Criminal Court

The Hon. Justice Dr. Giovanni M. Grixti LL.M., LL.D

Bill of Indictment 10/2018

The Republic of Malta

vs

Omar Bah

Sitting of the 16th May, 2022.

The Court,

Having seen Bill of Indictment number 10/2018 filed against Omar Bah holder of Maltese Identity Card No. 9000203A by which he is charged:

On the **first count** of having on the 13th of December of the year 2014 and in the preceding weeks, rendered himself guilty of conspiring to trafficking in dangerous drugs in breach of the provisions of the

Dangerous Drugs Ordinance or of promoting, constituting, organizing or financing the conspiracy;

On the **second count** with criminal intent, on the 13th December of the year 2014 and in the preceding weeks, rendered himself guilty of having in his possession (otherwise than in the course of transit through Malta or on the territorial waters thereof) the whole or any portion of the plant Cannabis (excluding its medical preparations) in that such possession was not for the exclusive use of the offender.

Having seen the Note of Pleas of Omar Bah filed on the 24 of July 2018 in accordance with article 438(2) of the Criminal Code, Chapter 9 of the Laws of Malta;

Having seen the List of Witnesses submitted by Omar Bah together with the above Note of Pleas;

Having seen the application of the Attorney General of the 31 July 2018 requesting therein that the accused states the proof which he intends to establish by the first four witnesses indicated in the list of witnesses filed by him namely Omar Sanyng, Ibrahim Tunkara, Lean Mifsud and "A person known to the accused only by the nickname of 'Kontriman' ";

Having seen that by decree of the 10 August, 2018, ordered that the above mentioned application be served on the accused;

Having heard oral submissions made by learned counsel to the accused and learned counsel from the Attorney General's office on the preliminary pleas;

Having seen the records of the proceeding of the 5 of October 2021 wherein the Court ordered that the accused be notified with the application of the Attorney General regarding the proof intended by the accused of his first four witnesses;

Having considered:

The First Plea – inadmissability of any verbal or written declaration:

1. In this first plea, accused alleges the "*inadmissability of any verbal and/or written declaration or statement made by the accused to the police since these, if made, were made in the absence of a legal counsel of the accused's choice*". Having examined the records of the proceedings, this Court refers to the written statement released by the accused as part of the evidence adduced by the prosecution which is marked as Document PG4 at folio 8 to 13 of the said records. This exhibit is a statement of the accused released by him on the 14 of December 2014 at **07:50 hrs**. Immediately preceding the said statement and any declaration by the accused, Omar Bah signed a confirmation that he was duly cautioned as follows:

> *Caution given by Police Inspector Malcolm Bondin in the presence of PC 1348 Joseph Campbell;*
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> *"You do not have to say anything unless you wish to do so, but what you say may be given in evidence. However, should you refuse to say anything or omit to state some fact, a rule of inference amounting to corroborative evidence may be drawn by the court or any adjudicator if during the trial you will put forward any defence based on a fact which you did not state during interrogation*".

At the end of the interrogation, accused set his signature on the following final declaration:

> *I declare that I gave this statement voluntarily, without any promises, threats or intimidation and after having read this statement by Insp. Malcolm Bondin. I declare that it is the true content of my statement and I do not wish to add or remove anything from it and I am also choosing to sign it.*

2. When tendering his evidence before the Court of Criminal Inquiry, Inspector Malcolm Bondin explained that upon his arrest accused "*was given his rights on site and also later on when he was brought to my office where I gave him once again the letter of rights so that he can read it in English as well to talk to his lawyer for legal advice where he took the legal advice and spoke to Dr. Noel Bartolo. From then on, on the following day on the fourteenth (14) December he released a written statement in my presence…*".

3. PC 1348 Joseph Campell also gave evidence with regard to this written statement as follows (ref. fol 336):

> *"….I remember that this is the statement of Mr.Omar Bah for which I was present. Mr. Omar Bah released the statement in front of Inspector Malcolm Bondin after being given the right to remain in silence and to consult a lawyer before taking the statement…*"

4. The considerations to be made by this Court with regard to this plea are therefore twofold namely to decide on whether the declaration signed by the accused was made in accordance with the

execution of the duty of the police to inform the suspect of the right to be assisted by a lawyer of choice and that if he is not in a position to engage a lawyer, a legal aid lawyer will be appointed to afford such legal assistance. The second consideration will focus on whether the declaration under oath of both the investigating Inspector and the Police Constable, witness to signatures (as will be seen further into these considerations), amount to sufficient proof that accused was given his right to be assisted by a lawyer when no such declaration was attested and signed for on the accused's statement;

5. That according to the written statement of the accused exhibited as Document PG4 (folio 8 to 13) the interrogation took place on the 14 December, 2014 at 07:50 hrs. The said statement is not preceded by a declaration by the accused, then still a suspect, to be assisted by a lawyer as required under the law in force at the time. The *quid iuris* at the time when the interrogation took place was regulated by article 355AT of the Criminal Code which provided as follows:

> **355AT. (1) Subject to the provisions of sub-article (3), a person arrested and held in police custody at a police station or authorised place of detention shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour. As early as practical before being questioned the person in custody shall be informed by the Police of his rights under this sub-article.**
>
> **(2) A request made under sub-article (1) shall be recorded in the custody record together with the time that it was made**

unless the request is made at a time when a person who makes it is at court after being charged with an offence in which case the request needs not be so recorded.

6. Article 355 AU then provided that failure to mention any fact after having received legal advise before being questioned is subject to the right of inference, that is a Court of Magistrates or the Court or jury "*may draw such inferences from failure as appear 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*".

7. The above position remained unchanged until 2016 when the right for legal assistance was no longer limited to a face-to-face meeting or telephone call for a maximum one hour and the right of inference was not only removed but amended in such manner than no such inference can be drawn from withholding of any fact. The suspect would since then have the right to consult a lawyer in private and to have a lawyer present and participate effectively during the interrogation;

8. This Court had the occasion to outline the developments or rather the evolution of the right for legal assistance under our Criminal Code in the case **The Republic of Malta vs Lamin Samuna Seguba** decided on the 11 June 2020 which judgement also dealt with the statement of accused given in similar circumstances in 2014. The relevant part of this judgment is being reproduced hereunder:

6. This matter has been the subject of numerous decisions by the Courts of these Islands in their various competences including the Constitutional Court and the European Court of Human Rights in Strasbourg. It is the subject of evolution from a judicial perspective which ranges from a long standing situation prior to 2002 where the only rights afforded to a suspect were the right to remain silent and that anything stated may be brought as evidence against such accused to the present legal right to be assisted by a lawyer from the moment of arrest through the interrogation process during the pre-trial stages. The lawyer's presence, however, is subject to the non intervention of same during the interrogation but that will not form the subject of today's debate as it is irrelevant to the resolution of the plea under examination;

7. The right of access to legal assistance is presently regulated by article 355AUA of the Criminal Code, Chapter 9 of the laws of Malta promulgated by means of Act LI of 2016 with the object of transposing Directive 2013/48/EU of the European Parliament and of the Council dated 22 October 2013. Act LI substituted the former provisions regulating the right to legal assistance prevailing at the time, namely article 355 AT introduced by means of Act III of 2002 and brought into full effect not before 2010 by means of Legal Notice 35 of that year with the established date of coming into force as the 10 of February 2010. This provision read as follows:

> ***355AT (1) Subject to the provisions of subarticle (3), a person arrested and held in police custody at a police station or other authorised place of detention shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour. As early as practicable before being questioned the person in custody shall be informed by the Police of his rights under this subarticle.***

8. Attached to this right, however, was the condition pertaining in then article 355 AU where, having made use of the right to seek legal advise as aforesaid, the Court of Magistrates or the jury may draw inferences where the accused failed to mention any facts relied on in defence during the proceedings. It must be stated that this indeed created an anomolous situation in that the only person who could explain the right of inference to the accused was the police inspector himself and there was no guarantee that the suspect would have understood all his rights and the legal consequences emanating from the choice at that particular moment. Indeed, for the suspect to have consulted a lawyer or legal procurator on the meaning of the right of inference would tantamount to have been given the maximum one hour right of legal assistance the consequence of which brings into play the right of inference. All that, however, changed with the coming into force of Act LI of 2016 as stated above;

9. In his submissions, accused made reference to a judgement of the Constitutional Court ***Christopher Bartolo vs Avukat Generali u l-Kummisarju tal-Pulizija*** *of the 5 October, 2018 and to that of the Court of Criminal Appeal* ***Il-Pulizija vs Claire Farrugia*** *of the 20 November 2018. The Attorney General, and as stated in his note of the 14 June 2019 is relying on the judgement of European Court of Human Rights in the case* ***Farrugia v. Malta*** *of the 4 June 2019;*

10. This Court is of the opinion that legal certainity of one's rights is a fundamental prerequisite and for this reason makes reference to a judgement of the Court of Criminal Appeal of the 3 April, 2019 ***Ir-Repubblika vs. Rio Micallef et*** *the merits of which are very similar to the case at hand. This judgement confirmed a decision of the Criminal Court which had upheld a request of the accused to expunge their statements*

and any declarations that they had made from the acts of the proceedings prior to the coming into force of Act LI of 2016. By way of background to this case, and because it presents a particular interest, the Criminal Court had initially, and prior to 2016, turned down the same request by the accused made in their prelimiary pleas. Following a decision of the European Court of Human Rights in the case ***Borg v. Malta*** *(Grand Chamber 2 January 2016), the accused made an application for a reconsideration of the Court's previous decision. This in itself created an exception to the rule on preliminary pleas subjected to a specific time frame from receipt of the Bill of Indictment but was accepted by the Criminal Court which found in favour of the accuseds' application and declared as inadmissable all written and verbal declarations made by them in the pre-trial stages of the proceedings;*

11. The Court also makes reference to principles emanating from a judgement of the Constitutional Court ***Il-Pulizija vs Aldo Pistella*** *of the 14 December 2018 (Rik 104/2016/1). Those judgements, however, are part of the legal evolution on the subject matter at hand which is presently led by the Farrugia v. Malta case cited above which seems to reverse the quid juris back to the time of the judgement of the Consititutional Court in the names Charles Steven Muscat vs. Avukat Generali of the 8 October 2012 of which the European Court of Human Rights was highly critical as being based on a very restrictive interpretation of its judgement in the case of Salduz v. Turkey;*

12. The Farrugia v. Malta case essentially states that not all statements given by suspects in the pre-trial proceedings in the absence of legal assistance should be expunged from the records. The court needs to follow a number of criteria before deciding on such a request among which whether the accused was a vulnerable person, the age of the

accused and whether that statement was the only evidence adduced. This Court now finds itself in a situation where it could have acceded to a request or a plea such as the present and must now decide in an opposite manner the next day even where there results "a systematic breach of pre-trial proceedings". Legal uncertainty for an accused may potentially be conducive to a breach of a fair hearing. It is the opinion of this Court that there needs to be a strong degree of certainty in such circumstances and not to hold a trial within a trial to examine whether a statement, for instance, is the only evidence produced by the prosecution;

13. Indeed the rules as provided in Directive 13/48 cited above should be the yardstick to which all pre-trial proceedings should be subjected without making any difference with regard to the vulnerability or otherwise of the suspects, their age and other criteria. In the case at hand, the accused was offered legal assistance consisting of a maximum one hour colloquial with a lawyer or legal procurator and subject to the right of inference if he does take up such offer. This Court is not aware of what made the accused decide to not take up that offer. Perhaps he decided that it would have been useless to talk to a lawyer for one hour over the phone or face to face and not having the lawyer by his side during the interrogation proper and this is precisely another reason why certainty of rules and rights is of utmost importance;

14. The Court therefore upholds the first plea raised by the accused and orders that the statement of the accused given on the 7 of December 2014 and exhibited as Doc PG3 at folio 17 et seq of the records be expunged and that no reference can be made by any witness of the prosecution to any verbal or written declaration made by the accused from the moment of his arrest;

9. This judgment was however reversed by the Court of Criminal Appeal on the 27 January 2021 but the debate on the right of access to legal assistance did not stop there and has remained the subject of further decisions by our Courts taking into consideration both the ECHR judgments **Farrugia vs Malta** of the 4 June 2019 and **Philippe Beuze v. Belgium** of the 9 November, 2018 (Grand Chamber 71409/10). This notwithstanding, the First Hall Civil Court in its Constitutional Jurisdiction in the case **Ir-Repubblika ta' Malta vs Rosario Militello** of the 18 November, 2021 per Hon. Justice Dr. Robert G. Mangion (Rik Kost 404/2021 RGM) following a reference by the Criminal Court, decided that use of the statement released by the accused could lead to a breach of his fundamental human rights and therefore ordered that no use thereof be made in his trial. This case also concerned the release of a statement taken in 2014 in circumstance similar to the case at hand including the caution given by the investigating inspector as reproduced above;

10. Although the latter judgement is under review by the Constitutional Court following an appeal by the Attorney General, further developments have taken place on this issue with the latest judgments both of the Constitutional Court and the Court of Criminal Appeal ordering that no use of statements be made thereof in the respective trials where such statements were made in the absence of legal assistance during the interrogation. Reference is made to the judgement in the case **Christopher Bartolo vs l-Avukat ta'l-Istat** (Constitutional Court 26 April, 2022) and to that decided by the Court

of Criminal Appeal **Ir-Repubblika ta' Malta vs Andrew Mangion** on the 4 of May, 2022. In the latter case the Court dismissed the appeal of the Attorney General requesting a reversal of the judgement of the the Criminal Court which declared as inadmissable the statement of the accused and ordered that it be expunged from the records. The statement merits of that case was made in 2016 after the suspect having spoken to his lawyer of choice prior, however, to the interrogation **but** not during the interrogation *per se* in that the law at that time did not allow for a lawyer to be present and participate in the interrogation;

11. Now in the case under consideration, the accused is said to have been given the right to speak to a lawyer prior the interrogation which right, however, was limited to a one hour face-to-face encounter or over the phone as detailed above. This is evidenced by the answer of the accused on the said statement when asked :"Am I right to say that while under this arrest, before being interrogated you consulted with your lawyer Dr. Noel Bartolo LL.D. legal aid?" where the accused replied "Yes". During the evidence tendered by the investigating inspector and the police constable who was a witness thereof, Inspector Malcolm Bondin declared the following under oath (folio 57 of the records): "*Omar Bah was given his rights on site and also later on when he was brought to my office where I gave him once again the letter of rights so that he can read it in English as well to talk to his lawyer for legal advice where he took the legal advice and spoke to Dr. Noel Bartolo".* This is followed by a confirmation by PC 1348 as already noted above where the latter confirmed the accused

was in his presence given his right to speak to a lawyer before being interrogated;

12. In the judgement **Andrew Mangion** cited above, the accused in that case had released a statement to the Police after being given the right to consult a lawyer which lawyer was, however, not present during the interrogation and the compilation of his statement as, similar to the present case, the law did not allow such presence. The Court of Criminal Appeal, in its judgement stated *inter alia*:

> "*Dan maghdud, madanakollu, l-Qorti tistqarr illi hija konsapevoli tal-pronunzjamenti recenti li gew moghtija mill-Qorti Kostituzzjonali fejn inghatat direzzjoni lil Qorti Kriminali sabiex ma tqisx bhala prova stqarrijiet li jkunu gew rilaxxjati minghajr id-dritt tal-assistenza legali waqt l-interrogatorju billi jinsorgi l-periklu li jkun hemm difett procedurali jekk jinstab illi dawn jitteldu id-dritt tal-persuna akkuzata ghal-smigh xieraq (Clive Dimech vs Avukat Generali, the Pllice vs Alexander Hickey, Morgan Onuorah vs l-Avukat ta'l-istat). Illi l-Qorti Kostituzzjonali stess fil-pronunzjamenti kollha minnha maghmula stqarret car u tond illi kien prematur f'dan l-istadu tal-proceduri tiddikjara illi kienet sehhet xi lezjoni, billi l-process gudizzjarju fl-intier tieghu kien ghad ma kiex konkluz, izda jidher illi bhalarimedju prekawzjonarju minhabba f'lezjoni potenzjali, dik il-Qorti qieghda ripetutament taghti direzzjoni lilll-Qorti Kriminali sabiex tisfilza il-prova ta'l-istqarrija*";

13. The circumstances of the case at hand are no different than those pertaining in the case just cited by this Court and there is no impending reason or circumstance which would warrant a different decision or outcome and that having made the above considerations accused's first plea will be upheld and consequently orders that no use thereof be made of the statement of the accused in folio 8 to 13 of the records nor to any other verbal declaration he may have made and that no witness shall make any mention of such statement or content thereof;

The second plea – nullity of the Second Count of the Bill of Indictment as there are no facts which could justify the said count:

14. The second preliminary plea reads as follows:

"*The nullity of the Second Count of the Bill of Indictment since from the facts recounted in the same Count and/or in the evidence adduced in the Records of the Inquiry and the Compilation of Evidence against the accused there are no facts which can in any way justify the accusation in the said Second Count of the Bill of Indictment and this on the basis that an accusation in a Count of the Bill of Indictment must be based on facts, whether true or not, recounted in the same Count*";

15. The accused therefore alleges the nullity of the bill of indictment in that the records contain no facts which could give rise to a charge as proferred in the second count and that therefore the said count should be declared null and void. Now, the requisites for a valid bill of indictment are contained in article 589 of the Criminal Code as follows:

> 589. The indictment shall be made in the name of the Republic of Malta and shall –
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> (a) specify the court before which it is preferred;
> (b) contain a clear indication of the person accused;
> (c) state the facts constituting the offence with such particulars as can be given relating to the time and place in which the facts took place and to the person against whom the offence was committed, together with all such circumstances as, according to law and in the opinion of the Attorney General, may increase or diminish the punishment for the offence; and
> (d) end with a summary in which the accused shall be charged with the offence as specified or described by the law, and with the demand that the accused be proceeded against according to law, and that he be sentenced to the punishment prescribed by law (quoting the article of the law creating the offence) or to any other punishment applicable according to law to the declaration of guilty of the accused.

16. Any considerations made by this court with regard to the validity of the bill of indictment should therefore refer to the requisites as detailed in article 589 of the Criminal Code reproduced above. Furthermore, caselaw has established that as long as the facts of the case and the charge itself emanate from the compilation of evidence namely from the records of the proceedings before the Court of Magistrates as a Court of Criminal Inquiry, a plea of nullity of the

bill would not be successful. Furthermore, it is established caselaw which this Court also embraces, that the narrative part of the bill of indictment made in accordance with subarticle (c) of article 589 does not represent the charge but the facts according to the prosecution and that it is incumbent on the trial judge to direct the jury that such narrative is only a narrative and not to be taken as proven and that it is still up to the prosecution to prove those allegations;

17. A thorough examination of records show that the second count is based on evidence adduced by the prosecution as a result of a controlled delivery of an alleged illegal substance where the said prosecution further alleges that the delivery was made and therefore possession was received of the said alleged substance by the accused. The control that this Court may exercise in this regard is to ensure that whatever is contained in the narrative part of the second count and the charge in furtherance thereof are not alien to the evidence compiled in the compilatory stage of the proceedings. It is then up to the jury to decide whether the prosecution has successfully and beyond reasonable doubt proved the allegations contained in the second count;

18. Now therefore, and consequent to the fact that the second count is not inconsistent with the records of the case, albeit that the allegations brought forward are subject to the verdict of the jury, the second plea is being dismissed;

Application of the Attorney General regarding the list of witnesses presented by the accused:

19. Considered that by application of the 31 July 2018, the Attorney General requested the accused to state the proof intended to be established by some of the witnesses indicated by him in the note together with his preliminary pleas. In his note as aforesaid, accused indicated *inter alia* the following persons to give evidence in his defence, namely, Omar Sanyang, Ibrahim Tunkar, Lean Mifsud and a person known to the accused only by the nickname of "Kontriman";

20. That the Court ordered that the Attorney General's application be served on the accused and this by decree of the 10 August 2018. That accused has to date not indicated the purpose which he intends in summoning the witnesses as indicated by him and this in terms of the proviso of article 438(4) of the Criminal Code. Moreover, the indication of a witness by a nickname without any further indication which would allow the prosecution to bring forward any pleas with regard to their admissability leaves this Court with no option but to consider inadmissable the above named witness. For the avoidance of doubt, this part of the judgement does not affect the fifth element indicated by the accused in his note, namely, "All the witnesses indicated in the List of Witnesses of the Attorney General for cross-examination and/or examination as the case may be";

21. For the above consideration, accused's **first plea** is herewith upheld and consequently orders that no use thereof be made of the statement of the accused in folio 8 to 13 of the records nor to any other

verbal declaration he may have made and that no witness shall make any mention of such statement or content thereof; accused's **second plea** is hereby dismissed; and accused's request to bring forward as witnesses Omar Sanyang, Ibrahim Tunkara, Lean Mifsud and a personv nicknamed "Kontriman" is also dismissed.