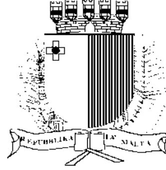

The Court of Criminal Appeal

His Honour the Chief Justice Dr Mark Chetcuti LL.D.

The Hon. Madame Justice Dr Edwina Grima LLD.

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

Today the 22nd day of September of the year 2021

Bill of Indictment No : 5/2020

The Republic of Malta

vs.

Christoph Doll

The Court:

1.Having seen the Bill of Indictment bearing number 5 of the year 2020 filed against appellee Christoph Doll, wherein he was charged by the Attorney General in the name of the Republic of Malta:

> **In the First Count**, of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, taken part in sexual activities with a minor, AA, a vulnerable person and this in abuse of a recognized position of trust, authority or influence over such person.
>
> **In the Second Count,** of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceding months and years, by several acts, even if committed at

different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, by lewd acts, defiled a minor, AA, who had not completed the age of twelve (12) and while being a person charged, even though temporarily, with the care, education, instruction, control or custody of the minor.

In the Third Count, of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, by means of information and communication technologies, proposed to meet a person under age, AA, for the purpose of participating in sexual activities with the minor, where the proposal was followed by material acts leading to such a meeting and this was done with the abuse of a recognized position of trust over the person under age.

In the Fourth Count, of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, as a citizen or permanent resident of Malta, whether in Malta or outside of Malta, as well as a person in Malta, made or produced or permitted to be made or produced any indecent material or produced, distributed, disseminated, imported, exported, offered, sold, supplied, transmitted, made available, procured for himself or for another or showed such indecent material, to the detriment of a person under age, AA, a person of the age of eleven (11).

In the Fifth Count, of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, acquired knowingly obtained access through information and communication technologies to, or was in possession of, any indecent material which shows, depicts, or represents a person under age, that person being AA, of eleven (11) years.

2. Having seen the note of preliminary pleas of the accused filed in the registry of the Criminal Court on the 23rd September 2020.

3. Having seen the judgment of the Criminal Court of the 17th November 2020 solely with regard to the first preliminary plea raised by accused, wherein the said Court upheld the said preliminary plea raised by the defence with regard to the

inadmissibility of the statement of the accused released on the 1st October 2015[1] marked as document PC1, which is found at fol. 26 to 33 of the acts of the proceedings, and declared it to be inadmissible in terms of law, and consequently ordered its withdrawal from the proceedings and also ordered that no reference is to be made to his statement (Dok PC 1) at any stage of the proceedings that are to follow.

4. Having seen the appeal application filed by the Attorney General of the 24th November 2020 wherein the Court was requested to revoke and reverse the decision given by the Criminal Court on the 17th of November 2020 and consequently to reject the first plea raised by the defence and to declare the statement of the accused, marked as Doc PC1 which is found at folio 26 to 33 of the acts of the proceedings as admissible for all intents and purposes of law.

5. Having seen the reply filed by accused of the 18th January 2021.

6. Having heard oral submissions by the parties.

7. Having seen all the acts of the case.

Considers:

8. That the Attorney General has registered her objection to the judgment delivered by the First Court and this with regard to the determination of the first preliminary plea put forward by the accused to the bill of indictment filed against him, which plea was upheld by the First Court resulting in the expungement from the court records of the pre-trial statement made by accused when he was arrested and interrogated by the police upon his arrest, ordering also that no reference be made to such statement during the trial by jury.

9. It is appellant's firm view, put forward in his one and only grievance, that the pre-trial statements made by the accused were released by him according to the law

[1] The date of the statement is indicated erroneously in the judgment of the Criminal Court, since accused's statement was released on the 15th March 2016.

applicable at the time, wherein he was given the right to legal assistance prior to being interrogated, which right was exercised by him, proceeding to release voluntarily and without any threats or coercion his statement to the investigating officer, and this after having obtained legal advice. Appellant relies, in his appeal, on the judgment delivered by the European Court of Human Rights in the case *Farrugia vs Malta* of the 4th of June 2019, amongst others, and the two-fold test set out in the said decision, wherein it was decided that the fact that a person did not have the right to have a lawyer present during interrogation did not amount to an automatic breach of his right to a fair hearing according to law.

10. In its reasoning the First Court, after making a detailed exposition of jurisprudence, both local and European regarding the probative value of pre-trial statements where the suspect did not have a lawyer present during his interrogation, thus declared:

> **"This Court thus declares that it is in no way stating that the taking of a statement per se in the absence of being assisted by a lawyer thougout its making equates to a breach of one's fundamental human rights. However, it feels that it is not correct and safe to leave the statement released on the 1st October 2015 in the absence of a lawyer in the proceedings since these current proceedings are still on going and are not a res judicata. Also on the premise that these proceedigns are going to be heard before a Jury and therefore such statement could have a bearing on the decision to be taken by the jurors since there is a potential risk that at a later stage this statement is consisered to have no probabtive value (by a Constitutional Court) and thus could lead to the retrial of the entire case and this to the prejudice of all parties. This is also being said in view of what the dissenting opinions held by the Judges who did not agree with the decisions taken both by the European Court and by the Grand Chamber. Thus, the court safely concludes by stating that the position with regards to the taking of statements in the absence of lawyer being present throughout has been crystalized in Malta.**
>
> **This court is of the opinion that notwithstanding the development registered in the domestic case law, it is indicative that in order for the court to decide whether there is a breach to a fair trial it has to take regard to the proceedings as a whole, and thus the isolated fact that the statement was taken in the absence of a lawyer being present, today is being interpreted that such a state of affairs should not equate to an automatic infringement to the right to a fair hearing. Due to the fact that in this case the Jury is yet to be appointed, the court is of the opinion to safeguard the integrity of the proceedings and in the sense of justice that is should order the withdrawal of the statement released by the accused on the 1st October 2015 from the proceedings forthwith.**

11. However, the Criminal Court, then proceeds to declare the said statement as "inadmissible in terms of law", although in its reasoning throughout the judgment it repeatedly emphasises that the statement has been released in line with the law prevailing at the time when it was released, accused having been duly cautioned and allowed to consult with a lawyer of his choice prior to the interrogation. Also, it must be pointed out that the Criminal Court also erroneously orders the expungement from the acts, of a statement allegedly released by accused on the 1st October 2015, when it transpires that accused was in fact interrogated by the police on the 15th March 2016, the statement consequently bearing the same date.

12. Thus although the Court can agree with the reasoning put forward by the Criminal Court that at this stage in the proceedings there is no violation of accused's right to a fair trial since, in line with the prevailing *dicta* issued both by the Constitutional Court as well as the European Court of Human Rights, the test of the "overall fairness of the proceedings" cannot as yet be determined, however it cannot concur with the conclusions of the First Court that this piece of evidence is inadmissible 'according to law'.

13. The regulatory principle as to the admissibility of evidence in criminal proceedings presupposes the existence of an express provision of law which regulates the admission of such evidence in a court of law. Evidence is consequently deemed to be inadmissible only if the law precludes its production. The law of evidence is made up of rules which exclude from the consideration of the Court evidence which may or may not have a reasonable bearing on the matter in hand. Consider for example, hearsay evidence, evidence obtained through illegal means, or evidence relating to the character or criminal conduct of the accused. If evidence is obtained in violation of the accused's constitutional rights, this could also result in the exclusion of such evidence from the trial echoing the exclusionary rule adopted by the United States Supreme Court. Similarly section 78 of the Police and Criminal Evidence Act in England and Wales provides that "*in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission*

of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

14. No similar provision, however, exists under Maltese law regulating the rules of evidence in criminal proceedings thus making accused's objection to the admissibility of his pre-trial statement as evidence during the trial, contrary to what he affirms in his reply, a matter having constitutional ramifications outside the competence of this Court in its criminal jurisdiction. The accused does not attack the probative value of the statements on any particular rule of penal law empowering the Court to reject it, but relies solely on the presumption that admitting this piece of evidence would deny him a right to a fair hearing, having been denied the right to have his lawyer present during interrogation, resulting therefore, in his opinion, to a denial of his right to mount a defence in a situation where incriminating statements were made to the police, alleging that obtaining advice prior to interrogation without having had a right to disclosure of the evidence in hand by the police, made it impossible for him to adequately mount a defence upon questioning. This Court cannot agree with the appellee's argument that the ruling ordering the statement to be discarded should be founded on different considerations other than those regulating a breach of his right to a fair trial, since, it is evident that the lack of legal assistance during interrogation and consequently the expungement of his statement from the acts of the proceedings is directly linked to the allegation that his fundamental rights have been breached or will be potentially breached if the statement is adduced as evidence in the trial.

15. Cases dealing with a violation under article 6 of the European Convention focus on the right to legal assistance. In the present case it cannot be said that accused was denied this right. In fact, prior to interrogation the accused was given the right existing according to the law in force at the time to speak to a lawyer privately either face to face or by telephone for an hour. The accused availed himself of such right, consulting as aforesaid with a lawyer of his choice prior to the interrogation by the police. Now it is true that the rule of inference existed at the time when the statement was released, implying therefore, that having obtained this form of legal advice, and subsequently refusing to answer some questions put to the accused, then suspect, by the

interrogating officer, the Court or Jury could draw such inferences from this failure as appears proper, which inferences may not by themselves be considered as evidence of guilt but may be considered as amounting to corroboration of any evidence of guilt of the person charged or accused. This rule has, however, today been removed from our statute book thus leaving intact the right to silence of the accused person in a criminal trial. In fact, accused availed himself of this right when presented by the investigating officer with the evidence they had in hand regarding the allegations made by the minor and her mother, thus exercising his right of defence, indicating that he fully understood the caution that had been administered in his regard.

16. The accused was given his rights to legal assistance as they existed at that particular moment in time when he was arrested and being interrogated. As already pointed out he availed himself of this right. Back in March 2016 the right of legal assistance which the suspect was entitled to by Maltese Law was granted within these parameters. There was no other right, or any further right of legal assistance in place at that moment in time that was denied to the accused, then suspect. He was not denied his statutory rights as they existed in Malta on the date of his interrogation. Legal assistance was granted to the suspect in line with Maltese Law and with the definition of legal assistance prevalent at the time.

17. Maltese Law did not extend, then, the right of legal assistance to include the right to have a lawyer present together with the accused in the interrogation room. This was a development that came into effect by Act LI of 2016 in November 2016. Therefore what the accused is demanding from a court of criminal jurisdiction is to apply procedural safeguards to specific procedural scenarios when those same specific procedural safeguards did not apply, since they did not form part of the legislative framework existing at the time. The right to legal existence envisaged by law was observed and exercised according to the letter of the law prevailing when accused was interrogated.

18. Today in the light of the decision delivered on the 9th of November 2018 by the Grand Chamber of the European Court in the case of *Philippe Beuze v. Belgium* (71409/10), (which the Criminal Court makes reference to in its judgment) the criteria

set out in the decision of *Salduz* and others have been reversed, although it found that in this case a violation of article 6 of the Convention had occurred. In this decision the European Court re-adopted the criterion of "overall fairness of the proceedings" so as to investigate whether any violation to the right to a fair hearing had occurred, and this after establishing a two-tier test, the first one being the existence or otherwise of compelling reasons to deny the right to legal assistance.

> **"441. When examining the proceedings as a whole, the following non-exhaustive list of factors should, where appropriate, be taken into account (Ibrahim and Others v. the United Kingdom [GC], § 274; Beuze v. Belgium [GC], § 150; Sitnevskiy and Chaykovskiy v. Ukraine, §§ 78-80):**
> **▪ Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.**
> **▪ 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.**
> **▪ Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.**
> **▪ 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.**
> **▪ 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.**
> **▪ In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.**
> **▪ 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.**
> **▪ Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.**
> **▪ The weight of the public interest in the investigation and punishment of the particular offence in issue.**
> **▪ Other relevant procedural safeguards afforded by domestic law and practice.**[2]

19. Therefore, in the light of the above-mentioned guidelines put forward by the European Court, this Court cannot *a priori* expunge a statement of a suspect who has

[2] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

been given the right to consult a lawyer before being interrogated, but where his lawyer was not present at the time, solely on the premise that this could potentially infringe his right to a fair hearing. The Court cannot create a blanket evidentiary rule of criminal law declaring a piece of evidence obtained lawfully, inadmissible in criminal proceedings on the basis that this could violate accused's right to a fair trial, all the more so, as already pointed out, where legal assistance had been given, although not within the parameters that exist at present in our statute book. As the European Court has guided domestic courts in dealing with pre-trials statements, each case must be dealt with individually thus taking into account, on a case by case basis, whether by the fact that accused person did not have a lawyer present when releasing the statement, although such person had obtained legal advice or at least had been given the right to obtain that advice, this could result at a later stage, during the criminal proceedings instituted against him, as a breach of his right to a fair hearing thus vitiating an otherwise legally obtained piece of evidence. In a similar case it was decided by the European Court that no violation of article 6 had occurred:

> **"In Doyle v. Ireland the applicant was allowed to be represented by a lawyer, but his lawyer was not permitted in the police interview as a result of the relevant police practice applied at the time. The Court found no violation of Article 6 §§ 1 and 3 (c) of the Convention. It considered that, notwithstanding the impugned restriction on the applicant's right of access to a lawyer during the police questioning, the overall fairness of the proceedings had not been irretrievably prejudiced. In particular, it laid emphasis on the following facts: the applicant had been able to consult his lawyer; he was not particularly vulnerable; he had been able to challenge the admissibility of evidence and to oppose its use; the circumstances of the case had been extensively considered by the domestic courts; the applicant's conviction had been supported by significant independent evidence; the trial judge had given proper instructions to the jury; sound public-interest considerations had justified prosecuting the applicant; and there had been important procedural safeguards, namely all police interviews had been recorded on video and made available to the judges and the jury and, while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.**
>
> **429. In addition, 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 (Ibid., § 136).[3]"

20. The Court is also of the firm opinion that at this early stage of the proceedings where the trial by jury has yet to be heard by the competent court it cannot be said that the two-tier test established in the *Beuze* judgment can be conducted. Also, since neither the First Court nor this Court has constitutional powers to address the issue and thus establish whether any violation of fundamental rights has occurred or if this could potentially occur. The Court of Criminal Jurisdiction cannot *a priori* expunge evidence from the records which at this stage still has its probative weight for the reason put forward by appellee in his preliminary plea. This is because according to the said court *dicta* the denial of legal assistance during interrogation does not automatically lead to a breach of the accused's right to a fair hearing, when the European Court is now directing domestic courts to investigate whether the proceedings as a whole were fair, an exercise that can be carried out only after all evidence has been brought forward at the trial, accused also having a right to appeal from the verdict and judgment of the Criminal Court establishing his guilt.

21. Having thus premised, from an overwiew of the evidence gathered during committal proceedings before the Court of Magistrates, it transpires that accused was arrested after a report filed to the police by a certain AB, regarding alleged sexual abuse perpetrated by accused on her daughter AA, who at the time of this alleged abuse was around 11/12 years of age. In his statement subsequently released to the police, accused denies any wrong doing. Accused not only availed himself of his right to legal advice, but also replied to certain questions while he chose to deny or else not to reply to others. This indicates that he understood the caution which was given to him by the interrogating officer and exercised his rights of defence at this early stage. Also there is no evidence in the acts that accused, at 31 years of age, was a vulnerable, inexperienced, or impressionable person. The Police during the course of their investigations proceeded to seize all mobile phones and computers found both in the

[3] *Ibid*

possession of the minor and the accused for further forensic examination by the Court appointed experts which reports are also found in the acts of the proceedings, together with other evidence.

22. The Court has taken judicial notice of the recent judgments delivered by the Constitutional Court of the 27th January 2021 wherein the said Court has directed the Criminal Court not to bring to the attention and cognisance of the jurors the statement of the accused and this as a precautionary measure, thus avoiding the possibility of placing the proceedings at a risk of being annulled due to a future potential breach of the accused's right to a fair trial, thus invalidating the proceedings[4]. It has also taken judicial notice of other judgments, one being more recent[5], where the Constitutional Court was of a contrary opinion[6]. Thus this Court having an overall picture, from the acts of the compilation of evidence, of all the evidence which the Prosecution will put forward in the trial by jury, and without delving into the merits of the case, since it does not have the power to do so at this stage of the proceedings, is of the firm opinion that each and every case has to be decided on its own merits and this in order to establish whether there is a risk that the accused may suffer a breach of his fundamental human rights if the statement released by him without having a lawyer present during interrogation is vitiated by a defect which cannot otherwise be remedied, and this when taking into consideration "*the overall fairness of the proceedings*". The Court observes that the Constitutional Court itself has repeatedly affirmed that at this early stage of the proceedings it cannot be determined whether accused person has suffered a breach of his fundamental human rights or whether potentially this can occur, and this before the proceedings have been terminated, (although in some cases it has directed the Criminal Court not to adduce the statement as a piece of evidence at the trial and this as a precaution). However, this Court, in its

[4] Clive Dimech vs Avukat Generali, The Police vs Alexander Hickey, Morgan Onuorah vs l-Avukat ta'l-Istat

[5] Micallef Briegel vs Avukat Ġenerali Const. Court 30/06/2021

[6] Constitutional Court: Ir-Repubblika ta' Malta vs Martino Aiello – 27 ta' Marzu 2020

criminal competence cannot expunge from the acts evidence which carries probative value and which has been legally obtained.

23. As was decided by the Constitutional Court itself:

> **"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[7].**
>
> **... 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)[8].**

24. In the light of the above considerations, and since the defence is basing its objection on the inadmissibility of the defendant's statement not on any evidentiary rule which attacks the probative value of such evidence, since the pre-trial statement complied with the criminal law in force at the time, but on the alleged breach of his right to a fair hearing under article 6 of the European Convention were that incriminating statement to be used in court of justice against him, the Court cannot agree with the ruling of the First Court wherein it declared such pre-trial statement inadmissible as evidence at this stage of the proceedings, since it is only after all evidence, both in favour and against the accused, has been heard that it would be possible to conduct the two-tier test as established by the European Court of Human Rights and this in order to determine whether the overall fairness of the proceedings has been compromised if accused's statement were to be used against him as evidence. It will be the duty of the presiding judge during the trial by jury to properly address the jurors as to the probative value of the statement, if during the jury it results that this

[7] Kost: Ir-Repubblika ta' Malta vs Martino Aiello – 27 ta' Marzu 2020

[8] *Ibid*

was not released according to law or if it results that the overall fairness of the proceedings has been compromised by the declarations made by accused in his pre-trial statement in terms of the criteria established in the *Beuze* judgment cited above. **Above all accused will always have a right of appeal from the verdict and judgment of the Criminal Court in the event of a finding of guilt in his regard. This right eradicates any risk which the Criminal Court has perceived as existing during the trial wherein the accused may suffer an alleged breach of his rights. Although it is true that the juror's verdict is not a motivated one, such that it would not be possible to determine whether accused's statement has had a bearing on the verdict of guilt, however the jurors will be guided by the presiding judge who will direct them as to the probative value of the statement should the said judge deem that such evidence may compromise the overall fairness of the proceedings. Not only, but a review of the verdict will also carried out by this Court should accused decide to exercise his constitutional right of appeal from an eventual finding of guilt in his regard, in which case the two-tier exercise indicated in the *Beuze* judgment can be carried out by the Court in its appellate jurisdiction.**

Consequently for the above-mentioned reasons the Court declares the grievance put forward by the Attorney General to be well-founded and upholds the same. Therefore revokes the judgment of the First Court wherein it declared that the statement released by accused is inadmissible according the law, and orders that the said statement of the 15th April 2016 be adduced as evidence in the trial by jury.

The Chief Justice Mark Chetcuti

Madame. Justice Edwina Grima

Mr. Justice Aaron Bugeja