CONSTITUTIONAL COURT

JUDGES

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

Sitting of Wednesday, 27th January, 2021.

Number: 13

Application number: 141/2019 RGM

The Police

v.

Alexander Hickey

The Court:

1. By application filed on the 9th October 2020 the appellant appealed from a judgment delivered by the Civil Court, First Hall on the 30th September 2020 whereby the court decided:

> *"For these reasons, this Court responds to the reference of the Court of Magistrates (Malta) as a Court of Criminal Judicature by declaring that:*
>
> > *"(1) As to the first question by the Referring Court – The release of the two statements by Alexander Hickey on the 5th and 9th April 2012 without legal assistance during interrogation do not breach Alexander*

Hickey's fundamental rights as protected by Aritle 39 of the Constitution and Article 6 of the Convention. This Court further declares that the Court of Magistrates (Malta) as a Court of Criminal Judicature will not be in breach of Alexander Hickey fundamental rights as protected by the above mentioned articles if his two statements are deemed admissible by the Referring Court.

"(2) As to the second question by the Referring Court – This Court declares that the Referring Court will not be in breach of Alexander Hickey's fundamental rights as protected by Article 6(1) and (3) of the Convention and Article 39 of the Constitution if it takes cognisance of his guilty plea when pronouncing judgment".

2. The relevant facts are the following:

i. The police arrested the appellant on the 4th April 2012.

ii. On the 5th and 9th April 2012 the accused was interrogated by the police and he replied to the questions (vide statements). At the time the accused was not assisted by a lawyer as the law did not provide for such a possibility. Prior to the statment dated 9th April 2012 he spoke to a lawyer.

iii. On the 9th April 2012 the accused confirmed both statements on oath before a Magistrate and gave evidence.

iv. On the 13th October 2014 charges were issued against the accused. They included conspiracy to import, sell or deal in cannabis grass, cannabis resin, ecstasy, LSD and methaphetamine; importation of the same; production, sale and dealing in cannabis, ecstasy and LSD; and possessing cannabis and ecstasy without special authorisation by the superintendent of Public Health.

v. On the 8th June 2015 the first sitting was held before the Court of Magistrates (Malta) as a Court of Criminal Judicature.

vi. During the sitting of the 16th November 2015 the appellant pleaded guilty to all charges. The *proces verbal* of that sitting states that he was warned *"…. about the consequences of such a guilty plea, and after being given ample time to reconsider said plea, the accused confirmed his guilty plea"*. He also requested a pre-sentencing report prior to delivery of judgment, and the parties suggested to the Court that the appellant is condemned to imprisonment for a period of three years and a fine of €7000.

vii. Further sittings were held on the 29th February 2016, 17th June 2016 and 2nd December 2016. The appellant produced evidence relevant to the conviction. During the sitting of the 13th March 2017 the case was adjourned for final oral submissions for the sitting of the 22nd March 2017.

viii. On the 20th March 2017 defence counsel to the accused filed a note and informed the court that she was no longer representing the appellant.

ix. During the sitting of the 4th December 2017 the new counsel to the appellant informed the Court that his client is

contesting the validity of the statements. This was a change of strategy towards the end of the criminal proceedings.

x. On the 5th June 2019 the appellant filed an application whereby he requested the court to order a constitutional reference on the basis of art. 46(3) of the Constitution and art. 4(3) of the European Convention Act (Chapter 319).

xi. By decree delivered on the 5th August 2019 the Court of Magistrates (Malta) as a Court of Criminal Judicature upheld appellant's request and asked the Civil Court, First Hall to answer the following questions:

> *"1) Whether the release of two statments by applicant on 5th and 9th April 2012 respectively without the right to legal assistance during both interrogations was in breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution and whether his rights under the said Articles would be breached should his statements be deemed by this Court as admissible evidence against him;*
>
> *2) And whether in the circumstances of this case, an eventual judgment by this Court based on applicant's guilty plea entered during these proceedings on 16th November 2015 would be in breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution"*.

3. The first Court reasoned:

> *"This Court asserts that the current case law shows that it is no longer the case that the mere fact that the law did not allow the assistance of a lawyer before or during interrogation automatically leads to a finding that there has been a breach of fair hearing, as the applicant claims, but this Court must take into account several factors before reaching its conclusion.*
>
> *"**Vulnerability.***

"*According to psychologist Bernard Caruana giving evidence on the 17th of June 2016, intellectual impairment. In the report it was noted that* "*Hickey was assessed on the 2nd of November 2004 by Ms. Denise Borg, Clinical Psychologist from which it "was found to fall within the high average range of intellectual ability. His Global IQ being 112 (average range between 85 and 115) with his Verbal IQ being 106 (average range[])] and his Performance IQ being 118 (above average)" although it was also found that he had Mathematics difficulties as well as attention difficulties. The psychological report prepared by Bernard Caruana clearly shows that he scored low on "vulnerability [which] indicated although Alexander Hickey suffers from autism, this does not cause that he perceives himself as capable of handling himself in difficult situations". Thus it is very clear that Alexander Hickey is an intelligent person, with no intellectual impairment and cannot be considered as a vulnerable person.*

"*Although the applicant had been duly cautioned in the English language that he can remain silent but whatever he says may be given in evidence, Hickey voluntarily chose to reply to the questions put to him by the police. Hickey released two statements – one on the 5th of April 2012 and another one 4 days later, on the 9th of April 2012. In the second statement, Hickey was cautioned again. In this latter statement, the applicant made some corrections to his first statement and gave further information. This Court also notes that both statements were released in the presence of his mother and this due to the fact that he was seventeen (17) years of age when he released his statements. This Court however remarks that although Hickey was still a minor, he was on the verge of celebrating his eighteenth (18th) birthday in less than two months from his arrest. It was not shown by the accused that he was forced to sign both his statements. Furthermore, both statements were confirmed before Magistrate Dr Francesco Depasquale. It also results to this court, from the report drawn up by the probation officer, Joanna Farrugia, that 'he had to testify in the cases of the other persons connected in the case'.*

"*This Court therefore concludes that the element of vulnerability is missing.*

"***The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial***

"*Although the law, when the statement was given, did not require the accused to have legal assistance during interrogation, it is uncontested that he was cautioned : "you do not have to say anything unless you wish to do so, but what you say may be given in evidence". This Court notes that the accused was given the opportunity to consult with a lawyer prior his interrogation, so much so that he confirmed that he consulted Dr Cedric Mifsud. The content of such exchange is irrelevant, what matters*

thus is the fact that the applicant had been given the opportunity to consult a lawyer and could therefore have sought legal advice.

"***Opportunity to challenge the authenticity of the evidence, the quality of that evidence and the manner in which that evidence was gathered***

"*Given the early guilty plea, the only evidence presented were several process verbal as well as the statements of Alexander Hickey. It does not appear that in this case the Police obtained the above-mentioned evidence against the Law and the taking of these statements was done regularly according to the Law in force at that time. Neither did Hickey raise the issue that he was forced by the police to release a statement or to answer all the questions that he was asked. Therefore, it is presumed that the statements were released voluntarily.*

"*Futhermore, given that the proceedings are still pending before the Court of Magistrates (Malta) as a Court of Criminal Judicature, the accused, depending whether his guilty plea is withdrawn (as explained further on), will have the opportunity to challenge the evidence brought against him, cross-examine any witness and even produce his own testimony and witnesses.*

"***In the case of a statement, the nature of the statement and whether it was promptly retracted or modified***

"*It does not appear that the applicant raised, in limine litis, any complaint about the manner in which his statements were taken by the Police or any irregularities or abuses by them during the taking of the same. Neither were they modified except that with the second statement, which was given 4 days after the first statement, the applicant made some corrections to the statement that he gave earlier and he even added further information.*

"*It is observed by this Court that the applicant insists that the statement should not form part of the criminal proceedings, after new legal considerations were adopted by the Constitutional Court back in 2017 and 2018. This is apparent from the criminal proceedings verbale where the lawyer of the accused requested "an adjournment so that the defence may reconsider its positions" following the judgements delivered by the Constitution Court in the names "Christopher Bartolo vs. Avukat Generali" and "Pulizija vs. Aldo Pistella". applicant did not insist on the non-use of the statement on the day it was presented but almost four (4) years later. Till-to-date the applicant did not withdraw what he said in the statements. On the contrary he confirmed to the probation officer everything he said in the statement.*

"***Who will carry out the assessment of guilt?***

"*Without any doubt it will be a Magistrate who will carry out the assessment of guilt, an independent and impartial court set up by Law.*

"*In answer to the first limb of the first question, the Court concludes that the release of two statements by the applicant without the right to legal assistance during interrogation does not breach Article 6 (1) and (3) of the Convention and Article 39 of the Constitution.*

"*Considers;*

"*The second limb of the first question refers as to whether there would be breach of fair hearing if the statements are deemed as admissible evidence. To substantiate his argument, the accused insists in his final note of submissions that he made various self-incriminating statements and that such statements constitute crucial evidence in the case against him. He also states that the guilty plea was based on the statements. This latter matter will be dealt with later in this judgement. Regarding the fact that the statement of the accused is crucial evidence, this court notes, as observed also by the accused himself in the note of submissions, that the prosecution have in their possession other evidence which supports their case.*

.....

"*Applying these observations to the current case, the court observers that the applicant failed to show that he was threatened, forced or deceived into releasing his statements. Moreover, the accused had the opportunity to consult with his lawyer before his interrogation. This Court takes also into into account what has been reported by the probation officer, namely, that "Alexander stated that the police have portrayed him as the mastermind in this case but he states that everyone had their part and that not everything that was said is true. Eventhough he admits his guilt he plays down his role in everything and is not taking full responsibility for his actions."*[22]

"***Given that the statements were not obtained in breach of the applicant's right to a fair hearing, the Court declares that the statements are to be considered as admissible evidence.***

"*Considered;*

"***A judgement based on the applicant's guilty plea***

"*The second question to be answered is whether a sentence based on a guilty plea would result in a breach of Article 39 of the Constitution and Article 6 of the Convention. In his application dated 5th June 2019, the accused explains that he registered an admission to all the charges due to the statements which he had "released to the Police wherein he had already admitted to his involvement with drugs". The applicant submits*

"that since such admission was based on his previous statements, which statements breach his rights as safeguarded by the European Convention and the Constitution of Malta, such admission should not be considered and he should be granted the opportunity to change his guilty plea" .

"*On the basis of that submission the Referring Court requests this court for direction as to whether the Court of Magistrates would be in breach of the accused's fundamental right to a fair hearing were it to take into account the accused's guilty plea.*

"*The accused submits that the only reason he filed a guilty plea was due to the statements he had released to the police during interrogation. His argument is that had it not been for the statements he released he would not have admitted to the charges levelled agsinst him.*

"*This Court observes that applicant has not asked the Court of Magistrates (Malta) as a Court of Criminal Judicature to withdraw his guilty plea. On the contrary he asked the Referring Court to accept his request for a constitutional reference claiming that were the court to take into account his guility plea his fundamental rights would be infringed.*

"*The Attorney General and the Commissioner of Police submitted that "such a matter falls within the competence of the criminal courts and so it should firstly be decided by the Court of Criminal Judicature rather than this Honourable Court. The Court of Magistrates did not give a decision as to whether applicant can or cannot retract his admission of guilt registered on the 16th November 2015".*

"*Whether the accused can at this stage of the penal proceedings ask to withdraw his guily plea is a matter which this court has not been asked in the constituional reference to pronounce itself.*

"*The question before this court is therefores not whether an eventual refusal to change a guilty plea would lead to a breach of human rights; but whether a judgment based on the accused's guilty plea would lead to a breach of Article 39 of the Constitution and Article 6 of the Convention.*

"*Of relevance to this case is the judgement delivered by the* ***Constitutional Court*** *on the 5th of October 2018 in the names* ***Christopher Bartolo vs. Avukat Generali et*** *(Rik. Kost. 92/2016 JPG) which held that*

> *"27. Fir-rigward tat-tezi tar-rikorrenti li l-kontenut tal-istqarrijiet, skont hu mehuda in vjolazzjoni tad-dritt ta' smigh xieraq tar-rikorrent, kellu effett fuq l-ammissjonijiet tieghu quddiem il-qrati kriminali u stante li f'dak iz-zmien skont hu, huwa kien fi stat ta'*

vulnerabbilita` huwa ma kellux ghazla hlief li jammetti, din it-tezi giet sostnuta mill-ewwel Qorti meta fis-sentenza appellata tghid:

"Meta wiehed iqis x' kienet l-ghazla li kellu quddiemu r-rikorrent, f'mument fejn kien kompletament vulnerabbli ghall-poter tal-Istat waqt li kien qed jissielet ma' kondizzjoni medika severa u terminali, huwa facli jifhem il-ghaliex ghazel li jammetti l-akkuzi migjuba kontra tieghu. Il-Qorti zgur ma tistghax tqis illi dan it-tip ta' Hobson's choice jista' jsarraf f'ghazla libera ghar-rikorrent sabiex ammetta l-akkuzi kontra tieghu." [Sent. Pga.26]

"*28. Din il-Qorti ma taqbel xejn ma' din it-tezi li fil-fehma taghha hija fattwalment u legalment insostenibbli, [sottolinear ta' din il-Qorti] anke jekk jigi kkonsidrat li huwa minnu li qabel ma ttiehdet l-ewwel stqarrija huwa kien ghadu gej mill-isptar fejn kien qed jiehu trattament mediku u anke jekk l- istqarrijet jitiqiesu bhala vjolattivi tal-artikolu konvenzjonali fuq citat, dan il- fatt ma jistax idghajjef l-effetti legali tal-ammissjonijiet quddiem il-qrati kriminali meta allura r-rikorrent kien legalment assistit matul dawk il-proceduri. Fil-fehma ta' din il-Qorti jirrizuta car li l-ghazla tar-rikorrent li jammetti ghall-akkuzi kienet ittiehdet meta kien legalment assistit u meta wkoll il-qorti kienet tatu zmien sabiex jahsibha sewwa, fatt li jindika li dik il- qorti kienet qed taghtih l-opportunita` li jirtira l-ammissjoni tieghu; izda ir- rikorrent baqa' jinsisti fuq l-ammissjoni tieghu, ovvjament bi skop li jottjeni mitigazzjoni tal-piena. Dawn il-konsiderazzjonijiet huma sorretti ukoll mill-fatt li, meta r-rikorrent kien deher quddiem il-Qorti tal-Magisrati, huwa naqas milli jattakka l-validita` tal-istqarrijiet maghmula minnu u kkonfermati minnu bil-gurament quddiem il-magistrat inkwirenti. Li kieku r-rikorrent verament hass li l-istqarrijiet ittiehdu b'lezjoni tad-drittijiet fondamentali tieghu, kien mistenni li mill-bidu tal-proceduri kriminali meta allura kien legalment assistit, huwa jew jattakka l-validita` tal-istqarrijiet bi proceduri kostituzzjonali jew ma jammettix ghall-akkuzi, izda huwa ghazel it-triq li jammetti, u ma hemm xejn li jsostni t-tezi tieghu li l-ghazla li jammetti ma kinitx wahda libera. Fid-dawl ta' dawn il-konsiderazzjonijiet din il-Qorti tqis bhala gratuwita u mhux sorretta mill-provi l-osservazzjoni tal-ewwel qorti li l-ghazla li r-rikorrent jammetti saret meta huwa kien "kompletament vulnerabbli ghall-poter tal-Istat", anzi din tinsab kontradetta mill-fatt pacifiku li matul il-proceduri kriminali u allura meta ammetta ghall-akkuzi ghal diversi drabi huwa kien dejjem assistit minn avukat.*

"*29. Fid-dawl tal-konsiderazzjonijiet premessi din il-Qorti tosserva li l- intimati ghandhom ragun li jsostnu li l-ammissjonijiet tieghu u l-istqarrijiet lill-pulizija huma elementi ta' prova separati u m'humiex, fi kliem l-ewwel Qorti, "instrinsikament konnessi." [Sent. Pga. 26]*"

.....

"*It must be pointed out that even when an accused pleads guilty, it is in the discretion of the Court whether to accept that guilty plea and this is clear from the second sub-article of* ***Article 453 of the Criminal Code*** *which provides that:*

"(2) Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the court shall, notwithstanding the confession of the accused, order the trial of the cause to be proceeded with as if the accused had not pleaded guilty."

"*Back to the second question in the constitutional reference, the Referring Court is requesting guidance on whether a future judgment by that court "based on applicant's guilty plea.....would be in breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution.*

"*This Court observes that during the sitting of the 16th November 2015 before the Magistrates Court, the accused was duly assisted. In the minutes of that sitting it is stated in alia that:*

> *"The parties are suggesting [to the Court] that in view of the circumstnances of the case, namely that he was a minor when the case was committed, that he cooperated fully with the police during the investigations, considering also his early guilty plea and that he has made substantial improvement since the time of his arrest, the Court imposes a punishment of 3 years imprisonment and a fine of 7000 Euro. The Court makes it clear and also explained to the accused that it is not bound by this suggestion."*

"*The case was then adjourned for the filing of the report by the probation officers.*

"*As stated above this Court is of the view that the release of the two statements by applicant/accused on the 5th and 9th April 2012 during both interrogations were not in breach of his fundamental rights as protected by Article 6 (1) and (3) of the Convention and Article 39 of the Constitution. Given that the only reason given by the accused for alleging a breach of his fundamental rights is that he admitted the charges brought against him due to the two statements he released during the interrogations; and given that this Court finds that the release of those two statements do not constitute a breach of applicant's fundamental human rights, this Court concludes that the Referring Court will not be in breach of the accused's fundamental rights in the event that in its judgment that court takes into account the accused's guilty plea"*.

4. The appellant filed his appeal application on the 9th October 2020 whereas the respondent replied on the 27th October 2020 and gave reasons why this court should dismiss appellant's request.

5. In his first complaint the appellant referred to the facts that he was not assisted by a lawyer, he was still a minor when he was interrogated by the police, he has a clean conduct, never had any contact with the police, it was the first time that he was interrogated by police, and his guilty plea was based on the two statement which he made in the absence of a lawyer.

6. It was during the sitting of the 2nd December 2016 that the appellant declared that he had no further evidence with regards to the punishment to be inflicted by the Court and the case was adjourned for final submissions. This after the year before (sitting of the 16th November 2015) he pleaded guilty to all charges.

7. There is no doubt that the statements dated 5th April 2012 and 9th April 2012 are self-incriminating statements. At the time the appellant was 17 years old. He explained that with other youngsters he bought drugs through the internet and sold them at school. He also confirmed that he bought drugs in Malta, and identified the sellers. The appellant also stated

that he personally made use of drugs. Present for both statements was his mother, Jennifer Pace.

8. Once the appellant filed a guilty plea there was no reason for the prosecution to present further evidence on the merits of the case. From then on, the defence produced evidence with regards to the punishment.

9. Obviously the appellant did not waive his right to legal assistance during police interrogation since under ordinary law he did not have such a right. Similarly, the issue whether there were compelling reasons to exclude the right to legal assistance, is irrelevant as at the time Maltese law did not grant a suspect the right to legal assistance during a police interrogation.

10. There is no doubt that appellant's statements to the police form an integral part of the evidence. It is unknown what would have happened had the appellant been assisted by a lawyer during the interrogation and the court cannot speculate.

11. At this particular point in time the criminal proceedings are still pending. This notwithstanding, during the criminal proceedings the appellant registered a guilty plea which was clearly accepted by the Court of Magistrates (Malta) as a Court of Criminal Judicature. Therefore, the

appellant will be declared guilty as charged. The uncertainty concerns the punishment to be imposed on the appellant.

12. A number of judgments have been delivered by the European Court of Human Rights, confirming that not having access to legal assistance while in custody because it was not possible in terms of the law in force at the time, is on its own a violation of Article 6. In the case Dayanan v Turkey (7377/03) decided on the 13th October 2009 the Court said:

> *"30. In relation to the absence of legal assistance in police custody, the Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see Salduz, cited above, § 51; Poitrimol v. France, 23 November 1993, § 34, Series A no. 277-A; and Demebukov v. Bulgaria, no. 68020/01, § 50, 28 February 2008).*
>
> "*31. The Court is of the view that the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention.*
>
> "*32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see Salduz, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.*
>
> "*33. In the present case it is not disputed that the applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see Salduz, cited above, §§ 27 and 28). A systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be*

> *found, notwithstanding the fact that the applicant remained silent when questioned in police custody.*
>
> "*34. Accordingly, the Court finds that there has been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1"*.[1]

13. On the other hand in the case Simons vs Belgium (app. 71407/10) decided on the 28th August 2012, the applicant complained that she was not assisted by a lawyer from the moment of her arrest, when she admitted a crime during interrogation. The ECtHR found the complaint under article 6 to be inadmissible because the applicant could not be considered to be a victim of a violation of her trial rights in the absence of a conviction, as the investigation was still ongoing;

> *"18. Selon la Cour, prise sous l'angle de l'article 6 §§ 1 et 3 c) de la Convention, la requête est en tout état de cause prématurée. Elle constate en effet que la procédure interne est pendante au stade de l'instruction. Or, d'une part, la conformité d'un procès aux principes fixés à l'article 6 de la Convention doit en principe être examinée sur la base de l'ensemble du procès (voir, parmi d'autres, Mitterrand c. France (déc.), no 39344/04, 7 novembre 2006). D'autre part, un « accusé » ne peut se dire victime d'une violation de son droit à un procès équitable en l'absence de déclaration de culpabilité et de condamnation (voir, par exemple, Bouglame c. Belgique (déc.), no 16147/08, 2 mars 2010).*
>
> *"La Cour déduit de ce qui précède que, prise sous l'angle de l'article 6 §§ 1 et 3 c) de la Convention, la requête doit être rejetée en application de l'article 35 §§ 1 et 4 de la Convention".*

14. In other judgments the same Court confirmed the 'overall fairness' test to establish whether a procedural defect of that kind had irretrievably prejudiced the fairness of the proceedings as a whole. Thus for example in the Beuze case the Court concluded that the subsequent assistance

[1] The same reasoning was adopted in the judgment Boz v. Turkey (2039/04) delivered on the 9th February 2010 (paragraph 35).

by a lawyer or the adversarial nature of the ensuing proceedings did not guarantee that the defects that occurred during police custody, had been remedied. This apart from the fact that the Court deciding the merits of the case had to undertake an analysis of the consequences of the lawyer's absence at crucial points of the proceedings.

15. It is a fact that the appellant was, according to law, given the opportunity to consult a lawyer prior to interrogation. He actually did consult a lawyer and therefore could prepare for his questioning beforehand with his lawyer. However this is not enough to remedy the lack of legal assistance during police interrogation. Amongst other things there is no proof of whether the lawyer was given any information by the police with regards to the alleged crimes committed by the appellant and proof that they had against the suspect (appellant). Information that was essential to place the lawyer in a position to properly advise his client.

16. Therefore, since the criminal proceedings are still pending, it is premature for a court to declare that the accused's right for a fair hearing was breached as a consequence of the fact that the evidence includes two statements he made in the absence of a lawyer.

17. This notwithstanding, judgments of this court have already made it amply clear that statements given by a suspect while in police custody

and in the absence of a lawyer, should not be used as evidence against him due to the risk that it may lead to a breach of the accused's right to a fair hearing. Judgments that are based on clear judgments delivered by the ECtHR throughout the years, which although one might not agree with, have given a clear direction to domestic courts as to the stand it will continue to take if other similar complaints are made to that court.

18. In this particular case the self-incriminating statements in issue were probably the reason why the appellant filed an early guilty plea.

19. Since at the time of the interrogations the appellant was still seventeen years old, was a student, had a clean criminal record and never had any previous contact with the police, there is a solid argument to conclude that he was a vulnerable suspect. The appellant also referred to a report filed in the criminal proceedings by psychologist Bernard Caruana, an *ex parte* witness for the appellant. In the report it is stated that appellant:

i. Has certain symptoms of autism spectrum disorder;

ii. Has attention and emotional difficulties and felt that he was not accepted by others;

iii. Has difficulty to connect with others;

iv. From a young age had been making use of drugs and alcohol;

20. It is a fact that the psychologist's report states, *"While his low score on Vulnerability indicates that he perceives himself as capable of handling himself in difficult situations"*. However, that is appellant's own perception.

21. The court concludes that there is enough evidence to conclude that at the time of the police interrogations appellant could be classified as a vulnerable person. On the other hand it is a fact that throughout the interrogations appellant's mother was present, evidently for support and assistance since he was a minor. This notwithstanding her presence was certainly not a sufficient remedy for the lack of presence of a lawyer.

22. It is a fact that in this particular case the appellant:

i. Was interrogated by the police on the 2nd April 2012 and 3rd April 2012 and charged on the 8th June 2015;

ii. Filed a guilty plea on the 16th November 2015 and was assisted by a lawyer, and warned by the court on the consequences of such a guilty plea and given time to consider whether he should confirm such a plea;

iii. Proposed to the court, in agreement with the prosecution, a punishment of three years imprisonment and €7000 fine;

iv. Produced evidence with regards to the issue concerning punishment and during the sitting of the 2nd December 2016 declared that he had no further evidence;

v. Changed counsel, and it was only at that stage that he first complained with regards to the statements he gave to the police in the absence of a lawyer (sitting of the 6th July 2017). At that point of the criminal proceedings appellant had already declared that he had no further evidence.

vi. Was always assisted by a lawyer during the court hearings and at no stage of the criminal proceedings did he contest the authenticity of the statements made while in police custody;

23. It also seems that the interrogations were not recorded. Therefore it is not possible for the court to know exactly what went on in the interrogation room. On the other hand at no point did appellant allege that irregularities took place during the interrogations and that he was pressured to self-incriminate himself. Neither did he allege that he falsely self-incriminated himself.

24. This notwithstanding on consideration of the judgments delivered by the ECHR, the court is of the opinion that there can be no guarantee that the procedural shortcoming that occurred during the police interrogations can be remedied during the criminal proceedings *per se*. This especially when one considers that the appellant probably registered a guilty plea on the basis that he made two self incriminating statements while in police custody in the absence of a lawyer. In the recent judgment Mehmet Zeki Celebi v Turkey (no. 27582/07) decided on the 28 January 2020, the ECtHR stated:

> *"57..... The Court also reiterates that it is only in very exceptional circumstances that it can conclude that a given trial has not been prejudiced by the restriction of an applicant's right of access to a lawyer"*.

25. There is no doubt that had the appellant been assisted by a lawyer during interrogation, he might have been advised to remain silent or not to answer all self-incriminating questions.

26. In the judgment Brian Vella vs Avukat Ġenerali, 14th December 2018, this court has already declared that a guilty plea might have been possibly conditioned by the fact that plaintiff had given a statement to the police without the assistance of a lawyer. Therefore, the remedy given by this court was the removal of the statement and for the proceedings to start afresh.

27. With regards to appellant's second complaint he claims that he should be given the opportunity to withdraw his guilty plea in the light of the fact that such plea was conditioned on the fact that he had already admitted to the charges in several statements released without being assisted by a lawyer.

28. Obviously in view of the considerations made by this court in the preceding paragraphs, a judgment based on the guilty plea of the appellant could lead to a breach of article 6(1) and (3) of the Convention and Article 39 of the Constitution. This based on the probabilty that appellant filed a guilty plea based also on the two self-incriminating statements he gave to the police on the 2nd and 3 April 2012 without the assistance of a lawyer.

29. In the circumstances a judgment based on applicant's guilty plea filed during the sitting of the 15th November 2015, would likely constitute a breach of article 6(1) and (3) of the Convention and Article 39 of the Constitution.

For these reasons the court revokes the judgment delivered by the Civil Court, First Hall on the 30th September 2020 and decides:

1. The answer to the first question of the Court of Magistrates (Malta) as a Court of Criminal Judicature is:

i. It is premature to declare that the issue of the contested two statements by the appellant in the absence of legal counsel, constitutes a breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution.

ii. It is likely that appellant's rights would be breached should the two statements (dated 2nd and 3rd April 2012) be used as evidence, and therefore it is recommended that the two statements are removed.

2. The answer to the second question of the Court of Magistrates (Malta) as a Court of Criminal Judicature is that a judgment based on applicant's guilty plea filed during the sitting of the 15th November 2015, would likely constitute a breach of article 6(1) and (3) of the Convention and Article 39 of the Constitution.

3. Since the appellant made his complaint after the criminal proceedings had been adjourned for final submissions and in view of what has been decided in this judgment, both parties to the criminal proceedings are to be placed in the same position

they were prior to appellant's guilty plea filed during the sitting of the 16th November 2015.

4. All judicial costs are to be shared between the parties as to ¼ at the charge of the appellant and ¾ at the charge of the respondent.

A copy of this judgment is to be inserted in the file of the case The Police v. Alexander Hickey (485/2014). The Registrar is also to ensure that the court file of the criminal case is sent back to the Court of Magistrates (Malta) as a Court of Criminal Judicature.

Mark Chetcuti Chief Justice	Giannino Caruana Demajo Judge	Anthony Ellul Judge

Deputy Registrar
gr