described above, it transpired that the accused **Mamadi Keita** wilfully and knowingly retained the resin obtained from the plant Cannabis, in considerable amounts, and this with a view of trafficking the same. Moreover, the considerable amount of drugs held, as well as the significant amount of money found on the accused's person and in his residence for which he provided no plausible explanation, most certainly do not indicate in any way that such substance could have been intended for the personal use of the accused;

That, due to the behaviour of **Mamadi Keita** as above indicated, the same **Mamadi Keita** also breached a condition incorporated in the Probation Order imposed upon him through a judgement delivered by the Court of Magistrates (Malta) on the ninth (9th) March of the year two thousand and fifteen (2015) in the names *The Police vs Mamadi Keita*, which judgement has become definitive;

Cannabis is a dangerous drug specified and controlled under the provisions of Part 1, First Schedule of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta). **Mamadi Keita** was not in possession of any valid and subsisting import or possession license or authorisation from the President of Malta granted in pursuance of the said law, and was not authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) or by other authority given by the President of Malta, to be in possession of this drug in terms of Regulation 9 of the said Regulations, and was likewise not in possession of a valid prescription in terms of the said Regulations.

The Consequences:

By committing the abovementioned acts with criminal intent, on the eleventh (11th) October of the year two thousand and fifteen (2015), the accused **Mamadi Keita** rendered himself guilty of **having in his possession in the Maltese Islands (otherwise than in the course of transit through Malta or the territorial waters thereof) the resin obtained from the plant Cannabis**, when he was not in possession of an import or an export authorization issued by the Chief Government Medical Officer in pursuance of the provisions of part III of the Ordinance, and when he was not licensed or otherwise authorized to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorized by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to him for his personal use, according to a medical prescription as provided in the said regulations and this in breach of the 1939 Regulations on the Internal Control of Dangerous Drugs (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, **and which drug was found under circumstances denoting that it was not intended for his personal use.**

And, also by committing the abovementioned acts with criminal intent, the same **Mamadi Keita** breached a condition incorporated in the Probation Order imposed upon him through a judgement delivered by the Court of Magistrates (Malta) on the ninth (9th) March of the year two thousand and fifteen (2015) in the names *The Police vs Mamadi Keita*, which judgement has become definitive.

The Accusation:

Wherefore, the Attorney General, in his capacity, accuses **Mamadi Keita** of having on the eleventh (11th) October of the year two thousand and fifteen (2015), rendered himself guilty of **having in his possession in the Maltese Islands (otherwise than in the course of transit through Malta or the territorial waters thereof) the resin obtained from the plant Cannabis,** when he was not in possession of an import or an export authorization issued by the Chief Government Medical Officer in pursuance of the provisions of part III of the Ordinance, and when he was not licensed or otherwise authorized to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorized by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to him for his personal use, according to a medical prescription as provided in the said regulations and this in breach of the

1939 Regulations on the Internal Control of Dangerous Drugs (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta**, and which drug was found under circumstances denoting that it was not intended for his personal use.**

And also, the Attorney General, in his capacity, accuses the same **Mamadi Keita** of having breached a condition incorporated in the Probation Order imposed upon him through a judgement delivered by the Court of Magistrates (Malta) on the ninth (9th) March of the year two thousand and fifteen (2015) in the names *The Police vs Mamadi Keita*, which judgement has become definitive.

The Punishment Demanded:

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused **Mamadi Keita** be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to a fine of not less than two thousand three hundred and thirty Euro (€2330) and not more than one hundred sixteen thousand and five hundred Euro (€116,500) and to the forfeiture in favour of the Government of Malta of the entire immovable and movable property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in sections 8(a), 12, 14, 20, 22(1)(a)(2)(a)(i)(3A)(a)(b)(c)(d), 22A, 24A and 26 of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) and regulation 4 and 9 of the 1939 Regulations for the Internal control of Dangerous Drugs (Legal Notice 292/39), and in sections 17, 23, 31 and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilt of the accused.

And because the same **Mamadi Keita** breached a condition incorporated in the Probation Order imposed upon him through a judgement delivered by the Court of Magistrates (Malta) on the ninth (9th) March of the year two thousand and fifteen (2015) in the names *The Police vs Mamadi Keita*, which judgement has become definitive, the Attorney General demands that Article 23(1)(b) of the Probation Act (Chapter 446 of the Laws of Malta) be applied.

SECOND (2nd) AND FINAL COUNT
Breach of Bail Conditions

The Facts of the Case:

That, it resulted that on the day of the incident mentioned in the First Count of the Bill of Indictment, that is on the eleventh (11th) of October of the year two thousand and fifteen (2015), the accused **Mamadi Keita** had several bail conditions imposed upon him by virtue of a decree delivered by the Criminal Court on the twelfth (12th) of August of the year two thousand and thirteen (2013), in the names of *The Republic of Malta vs Mamadi Keita*, wherein he had been granted bail. One of these bail conditions was that the accused cannot commit any crime of a voluntary nature whilst released on bail;

That, by committing the acts described in the First Count of this Bill of Indictment, **Mamadi Keita** committed a crime of a voluntary nature whilst on bail, thus breaching the bail conditions imposed upon him by the Criminal Court, above cited.

The Consequences:

By committing the above-mentioned acts with criminal intent, on the eleventh (11th) October of the year two thousand and fifteen (2015), the accused **Mamadi Keita** rendered himself guilty of breaching the bail conditions imposed upon him by virtue of a decree delivered by the Criminal Court on the twelfth (12th) August of the year two thousand and thirteen (2013), in the names of *The Republic of Malta vs Mamadi Keita*, and this in breach of the provisions of the Criminal Code (Chapter 9 of the Laws of Malta).

The Accusation:

Wherefore, the Attorney General, in his aforesaid capacity accuses **Mamadi Keita** of having, on the eleventh (11th) October of the year two thousand and fifteen (2015), **rendered himself guilty of breaching the bail conditions imposed upon him by virtue of a decree delivered by the Criminal Court on the twelfth (12th) August of the year two thousand and thirteen (2013), in the names of *The Republic of Malta vs Mamadi Keita***.

The Punishment Demanded:

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused **Mamadi Keita** be proceeded against according to law, and that he be sentenced to the punishment of a fine (multa) or to a term of imprisonment from four (4) months to two (2) years, or to both such fine and imprisonment and the forfeiture in favour of the Government in Malta of the bail bond amounting to five thousand Euro (€5,000), as is stipulated and laid down in Articles 17, 23, 31, 533, 575 and 579 of the Criminal Code (Chapter 9 of the Laws of Malta) or to any other punishment applicable according to law to the declaration of guilt of the accused.

2. Having seen the records of these proceedings, including the records of the Court of Magistrates (Malta) as a Court of Criminal Inquiry;

3. Having seen the notice of preliminary pleas filed by the accused in terms of article 438(2) of the Criminal Code wherein he raised the following preliminary plea :

1. In the first place, he is submitting as a preliminary plea, the invalidity, and consequently the exclusion from the evidence, of any declaration, including written statements to the Police, which accused may have made to the Police in connection with this case since any such declarations and/or written statements were not made in accordance with the law, that is to say after the accused had consulted a lawyer and/or in the presence of his lawyer, since as has been held by our Courts and the Strasbourg Court for Human Rights, both the right to consult a lawyer as well as the presence of a lawyer when an accused makes a declaration to the police are essential elements for such declarations to be deemed valid so that these may be brought in evidence.

Considers the following : -

4. According to the testimony of Police Inspector Nikolai Sant, at fol 18 :

It was my turn then to investigate further the accused and after he was advised by his legal lawyer Dr. Mifsud at the headquarters himself on the 12th October at around half twelve till around quarter to one, I asked him what had happened and to give me his version of events. He stated that the bag which he was carrying which the police had found around one kilo suspected to be cannabis resin, he said that he didn't know that there were

drugs inside and that he was given this bag from an Arab man whom he used to work sometimes with him but he didn't know his name, surname, details or anything that could help us continue this investigation....and the last document I am presenting today is Doc. NS6 which is the statement taken to Mr. Keita Mamadi ID card 54627A and police number 08B007 The statement was taken on the 12th October at 3.20pm on three pages and Mr. Mamadi Keita also signed this statement in the presence also of my colleage PC1183 Oliver Borg was witness to this statement. This statement before I started I also informed him about his right not to answer to the questions and whatever he had to say could be used as evidence in Court.

5. The statement of the accused is found at fol. 25 of the records of these proceedings, dated 12th October 2015 and was made in the Office of Inspector Nikolai Sant at 15:20. This statement carries a declaration to the effect that:

> You do not have to say anything unless you wish to do so, but what you say may be given in evidence; however, should you refuse to say anything or omit to state some fact, a rule of inference amounting to corroborative evidence may be drawn, by the Court or any toher adjudicator if during trial you will put forward any defence based on a fact which you did not state during interrogation.

6. The first part of this statement states as follows: -

> Q: Did you understand the caution?
> A: Yes I understand.
> Q : Do you confirm that prior being questioned you were given the right to consult with a lawyer and you consulted privately with Dr. Joseph Mifsud?
> A: Yes.

7. The statement ends with a declaration that states :

> This statement was done by myself after I was cautioned without any threats or promises what so ever and after the Police have read it to me I confirm that this is the truth and I choose to sign it.

8. The statement was signed by Inspector Nikolai Sant, PC1183 Oliver Borg and Mamadi Keita and it ended at 15:50 of the 12th October 2015.

9. PC1183 Oliver Borg testified on the 11th October 2017 and his testimony is found at fol. 197. Reference was made to the statement released by the accused at fol 25 to 27 and this witness confirmed the following :

> I can remember that this is the statement that Inspector Nikolai Sant issued to Mr. Keita Mamadi that I can see in the Court room. I remember that Inspector Sant gave the caution in detail to Mr. Keita that he has the right to remain silent and not to answer the questions, and I can recognise the signature of Mr. Sant and mine and I remember that Mr. Keita chose to sign the statement. That is all my involvement in the statement.
>
> Pros; You know if Mr.Keita took the advice or there is written in the statement, in the first part of the statement? If it is written?
>
> Witness; Mr. Keita understood the caution and he chose to answer the questions.

Considers as follows : -

10. In the case ***Il-Pulizija vs. Timothy Joseph Agius***, decided on the 21st July 2020, the Court of Criminal Appeal, differently presided, delivered a detailed judgment containing a thorough exposition of the more recent cases dealing with the legal and human rights issues under examination in this case and to which this Court refers.

11. This Court understands that there are different ideological undertones underpinning the legal point raised in this preliminary plea. Suffice it to state, at this stage, that the developments taking place since ***Beuze vs Belgium***[1] and ***Farrugia vs. Malta***[2] the ECtHR

[1] Decided by the European Court of Human Rights Grand Chamber on the 9th November 2018.
[2] Decided by the European Court of Human Rights (Third Section) on the 4th June 2019.

have to be taken as the latest guiding principles which domestic courts have to apply in their domestic cases. As usually happens with ECtHR judgments, these cases come with some dissenting opinions as expressed by some judges of that Court. This is hardly surprising given the ideological tensions inherent in this debacle over the past years, which have also led to different legal conclusions.

12. In the criminal appeal ***Il-Pulizija vs. Simon Camilleri*** decided on the 7th May 2020, the presiding judge held as follows : -

> 31. Illi wieħed mill-aggravji prinċipali tal-appellant jittratta l-inammissibbilita tal-istqarrija rilaxxjata minnu lill-Pulizija. Il-ġurisprudenza l-aktar reċenti kemm tal-Qrati Maltin, kif ukoll il-Qorti Ewropea dwar id-Drittijiet tal-Bniedem (il-Qorti Ewropea) dwar din il-materja żviluppat diversi prinċipji regolaturi dwar meta jiġu riskontrati b'allegazzjonijiet ta' ksur tad-drittijiet minħabba n-nuqqas tal-aċċess għall-avukat. Fis-sentenza ***Beuze vs Belgium*** (para 120 – 130)[3] il-Qorti Ewropea iddikjarat illi l-obbligu tal-assitenza legali japplika mill-mument meta' persuna tkun '*charged with a criminal offence*' u dan skond it-tifsira indikata fl-artikolu 6(3) tal-Konvenzjoni Ewropea (para 129).[4]
>
> 32. Madankollu skond l-istess sentenza dik il-Qorti stabbiliet illi :
>
> > In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against

[3] Deċiża fid-9 ta' Novembru 2018 mill-Qorti Ewropea għall-protezzjoni tad-Drittijiet tal-Bniedem, applikazzjoni no. 71409/10.

[4] Artikolu 6(3) :

> Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and the facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

self-incrimination takes on particular importance (see Ibrahim and Others, cited above, § 273, and case-law cited therein).'

33. Jiġifieri li skond din is-sentenza tal-*Grand Chamber* tal-Qorti Ewropea, l-esklużjoni tat-twissija lil dak li jkun bid-dritt tiegħu li jkun assistit minn avukat ma ġġibx magħha awtomatikament il-konsegwenza tal-ksur ta' smiegħ xieraq jew l-inammissibilita ta' evidenza miġbura f'dak l-istadju. Biex jitqies integrat ksur tal-jeddijiet fundamentali tal-bniedem il-Qorti tkun trid tistħarreġ il-proċedura kollha kif tkun ġiet applikata f'dak il-każ partikolari b'mod sħiħ; u huwa wara li ssir l-analiżi ta' dan l-eżerċizzju globali li l-Qorti tkun tista' tgħid jekk il-proċedura segwita kienetx tħares il-jeddijiet ta' smiegħ xieraq jew le.

34. Fl-istess sentenza ingħad illi apparti ċertu istanzi indikati fejn il-preżenza attiva u mhux astratta tal-avukat tkun meħtieġa :

the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see Hovanesian v. Bulgaria, no. 31814/03, § 34, 21 December 2010; Simons, cited above, § 30; A.T. v. Luxembourg, cited above, § 64; Adamkiewicz, cited above, § 84; and Dvorski, cited above, §§ 78 and 108)'.

35. Din is-sentenza stħarrġet il-prinċipji riżultanti mill-każ ***Salduz vs Turkey.*** Biss f'***Beuze*** il-Qorti Ewropea irrikonoxxiet li sussegwentement l-istess Qorti kienet ħadet approċ inqas assolutista. Fil-fatt qalet hekk :

138. The *Salduz* judgment also demonstrated that the application on a "systematic basis", in other words on a statutory basis, of a restriction on the right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 57-58).

139. The stages of the analysis as set out in the *Salduz* judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.

140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan*, cited above, § 33, and *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010). Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form (see, among other authorities, *Çarkçı v. Turkey (no. 2)*, no. 28451/08, §§ 43-46, 14 October 2014), and sometimes in greater detail (see, among other authorities, *A.T. v. Luxembourg*, cited above, §§ 72-75).

141. Being confronted with a certain divergence in the approach to be followed, in *Ibrahim and Others* the Court consolidated the principle established by the *Salduz* judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them (see *Ibrahim and Others*, cited above, §§ 257 and 258-62).

36. Sabiex dan jiġi stabbilit, il-Qorti rriteniet is-segwenti:

(α) Concept of compelling reasons

142. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Salduz*, cited above, §§ 54 *in fine* and 55, and *Ibrahim and Others*, cited above, § 258). A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.

143. The Court has also explained that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see *Ibrahim and Others*, cited above, § 259, and *Simeonovi*, cited above, § 117).

(β) The fairness of the proceedings as a whole and the relationship between the two stages of the test

144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer (see paragraph 97 above) to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the *Ibrahim and Others* judgment, followed by the *Simeonovi* judgment, the Court rejected the argument of the applicants in those cases that *Salduz* had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the *Dayanan* case and other judgments against Turkey (see paragraph 140 above).

145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, cited above, § 265).

146. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against

self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 273 *in fine*).

147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention (see the case-law on Article 6 § 1 cited in paragraph 120 above).

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

149. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case.

(γ) Relevant factors for the overall fairness assessment

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see *Ibrahim and Others,*cited above, § 274, and *Simeonovi*, cited above, § 120):
(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;
(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and
(j) other relevant procedural safeguards afforded by domestic law and practice.

37. L-istess prinċiplji ġew applikati f'sentenza oħra ta' din il-Qorti fil-kawża fl-ismijiet ***Farrugia Carmel Joseph vs Malta*** fejn a bażi ta' dawn il-prinċipji l-Qorti kkonkludiet illi

> while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.[5]

38. Illi f'dan il-każ, jirriżulta li qabel ma l-appellant ġie mitkellem mill-Pulizija, kemm fit-28 ta' Ġunju 2015 kif ukoll l-għada, huwa kien ingħata twissija mill-Ispettur Joseph Mercieca. Nhar it-28 ta' Ġunju l-ispettur Mercieca, fil-preżenza ta' PC Donatello Cortis l-appellant kien ingħata d-dritt li jikkonsulta mal-avukat Dr. Victor Bugeja, avulat għall-għajnuna legali, wara li l-legali mixtieq minnu, Dr. Leon Bencini ma kienx qiegħed jieħu telefonati. Matul l-istess jum, qabel ma ttieħdet l-istqarrija mingħandu l-appellant ġie wkoll imwissi li ma kienx obbligat li jitkellem sakemm ma jkunx jixtieq li jitkellem; li dak li jgħid jista' jinġieb bi prova; madanakollu jekk ma jkun irid jgħid xejn, jew jonqos li jsemmi xi fatt, il-Qorti jew il-ġudikant jistgħu jaslu għal regola t'inferenza li tammonta għal prova korroborattiva, jekk matul il-proċess huwa jressaq difiża li tkun ibbażata fuq xi fatt li ma jkunx semma matul l-interrogazzjoni. L-istess twissijiet ingħatawlu l-għada, 29 ta' Ġunju 2015 mill-ispettur Mercieca fil-preżenza tal-Ispettur Kylie Borg. Anke din id-darba l-appellant għażel li jitkellem mal-Avukat Victor Bugeja qabel ma sarlu l-interrogatorju.

39. Fiż-żmien meta seħħ dan il-każ, u ċioe fis-sena 2015, il-liġi Maltija kienet għadha ma tistipulax b'mod ċar illi kull min ikun mizmum għandu awtomatikament jingħata aċċess għall-avukat. Infatti l-artikolu 355AT tal-Kodiċi Kriminali qabel l-emendi kien jinqara kif ġej:

> **355AT.** (1) Bla ħsara għad-disposizzjonijiet tas-subartikolu (3), persuna li tkun arrestata u qed tinżamm taħt il-kustodja tal-Pulizija f'xi Għassa jew f'xi post ieħor ta' detenzjoni awtorizzat għandha, jekk hija hekk titlob, titħalla kemm jista' jkun malajr tikkonsulta privatament ma' avukat jew prokuratur legali, wiċċ imb'wiċċ jew bit-telefon, għal mhux iktar minn siegħa żmien. Kemm jista' jkun malajr qabel ma tibda tiġi interrogata, l-persuna taħt kustodja għandha titgħarraf mill-Pulizija bid-drittijiet li għandha taħt dan is-subartikolu.

40. Kwindi jidher illi sabiex jiskatta dan id-dritt skond il-liġi applikabbli fi żmien mertu ta' dan il-każ, il-persuna ikkonċernata kellha tkun arrestata u fil-kustodja tal-pulizija fl-għassa jew post ieħor ta' detenzjoni. Is-sentenzi hawn fuq ċitati jistgħu japplikaw fir-rigward ta' dan il-każ sabiex jiġi stabbilit jekk fil-mument meta l-appellant għamel dawk id-dikjarazzjonijiet mal-Pulizija, kienx hemm xi leżjoni tad-drittijiet tiegħu.

[5] Deċiża nhar l-4 ta' Ġunju 2019 mill-Qorti Ewropea tad-Drittijiet tal-Bniedem, Applikazzjoni no. 63041/13.

Minn dawn is-sentenzi jirriżulta ċar li s-sempliċi esklużjoni ta' dan id-dritt ma jwassalx neċessarjament għalbiex il-Qorti tiskarta l-prova li tkun inkisbet; iżda din il-Qorti trid tqis it-totalita' tal-proċess kriminali meħud kontra l-appellant sabiex tistabbilixxi jekk kienx hemm xi nuqqas li bih l-appellant setgħa kien preġudikat għal dak li jirrigwarda is-sejbien ta' ħtija tiegħu.

41. Skond il-prinċipji ravviżati fis-sentenza ***Beuze*** il-Qorti Ewropea elenkat numru ta' fatturi illi għandhom jitqiesu mill-Qorti filwaqt li tkun qed tistabilixxi dan, u senjatament :
(a) il-vulnerabblita tal-persuna konċernata minħabba l-eta' jew minħabba inkapaċita mentali;
(b) l-istruttura legali li jirregola l-proċeduri *pre-trial* u l-amissibilta' tal-provi matul proċess ġudizzarju li fl-eventwalita' tal-applikazzjoni ta' xi regola li teskludi dan id-dritt, huwa diffiċli li jitqies bħala inġusta;
(c) jekk l-appellant kellux l-opportunita li jisfida l-awtentiċita tal-provi mressqa kontra tiegħu;
(d) il-kwalita ta' provi kontriħ u jekk hemmx dubbju dwar l-attendibilita' tagħhom minħabba l-mod kif dawn ġew akkwistati;
(e) jekk il-provi ġew ottjenuti illegaliment, jekk dan jipprovjenix minn xi vjolazzjoni oħra ta' artikolu ieħor tal-Konvenzjoni Ewropea u n-natura ta' din il-vjolazzjoni;
(f) fil-każ ta' stqarrija, jekk din ġiex prontament rtirata jew mibdula;
(g) il-mod kif l-provi ntużaw u partikolarment jekk dawn il-provi kkostitwewx parti integrali jew sinjifikanti tal-provi probatorji li a bażi tagħha l-appellant ikun instab ħati u s-saħħa ta' provi oħrajn fil-każ;
(h) jekk il-kunsiderazzjonijiet dwar il-ħtija sarux minn imħallef jew maġistrat professjonali jew minn ġurija popolari u fl-aħħar każ u jekk applikabbli, l-estent tad-direzzjoni u l-linji gwida mogħtija lilhom dwar l-istess;
(i) Il-piż tal-interess pubbliku fil-kors tal-investigazzjoni u l-piena tar-reat in kwistjoni u finalment;
(j) Proċeduri protettivi oħrajn relevanti offruti skond il-liġi domestika jew prattika tal-pajjiz li jkun.

13. Moreover the same position was adopted in the criminal appeal ***Il-Pulizija vs. Anthony McKay*** decided on the 18th June 2020, where the same judge held as follows:-

43. Illi fir-rigward ta' dawn l-istqarrijiet issir referenza għall-ġurisprudenza aktar reċenti dwar din il-materja, b'mod partikolari ***Ir-Repubblika ta' Malta vs. Martino Aiello*** deċiża fis-27 ta' Marzu 2020 mill-Qorti Kostituzzjonali, li ċċitat u ħadnet ukoll dak imsemmi fis-sentenza ***Beuze***

vs. Belgium (para 120 – 130).[6] F'din is-sentenza ***Beuze*** tal-Qorti Ewropea fi Strasburgu iddikjarat illi l-obbligu tal-assitenza legali tapplika mill-mument meta persuna tkun '*charged with a criminal offence*' u dan skond it-tifsira indikata fl-artikolu 6(3) tal-Konvenzjoni Ewropea (para 129).[7] Madankollu skond l-istess sentenza dik il-Qorti stabbiliet illi:-

> In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see Ibrahim and Others, cited above, § 273, and case-law cited therein).

44. Jiġifieri l-esklużjoni tad-dritt tal-assistenza legali ma tfissirx awtomatikament illi l-proċedura adoperata tkun ritenibbli inamissibbli jew illi d-drittijiet fundamentali ta' dak li jkun ikunu ġew awtomatikament leżi. Biex jiġi deċiż jekk u safejn dawn il-jeddijiet ta' smiegħ xieraq ikunu ġew mittiefsa wieħed irid iħares lejn il-proċedura imħadma b'mod globali u sħiħ u jara jekk din kienetx waħda ġusta.

45. In oltre skond l-istess sentenza ingħad illi apparti ċertu istanzi indikati fejn il-presenza attiva u mhux astratta tal-avukat tkun meħtieġa : -

> the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see Hovanesian v. Bulgaria, no. 31814/03, § 34, 21 December 2010; Simons, cited above, § 30; A.T. v. Luxembourg, cited above, § 64; Adamkiewicz, cited above, § 84; and Dvorski, cited above, §§ 78 and 108)'.

46. Infatti din is-sentenza tagħmel referenza wkoll għal dak li rriżulta mill-każ ta' ***Salduz vs Turkey*** fejn irrispettivament mill-linji gwida mogħtija minnha, sostniet illi l-Qorti Ewropeja sussegwentement għal din is-sentenza, ħadet approċċ inqas assolutista għall-effetti ta' dan in-nuqqas

[6] Delivered on the 9th November 2018 by the ECtHR application number 71409/10.

[7] Article 6(3) of the European Convention states:

> 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 the facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

tal-assistenza legali : *and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form and sometimes in greater deal'*.

14. Furthermore, in the criminal appeal ***Il-Pulizija vs. Maximilian Ciantar***, decided on the 27th February 2019 the Court of Criminal Appeal, this time presided by Madame Justice Edwina Grima held as follows : -

> Illi gjaldarba l-Qorti ser tghaddi biex tikkonferma d-decizjoni appellata u kwindi anke dik il-parti fejn l-Ewwel Qorti sejset ir-reita' ukoll fuq l-istqarrija rilaxxjata mill-appellant, hija tal-fehma li ghandha taghmel is-segwenti osservazzjonijiet, ghalkemm l-appellant qatt ma ikkontesta l-valur probatorju tal-istqarrija rilaxxjata minnu lill-pulizija. Dan ghaliex il-qrati ta' kompetenza penali taghna, u dan abbazi tad-decizjonijiet tal-Qorti Kostituzzjonali[8] u d-direzzjoni hemmhekk moghtija, qed jiehdu il-linja illi dawk l-istqarrijiet rilaxxjati mill-persuna suspettata u sussegwentement akkuzata wara l-emedni li dahhlu fis-sehh fil-ligi fis-sena 2010, kienu qed jigu skartati bhala prova in atti, u dan ghaliex ghalkemm moghtija il-jedd li jiehdu parir minn ghand avukat qabel jigu interrogati, izda ma kellhomx il-jedd li ikollhom l-avukat prezenti maghhom matul it-tehid tal-istqarrija u dan wara lemendi li dahhlu fis-sehh ghal Kodici Kriminali permezz tal-Att LI tal-2016 li inkorporaw fil-ligi taghna dak imfassal bid-Direttiva 2013/48/UE tal-Parlament Ewropew u tal-Kunsill tat-22 ta' Ottubru 2013 dwar id-dritt tal-aċċess għal avukat fi proċeduri kriminali u fi proċeduri tal-mandat ta' arrest Ewropew. Dan ghaddifferenza ta' dawk l-istqarrijiet fejn il-persuna akkuzata ma kenitx tigi moghtija dan il-jedd ghal kollox fejn allura hemmhekk il-lezjoni tirrizulta inkonfutabbilment.
>
> Illi din il-Qorti hassbet fit-tul qabel ma wasslet ghad-decizjoni taghha f'dan il-kaz u dan ghaliex l-appellant ghalkemm ikkonsulta mal-avukat tal-fiducja tieghu Dr. Joseph Brincat, madanakollu dan l-avukat ma kienx prezenti mieghu imbaghad meta giet rilaxxjata l-istqarrija ghaliex il-ligi f'dak iz-zmien dan ma kenitx tippermettieh. Illi ghalkemm il-qrati, inkluza din il-Qorti kif diversament ippresjeduta, qed jiehdu il-linja li jiskartaw tali prova mill-atti u dan anke meta dan ma jigix mitlub minn ebda wahda mill-partijiet u dan sabiex b'hekk ma tinsorgiex il-biza' ta' xi lezjoni ghad-dritt ta' smigh xieraq, din il-Qorti madanakollu hija tal-fehma illi ghandha timxi b'iktar kawtela u cirkospezzjoni iktar u iktar wara decizjoni moghtija millQorti Ewropeja dwar id-Drittijiet tal-Bniedem fil-kaz - **Philippe Beuze**

[8] See ***Bartolo Christopher vs Avukat Generali et*** decided on the 05/10/2018 and ***Il-Pulizija vs Aldo Pistella*** – decided on the 14th December 2018.

vs Belgium (71409/10) deciza mill-Grand Chamber recentement fid-09 ta' Novembru 2018 li regghet qallbet il-kriterji imfassla fid-decizjoni ta' *Salduz* u ohrajn u dan ghalkemm sabet li f'dan il-kaz kien sehh vjolazzjoni tal-artikolu 6 tal-Konvenzjoni. Illi f'din iddecizjoni il-Qorti Ewropeja regghet addottat il-kriterju tal-"*overall fairness of the proceedings*" sabiex jigi mistharreg jekk sehhitx xi lezjoni ghad-dritt tas-smigh xieraq. Il-Qorti ser tirriproduci *in extenso* din id-decizjoni u dan sabiex jigi imfisser ahjar ilkonkluzjonijiet milhuqa minnha. Qalet hekk il-Qorti Ewropeja f'din id-decizjoni:

> **"(a) Preliminary comments**
>
> 114. The Court observes, by way of introduction, that the Grand Chamber has already had occasion, in a number of cases, to rule on the right of access to a lawyer under Article 6 §§ 1 and 3 (c) of the Convention (see, as recent examples, *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015; *Ibrahim and Others*, cited above; and *Simeonovi*, cited above).
>
> 115. In the present case, as can be seen from paragraphs 3 and 90 above, the applicant complained first that he had not had access to a lawyer while in police custody and, in addition, that even once he had been able to consult with a lawyer, his lawyer could not assist him during his police interviews or examinations by the investigating judge or attend a reconstruction of events.
>
> 116. The applicant's complaints concern statutory restrictions on the right of access to a lawyer, the first alleged restriction being of the same nature as that complained of in the *Salduz* judgment. It should be pointed out that, further to that judgment, the Grand Chamber provided significant clarification on the right of access to a lawyer in its *Ibrahim and Others* judgment, even though the restriction complained of in the latter case was not one of a general and mandatory nature. The present case thus affords the Court an opportunity to explain whether that clarification is of general application or whether, as claimed by the applicant, the finding of a statutory restriction is, in itself, sufficient for there to have been a breach of the requirements of Article 6 §§ 1 and 3 (c).
>
> 117. The present case also raises questions concerning the content and scope of the right of access to a lawyer. The Court observes that, since the *Salduz* judgment, its case-law has evolved gradually and that the contours of that right have been defined in relation to the complaints and circumstances of the cases before it. The present case thus affords an opportunity to restate the reasons why this right constitutes one of the fundamental aspects of the right to a fair trial, to provide explanations as to the type of legal assistance required before the first police interview or the first examination by a judge. It also allows the Court to clarify whether the lawyer's physical presence is required in the course of any questioning or other investigative acts carried out during the period of police custody and that of the pre-trial investigation (as conducted by an investigating judge in the present case).
>
> 118. Those questions will be examined in the light of the general principles set out below.
>
> **(b) General principles**
>
> *(i) Applicability of Article 6 in its criminal aspect*
>
> 119. The Court reiterates that the protections afforded by Article 6 §§ 1 and 3 (c), which lie at the heart of the present case, apply to a person subject to a

"criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Ibrahim and Others*, cited above, § 249, and *Simeonovi*, cited above, §§ 110-11, and the caselaw cited therein).

(ii) General approach to Article 6 in its criminal aspect

120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *Ibrahim and Others*, cited above, § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings

……

121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Salduz*, cited above, § 50;*Al-Khawaja and Tahery*, cited above, § 118; *Dvorski*, cited above, § 76; *Schatschaschwili*, cited above, § 100; *Blokhin*, cited above, § 194; and *Ibrahim and Others*, cited above, § 251).

122. Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others*, cited above, §§ 251 and 262, and *Correia de Matos*, cited above, § 120).

(iii) Right of access to a lawyer

123. The right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz*, cited above, § 51, and *Ibrahim and Others*, cited above, § 255).

(α) Starting-point of the right of access to a lawyer

124. Where a person has been taken into custody, the starting-point for the right of access to a lawyer is not in doubt. The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law (see paragraph 119 above) and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see *Simeonovi*, cited above, §§ 111, 114 and 121).

(β) Aims pursued by the right of access to a lawyer

125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 5354; *Blokhin*, cited above, § 198; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

126. The Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and illtreatment of suspects by the police (see *Salduz*, cited above, § 54; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

127. The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (see *Salduz*, cited above, § 54, and *Ibrahim and Others*, cited above, § 253).

128. Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see *Salduz*, cited above, § 54; *Dvorski*, cited above, § 77; and *Blokhin*, cited above, § 198) and for his right to remain silent.

129. In this connection, the Court has considered it to be inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence", within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed would not be practical and effective (see *Ibrahim and Others*, cited above, § 272, and *Simeonovi*, cited above, § 119; the complementarity of these rights had already been emphasised in*John Murray v. the United Kingdom*, 8 February 1996, § 66, *Reports of Judgments and Decisions* 1996-I; *Brusco v. France*, no. 1466/07, § 54, 14 October 2010; and *Navone and Others*, cited above, §§ 73-74). Consequently, Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see *Simeonovi*, cited above, § 119).

130. In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see *Ibrahim and Others*, cited above, § 273, and case-law cited therein).

(γ) Content of the right of access to a lawyer

131. Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see *Öcalan v. Turkey* [GC], no. 46221/99, § 135, ECHR 2005-IV; *Salduz*, cited above, § 51; *Dvorski*, cited above, § 80; and *Ibrahim and Others*, cited above, § 272).

132. Assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see *Öcalan*, cited above, § 135; *Sakhnovskiy v. Russia*[GC], no. 21272/03, § 95, 2 November 2010; and *M v. the Netherlands*, no. 2156/10, § 82, 25 July 2017), and to that end, the following minimum requirements must be met.

133. First, as the Court has already stated above (see paragraph 124), suspects must be able to enter into contact with a lawyer from the time when they

are taken into custody. **It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview** (see *Brusco*, cited above, § 54, and *A.T. v. Luxembourg*, cited above, §§ 86-87), or even where there is no interview (see *Simeonovi*, cited above, §§ 111 and 121). **The lawyer must be able to confer with his or her client in private and receive confidential instructions** (see *Lanz v. Austria*, no. 24430/94, § 50, 31 January 2002; *Öcalan*, cited above, § 135; *Rybacki v. Poland*, no. 52479/99, § 56, 13 January 2009; *Sakhnovskiy,* cited above, § 97; and *M v. the Netherlands*, cited above, § 85).

134. Secondly, the Court has found in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (see *Adamkiewicz v. Poland*, no. 54729/00, § 87, 2 March 2010; *Brusco*, cited above, § 54; *Mađer v. Croatia*, no.56185/07, §§ 151 and 153, 21 June 2011; *Šebalj v. Croatia*, no. 4429/09, §§ 256-57, 28 June 2011; and *Erkapić v. Croatia*, no. 51198/08, § 80, 25 April 2013). **Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract** (see *A.T. v. Luxembourg*, cited above, § 87), and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see *John Murray*, cited above, § 66, and *Öcalan*, cited above, § 131).

135. The Court has found, for example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may undermine the fairness of the proceedings:

(a) a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation (see *Moiseyev v. Russia*, no. 62936/00, §§ 217-18, 9 October 2008; *Sapan v. Turkey*, no. 17252/09, § 21, 20 September 2011; and contrast *A.T. v. Luxembourg*, cited above, §§ 79-84);

(b) the non-participation of a lawyer in investigative measures such as identity parades (see *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 67, 20 April 2010) or reconstructions (see *Savaş v. Turkey*, no. 9762/03, § 67, 8 December 2009; *Karadağ v. Turkey*, no. 12976/05, § 47, 29 June 2010; and *Galip Doğru v. Turkey*, no. 36001/06, § 84, 28 April 2015).

136. In addition to the above-mentioned aspects, which play a crucial role in determining whether access to a lawyer during the pre-trial phase has been practical and effective, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see *Hovanesian v. Bulgaria*, no. 31814/03, § 34, 21 December 2010; *Simons*, cited above, § 30; *A.T. v. Luxembourg*, cited above, § 64; *Adamkiewicz*, cited above, § 84; and *Dvorski*, cited above, §§ 78 and 108).

(iv) Relationship between the justification for a restriction on the right of access to a lawyer and the overall fairness of the proceedings

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the *Salduz* judgment (cited above, § 55) as follows:

"... in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will

in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

138. The *Salduz* judgment also demonstrated that the application on a "systematic basis", in other words on a statutory basis, of a restriction on the right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 5758).

139. The stages of the analysis as set out in the *Salduz* judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.

140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan*, cited above, § 33, and *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010). Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form (see, among other authorities, *Çarkçı v. Turkey (no. 2)*, no. 28451/08, §§ 43-46, 14 October 2014), and sometimes in greater detail (see, among other authorities, *A.T. v. Luxembourg*, cited above, §§ 72-75).

141. **Being confronted with a certain divergence in the approach to be followed, in *Ibrahim and Others* the Court consolidated the principle established by the *Salduz* judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them** (see *Ibrahim and Others*, cited above, §§ 257 and 258-62).

(α) Concept of compelling reasons

142. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Salduz*, cited above, §§ 54 *in fine* and 55, and *Ibrahim and Others*, cited above, § 258). A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.

143. The Court has also explained that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see *Ibrahim and Others*, cited above, § 259, and *Simeonovi*, cited above, § 117).

(β) The fairness of the proceedings as a whole and the relationship between the two stages of the test

144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6.

Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer (see paragraph 97 above) to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. **However, as can be seen from the *Ibrahim and Others* judgment, followed by the *Simeonovi* judgment, the Court rejected the argument of the applicants in those cases that *Salduz* had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the *Dayanan* case and other judgments against Turkey** (see paragraph 140 above).

145. **Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment**. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, cited above, § 265).

146. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 273 *in fine*).

147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention (see the case-law on Article 6 § 1 cited in paragraph 120 above).

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

149. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3(c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case.

(γ) Relevant factors for the overall fairness assessment

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see *Ibrahim and Others,* cited above, § 274, and*Simeonovi*, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case; (h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i)the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j)other relevant procedural safeguards afforded by domestic law and practice."

Issa maghmula allura dawn il-konsiderazzjonijiet fejn gew imfassla il-kriterji li ghandhom jigu ezaminati f'kull kaz ghalih u dan anke fejn allura tezisti restrizzjoni generali fil-ligi dwar id-dritt tal-access ghall-avukat, bil-Qorti Ewropeja titbieghed mill-insenjament tramandat fil-kaz ta' *Salduz*, din il-Qorti taghmel is-segwenti osservazzjonijiet fuq il-kaz taht il-lenti taghha.

Illi ghalkemm illum kif inghad il-ligi regghet giet emendata u dan sabiex jigi fis-sehh fil-ligi domestika d-dritt komunitarju fir-rigward u sabiex ukoll ir-restrizzjoni sistematika dwar id-dritt ghall-avukat jigi regolat, madanakollu fiz-zmien meta giet rilaxxjata l-istqarrija tal-appellant kien hemm dritt, ghalkemm wiehed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiducja taghha fil-hin precedenti l-interrogatorju mill-pulizija. Illi allura din il-Qorti fid-dawl tal-pronunzjament surriferit tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ma tistax *a priori* tiskarta stqarrija ta' persuna li tkun inghatat l-jedd tikkonsulta ma' avukat qabel ma tigi interrogata, izda fejn l-avukat taghha ma kienx prezenti filwaqt tal-interogazzjoni, u dan ghaliex allegatament jista' jkun hemm lezjoni tad-dritt taghha ghal smigh xieraq, billi kif mistqarr f'dan il-pronunzjament kull kaz irid jitqies ghalih u cioe' allura billi jigi mistharreg f'kull kaz individwalment jekk bil-fatt illi l-persuna akkuzata ma kellhiex l-avukat prezenti waqt it-tehid tal-istqarrija dan setax impinga fuq is-smigh xieraq iktar 'il quddiem tul il-proceduri penali istitwiti kontra taghha.

Din il-Qorti ma ghandhiex funzjonijiet kostituzzjonali u allura ma ghandhiex il-poter tistharreg jekk ikunx sehh lezjoni tad-dritt ta' smigh xieraq jew jekk potenzjalment dan jistax isehh u dan f'kaz fejn xi forma ta' assistenza legali tkun giet moghtija. Ma tistax il-Qorti ta' kompetenza penali tiddeciedi *a priori* illi bil-fatt wahdu illi fiz-zmien li l-persuna akkuzata tkun giet interrogata ma kellhiex il-jedd ikollha l-avukat prezenti maghha dan awtomatikament kien vjolattiv tal-jedd taghha ghal smigh xieraq meta l-

Qorti Ewropeja issa qed tidderigi il-qrati domestici jindagaw jekk ilproceduri fl-intier taghhom kenux gusti fil-konfront tal-akkuzat bit-test allura li irid jigi segwiet fuq zewg binarji u cioe':

1. *the existence of compelling reasons for the right to be witheld*
2. *the overall fairness of the proceedings.*

Jinghad biss f'dan il-kaz illi l-appellant kien abbilment assistit tul dawn il-proceduri kriminali istitwiti kontra tieghu. Fl-ebda mument tul il-proceduri ma jqanqal il-kwistjoni dwar il-valur probatorju tal-istqarrija minnu rilaxxjata biex b'hekk il-Qorti ghandha quddiemha prova li qatt ma giet ikkontestata. Illi maghdud dan madanakollu l-Qorti tosserva li l-appellant kien ikkonsulta mal-avukat tal-fiducja tieghu qabel ma gie interrogat. F'dak iz-zmien huwa kellu sitta u ghoxrin sena u diga` kellu irregistrati kontra tieghu hdax-il kundanna biex b'hekk ma jistax jitqies li kien bniedem vulnerabbli. L-appellant qatt ma jikkontendi illi hu jew l-avukat tieghu ma gewx mgharrfa mill-pulizija dwar in-natura tal-akkuzi migjuba fil-konfront tieghu jew tal-provi li l-pulizija kellhom f'idejhom. Fuq kollox dak mistqarr millappellant fl-istqarrija minnu rilaxxjata huwa biss korroborazzjoni ta' dak li jikkontendu l-vittmi billi dawn kienu x-xhieda ewlenija f'dan il-kaz meta jistqarru li gharfu lill-appellant bhala wiehed mill-hallelin.

Illi finalment ghalkemm il-ligi f'dak iz-zmien ma kenitx tippermetti lill-avukat li jkun prezenti waqt it-tehid tal-istqarrija, madanakollu ghandu jinghad illi l-ligi kif inhi illum ma tantx toffri dik l-assistenza effettiva bil-fatt illi l-avukat ikun prezenti malpersuna suspettata waqt li din tkun qed tigi interrogata bil-*proviso* ghall-artikolu 355AUA (8)(c) tal-Kodici Kriminali jiddisponi hekk:

"Id-dritt tal-avukat li jipparteċipa b'mod effettiv ma għandux jinftiehem bħala dritt tal-avukat li jostakola l-interrogazzjoni jew li jissuġġerixxi tweġibiet jew reazzjonijiet oħra għall-interrogazzjoni u kull mistoqsija jew rimarka oħra mill-avukat għandha, ħlief f'ċirkostanzi eċċezzjonali, issir wara li l-Pulizija Eżekuttiva jew awtorità oħra investigattiva jew awtorità ġudizzjarja jkunu ddikjaraw li ma għandhomx aktar mistoqsijiet." Fil-fatt minn qari tad-Direttiva tal-Unjoni Ewropeja dwar id-Dritt tal-assistenza legali, ghalkemm din giet tramandata kwazi kelma b'kelma fil-ligi taghna, madanakollu dana l-*proviso* ma jirriaffigura imkien fl-artikolu 3 tad-Direttiva, li gie trasportat fl-artikolu 355AUA tal-Kodici Kriminali.

Maghmula dawn il-konsiderazzjonijiet ghalhekk din il-Qorti ma issib l-ebda mottiv li jista' igieghlha titbieghed mill-fehma milhuqa mill-Ewwel Qorti li strahet fuq ixxiehda tal-vittmi f'dan il-kaz abbinata mal-istqarrija

rilaxxjata mill-appellant u dan sabiex sejset is-sejbien ta' htija fil-konfront tieghu.

Għal dawn il-motivi din il-Qorti, taqta' u tiddeċiedi billi tiċħad l-appell ta' Maximilian Ciantar u konsegwentement tikkonferma l-ewwel sentenza mogħtija mill-Qorti tal-Maġistrati (Malta) nhar id-29 ta' Novembru 2017 fl-intier tagħha.

15. Indeed in the judgment delivered by the Constitutional Court in re ***Ir-Repubblika ta' Malta vs. Martino Aiello*** of the 27 th March 2020 it was stated as follows : -

1. Dawn il-proċeduri bdew permezz ta' riferenza kostituzzjonali li ordnat il-Qorti tal-Appell Kriminali fid-9 ta' April, 2018 sabiex tkun imwieġba d-domanda:

   "jekk bl-użu fil-ġuri kontra l-akkużat appellat Martino Aiello talistqarrija rilaxxjata minnu lill-pulizija fid-19 ta' Ottubru, 2014 jiġix leż id-dritt tal-istess Martino Aiello għal smigħ xieraq sanċit permezz tal-artikolu 39(1)(3) tal-Kostituzzjoni u l-artikolu 6(1)(3) tal-Konvenzjoni għall-Protezzjoni tad-Drittijiet tal-Bniedem u talLiberatjiet Fundamentali".

2. L-appellant isostni li l-istqarrija li ta fid-19 ta' Ottubru, 2014 m'għandhiex isservi ta' prova kontrih. Stqarrija li f'partijiet minnha hi self incriminating.

3. B'sentenza mogħtija mill-Qorti Kriminali fid-9 ta' Mejju, 2017 ġie ddikjarat li l-istqarrija li kien ta Aiello lill-pulizija fid-19 ta' Ottubru, 2014 ma kinitx ammissibbli bħala prova fil-ġuri peress li meta ngħatat l-akkużat Aiello ma kienx assistit minn avukat. L-Avukat Ġenerali appella minn dik id-deċiżjoni, u b'digriet mogħti fid-9 ta' April, 2018 il-Qorti tal-Appell Kriminali ordnat riferenza kostituzzjonali sabiex tkun deċiża d-domanda fuq riprodotta.

4. L-appellant għandu proċeduri kriminali pendenti quddiem il-Qorti Kriminali li fihom akkużat :

   "(1) fit-18 ta' Ottubru tas-sena Elfejn u Erbatax (2014) u matul I-ahhar sitt xhur qabel din id-data, assocja ruhu ma' xi persuna jew persuni ohra f'Malta jew barra minn

Malta sabiex ibiegh jew jitraffika medicina f'Malta (il-pjanta Cannabis kollha jew bicca minnha) kontra d- disposizzjonijiet ta' lOrdinanza dwar il-Medicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, jew ippromwova, ikkostitwixxa, organizza jew iffinanzja tali assocjazzjoni.

"(2) fit-18 ta' Ottubru tas-sena Elfejn u Erbatax (2014) u matul l-ahhar sitt xhur qabel din id-data, importa, gieghel li tigi mportata jew ghamel xi haga sabiex tista' tigi mportata medicina perikoluza (il-pjanta Cannabis kollha jew bicca minnha) f' Malta bi ksur tad-disposizzjonijiet ta' l-Ordinanza dwar ilMedicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, u dan meta ma kellux Iicenzja jew awtorizazzjoni mahruga taht l-imsemmija Ordinanza li tawtorizza l-importazzjoni ta' dak l-oggett.

"(3) fit-18 ta' Ottubru tas-sena Elfejn u Erbatax (2014) kellu fil-pussess tieghu il-pjanta Cannabis kollha jew bicca minnha meta ma kienx fil- pussess ta' awtorizzazzjoni ghall-importazzjoni jew ghall esportazzjoni mahrug skond id-disposizzjonijiet tat-Taqsima VI ta' l-Ordinanza dwar ilMedicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, u meta ma kienx billicenzja jew xort'ohra awtorizzat li jimmanifattura jew iforni d- droga msemmija, u ma kienx b'xi mod iehor bil-licenzja moghtija mill Ministru responsabbli ghad-Dipartiment tas-Sahha u ma kienux awtorizzati birRegoli ta' l-1939 ghall-Kontroll Intern Fuq id-Drogi Perikoluzi jew b'xi awtorita' moghtija mill-Ministru responsabbli ghad- Dipartiment tas-Sahha Ii jkollu dik id-droga li ma gietx fornita lilu ghall- uzu tieghu skond ricetta kif provdut fir-Regoli msemmija, u b'dan illi c- cirkostanzi li fihom instabet din id-droga juru Ii dak il-pussess ma kienx ghall-uzu esklussiv tieghu.

"(4) matul is-sitt xhur qabel it-18 ta' Ottubru tas sena Elfejn u Erbatax
(2014), senjatament f' Mejju u f'Gunju 2014, forna, biegh jew xort'ohra ttraffika fir-raza mehuda mill-pjanta Cannabis jew f'xi preparazzjonijiet li kellhom bhala bazi din ir-raza minghajr ma kellu l-licenzja mill- Ministru responsabbli ghas-Sahha u minghajr ma kien awtorizzat bir- Regoli ta'l1939 ghall-Kontroll Intern tad-Drogi Perikoluzi jew minn xi awtorità apposta moghtija mill-Ministru responsabbli ghas-Sahha li jforni d-droga msemmija, u minghajr ma kien fil-pussess ta' awtorizazzjoni ghall-importazzjoni jew awtorizazzjoni ghall- esportazzjoni mahruga mit-Tabib Principali tal-Gvern skond id- disposizzjonijiet tat-Taqsima VI ta' l-Ordinanza dwar il-Medicini Perikoluzi, u minghajr ma kellu licenzja jew xort'ohra awtorizzat li jimmanifattura d-droga msemmija, u minghajr ma kellu licenzja Ii jipprokura l-istess droga".

5. B'sentenza tas-17 ta' Ottubru, 2019 il-Qorti Ċivili, Prim'Awla ddeċidiet li l-appellant ma kienx irnexxielu juri li ser iġarrab ksur tad-dritt tiegħu għal smigħ xieraq bl-użu fil-ġuri kontra tiegħu tal-istqarrija li ta fid-19 ta' Ottubru, 2014. Wara li l-ewwel Qorti għamlet riferenza għall-ġurisprudenza (inkluż is-sentenza **Beuze v il-Belġju** tal-QEDB), osservat:-

"Applikati dawn il-prinċipji għall-kawża li għandha quddiemha llum, din il-Qorti hija tal-fehma li ma ġiex muri li bl-użu tal- istqarrija tiegħu fil-ġuri kontra l-akkużat ser jiġi mittiefes id-dritt tiegħu għal smigħ xieraq.

"Qabel xejn, din il-Qorti tgħid illi ma jirriżultax li kien hemm raġunijiet tajbin li jżommu lill-akkużat milli jkollu avukat preżenti waqt l-interrogazzjoni u waqt li kien qiegħed jagħti l- istqarrija. L-uniku raġuni li Martino Aiello ma setax ikun mgħejjun minn avukat kienet li, dak iż-żmien, il-liġi ma kienitx tippermetti li l-akkużat ikun hekk mgħejjun f'dak l-istadju imma seta' jikkonsulta ma' avukat biss

qabel l-interrogazzjoni, xi ħaġa li mhux kontestat li Martino Aiello rrifjuta li jagħmel.

"Madanakollu, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-liġi ma kienitx tippermetti l- assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad- dritt għal smigħ xieraq, kif qiegħed jippretendi l-akkużat, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall- konklużjoni tagħha. "Kif diġà ntqal, dan il-każ huwa kemmxejn differenti mill-każ ta' Aldo Pistella in kwantu li Martino Aiello kien fil-fatt irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interogazzjoni jew waqt li kien qiegħed jirrilaxxja l-istqarrija.....

"L-akkużat naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Fil-fatt, meta xehed quddiem din il-Qorti, tista' tgħid li ma semma xejn dwar iċ-ċirkostanzi tal-arrest tiegħu flimkien ma' martu mal wasla tagħhom hawn Malta. Martino Aiello la kien minorenni u lanqas kien ibati minn xi forma oħra ta' vulnerabilità fiż-żmien in kwistjoni. Lanqas jirriżulta xi prova fis-sens li ċ-ċirkostanzi li fihom ittieħdet l- istqarrija kienu għalih intimidanti. L-istqarrija ngħatat volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont illiġi, u ċioè li ma kienx obbligat jitkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jinġieb bħala prova kontrih. Lanqas ma ġie muri li l-akkużat ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Il-Qorti tinnota wkoll illi Martino Aiello ma qajjem l-ebda lment dwar l-istqarrija li kien irrilaxxja qabel ma ġie deċiż il-każ ta' Borg vs Malta imma huwa talab lill-Qorti Kriminali sabiex ikun jista' jressaq eċċezzjoni dwar linammissibilità tal-istqarrija biss minħabba dak deċiż mill-Qorti Ewropea flimsemmija każ. Imma kif rajna, din il-ġurisprudenza m'għadhiex applikabbli inkondizzjonatament safejn l-akkużat qiegħed jippretendi li l- istqarrija tiegħu mhijiex ammissibbli bħala prova abbażi tal-fatt waħdu li dak iż-żmien ma setax ikun assistit minn avukat waqt l-interrogazzjoni u waqt li kien qiegħed jirrilaxxja l-istqarrija. Anzi, għandhom jittieħdu in konsiderazzjoni diversi fatturi li flimkien jagħmlu ċ-ċirkostanzi tal-każ.

"Martino Aiello fl-ebda stadju ma kkontesta l-awtentiċità tal- prova li ġabet il-Prosekuzzjoni kontrih, liema prova mhijiex limitata għall-istqarrija in kwistjoni. Lanqas ma oppona għall- preżentata ta' dik l-evidenza. L-assjem tal-provi ser ikun evalwat minn Imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija.

"Finalment, il-Qorti tqis illi huwa indubbjament fl-interess pubbliku li jiġi investigat u imressaq sabiex jiġi ġudikat mill- Qrati ta' ġurisdizzjoni kriminali l-akkużat li nqabad in flagrante jittraffika d-droga f'Malta".

6. B'rikors preżentat fit-28 ta' Ottubru, 2019 l-appellant appella mis-sentenza fejn ilmenta li:-

i. Għal dak li jirrigwarda l-akkużi dwar dak li ġara fix-xhur ta' Mejju u Ġunju, 2014, huma bażati fuq l-istqarrija li ta fid-19 ta' Ottubru, 2014.

ii. Diversi kriterji tal-ġurisprudenza li tapplika għall-każ tal-appellant, ma kinux ikkunsidrati mill-ewwel Qorti.

iii. Il-vulnerabbilta` o meno tal-appellant hi biss waħda milli kriterji li lQorti kellha tikkunsidra. L-appellant qiegħed f'pajjiż barrani u dak jirrendih vulnerabbli.

iv. L-Artikolu 436 tal-Kodiċi Kriminali ma ġiex ikkunsidrat mill-ewwel Qorti.

v. Il-kontestazzjoni ssir fil-pre-trial stage u mhux quddiem il-Qorti tal-Maġistrati (Malta) bhala Qorti ta' Kumpilazzjoni.

vi. Fis-sentenza **Graziella Attard v. Avukat Ġenerali** din il-Qorti diġa` ddeċidiet li ma jkunx għaqli li jsir użu mill-istqarrija waqt il-proċess kriminali.

7. Mill-atti tal-proċeduri kriminali jirriżulta li fid-19 ta' Ottubru, 2014 lappellant ta stqarrija lill-pulizija. Fiha jingħad, "M'intix obbligat li titkellem sakemm ma tkunx tixtieq li titkellem, imma dak li tgħid jista' jinġieb bi prova". Tagħrif ċar li ngħata lill-appellant u li bih kien jaf li għandu dritt ma jweġibx u dak li jgħid jista' jinġieb bi prova. Fiha wkoll dikjarazzjoni li l-appellant għamel listqarrija volontarjament, mingħajr theddid jew biża', wegħdiet jew twebbil ta' xi vantaġġ. Fost'affarijiet oħra, fl-istqarrija l-appellant iddikjara li:

i. F'Mejju, 2014 kien ġie Malta bil-catamaran minn Sqallija, darbtejn b'negozju u darba bid-droga;

ii. F'Ġunju, 2014 reġa ġie Malta bil-catamaran, darbtejn fuq negozju u darba bid-droga;

iii. Meta l-pulizija waqfu fit-18 ta' Ottubru, 2014 għall-ħabta tal-10.30 pm, instabu erba' kilos droga u li s-sieħba tiegħu ma kinitx involuta.

8. Waqt il-kumpilazzjoni, l-Ispettur Herman Mula xehed (seduta tat-30 ta'

Ottubru, 2014) li spjega lil Aiello kif l-istqarrija ittieħdet ".... wara li jiena erġajt wissejt lill-imputat u irrifjuta li jikkonsulta ma' avukat qabel l-interrogazzjoni". Filfatt ix-xhud ippreżenta wkoll dikjarazzjoni li ffirma l-appellant, u miktuba bit-Taljan:

> "Oggi, 19 Ottobre 2014, io Martino Aiello, detentore della carta d'identita Italiana con il numero AS4759564 sono stato arrestato dalla Polizia di Malta in connessione con una investigazione di droga, sono stato informato dal ispettore Herman Mula,

che **ho il diritto di consultare privatamente con un avocato, o un procuratore legale, faccia a faccia, o via telefono per un massimo di un ora prima di essere interrogato** (art. 355 tal-Kap. 9).

"Io sto dichiarando che rifiuto questo diritto".

9. Fiż-żmien rilevanti l-Artikolu 355AT(1) tal-Kodiċi Kriminali kien jipprovdi:

"Bla ħsara għad-disposizzjonijiet tas-subartikolu (3), pesuna li tkun arrestata u qed tinżamm taħt il-kustodja tal-Pulizija f'xi Għassa jew f'xi post ieħor ta' detenzjoni awtorizzat għandha, **jekk hija hekk titlob, titħalla kemm jista jkun malajr tikkonsulta privatament ma' avukat jew prokuratur legali, wiċċ imb'wiċċ jew bit-telefon, għal mhux iktar minn siegħa żmien. Kemm jista' jkun malajr qabel ma tibda tiġi interrogata, l-persuna taħt kustodja għandha titgħarraf mill-Pulizija bid-drittijiet li għandha taħt dan is-subartikolu**".

10.Għalhekk l-appellant ma kellux jedd li jkollu avukat preżenti waqt l-interrogatorju. Sussegwentement, il-liġi inbidlet sabiex tat id-dritt għallprezenza ta' avukat waqt l-istqarrija.

11.Skont artikolu 6(1) u 6(3) tal-Konvenzjoni:

"1. In the determination of..... any criminal charge against him, everyone is entitled to a fair..... hearing....

3. Everyone charge with a criminal offecne has the following minimum rights:.....
(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".

12.L-istess jingħad fl-artikolu 39(1) u (6) tal-Kostituzzjoni.

13.Kienet għażla libera tal-appellant li rrifjuta l-assistenza ta' avukat qabel kien interrogat mill-pulizija. L-appellant fl-ebda stadju m'allega li kien ġie mħajjar jew mġiegħel li jirrinunzja għal dak id-dritt. Fir-rikors tal-appell argument :

"Fix-xiehda mogħtija minnu fid-9 ta' Jannar, 2019, quddiem il-Qorti Ċivili Prim'Awla (sede Kostituzzjonali), huwa stqarr li qabel ma rrilaxxxja listqarrija ġie

lilu spjegat li dakinhar seta' biss jingħata parir legali bittelephone qabel l-istqarrija u mhux waqt l-istqarrija u għalhekk għażel li ma jikkonsultax ma' avukat".

14.Pero` fid-dikjarazzjoni li l-appellant stess iffirma hemm dikjarat li kien infurmat li għandu d-dritt ukoll li jiltaqa' wiċċ imb'wiċċ ma' avukat u jkellmu qabel l-interrogazzjoni. Għaldaqstant, żgur li l-appellant ma jistax jilmenta li qabel linterrogazzjoni ma kienx ingħata l-opportunita` li jikkonsulta ma' avukat jew li ngħata biss id-dritt li jkellmu permezz tat-telefon.

15.Il-qorti semgħet ir-recording tad-deposizzjoni, u m'huwiex veru li x-xhud qal li l-pulizija nfurmawh li għandu biss id-dritt li jkellem avukat permezz tattelefon qabel l-interrogazzjoni. L-appellant spjega li kien infurmat mill-pulizija li kellu jedd jitkellem ma' avukat qabel iżda mhux waqt l-interrogazzjoni. Kompla li l-ġurnata kienet is-Sibt u li probabbilment l-avukat seta' jkellmu wkoll bittelefon. Pero` fl-ebda ħin ix-xhud ma qal li l-pulizija infurmah li jista' jkellem avukat biss permezz tat-telefon. Id-dikjarazzjoni bit-Taljan li l-appellant iffirma hi l-aħjar prova li l-appellant ingħata l-opportunita` jitkellem ma' avukat wiċċ imb'wiċċ jew permezz tat-telefon. Dikjarazzjoni li fl-ebda stadju tal-proċeduri ma jirriżulta li saret xi kontestazzjoni dwarha.

16.Hu veru li kif kienet il-liġi fiż-żmien rilevanti, nies fil-posizzjoni tal-appellant ma kellhomx il-jedd ta' avukat waqt l-interrogazzjoni. Fil-fatt kien waqt dik linterrogazzjoni li l-appellant ammetta li qabel it-18 ta' Ottubru, 2014 kien hemm darbtejn oħra meta huwa importa cannabis f'Malta matul ix-xhur ta' Mejju u Ġunju ta' dik is-sena. Għal dak li jirrigwarda t-18 ta' Ottubru, 2014 l-appellant twaqqaf meta niżel bil-vettura minn fuq il-catamaran u d-droga nstabet wara tfittxija li l-pulizija għamlu fil-vettura. Għalhekk żgur li l-istqarrija m'hijiet l-unika prova fir-rigward ta' dak li ġara fit-18 ta' Ottubru, 2014.

17.Il-Qorti m'hijiex ser toqgħod tispekula x'kien jagħmel l-appellant li kieku kien offrut l-assistenza ta' avukat waqt l-interrogatorju. Il-fatt li rrifjuta li jkellem avukat qabel ta l-istqarrija ma jfissirx li kien ser jirrifjuta li jkollu avukat, kieku kellu l-opportunita`, li jassistih waqt l-interrogatorju.

18.Fil-każ **Beuze v il-Belġju** (App. Numru 71409/10) tad-9 ta' Novembru 2018, il-liġi domestika relevanti ma kinitx tippermetti li tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni. F'dak il-każ ukoll ma kienx hemm raġuni impellenti għalfejn ma ngħatatx l-għajnuna ta' avukat. Fil-każ tal-lum, l-Avukat Ġenerali argumenta li kien hemm 'compelling reasons' biex l-interrogazzjoni ssir malajr kemm jista' jkun, peress li huwa daħħal droga

f'Malta biex jgħaddiha lil ħaddieħor. Pero` r-raġunijiet impellenti jridu jkunu biex is-suspettat ma jitħallix jikkonsulta ma' avukat. Dritt li dak iż-żmien f'Malta ma kienx jeżisti. Għalhekk hu evidenti li l-pulizija m'għamlitx eżerċizzju sabiex tiddetermina kienx hemm 'compelling reasons' li jiġġustifikaw li l-appellant ikun interrogat minnufih mingħajr l-assistenza ta' avukat. Id-dritt li s-suspettat jitkellem ma' avukat kien jeżisti biss qabel l-interrogazzjoni. Dan apparti li qabel l-interrogazzjoni lappellant kien diġa` ngħata d-dritt li jkellem avukat, kif wara kollox kellu d-dritt skont l-Artikolu 355AT(1) tal-Kodiċi Kriminali. Għaldaqstant, żgur li ma jistax jingħad li kienu jeżistu ċirkostanzi eċċezzjonali li l-appellant ma jitħallix jikkomunika ma' avukat sabiex issirlu l-interrogazzjoni minnufih.

19.Fis-sentenza li ngħatat mis-Sezzjonijiet Magħquda tal-Qorti Ewropea fid-9 ta' Novembru 2018 il-qorti qalet :

> "120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see Ibrahim and Others, ... § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings ... ...
>
> "121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. ... ...
>
> "... ... ...
>
> "139. The stages of the analysis as set out in the Salduz judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.
>
> "140. In a number of cases, which all concerned Turkey, the Court did not, however, address the **question of compelling reasons, and neither did it examine the fairness of the proceedings**, but found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention ... ... Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form ...
> and sometimes in greater detail ...
>
> "141. Being confronted with a certain divergence in the approach to be followed, in Ibrahim and Others the Court consolidated the principle established by the Salduz judgment, thus confirming that the applicable test consisted of two stages and

providing some clarification as to each of those stages and the relationship between them (see Ibrahim and Others, ... §§ 257 and 258-62).

"144. In Ibrahim and Others the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see Ibrahim and Others, ... § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer ... to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the Ibrahim and Others judgment, followed by the Simeonovi judgment, the Court rejected the argument of the applicants in those cases that Salduz had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the Dayanan case and other judgments against Turkey.

"145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced byrad the restriction on access to a lawyer (see Ibrahim and Others, ... § 265).....

"147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the
Convention ... ...

"148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.....

"150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see Ibrahim and Others, ... § 274, and Simeonovi, ... § 120):

"(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

"(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

"(c)whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

"(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

"(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

"(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

"(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

"(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

"(i)the weight of the public interest in the investigation and punishment of the particular offence in issue; and

"(j) other relevant procedural safeguards afforded by domestic law and practice".

20.Hu fuq l-Istat l-obbligu li jagħti prova li fil-proċess kriminali kien hemm *overall fairness*. F'dan il-każ m'huwiex possibbli li jsir għal kollox l-eżerċizzju li ssemma fil-każ ta' Beuze għaliex s'issa l-ġuri għadu ma sarx.

21.L-istqarrija in kwistjoni m'hijiex l-unika prova għal dak li jirrigwarda x'ġara fit-18 ta' Ottubru, 2014. Mill-atti tal-proċeduri kriminali jirriżulta li l-appellant kien qiegħed isuq il-vettura li fiha nstabet id-droga. Kif il-vettura niżlet minn fuq il-catamaran twaqqfet mill-pulizija li għamlu tfittxija u sabu d-droga fil-vettura. Lappellant stess meta xehed fis-seduta tad-9 ta' Jannar, 2019 quddiem l-ewwel Qorti, qal li l-pulizija arrestawh meta kellu d-droga.

22.M'hemmx dubju li fil-każ in eżami m'hemmx l-iċken indikazzjoni li l-appellant, raġel ta' 49 sena, kien persuna vulnerabbli. L-appellant irrefera għallfatt li hu persuna ta' nazzjonalita` Taljana f'pajjiż esteru. Pero` b'daqshekk ma jfissirx li kien vulnerabbli. Jista' jkun li f'Malta ma kienx jaf avukati lil min seta' jqabbad biex jagħtuh parir legali, madankollu ma kien hemm xejn x'iżommu milli jinsisti li jkellem avukat. Hu evidenti wkoll li waqt l-interrogazzjoni kien assistit minn interpretu. Il-Qorti ma tarax li l-appellant kien f'xi pozizzjoni differenti minn dik li kien ikun kull suspettat ieħor li qiegħed jiġi investigat dwar l-istess tipi ta' reati.

23.L-appellant tressaq b'arrest fl-20 ta' Ottubru, 2014 u dakinhar stess il-prosekuzzjoni ppreżentat l-istqarrija. L-appellant kellu opportunita` li jikkontesta l-awtenticita` tal-istqarrija li ta lill-pulizija li nvestigawh, ukoll waqt ilkumpilazzjoni. Li l-appellant jargumenta li "…. huwa risaput li l-kontestazzjoni ta' provi ma ssirx quddiem il-Qorti tal-Maġistrati fil-vesti tagħha ta' qorti istruttorja iżda fil-pre-trial stage", ma jfissirx li fl-istadju tal-kompilazzjoni ma kellux l-opportunita` li jiddikjara li qiegħed jikkontesta l-awtenticita` tal-istqarrija u jispjega għalfejn. Dan in-nuqqas ma jagħtix wieħed x'jifhem li kien qiegħed iqies lilu nnifsu fi żvantaġġ meta għamel id-dikjarazzjoni. Hu veru wkoll li għandu l-jedd tas-silenzju pero` wkoll waqt il-kumpilazzjoni għandu pereżempju l-jedd li jagħmel kontro-eżamijiet u jressaq xhieda. Lanqas ma jirriżulta li fi stadju viċin li għamel id-dikjarazzjoni, l-appellant talab li jirtira jew jibdel listqarrija.

24.L-istqarrija ma ttieħditx bi ksur ta' xi dispozizzjoni ta' liġi u kien ċertament fl-interess pubbliku li każ dwar traffikar ta' droġi f'Malta, ikun investigat u jittieħdu proċeduri kriminali dwaru.

25.M'hemm l-ebda indizju li l-appellant ġie mġiegħel jagħmel dik l-istqarrija.

Fl-ebda stadju m'allega xi theddid jew wegħda biex għamilha.

26.Fir-rigward ta' paragrafu (g) m'hemmx dubju li l-prosekuzzjoni trid li dik l-istqarrija tintuża bħala prova importanti tal-ġuri li għad irid isir, u dan b'riferenza għal dak li ġara f'Mejju u Ġunju, 2014 peress li fl-istqarrija Aiello ammetta li kien hemm darbtejn oħra f'dawk ix-xhur meta kien diġa` importa droga f'Malta. Fatt li saret riferenza espressa għalih fl-att tal-akkuża. Għalkemm il-ġuri għadu ma sarx, hu evidenti li dik l-ammissjoni fl-istqarrija għandha importanza fil-proċess kriminali tant li saret riferenza għaliha fl-att tal-akkuża.

27.Inoltre, dwar dan il-każ għad irid isir il-ġuri. Għalhekk huma l-ġurati li ser jiddeċiedu jekk l-appellant huwiex ħati tal-akkużi li hemm kontrih. Madankollu, ser ikun l-imħallef li fl-indirizz li jrid jagħmel lill-ġurati ser jiġbor ix-xiehda tax-xhieda u l-provi li jkunu marbutin magħhom, kif ukoll ifisser ix-xorta u l-elementi tar-reati rilevanti għall-każ. Hu l-imħallef li jagħmel "…. kull osservazzjoni oħra li tiswa biex trieġi u turi lill-ġuri kif għandu jaqdi sewwa d-dmirijiet tiegħu" (Artikolu 465 tal-Kap. 9).

28.Li hu żgur hu li f'dan il-każ l-appellant ingħata l-opportunita' li jitkellem ma' avukat, bit-telefon jew wiċċ imb'wiċċ, iżda irrifjuta. B'dak il-mod l-

appellant ċaħħad lilu nnifsu mill-opportunita' li jkollu parir ta' avukat sabiex jipprepara ruħu għall-interrogazzjoni u sabiex jingħata tagħrif dwar il-vantaġġi u żvantaġġi li jitkellem jew jagħżel is-silenzju waqt l-interrogazzjoni. Dan meta kien jaf li waqt l-interrogazzjoni ma kienx ser ikollu l-assitenza ta' avukat preżenti. Dan apparti li kien infurmat b'mod ċar bil-jedd li jibqa' sieket u ma jweġibx iżda xorta agħżel li jwieġeb liberament. Madankollu xorta agħżel li jwieġeb għad-domandi li sarulu.

29.Fis-sentenza **Charles Steven Muscat v Avukat Ġenerali** tat-8 ta' Ottubru, 2012, il-Qorti Kostituzzjonali qalet :

> "31. Relevanti wkoll il-fatt illi l-attur kien mgħarraf bil-jedd tiegħu li jibqa' sieket u ma jweġibx. Kif rajna, din l-għażla seta' jagħmilha bla konsegwenzi ta' xejn u għalhekk għamilha b'libertà sħiħa. Ma hemm ebda xiehda u lanqas allegazzjoni li kien mhedded jew imqarraq b'wegħdiet ta' xi vantaġġ. Din il-libertà fl-għażla jekk iweġibx jew le tagħti garanzija kontra kull preġudizzju minħabba awto-inkriminazzjoni.
>
> "32. Relevanti wkoll il-fatt illi sakemm fetaħ il-kawża tallum fit-2 ta' Diċembru 2010 – wara li kienet magħrufa s- sentenza ta' Salduz – l-attur qatt ma fittex li jieħu lura l-istqarrija li kien għamel jew li jiċħad dak li qal fiha. Dan huwa sinjal li l-attur stess ma kienx qiegħed iħoss illi tqiegħed taħt svantaġġ inġust bl-istqarrija li, wara kollox, għamilha liberament.
>
> "33. Meta tqis ukoll illi l-attur għad irid igħaddi mill-proċess penali bilgaranziji proċedurali kollha li dan jagħti u fejn jinġiebu l-provi kollha, u mhux biss l-istqarrija tal- akkużat; illi matul dan il-proċess l-attur sejjer ikollu lgħajnuna ta' avukat; u illi l-imħallef togat sejjer iwissi lill- ġurati bil-perikolu illi joqogħdu biss fuq l-istqarrija meta jiddeċiedu dwar ħtija, bla ma jqisu wkoll il-provi l-oħra, u illi l-imħallef saħansitra jista' jwissi lill-ġurati biex jiskartaw l- istqarrija jekk tinġieb xiehda – li ma tressqitx quddiem din il-qorti – li l-istqarrija ttieħdet bi vjolenza, b'qerq jew b'tehdid, din il-qorti hija talfehma illi ma ntwera ebda ksur tal-jedd għal smigħ xieraq bit-teħid talistqarrija tal-attur mingħajr ma kellu l-għajnuna ta' avukat.
>
> "34. Bħala garanzija addizzjonali, din il-qorti sejra tordna illi kopja ta' din issentenza tiddaħħal fl-atti tal-proċess kriminali sabiex il-paragrafu ta' qabel dan jinġieb għall-attenzjoni tal-ġudikanti tad-dritt u tal-fatt."

30.L-appellant għamel riferenza għas-sentenza **Graziella Attard v. Avukat Ġenerali** tas-27 ta' Settembru, 2019 fejn il-Qorti Kostituzzjonali ordnat li l-istqarrija ma kellhiex tintuża bħala prova:-

> "10. ..... billi ċ-ċirkostanzi fejn il-persuna interrogata tista' ma titħalliex tkellem avukat huma l-eċċezzjoni aktar milli r-regola, u din il-qorti għandha s-setgħa li tagħti rimedju fejn issib li disposizzjoni li tħares dritt fondamentali mhux biss "qiegħda tiġi" iżda wkoll meta "tkun x'aktarx sejra tiġi miksura", din il-qorti hija tal-fehma, kif osservat fis-sentenza mogħtija fl-24 ta' Ġunju 2016 fl-ismijiet Malcolm Said v. Avukat Generali, illi ma jkunx għaqli – partikolarment fid-dawl ta' inkonsistenzi fis-sentenzi tal-Qorti Ewropea li joħloq element ta' imprevedibilità,

kif jixhdu l-posizzjonijiet konfliġġenti li ħadet fil-każ ta' Borg u f'dak ta' Beuze – illi l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija mogħtija mill-attriċi lill-pulizija għaliex tqis illi, fiċ-ċirkostanzi, **in-nuqqas ta' għajnuna ta' avukat ma kienx nuqqas li ma jista' jkollu ebda konsegwenza ta' preġudizzju għallattriċi, aktar u aktar meta fl-istqarrija ammettiet sehma fir-reat**".

31.Pero` dak il-każ kien differenti peress li l-akkużata ma ngħatatx l-opportunita` li titkellem ma' avukat qabel bdiet l-interrogazzjoni mill-pulizija.

32. Fiċ-ċirkostanzi l-qorti taqbel mal-konklużjoni li waslet għaliha l-ewwel Qorti.

32.Għal dawn il-motivi tiċħad l-appell bl-ispejjeż kontra l-appellant.

16. This Court has quoted extensively from the ***Ciantar*** and ***Aiello*** judgments as they represent not only two judgments that reflect the latest interpretation, but, in the view of this Court, the more substantially and procedurally coherent and sound legal position regarding the use of statements released by accuseds in the course of criminal proceedings in circumstances analogous to this case.

17. In this case, the statement was released by the accused :

(a) after he was given the right to consult with a lawyer prior to his interrogation; **and**

(b) after consulting privately and in person with his lawyer at the Police Headquarters **prior** to his interrogation in line with the right of legal assistance in operation at the time;

(c) **before** releasing his statement the accused was cautioned by the Police Inspector about his right to remain silent, that whatever he said

(or omitted) could be brought as evidence or give rise to inference during trial;

(d) Apart from being so cautioned, the same Police Inspector **verified and ensured** that accused **understood** this caution and he only proceeded with the taking of the statement after that the accused replied in the affirmative;

(e) the accused **signed** this statement, and **signed** a declaration stating:

i. that the statement was done after he was duly cautioned,

ii. that this statement was released without any threats or promises whatsoever,

iii. after that the Police had read it to him; and

iv. the accused confirmed that the statement contained the truth.

18. This statement forms part of the body of evidence in this case, and it is just one particular, albeit important, piece of evidence. It cannot be considered in isolation. It has to be assessed as part of the testimony, documents and exhibits making up the body of evidence in this case and as part of the criminal proceedings against the accused seen as a whole.

19. On the basis of the above, this Court concludes that it would be premature to exclude the statement from the records of these proceedings. Expuning the statement of the accused at this stage would be tantamount to depriving the jurors from one of the proverbial pieces of the evidentiary puzzle making up this case. During the course of the trial by jury, the trial judge has the duty to explain to the jurors the legal principles stemming from this case,

including the manner in which they are to approach and assess the different pieces of evidence produced in this case – including and in particular this statement of the accused.

Consequently, for the reasons abovementioned, the Court dismisses the preliminary plea raised by the accused.

This cause is being adjourned "sine die" awaiting its turn for trial by jury or pending the outcome of an eventual appeal to the Court of Criminal Appeal, if any.

In the meantime the accused is to remain subject to the same bail conditions.

Aaron M. Bugeja
Judge