FIL-QORTI TAL-MAGISTRATI (MALTA)

BHALA QORTI TA' GUDIKATURA KRIMINALI

MAGISTRAT DR. ELAINE MERCIECA LL.D.

Illum it-12 ta' April 2022

Kaz Nru: 112/2015

IL-PULIZIJA

(Spettur Malcolm Bondin)

Vs

JOSEPH MUSCAT

(ID: 132387(M))

Il-Qorti,

Rat l-akkuzi migjuba kontra **Joseph Muscat** ta' sebgha u ghoxrin (27) sena bin Anthony u Josephine nee' Calleja imwieled l-Pieta nhar it-8 ta' Marzu 1987, resident gewwa 17, 3rd October Court, Blk A, Flat 4, Triq San Frangisk, Balzan u detentur tal-karta tal-identita' bin-numru 32387M, akkuzat talli f'dawn il-gzejjer fit-30 ta' Lulju 2014 u fix-xhur ta' qabel din id-data:

1. Kellu fil-pussess tieghu il-pjanta Cannabis kollha jew bicca minnha bi ksur ta' l-artikolu 8(d) tal-Kap. 101 tal-Ligijiet ta' Malta;
2. Sar recediv b'sentenza mghotija mill-Qorti ta' Malta preseduta mill-Magistrat Dr. E. Grima LL.D. nhar il-11 ta' Gunju 2012, liema sentenza saret definittiva u ma tistax tigi mibdula; u
3. Talli kkommetta reat punibbli bi prigunerija waqt perjodu perattiv ta' sentenza sospiza ta' prigunerija, liema sentenza inghatat mill-Magistrat Dr. F. Depasquale nhar id-9 ta' April 2013, liema sentenza saret definittiva u ma tistax tigi mibdula.

Il-Qorti giet mitluba sabiex barra milli tapplika il-piena stabbilita mil-ligi, tordna lill-akkuzat sabiex ihallas l-ispejjez li ghandhom x'jaqsmu mal-hatra tal-esperti skond l-artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta.

Rat l-Ordni tal-Avukat Ġenerali ai termini tas-sub-artikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Mediċini Perikolużi (Kap. 101 tal-Liġijiet ta' Malta)[1] sabiex din il-kawża tinstema' minn din il-Qorti bħala Qorti ta' Ġudikatura Kriminali,

Rat id-Digriet tal-Assenjazzjonijiet ta' Kawzi u Doveri datat it-28 ta' Lulju 2021[2];

Rat l-ezenzjoni tal-partijiet mis-smigh mill-gdid tal-provi prodotti minn dina l-Qorti diversament preseduta;

Semghet u rat ix-xhieda;

Rat l-atti kollha tal-każ u d-dokumenti kollha ezebiti;

Semghet is-sottomissjonijiet tal-partijiet;

Ikkunsidrat:

Illi ghalkemm il-proceduri odjerni jafu l-bidu taghhom ghall-seba' snin ilu u cioe' f'April tas-sena 2015, fihom xehdu biss l-ufficjal prosekutur l-ispettur Malcolm Bondin u PC626 Giancarlo Bennetti. Mix-xhieda ta' Bennetti jirrizulta li fit-30 ta' Lulju 2014 waqt li huwa kien qed jaghmel ronda flimkien ma PC199 minn Naxxar Road direzzjoni lejn B'Kara giet osservata vettura bin-numru ta' registrazzjoni JBD 471 li kellha d-dawl ta' wara maqtugh. B'hekk din il-vettura giet imwaqqfa mill-pulizija. F'din il-vettura kien hemm zewgt persuni ta' sess maskili wiehed minnhom il-*qua* imputat, Joseph Muscat li kien qed isuq l-imsemmija vettura. Minn verifiki li ghamlet il-pulizija fuq il-post irrizulta li dina l-vettura kellha l-insurance u l-licenzja skaduti sa minn Ottubru tas-sena 2013. Il-pulizija osservaw ukoll lix-xufier tal-imsemmija vettura u cioe' l-qua imputat Joseph Muscat agitat u ghaldaqstant saret tfittxija fuq il-persuna tieghu. Minn din it-tfittxija irrizulta li fil-but tal-qalziet kellu crusher. Minn tfittxija fil-vettura, l-pulizija sabet crusher iehor u joint li kien mal-art fil-vettura stess. Wara li nghata d-drittijiet legali il-qua imputat ha r-responsabilita' tal-oggetti kollha misjub fil-vettura misjuqa minnu. Ta min jghid li tfittxija fuq il-passigier li kien fil-vettura ma' Muscat irrizultat fin-negattiv. Il-qua imputat gie arrestat ghall-izjed investigazzjonijiet. L-ispettur Bondin fix-xhieda tieghu jikkonferma li hekk kif gie infurmat bil-fatti hawn fuq imsemmija, huwa kien proceda bl-interrogazzjoni tal-qua imputat wara li kien nghata u rrifjuta d-dritt ghall-assistenza legali[3]. Fl-istqarrija rrillaxata minnu fit-30 ta' Lulju 2014 l-imputat kien ammetta li l-oggetti

[1] Ara fol. 6 tal-atti processwali;
[2] Ara fol. 50 tal-atti processwali.
[3] Ara d-dikjarazzjoni f'dan is-sens a fol. 20 tal-atti processwali. Dok. MB1.

elevati kien tieghu u li huwa kellu l-vizzju tas-sustanza Cannabis u li kien ilu jpejjep joint (0.2 grm) filghodu u joint filghaxija ghall-perjodu ta' sena qabel.

Illi fir-rigward tas-sustanza elevata mill-vettura dakinhar tat-tfittxija tal-pulizija fit-30 ta' Lulju 2014, fl-udjenza tal-14 ta' Jannar 2019 il-partijiet iddikjaraw li "*qed jaqblu li s-sustanza esebieta bhala Dok. MB2 fis-seduta tat-8 ta' April 2016 kienet tikkonsisti fi tracci tal-pjanta tal-Cannabis u li ghalhekk m'hemmx il-htiega li jinhatar espert sabiex janalizza din is-sustanza*".

Illi preliminarjament dina l-Qorti ser tanalizza l-piz probatorju li ghandha tinghata l-istqarrija rrillaxata mill-*qua* imputat fit-30 ta' Lulju 2014. Din l-istqarrija ittiehdet skond il-ligi vigenti dak iz-zmien ghaldaqstant prima facie jidher li dina l-istqarrija bhala prova hija wahda ammissibli f'dawn il-proceduri penali. Fil-fatt mill-istqarrija jidher li l-imputat gie mwissi fil-prezenza ta' PC1013 Raymond Debono li *"M'intix obbligat li titkellem sakemm ma tkunx tixtieq li titkellem, imma dak li tghid jista' jingieb bi prova"*[4] u l-imputat irrifjuta dan id-dritt. Fil-fatt il-qua imputat iffirma ukoll dikjarazzjoni fejn ikkonferma li gie nfurmat li qabel ma tittiehed l-istqarrija "*jien ghandi il-jedd u d-dritt, jekk hekk nitlob, li qabel ma ssirli xi interrogazzjoni nithalla kemm jista' jkun malajr nikkonsulta privatament ma' avukat jew prokuratur legali, wicc imb wicc jew bit-telefon"* u li huwa rrinunzja li jezercita dan id-dritt[5]. Il-volontarjeta' tal-istqarrija u tad-dikjarazzjoni hawn fuq imsemmija ma giet qatt ikkontestata madanakollu x-xhieda tal-istess ma gew qatt prodotti sabiex jixdhu f'dan ir-rigward.

Madanakollu tibqa l-kwistjoni li l-qua imputat ma giex offrut id-dritt ghall-assistenza legali <u>waqt</u> l-istqarrija u jekk dan jistghax iwassal sabiex jigi lez id-dritt tas-smigh xieraq tal-imputat.

Mill-atti processwali ma jirrizultax li kien hemm ragunijiet (*compelling reasons*) li jzommu lill-imputat milli jkun assistiet permezz ta' avukat jew prokuratur legali waqt l-interogazzjoni. Fil-fatt mill-istqarrija u d-dikjarazzjoni pprezentata jirrizulta li l-qua imputat gie offrut id-dritt ghall-assistenza legali <u>qabel</u> (mhux waqt) l-interrogazzjoni u dana dejjem skond ma kienet il-ligi vigenti dak iz-zmien. Isegwi ghalhekk li probabilment l-unika raguni l-ghaliex l-imputat ma kienx mghejjun minn avukat waqt l-interrogazzjoni kienet l-ghaliex il-ligi vigenti dak iz-zmien ma kinitx tippermettieha. Dak iz-zmien li fiha ttiehdet l-istqarrija odjerna (Lulju 2014) il-ligi kienet tippermetti biss li l-imputat jkun jista' jikkonsulta ma avukat qabel ma tittiehed l-istqarrija sa massimu ta' siegha. Id-dritt tal-assistenza legali waqt l-istqarrija gie ntrodott fil-Kodici Kriminali permezz ta' l-Att LI fit-28 ta' Novembru 2016.

[4] Fol. 18 tal-atti processwali, Dok. MB
[5] Fo. 20 tal-atti processwali Dok. MB1.

Illi l-guriprudenza lokali ricenti fir-rigward tal-assistenza legali waqt l-interrogatorju jidher li qed tistrieh fuq l-insenjament mghoti fil-kaz **Beuze v il-Belgju** (App. Numru 71409/10) tad-9 ta' Novembru 2018, li kien jitratta ukoll sitwazzjoni fejn il-ligi domestika relevanti ma kinitx tippermetti l-assistenza legali waqt l-interrogazzjoni u fejn ma kienx hemm ragunijiet impellenti ghalfejn ma tigiex offruta l-assistenza tal-avukat. F'dan il-pronunzjament intqal:

> *"120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see Ibrahim and Others, ... § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings ... ... "*
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> *121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. ... ... "*
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> *... ... ... "139. The stages of the analysis as set out in the Salduz judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case- specific decisions taken by the competent authorities.*
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> *"140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention ... ... Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form ... and sometimes in greater detail ...*
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> *"141. Being confronted with a certain divergence in the approach to be followed, in Ibrahim and Others the Court consolidated the principle established by the Salduz judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them (see Ibrahim and Others, ... §§ 257 and 258-62).*
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> *"144. In Ibrahim and Others the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see Ibrahim and Others, ... § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer ... to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the Ibrahim and Others judgment, followed by the Simeonovi judgment, the Court rejected the argument of the applicants in those cases that Salduz had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the Dayanan case and other judgments against Turkey.*

"145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer[6] *(see Ibrahim and Others, ... § 265).....*

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] Emfazi ta' dina l-Qorti

Fil-kaz in dezamina jirrizulta li l-qua imputat irrifjuta l-assistenza legali qabel it-tehid tal-istqarrija u ma kienx offrut id-dritt ghall-assistenza legali waqt l-istqarrija. Fl-istess stqarrija il-qua imputat kjarament inkrimina lilu nnifsu tant li l-imsemmija stqarrija hija l-prova principali fir-rigward tal-ewwel imputazzjoni dedotti fil-konfront tieghu.

Ghaldaqstant dina l-Qorti, wara li hadet konjizzjoni tal-provi migbura u l-gurisprudenza relatata mal-valur probatorju li hija ghandha taghti l-istqarrija mehuda f'cirkostanzi simili ghal dawk tal-kaz odjern, partikolarment il-fatturi stabbiliti sabiex isir l-analizi tal-*overall fairness* tal-proceduri, ma thossx li jkun opportun li tistrieh fuq l-istqarrija sabiex tistabillixi r-reita o meno tal-imputat ghall-imputazzjonijiet odjerni. Dana fic-cirkostanzi imsemmija fil-paragrafu precedenti kif ukoll fid-dawl tan-natura u c-cirkostanzi tar-reati (hekk kif ser jinghad aktar 'il quddiem f'din is-sentenza). Il-Qorti qieset ukoll l-interess pubbiku fl-isfond tal-emendi introdotti permezz tal-Att LXVI ta-sena 2021.

Isegwi ghalhekk li ghar-ragunijiet suesposti u fid-dawl tal-principju tal-*overall fairness,* dina l-Qorti ma hijiex ser tikkunsidra l-istqarrija rrillaxxata mill-imputat meta tigi sabiex tikkunsidra ir-reita' tieghu o meno ghall-imputazjonijiet dedotti fil-konfront tieghu.

Illi stabbilit dan, il-Qorti ser tghaddi sabiex tevalwa l-bqija tal-provi mressqa mill-prosekuzzjoni bil-ghan li tistabilixxi r-responsabilita' tal-imputat fir-rigward tal-imputazzjonijiet dedotti fil-konfront tieghu.

Fir-rigward tal-ewwel imputazzjoni jirrizulta mill-provi prodotti li l-qua imputat instab fil-pussess ta' *joint* u *crushers* bi tracci ta' sustanza. Il-partijiet skond il-verbal tal-udjenza tal-14 ta' Jannar 2019 jaqblu li din is-sustanza hija pjanta Cannabis. L-ammont ta' din is-sustanza misjub u elevat definittivament ma jaqbizx l-ammont ta' 7 grammi[7] u skond l-imputazzjoni kif ippostulata mill-prosekuzzjoni u mill-provi prodotti jirrizulta li dan l-ammont kien wiehed intenzjonat ghall-uzu personali tieghu. Fi-dawl ta' dawn ir-rizultanzi, jirrizulta li l-ewwel imputazzjoni dedotta fil-konfront tal-qua imputat giet milquta bl-emendi introdotti f'Dicembru tas-sena 2021 senjatament permezz tal-Att LXVI tas-sena 2021. Bis-sahha ta' dawn l-emendi l-artikolu 4A tal-Kap. 537 jistipula:

> *(1) Minkejja d-dispożizzjonijiet ta' kull liġi oħra, il-pussess minn persuna ta' 'l fuq minn tmintax (18)-il sena tad-droga kannabis f'ammont ta' mhux iktar minn seba' grammi, f'ċirkostanzi li jwasslu li wieħed raġonevolment jemmen li tali pussess huwa għall-użu personali ta' tali persuna,* ***ma għandux jikkostitwixxi reat****, u l-persuna ma għandhiex tinżamm f'kustodja taħt arrest minbarra*

[7] Instab joint wiehed li normalment ikollu piz ta' madwar 0.2grms u xi tracci zghar ohra.

fejnhemm suspett raġonevoli ta' traffikar jew tmexxija ta' droga kannabis

Illi allura ghalkemm l-att vjolatur kien jikkostitwixxi reat meta sehh, dan madanakollu ma ghadux jigi hekk ikkunsidrat illum il-gurnata.

Illi l-artikolu 12 tal-Kap. 249 tal-Ligijiet ta' Malta jistipula:

(1) Meta xi Att mgħoddi wara l-bidu fis-seħħ ta' dan l-Atti ħassar xi liġi oħra, kemm-il darba ma jidhirx ħsieb kuntrarju, t-tħassir m'għandux –

(a) jerġa' jġib fis-seħħ xi ħaġa li ma tkunx fis-seħħ jew lima tkunx teżisti fiż-żmien li fih iseħħ it-tħassir;

(b) jolqot it-tħaddim ta' xi liġi qabel ma kienet hekk imħassra jew xi ħaġa magħmula jew li tħalliet issir taħt xi liġi hekk imħassra;

(ċ) jolqot xi dritt, privileġġ jew responsabbiltà miksuba jew meħuda taħt xi leġislazzjoni hekk imħassra jew liġejja minn xi leġislazzjoni bħal dik;

(d) jolqot xi penali, konfiska jew piena li wieħed seta' jeħel dwar xi reat li jkun sar kontra xi liġi hekk imħassra, jew xi responsabbiltà għal xi penali, konfiska jew piena bħal dawk;

(e) jolqot kull stħarriġ, proċedimenti legali, jew rimedju dwar xi dritt, privileġġ, obbligazzjoni, responsabbiltà, penali, konfiska, jew piena kif intqal qabel,

u kull stħarriġ, proċedimenti legali, jew rimedju bħal dawk jistgħujinbdew, jitkomplew, jew jiġu nforzati, u kull penali, konfiska jewpiena bħal dawk jistgħu jiġu mposti, bħallikieku l-Att li jħassar majkunx għadda.

Madanakollu ssir referenza ghas-sentenza mghotija mill-Qorti tal-Appell Kriminali fl-ismijiet il-***Pulizija vs. Juanita Fenech*** nhar is-27 ta' Frar 2019 fejn gie ddikjarat:

"Illi in linja mad-decizjonijiet moghtija mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem ibbazati fuq l-artikolu 7 tal-Kovenzjoni Ewropeja dwar il-Drittijiet tal-Bniedem, il-Qorti hija tal-fehma illi illum ebda piena ma ghandha tigi imposta fuq l-appellanti u l-Qorti bilfors trid tastjeni milli tiehu konjizzjoni ta' dina l-akkuza:

> *"The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties .... The Court .... affirms that Article 7 § 1 of the Convention guarantees not only the principle of non-*

retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."

Din il-posizzjoni ġiet riaffermata permezz tas-sentenza tal-Qorti Ewropeja fl-ismijiet Öcalan v. Turkey deciza fit-18 ta' Marzu, 2014.

Illi l-Professur Sir Anthony Mamo jidher li kien tal-fehma ukoll li f'sitwazzjonijiet bħal dawn il-proċeduri jew l-effett provenjenti minnhom permezz tas-sentenza li tkun ingħatat, għandhom jieqfu.

"In fact, in the hypothesis under discussion, though the liability was contracted while the former law was still in force, the prosecution and sentence would be carried on and pronounced after such law has been repealed. So that, if such law were to be applied to such prosecution and sentence, it would be given an effect beyond its legal limit of operation. It is thus not by way of an equitable retrospective application of the new law but rather on the grounds that the operation of the old law cannot extend beyond its repeal (divieto di ultra-attivita') that, in this hypothesis, the criminal proceedings cannot be maintained in respect of the act which, at the time of the trial, has ceased to constitute a criminal offence".

***B'hekk illum għalkemm il-prosekuzzjoni tar-reat abrogat fil-mori tal-proċeduri jista' jitkompla u dan fid-dawl ta' dak li jipprovdi l-Att dwar l-Interpretazzjoni, madanakollu l-istess qiegħed jitqies illi huwa leżiv tal-artikolu 7 tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem**."* (emfazi ta' dina l-Qorti)

Ghaldaqstant, fid-dawl ta' dan l-insenjament u f'dawn ic-cirkostanzi dina l-Qorti ser tghaddi sabiex tiddikjara prodiment ezawriet fil-konfront tal-ewwel imputazzjoni.

Konsegwentament, galadarba ma tirrizultax htija fuq l-ewwel imputazzjoni dina l-Qorti ser tghaddi sabiex tillibera lill-qua imputata mit-tieni u mit-tielet imputazzjoni dedotta fil-konfront tieghu galadarba dawn jistghu jirrizultaw biss f'kaz li tinstab htija fuq l-ewwel imputazzjoni.

Decide:

Ghaldaqstant, ghal dawn il-mottivi u wara li rat l-artikoli 8(d), 15A u 22(2)(b)(ii) tal-Kap. 101 tal-Ligijiet ta' Malta, l-artikolu 4A(1) tal-Kap. 537 tal-Ligijiet ta' Malta, u l-artikoli 28A, 28B, 49 u 50 tal-Kodici Kriminali, dina l-Qorti fir-rigward tal-ewwel imputazzjoni, tenut kont li dan ir-reat gie ormai abbrogat qeghda tastjeni milli tiehu iktar konjizzjoni tal-imsemmija imputazzjoni migjuba fil-konfront tal-qua imputat u konsegwentament qed tghaddi sabiex tillibera lill-istess imputat, **Joseph Muscat,** mit-tieni u mit-tielet imputazzjoni dedotta fil-konfront tieghu.

MAGISTRAT DR. ELAINE MERCIECA BA. LL.D.

Christine Farrugia

Deputat Registratur