



# THE COURT OF CRIMINAL APPEAL

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

Appeal number: 193/2020

**The Police  
Vs.  
Lin Han**

**Sitting of the 24th February 2022**

The Court:

## **A. THE CHARGES:**

1. Having seen that this is an appeal lodged by Lin HAN holder of Maltese Identity Card number 31973A and Chinese Passport Number G20435992 from a judgment delivered against her by the Court of Magistrates (Malta) on the 24th September 2020, after that she was charged with having:

On the 3rd February 2013 and in the preceding months on these Islands by several acts committed by her even if at different times, which constitute violations of the same provision of the law, committed in pursuance of the same design:

- i. By means of violence, threats including abduction, deceit or fraud, misuse of authority, influence or pressure or by giving or receiving payments or benefits to achieve the consent of persons having control over, trafficked persons of age namely Liu Rentua, Yu Yali and Qin Wihong for the purpose of exploiting that purpose in the production of goods and provision of services and also for prostitution in breach of Articles 248A, 248B and 248D of Chapter 9 of the Laws of Malta;
- ii. Kept or managed or shared with others in the management of a brothel or of any house, shop or other premises or any part thereof which is or are or is or are reputed to be resorted to for the purpose of prostitution or other immoral purposes in breach of Article 8(1) of Chapter 63 of the Laws of Malta;
- iii. Knowingly lived, wholly or in part, on the earnings of the prostitution of other persons of foreign nationality in breach of article 7(1) of Chapter 63 of the Laws of Malta;
- iv. As a person responsible for the shop, lodging-house or hotel or any private apartment suffered or permitted such shop, lodging house, hotel or apartment or any part thereof to be used as a place of assignation for the purpose of prostitution or any other immoral purpose in breach of article 9 of Chapter 63 of the Laws of Malta;
- v. Made use of premises 'Honey Girl' at Valley Road, Balzan for the purpose other than those purposes licensed for in breach of Article 7 and 18(d) of subsidiary legislation 409.08 thus breaching conditions of licence as per article 23(1) of the same legislation hence breaching article 43(1)(b) of Chapter 409 of the laws of Malta.

## **B. THE JUDGEMENT OF THE COURT OF MAGISTRATES**

2. By means of the said judgment, the Court of Magistrates (Malta), whilst finding the accused Lin HAN not guilty of the fifth charge brought against her, after having seen Articles 17, 18, 23, 31, 248A(1)(2)(3), 248B and 248E(1) of Chapter 9 of the Laws of Malta and Articles 7(1)(3), 8(1)(2)(3), 9, 10 and 14 of Chapter 63 of the Laws of Malta found the accused guilty of the first, second, third and fourth charges brought against her and condemned her to a five year term of effective imprisonment. The Court also ordered the cancellation of any licence held by the offender in respect of any hotel, lodging house, shop or other premises wherein or within the precincts of the premises Honey Girl, Valley Road, Balzan and also ordered the cancellation of the offender's driving licence and any other licence held by the offender in respect of the vehicle of the model BMW bearing registration number LIN 888. The Court also ordered the forfeiture of the corpus delicti in line with the provisions of Article 23 of Chapter 9 of the Laws of Malta namely the sum of Euro 24,000 confiscated from the offender's residence together with

all the documentation and items seized from Lin Han's residence and from the premises 'Honey Girl' in Balzan documented in the acts of these proceedings as RZ1, RZ2 and RZ3 and Doc LC7. Also, after having seen Article 412C of Chapter 9 of the Laws of Malta, the Court ordered the issue of a protection order against the accused Lin HAN and this for a period of five years from the date of the judgment in favour of Liu Renhua, Yu Yali and Qin Wiehong. Furthermore, in pursuance of Article 533 of the Laws of Malta, the Court ordered the offender Lin HAN to pay to the Registrar the sum of Euro 753.98 representing the expenses incurred in the employment of experts.

### **C. THE APPEAL**

3. Lin HAN filed an appeal wherein she requested this Court to modify the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 24th September 2020 in her regards and this, in the first place by affirming that the applicant is not guilty of the fifth charge brought against her and reversing the finding of guilt in the first, second, third and fourth charge brought against her and consequently acquits her of them; alternatively, to vary the appealed judgment as regards to the punishment inflicted and instead to apply a lesser punishment which is more appropriate after that the appellant, in brief, claimed that:

- i. The Court of Magistrates (Malta) made a wrong application of the facts and evidence produced, apart from wrongly applying the law with regards to the finding of guilt of the first four charges;
- ii. The punishment inflicted was manifestly excessive.

### **D. THE CONSIDERATIONS OF THIS COURT**

#### **Preliminary Considerations**

4. That during the debate of the appeal proceedings, on the 20th April 2021, Defence raised a procedural plea, namely that the Court of Magistrates (Malta) lacked jurisdiction on account of the fact that not all formalities prescribed by Law were adhered to. The Attorney

General objected to this plea as she claims that it was untimely and was not raised as a specific ground of appeal in the appeal application.

5. The Court granted the appellant Lin HAN time for the filing of a note of submissions on this issue, which note was filed by her on the 27th April 2021. The Attorney General then replied to the note of submissions filed by the appellant as aforesaid, on the 5th May 2021. Final oral submissions in this regard were made in the sitting dated 1st June 2021.
6. The appellant contends that the proceedings before the Court of Magistrates (Malta) were null and void due to a defect in the procedural formalities required at law in terms of Article 370 of the Criminal Code. The appellant observed how the acts of the proceedings were silent as to whether the procedure requested at law in terms of Article 370(3) of the Criminal Code was adhered to by the Court of Magistrates (Malta). In a nutshell, the appellant argues that the minutes of the sitting dated 1st of April 2016 show how the Court of Magistrates (Malta), following the remittance of the acts of the proceedings by the Attorney General in terms of Article 370(3)(a) of the Criminal Code on the 30th March 2016, simply proceeded by adjourning the case to the 12th May 2016 without requesting the accused whether she was objecting or otherwise to her case being dealt with summarily before the Court of Magistrates (Malta) as a Court of Criminal Judicature.
7. The Attorney General on the other hand, while conceding that the formalities dictated by the provisions of Article 370(3) of the Criminal Code were not adhered to by the Court of Magistrates (Malta), proceeded to argue that this plea was never raised before this stage of the proceedings and that mention thereof was not even made in the appeal application filed by the appellant. The Attorney General further added that after the conversion of the Court of Magistrates (Malta) as a Court of Criminal Inquiry into a Court of Criminal Judicature, the appellant always behaved in such way as to suggest that she was submitting herself to the judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature and was therefore not objecting to be tried summarily by the same. The Attorney General pointed out how following the conversion of the Court as aforesaid, the appellant filed applications for travel abroad and on the 24th May 2018 the appellant herself testified under oath before the Court of Magistrates as a Court of Criminal

Judicature thereby implying her tacit acceptance of the competence of the Court of Magistrates as a Court of Criminal Judicature to deal with the case and pass judgment thereon.

8. The Attorney General added that Article 370(3) of the Criminal Code does not mention the nullity of the proceedings should the procedure laid out therein not be observed. In support of her arguments, the Attorney General cites the judgment of the Court of Criminal Appeal **II-Pulizija vs. Russell Bugeja** dated 29th February 2008. Reference was also made by her to the provisions of Article 370(4A) of the Criminal Code as further evidence that the Legislator did not contemplate the nullity of the proceedings consequent to a defect in the formalities required in terms of Article 370(3) of the Criminal Code.
9. The Attorney General quoted also the provisions of Article 428(2) and (3) of the Criminal Code in furtherance to her argument, insisting that without prejudice to her position on the matter, in the case of a breach or omission of a substantial formality, this Court was to proceed to quash the judgment and determine the case on its merits. The Attorney General further insisted that the provisions of Article 428(6) of the Criminal Code were also relevant in this case in that if read in tandem with the provisions of Article 428(3) of the same, it would mean that the appellant could not at this stage raise the plea to the jurisdiction of the Court of Magistrates as a Court of Criminal Judicature and this Court was to decide only on the merits of the appeal as put forward by the appellant in this case.

**Considers further:**

10. That though the preliminary plea under examination was not raised by the accused in her appeal application, the allegation of the lack of observance by the Court of Magistrates of the procedure laid out in Article 370(3) of the Criminal Code is a procedural defect that can be raised by this Court *ex officio*, independently of the merits of the appeal. This Court refers to its judgment of the 22nd October 2019 in the appeal proceedings **II-Pulizija vs. Giulio Zarb** where it was held that cumulative procedural shortcomings in criminal proceedings are a form of *lex processualis error* which hits directly at one of the cardinal and basic rights of the accused in criminal proceedings. As such this would qualify as a matter of public order as it affects the basic principles on which the conduct of criminal

proceedings and the rights of defence of an accused person are based. Thus any such matter may be raised also *ex officio* by the Court at any stage of the proceedings.<sup>1</sup>

11. Furthermore, the composition, procedure, competence and jurisdiction of the Court of Magistrates is regulated under Title II of Part I of Book Second of the Criminal Code. Article 367(1) of the Criminal Code establishes that the Court of Magistrates may have a **two-fold jurisdiction** namely as a Court of Criminal Judicature for the trial of offences which fall within its jurisdiction and as a Court of Criminal Inquiry in respect of offences which fall within the jurisdiction of a higher tribunal. The provisions of Article 367(1) of the Criminal Code must also be read and construed together with the provisions of Article 389 of the Criminal Code the latter regulating the procedure before the Court of Magistrates as a Court of Criminal Inquiry for those offences that fall beyond the competence of the Court of Magistrates as a Court of Criminal Judicature.
12. In her preliminary plea the appellant contends that the Court of Magistrates as a Court of Criminal Judicature failed to adhere strictly to the procedure laid out in the provisions of article 370(3) of the Criminal Code. Article 370 of the Criminal Code is the procedural key-stone of Maltese Law of Criminal Procedure as it regulates the procedure before the Court of Magistrates as a Court of Criminal Judicature and expounds the limits of the jurisdiction of this Court.
13. Article 370(1) of the Criminal Code establishes the proper jurisdiction of the Court of Magistrates - otherwise informally referred to as the “**original competence**” of the Court of Magistrates – by creating a set of criteria based on the nature of the criminal offences and the nature, quality or quantity of the punishments that may be awarded. These proceedings of first instance are meant to be summary proceedings and therefore heard and decided by that Court, sitting as a Court of Criminal Judicature, with the least formalities possible.
14. That Court retains its jurisdiction of origin even where a higher punishment would be applicable to a specific case due to the application of Article 17 (concurrent offences and punishments) or Article 18 (continuous offence qualification) or previous convictions (recidivism) in terms of articles 50, 53 or 289 of the Criminal Code :

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<sup>1</sup> Vide also **II-Pulizija vs. Louis sive Louie Naudi** decided by this Court on the 27th February 2020.

as long as the offences dealt with and decided by that Court fall within any one of the category of offences reserved for trial by that Court or carry a punishment (determined in abstracto that is, as it stems from the statute book) of the nature, quality or quantity reserved to that Court by article 370(1) of the Criminal Code.

15. The Court of Magistrates as a Court of Criminal Judicature is also vested with jurisdiction to decide cases that may be deemed to be triable either way. This is referred to as the “**extended competence**” of that Court. Under these parameters the Court of Magistrates may try and decide on offences whose criteria fall beyond the rules set by article 370(1) of the Criminal Code for its “original competence”.
16. The extended competence of the Court of Magistrates is based on two prongs reflected by sub-article 3 and sub-article 4 of Article 370 of the Criminal Code. This two-pronged approach is based on the nature and quantity of the punishments established for the offence thus :
  - i) Crimes which carry the punishment of imprisonment for a term exceeding two years but not exceeding six years (article 370(4) of the Criminal Code);
  - ii) Crimes which carry the punishment of imprisonment for a term exceeding two years but not exceeding twelve years (article 370(3) of the Criminal Code);
17. That therefore, these two prongs operate as concentric circles, with the article 370(4) prong operating within the temporary parameters established by article 370(3) of the Criminal Code. However the procedural requirements for the satisfaction of the respective criteria differ.
18. If the parameters of punishment are satisfied, the Attorney General has the discretion to prosecute a case either under sub-article 3 or sub-article 4 of article 370 of the Criminal Code. But once she decides to prosecute a case under any one of those articles, the Attorney General and the Court of Magistrates are bound to follow the specific procedural rules applicable therefor; and they have to do so scrupulously given that, by Law, the conferment of jurisdiction to the Court of Magistrates to decide the merits of cases falling within its extended jurisdiction depends on the strict adherence to the procedural requirements mentioned in article 370(3) or (4) of the Criminal Code as the case may be.

19. The procedural requirements mentioned by Article 370(3) of the Criminal Code state that:

(3) (a) Notwithstanding the provisions of sub-article (1)(b), the Attorney General may send for trial by the said court any person charged with a crime punishable with imprisonment **for a term exceeding two years but not exceeding twelve years if there is no objection on the part of such person.**<sup>2</sup>

(b) On the record being returned to the court to try such crime, the court shall ask the accused whether he objects to his case being dealt with summarily; the court shall, in its discretion, give a reasonable time to the accused to reply to this question.

(c) If, within the said time, the accused replies that there is no objection on his part to the case being tried summarily, the court shall note the reply in the records of the proceedings and there upon the court shall become competent to try the accused and shall proceed to give judgment forthwith, as provided in article 377.

20. Therefore in case of offences falling under the article 370(3) prong, the Attorney General is granted the discretion either to prosecute the case before the Criminal Court or else refer the case to the Court of Magistrates for judgment provided that the formalities there mentioned are satisfied by that Court. These formalities are aimed at ensuring that the conversion of the Court of Magistrate as a Court of Criminal Inquiry into a Court of Criminal Judicature competent therefore to try and decide the case **summarily** against the accused take place **only** if the accused categorically declares that he finds no objection for his case to be decided summarily by that Court and his declaration is minuted by the Court in the records of the proceedings.

21. When the Attorney General decides to send an article 370(3) case for judgment before the Court of Magistrates, she sends a written demand equivalent to the formal accusatory document commonly referred to as a “nota tar-rinviju għall-ġudizzju” wherein, inter alia, she calls upon the Court of Magistrates as a Court of Criminal Inquiry to convert itself into a Court of Criminal Judicature and pass judgment against the accused on the breach of the provisions of the law therein listed provided that first that Court implements any request written by the Attorney General in that note and subsequently after that the Court of Magistrates would have read out the formal accusations to the person charged, that same

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<sup>2</sup> Empashis by the Court.



Court would have asked the person charged the question as to whether he objects to his case being dealt with summarily; following which the court shall, in its discretion, give a reasonable time to the accused to reply to this question. Then if, within the said time, the accused replies that there is no objection on his part to the case being tried summarily, the court must note the reply in the records of the proceedings **and thereupon the court becomes competent to try the accused** and shall proceed to give judgment forthwith, as provided in article 377 of the Criminal Code. Clearly these are sine qua non requirements.

22. In this regard the Court refers to the case **II-Pulizija vs. Joseph Grech u George Briffa** decided by the Court of Criminal Appeal on the 31st May 2017 where the relationship between the Attorney General, the written demand, and the Court of Magistrates at this stage of the proceedings was described as follows:

Ma huwhiex qiegħed iktar isejjaħ lill-Qorti, l-Avukat Ġenerali sabiex tikkompila l-provi biss, sabiex tiġbor l-evidenza bil-għan illi din tiġi ippreservata ai fini tal-ħruġ tal-att tal-akkuża. Issa bin-nota tar-rinviju għal ġudizzju u ċjoe dik illi għandha l-istess rwol ta' l-att ta' akkuża, minn dak il-mument il-funzjoni tal-Qorti hija waħda differenti – mhux iżjed dik kumpilatorja – iżda issa dik deċiżorja.

23. It clearly transpires therefore that the Court of Magistrates cannot proceed to pass judgment against the accused **unless** the formalities specified by this Law are met and the accused has been asked if he has any objection to his case being tried summarily before the Court of Magistrates as a Court of Criminal Judicature and he has been given reasonable time to reply to this question. The Court of Magistrates may only be deemed competent to try and decide the case against the accused if his no objection is duly expressed explicitly by him and duly recorded in the records of the proceedings by the Court. In the absence of this declaration and registration the Court of Magistrates cannot be considered to have acquired jurisdiction over the case. The procedure spelt out in Article 370(3)(d) of the Criminal Code must be followed strictly by the Court of Magistrates.

24. This procedural formality requires to be followed explicitly and not implicitly. The Law does not allow the silence of the person charged as being tantamount to positive consent, or no objection to summary proceedings, in this case. The Law requires his positive

explicit declaration before the Court and its recording in the records of the proceedings.

25. In lieu of this, the alternative option open to the Attorney General in this case is the filing of the bill of indictment before the Criminal Court within the time frames set by Law in Article 432 of the Criminal Code, which term runs from the day that the Attorney General would have received the acts of the proceedings previously remitted by the Court of Magistrates as a Court of Criminal Inquiry.
26. In this regard this Court refers to the **Grech and Briffa** case wherein the procedure laid out in Article 370(3) of the Criminal Code, was explained as follows:

Minn qari ta' din id-disposizzjoni tal-ligi jemergu dawn iz-zewg fatturi determinanti kif spjegat hawn fuq u cioe' illi fl-ewwel lok meta l-Avukat Generali jibghat in-nota ta' rinviju ghal gudizzju tieghu huwa qiegħed jadixxi l-Qorti fil-vesti tagħha tal-Gudikatura Kriminali. Il-Qorti, madanakollu, hekk adita, tista tghaddi ghal gudizzju biss jekk l-imputat jagħti l-kunsens tieghu sabiex hekk isehh. Meta dan il-kunsens ma jingħatax allura il-Qorti ma għandhiex il-kompetenza tisma' u tiddeciedi l-kaz u trid terga' tiffinjija l-atti lill-Avukat Generali bhala Qorti Istrutturja sabiex tinhareg l-att ta'l-akkuza. Fil-fatt is-sub-inciz (b) jipprovdni illi meta l-atti jinbagħtu lura lill-qorti sabiex tiġġudika dak id-delitt, il-qorti għandha tistaqsi lill-akkużat jekk għandux oġġezzjoni illi l-kaz tiegħu jiġi ittrattat bi proċedura sommarja u tagħtih, fid-diskrezzjoni tagħha, żmien xieraq biex iwieġeb għal din il-mistoqsija. **Dan ifisser illi ir-rwol tan-nota ta' rinviju ghal gudizzju jagħti lil Qorti tal-Magistrati is-setgħa li tiddeciedi l-kaz prevja ovvjament l-kunsens tal-imputat.**<sup>3</sup> Izda l-legislatur jimponi obbligi oħra fuq il-Qorti tal-Magistrati qabel ma hi tghaddi biex titlob il-kunsens mill-imputat sabiex titratta u tiddeciedi l-vertenza imressqa quddiemha:

“Qabel ma l-qorti tistaqsi lill-akkużat jekk għandux oġġezzjoni li l-kaz tiegħu jiġi ttrattat bi proċedura sommarja, kif provdut fil-paragrafu (b), il-qorti għandha tisma' dik ix-xhieda oħra li tista' tiġi ndikata mill-Avukat Generali fl-istess nota li biha jibgħat lill-persuna akkużata sabiex tkun iġġudikata mill-qorti fuq imsemmija skont il-paragrafu (a)”

27. As can be seen from fol 589 of the records, on the 30th March 2016, the Attorney General transmitted the records of the proceedings to the Court of Magistrates as a Court of Criminal Inquiry for the accused to be tried by the Court of Magistrates as a Court of Criminal Judicature in terms of Article 370(3)(a) of the Criminal Code, subject to no objection being made in this regard by the accused in accordance with Article 370(3)(b)(c) of the same. The

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<sup>3</sup> Emphasis of the Court.

Attorney General also made an additional requests to the Court of Magistrates in terms of Article 370(3)(f) of the Criminal Code and this insofar as the Attorney General requested the Court to:

- a) To hear Anthony Vassallo to testify about the facts of the case;
- b) Saving defence exemption and further to evidence tendered by Ryan Spagnol, to hear Inspector Mario Haber;
- c) To hear any further evidence produced by the police.

28. That, as appears from the minutes of the sitting dated 1st April 2016 at folio 590 of the acts of the proceedings, after minuting that the Court read the written demand of the Attorney General dated 30th March 2016 as aforementioned, the Court of Magistrates as a Court of Criminal Inquiry proceeded to adjourn the case to the 12th May 2016. On the sitting scheduled for the 12th May 2016 the case was adjourned once more to a further date this being the 9th June 2016 and the accused was notified about this adjournment in Court. On the 9th June 2016, there was a further adjournment to the 19th July 2016 following a request being made by the accused to which the Court acceded. On the 19th July 2016, the Court heard the Prosecution witnesses Caroline Fabri and Inspector Mario Haber and the case was further adjourned to the 17th November 2016 and from there to the 2nd February 2017 and then again to the 9th March 2017.

29. On the 9th March 2017 the Court of Magistrates declared that after having seen the records of the proceedings, it declared the evidence of the Prosecution to be concluded and adjourned this case for the Defence to submit its evidence. It is to be noted that on that day, only the accused appeared for the sitting. She was not assisted by her lawyer. The Prosecuting Officer was not present. No further delarations were made by the Court or the accused during that sitting. Ten months passed by, with several adjournments taking place with not progress being registered.

30. During the sitting of the 25th January 2018 Defence objected to the production of Anthony Vassallo as prosecution witness – despite that the Attorney General had specifically requested his testimony in her accusatory document at fol 589. Defence claimed that the case was put off for the evidence of Defence. However the Court after hearing submissions, decided to allow the production of this witness on account of the fact that Defence had not, at that stage, produced any evidence as yet. Witness Anthony Vassallo

testified on the 8th March 2018. Vassallo was the last witness to be produced by the Prosecution in this case. After his production, the Prosecution did not declare that it was resting its case. Nor is there any reference stating that the Court read out the formal accusatory document to the appellant or that any question was posed to her in terms of article 370(3) of the Criminal Code as requested by the Attorney General in her written demand at fol 589.

31. On the sitting of the 24th May 2018, the accused took the witness stand and testified under oath. No declaration was made prior to her testimony in this case.
32. After this sitting it transpired that there was a change in the sitting Magistrate, the previous Magistrate having been elevated to judgeship.
33. On the 25th October 2018, the sitting presided by the new Magistrate minuted that the parties declared that they were exempting the Court from re-hearing the evidence and the witnesses already produced until that stage. The case was eventually adjourned for final submissions to the 6th December 2018. No further declarations were made by any one of the parties. Eleven months later, with no further progress in sight, the parties were ordered to file a note of written submissions by the 28th November 2019. Eventually, due to Covid-19 restrictions, nothing concrete happened and eventually the Court passed judgment on the 24th September 2020.
34. That, from an examination of the iter as aforesaid, it therefore appears that on the 1st April 2016 the Court of Magistrates as a Court of Criminal Inquiry proceeded to read out the written demand of the Attorney General in terms of Article 370(3)(a)(f) of the Criminal Code.
35. However even there, the Court of Magistrates (Malta) did not correctly follow the procedures set by Law and as mentioned in the written demand of the Attorney General at fol 589. The said note instructed the Court of Magistrates to first proceed with the case against the accused including the hearing of the witnesses in accordance with the request made by the Attorney General in terms of Article 370(3)(f) of the Criminal Code. Then, after hearing all the Prosecution witnesses in accordance with Article 370(3)(f) of the Criminal Code - the last of which transpired to be Antonio Vassallo

– the Prosecution Officer had to declare that they were resting their case, the Court of Magistrates had then to read out the formal accusatory document to the person charged, proceed with posing to her the question as to whether she found any objection for her case to be tried summarily by that Court, grant her a reasonable period of time within which to consider her position, repropose the question and register her answer in the records of the proceedings. If the accused declared that she found no objection for her case to be tried summarily then the Court had to record that reply in the records of the proceedings and thereupon the Court would have become competent to try the accused and competent to pass judgment forthwith in terms of article 377 of the Criminal Code.

36. From the records of the proceedings none of the above was carried out by the Court of Magistrates; and when the written demand was read out to the person charged on the sitting of the 1st April 2016, the Court did so without following the instructions of the Attorney General and the provisions of article 370(3) of the Criminal Code.

37. In this procedural scenario, this Court cannot embrace the argument propounded by the Attorney General that the active participation of the appellant in the proceedings before the Court of Magistrates amounted to **tacit acceptance** to the jurisdiction of the Court of Magistrates as a Court of Criminal Judicature. Article 370(3)(b)(c) of the Criminal Code is clear in requiring the clear explicit no objection coupled with the Court's written recorded reply of the person charged in order for that Court to acquire jurisdiction to try the case and therefore for the proceedings to continue summarily before the Court of Magistrates as a Court of Criminal Judicature.

38. This Court cannot but stress the importance of the provisions of sub-article 370(3)(c) of the Criminal Code wherein the Legislator has unequivocally required the reply of the accused to be **noted in writing** by the Court of Magistrates. The letter of the law is therefore clear in not allowing the reply of the accused to be shadowed by any doubt. If the no objection of the accused were to be deduced by other factors as suggested by the Attorney General, this would lead to uncertainty in criminal proceedings and possibly also, the infringement of the accused's procedural safeguards.

39. Also, it has been repeatedly noted by various Court judgments that the minutes of the proceedings before the presiding judge or magistrate have to scrupulously lay out every detail of what goes on during that sitting; even more so when the law specifically requires the adherence to a procedure to be recorded in writing as is the case with the formalities prescribed in Article 370(b)(c) of the Criminal Code. In this regard the Court makes reference to the case **II-Pulizija vs. Angel Attard** decided on the 29th October 2019 wherein the Court of Criminal Appeal maintained the following:

Din il-Qorti tifhem li għal raġunijiet ta' prattiċita' u sforz tal-kwantita' kbira ta' każijiet li l-Qrati tal-Maġistrati iridu jittrattaw, mhux dejjem ikun possibbli għal dawk il-Qrati li fil-verbali tas-seduti jniżlu kelma b'kelma dak li jkun seħħ fl-Awla. Dan pero, jista' jkollu konsegwenzi serji fuq il-proċeduri kondotti quddiemhom. Għalkemm hemm aspetti tal-proċedura li ma hemmx għalfejn ikunu verbalizzati b'mod dettaljat ħafna, hemm oħrajn pero li jeħtieġu li jkunu magħmula b'reqqa kbira. **Dan b'mod partikolari f'dawk il-każijiet li jkunu jaqgħu fil-kompetenza estiża tal-Qrati tal-Maġistrati, fejn il-pieni jistgħu ilaħqu sa' massimu ta' tnax il-sena prigunerija.**<sup>4</sup>

40. The Attorney General cites the appeal **II-Pulizija vs. Russell Bugeja** of the 29th February 2008, which sentence is mentioned in the judgment **II-Pulizija vs. Francis Vella** decided by the Court of Criminal Appeal on the 7th March 2011, wherein that Court quashed a request to annul the proceedings because of a lack of observance of a formality by the Court of Magistrates as a Court of Criminal Judicature. That Court decided as follows:

Barra minn dan l-istess artikolu mkien ma jgħid li jekk ma ssirx din l-ispjegazzjoni jew jekk din ma tinkitibx, allura hemm xi nullita'. Kif qalet din il-Qorti diversament preseduta fil-każ 'II-Pulizija versus Russell Bugeja' (29 ta' Frar 2008):

'Leċċezzjoni tan-nullita' ta' att fil-kamp tal-proċedura penali hija, bħala regola ġenerali, ammissibbli biss fejn il-Legislatur jikkominaha. Mill-bqija għandha tipprevalu l-massima 'interpretatio fienda est ut res magis valeat quam pereat.'

41. This Court cannot agree with the Attorney General in basing her arguments on the legal considerations made by the Court of Criminal Appeal in **Vella** and **Bugeja** mentioned above. As can be seen from the above extract, it is clear that the Court of Criminal Appeal emphasised that the annullability of a decision depends on the interpretation of the letter of the law. In **Vella**, the appellant

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<sup>4</sup> Emphasis by this Court.

argued against the unenforceability and nullity of the judgment passed against him because the Court of Magistrates after that that court condemned him to a suspended sentence in terms of Article 28A of the Criminal Code and failed to adhere to the provisions of sub-article 4 thereto. The Court of Criminal Appeal rightly concluded that nowhere in the provisions of Article 28A(4) of the Criminal Code was it stated that the Court had to record in writing that the formalities therein were observed. This ruling therefore cannot be taken to be identical or even similar to the legal situation that presented itself in the case against appellant, in that Article 370(3)(c) of the Criminal Code makes it clear that the reply of the accused to the question put forward to him in terms of 370(3)(b) of the Criminal Code had to be recorded **in writing in** the records of the case.

42. The lack of objection of the person charged given in terms of Article 370(3)(b)(c) of the Criminal Code is an obstacle to the continuation of proceedings before the Court of Magistrates as a Court of Criminal Judicature as the Court of Magistrates acquires jurisdiction for article 370(3) cases only when the formalities mentioned by article 370(3)(d) of the Criminal Code are satisfied. If these procedural requirements are not adhered to, then the Court of Magistrates does not acquire jurisdiction over the case. A lack of adherence to this procedure cannot therefore be simplistically considered as a lack of formality; rather it is tantamount to a fundamental procedural defect which directly impacts the validity of the criminal proceedings themselves.

43. In **Il-Pulizija vs. Amad Aluwyad Nabil Mahmoud** decided on the 28th September 2017 this Court, differently presided said:

Fil-fatt is-sub-inciz (b) jipprovdi illi meta l-atti jinbagħtu lura lill-qorti sabiex tiġġudika dak id-delitt, il-qorti għandha tistaqsi lill-akkużat jekk għandux oġġezzjoni illi l-każ tiegħu jiġi ittrattat bi proċedura sommarja u tagħtih, fid-diskrezzjoni tagħha, żmien xieraq biex iwieġeb għal din il-mistoqsija. Dan ifisser illi ir-rwol tan-nota ta' rinviu għal gudizzju jaghti lil Qorti tal-Magistrati is-setgħa li tiddeciedi l-kaz prevja ovvjament l-kunsens tal-imputat. Izda l-legislatur jimponi obbligi oħra fuq il-Qorti tal-Magistrati qabel ma hi tghaddi biex titlob il-kunsens mill-imputat sabiex titratta u tiddeciedi l-vertenza imressqa quddiemha:

“Qabel ma l-qorti tistaqsi lill-akkużat jekk għandux oġġezzjoni li l-każ tiegħu jiġi ttrattat bi proċedura sommarja, kif provdut fil-paragrafu (b), ilqorti għandha tisma' dik ix-xhieda oħra li tista' tiġi ndikata mill-Avukat Generali fl-istess nota li biha jibgħat lill-persuna akkużata sabiex tkun iġġudikata millqorti fuq imsemmija skont il-paragrafu (a)”

...../.....

Illi evidentement il-procedura imfassla fil-ligi, kif hawn fuq spjegat, ma gietx segwieta mill-Ewwel Qorti biex b'hekk allura hija ma kellhiex il-kompetenza tisma' u tiddeciedi il-kawza kif ghamlet u dan fit-termini ta'l-artikolu 428(1) tal-Kodici Kriminali.

44. The lack of adherence to the procedure laid out in Article 370(3) of the Criminal Code is not merely a breach or an omission of any formality but hits at the very heart of the correct administration of justice. It thus follows that it cannot be treated as a breach of formalities in terms of Article 428(3) of the Criminal Code, Chapter 9 of the Laws of Malta.

45. Hence, the lack of observance of the procedures laid out in Article 370(3) of the Criminal Code renders these proceedings partially null, that is only as from the proceedings that took place on and after the 1st April 2016 onwards. This judgment does not affect the proceedings undertaken on and before the 30th March 2016 as at fol 589 of the proceedings.

## **Decide**

For these reasons, the Court is declaring the proceedings undertaken before the Court of Magistrates as from 1st April 2016 onwards, including the judgment delivered by the Court of Magistrates on the 24th September 2020 as null and void and therefore while it revokes the said judgment, it transmits the records of the proceedings back before the Court of Magistrates in order for the proceedings against the appellant Lin HAN to continue from the date of filing of the formal accusatory document by the Attorney General of the 30th March 2016 at fol 589 onwards in accordance with the law and therefore abstains from taking further cognisance of this appeal application.

**Aaron M. Bugeja**  
**Judge**