CRIMINAL COURT

Hon. Madame Justice Dr. Consuelo-Pilar Scerri Herrera LL.D.

Bill of Indictment Nr. 21/2021

THE REPUBLIC OF MALTA

vs

Tiberiu-Mihail Miculescu

Today the 29th September, 2022

The Court,

Having seen the bill of indictment number twenty-one (21) of the year two thousand and one (2021) brought against Tiberiu-Mihail Miculescu holder of Romanian Identity Card XT 866742 **wherein the Attorney General in the first count of the bill of indictment premised**:

> That on the eleventh (11th) day of September of the year two thousand and nineteen (2019) **Tiberiu-Mihail Miculescu**, hereinafter referred to as the accused, decided to illegally import drugs into the Maltese Islands.

In fact, on the abovementioned date, at around quarter to noon (11.45), during a search conducted by the Drug Squad Police Officers, aided by Customs officials, on various vehicles and passengers arriving from Pozzallo, Sicily aboard the Virtu Ferries Catamaran, at the Marsa Sea Port Terminal, the accused was stopped due to the fact that the dog of the Custom's canine unit showed particular interest in the vehicle that the accused was driving, a black BMW X5 bearing registration number HD-TM 1087. When spoken to by the police and given his rights in english, the accused answered and acknowledged that he understood the implication. A search was conducted on sight but nothing illegal was retrieved. As the accused was informed that another intensive search needed to be carried out at the Police garage he told the police that he had to leave Malta that same day at 15 hours by plane. This search was performed by PC 258 John Lee Howard in the presence of the accused whereby a foreign and hidden compartment was noticed at the rear of said vehicle. On drilling a hole into the chassis a smell of Cannabis grass was noted. On such outcome the duty Magistrate was immediately notified whereby a number of experts were nominated to assist, preserve all the evidence extracted from the crime scene and to carry out all the necessary examination thereof.

On further analysis it transpired that in all there were four (4) foreign compartments built next to the fuel tank. Eventually a total of forty seven (47) packets were elevated from said vehicle. All the procedure was photographed, and the substance extracted from the compartments were sealed by the scene of the crime officers, always in the presence of the accused. During the interview the accused

confirmed that the vehicle in question was his and that it was not the first time he came to Malta.

From further analysis carried out by one of the Court nominated experts, namely forensic scientist Godwin Sammut it was established that the green substance elevated from the vehicle in question contained tetrahydrocannabinol (THC) confirming that the substance was in fact cannabis. The total weight of the cannabis grass was seven kilograms and two hundred grams (7.2 kgs) with a purity of circa 28% and a value, at that time, of between seventy-two thousand (72,000) euro and two hundred and one thousand and six hundred (201,600) euro.
The plant cannabis or any portion thereof is scheduled under part III of the Dangerous Drugs Ordinance.

By committing the abovementioned acts with criminal intent, **Tiberiu-Mihail Miculescu** rendered himself guilty of importing, or caused to be imported, any dangerous drug (Cannabis) into Malta in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accuses **Tiberiu-Mihail Miculescu** of being guilty of having, on the eleventh (11th) day of September of the year two thousand and nineteen (2019), with criminal intent, imported, or caused to be imported any

dangerous drug (cannabis) into Malta in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta;

and demands that the accused be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to a fine of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (€116,468.67) and the forfeiture in favour of the Government of Malta of the entire immovable and movable property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in articles 7, 12, 14(1), 15A, 22(1)(a)(1B)(2)(a)(i) (3A)(d), 22A, 24A and 26 of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, and of articles 23 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or to any other punishment applicable according to law to the declaration of guilt of the accused **Tiberiu-Mihail Miculescu**.

Wherein the Attorney General in the second and final count of the bill of indictment premised:

That during the same period of time mentioned in the preceding count of this bill of indictment, and within the same circumstantial context, that is to say on the eleventh (11th) day of September of the year two thousand and nineteen (2019) **Tiberiu-Mihail Miculescu**, was knowingly in possession of seven kilograms and two hundred grams (7.2kgs) of cannabis buds in the Maltese Islands and thus the amount itself and the circumstances in which it was found denotes

that it was not intended for his exclusive personal use. Moreover, he was not authorized to be in possession of such drugs in terms of Law.

Consequently by committing the abovementioned acts with criminal intent, **Tiberiu-Mihail Miculescu** rendered himself guilty of being in possession of the plant cannabis or any portion thereof (cannabis buds) as specified under part III of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta when he was not in possession of an import or an export authorization issued by the Chief Government Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance, and when he was not licensed or otherwise authorized to manufacture or supply the mentioned drug, and was not otherwise licensed by the President of Malta or authorized by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drug, and failed to prove that the mentioned drug was supplied to him for his personal use, according to a medical prescription as provided in the said regulations and this in breach of the 1939 Regulations of the Internal Control of Dangerous Drugs (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and which drug was found under circumstances denoting that it was not intended for his exclusive personal use.

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above,

accuses **Tiberiu-Mihail Miculescu** of being guilty of having, on the eleventh (11th) day of September of the year two thousand and nineteen (2019) of being in possession of a dangerous drug (cannabis) with criminal intent, as specified in the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta when he was not in possession of an import or an export authorization issued by the Chief Government Medical Officer in pursuance of the provisions of paragraphs 4 and 6 of the Ordinance, and when he was not licensed or otherwise authorized to manufacture or supply the mentioned drugs, and was not otherwise licensed by the President of Malta or authorized by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) to be in possession of the mentioned drugs, and failed to prove that the mentioned drugs were supplied to him for his personal use, according to a medical prescription as provided in the said regulations and this in breach of the 1939 Regulations on the Internal Control of Dangerous Drugs (G.N. 292/1939) as subsequently amended by the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and which drug was found under circumstances denoting that it was not intended for his exclusive personal use;

and demands that the accused be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to a fine of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (€116,468.67) and the

forfeiture in favour of the Government of Malta of the entire immovable and movable property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in articles 2, 8(d), 10(1), 12, 20, 22(1)(a)(2)(a)(i)(ii), (3A)(a)(b)(c)(d)(7), 22(A), 24A, and 26 of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and of regulations 9 and 16 of the 1939 Regulations on the Internal Control of Dangerous Drugs (G.N. 292/1939) and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilt of the accused Tiberiu-Mihail Miculescu.

Having seen the acts of the proceedings, including those of the compilation of evidence before the Court of Magistrates as a Court of Criminal Inquiry.

Having seen that the accused in terms of article 449 presented a note of preliminary pleas on the 17th May 2022 wherein the accused submitted:

A. **The Bill of Indictment**:

1. The nullity of the first (1st) count of the Bill of Indictment since it contains statements and conjectures that do not emerge from the acts of the inquiry, specifically the part found in this count of the Bill of Indictment that mentions that "a total of forty seven (47) packets were found from said vehicle". This is being said in light of the fact that in their testimony and/or respective reports, the following witnesses

indicated that thirty-seven (37) packets where actually found: PC258 John Lee Howard[1], PS186 Kristian Mintoff[2] and Dr. Godwin Sammut[3].

B. **Inadmissibility of Evidence**:

2. The inadmissibility and consequent expunging from the acts of proceedings of the *process-verbal,* including the testimony in these proceedings and respective reports of all experts appointed therein since said *process-verbal* is irregularly drawn-up on account of the fact that the Inquiring Magistrate Dr Donatella Frendo Dimech failed to accede to the crime scene herself as required by article 547 *et seq* of the Chapter 9 of the Laws of Malta;

3. Without prejudice to preliminary plea number two (2) above, the inadmissibility and consequent expunging from the acts of proceedings of the testimony of court appointed expert Dr. Godwin Sammut[4] alongside the report duly exhibited by him [Doc. GS1[5]] since the laboratory used by Dr. Sammut to conduct the relative scientific forensic examinations, i.e. a lab at the Department of Chemistry at the University of Malta, is not an accredited drug testing lab according to ENISO/IEC 17025 and consequently fails to comply with the

[1] Folio 77 *et seq*.
[2] Folio 118 *et seq*.
[3] Folio 193 *et seq*.
[4] Of the 17th June 2020 – Folio 190 *et seq*.
[5] Folio 193 *et seq*.

requirements set-out in Council Framework Decision 2009/905/JHA and the corresponding Subsidiary Legislation 460.31 of the Laws of Malta;

4. Without prejudice to preliminary pleas number two (2) and three (3) above, the inadmissibility and consequent expunging from the acts of proceedings of the testimony of court appointed expert Dr. Godwin Sammut[6] alongside the report duly exhibited by him [Doc. GS1[7]] since the alleged illicit substances exhibited in these proceedings were stored in the Court building and not in 'a safe place' by the person designated by Legal Notice 121 of 2002, i.e., by the Director of Health.

Considered:

In his **first (1st) preliminary plea** the accused is requesting the nullity of the first count of the bill of indictment on the basis that it contains statements and conjectures that do not emerge from the acts of the inquiry. The accused specifically makes reference to the part stating "a total of forty seven (47) packets were found from said vehicle". In his preliminary plea, the accused emphasises that the witnesses indicated that thirty-seven (37) packets where actually found and not forty seven (47) packets. Reference is here made to Article 589 of the Criminal Code which provides how a bill of indictment should be drawn up. Article 589(c) of the Criminal Code provides the following:

[6] Of the 17th June 2020 – Folio 190 *et seq*.
[7] Folio 193 *et seq*.

> *The indictment shall be made in the name of the Republic of Malta and shall –*
>
> *…*
>
> *(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;*

This part in the bill of indictment is described as the narrative part in which the Attorney General presents a summary of the facts of the case under investigation. Reference is made to the judgment in the names **The Republic of Malta vs Grazio Azzopardi**[8] where the accused complained that the Attorney General had dramatized the narrative in the bill of indictment and excluded from it aspects favourable to the accused in such a way that could affect the jurors. This is the first thing the jury hears when the bill of indictment is read out to them. The Judge will explain and keep reminding the jury, until the moment they enter for deliberation, that this is only a narrative according to the Attorney General and it does not amount to proving the facts of the case.

Having seeing the acts of the proceedings, the accused is right in this observation and indeed it results that the witnesses mentioned by the same accused stated that thirty-seven (37) packets were found and not forty-seven

[8] Decided by the Court of Criminal Appeal (Inferior Jurisdiction) on the 16th February, 2021.

(47) as wrongly indicated by the Attorney General in the first count of the Bill of Indictment. This Court would like to emphasise that such mistake does not bring about the nullity of the first count of the bill of indictment. However, in terms of Article 597[9] of the Criminal Code, this Court is ordering that a correction is made to the bill of indictment, specifically where there is mentioned '*Eventually a total of forty-seven (47) packets were elevated from said vehicle*', and consequently be replaced by the following '*Eventually a total of thirty-seven (37) packets were elevated from said vehicle*'. Therefore, this Court is rejecting the **first (1st) preliminary plea** brought forward by the accused.

In his **second (2nd) preliminary plea** the accused is stating that the *proces-verbal* is inadmissible and consequently should be expunged since this was irregularly drawn-up on account of the fact that the Inquiring Magistrate Dr. Donatella Frendo Dimech failed to accede to the crime scene herself as required by article 547 et seq of the Criminal Code.

The Court here will not delve into the matter whether the Inquiring Magistrate had to accede to the crime scene herself or not. This because if the Inquiring Magistrate was obliged to accede to the crime scene and failed, **the *proces-verbal* would still not be considered as inadmissible**. Here reference is made to the case in the names **Il-Pulizija vs John Mifsud**[10] where the Court stated the following:

[9] 597. (1) It shall be in the power of the court, either ex officio, or upon the plea of the accused, to make an order for the amendment of the indictment, provided this is done before the accused pleads to the general issue of guilty or not guilty: but nothing shall be added which might render the offence of a graver character.

[10] *Decided by the Court of Criminal Appeal (Inferior Jurisdiction) on the 23rd September, 2021.*

' Din il-Qorti tqis li kif tajjeb issottometta l-appellant kellu jkun il-Magistrat Inkwirenti li jaghmel access u mhux jiddelega lill-Ispettur sabiex tkun hi li taghmel access. Nonostante dan in-nuqqas, din il-Qorti ma taqbilx mal-appellant li kwalsiasi rizultanzi li setghu inhargu in segwitu ghall-premess ghandhom jigu dikjarati inammissibbli. Fil-ligi ta' Malta ma ghandhiex il-principju tal-'fruit of the forbidden tree' u ghalhekk anke jekk kellu jkun il-Magistrat li jaccedi fuq il-post u mhux jiddelega dan lill-Ispettur, dan ma jfissirx li r-rizultanzi tal-inkjesta huma inammissibli.

Kif meqjus fid-digriet fl-ismijiet ***'DANIEL ZAMMIT VERSUS ROCCO BARTOLUCCIO'***[11] *dwar fatti u kwistjonijiet kompletament differenti minn dawn odjerni:*

Skond il-fehma tal-konvenut, ir-registrazzjonijiet telefonici ittiehdu b'manjiera illecita u minghajr il-kunsens tieghu u, allura, l-istess ma jistghu qatt jitressqu bhala evidenza ideonea fi procediment gudizzjarju. B'dan l-argument il-konvenut donnu qed jittenta jdahhal fil-vicenda de quo dak il-principju maghruf bhala ***"fruits of the poisoned tree"****.* ***Dan hu precett predominanti hafna fis-sistema legali Amerikana fejn il-logika ta' warajh trid illi jekk is-sors innifsu ta' l-akkwist ta' l-evidenza huwa illecitu, allura kull haga li tiddixxendi minn tali sors huwa wkoll illegali (fi kliem iehor, l-effett negattiv ad inceptio jirriverbera ex posterior fuq kollox li johrog jew jemana***

[11] *Moghti mit-Tribunal ghal Talbiet Zghar fit-3 ta' Frar, 2020 (Avviz tat-Talba numru: 80/2019).*

minnu). *Madanakollu, jigi sottolinejat, illi* ***tali principju ma jezistix fl-ordinament guridiku Malti****. Mhux konsentit li jidahhlu principji ritwali godda jew novelli li l-legislatur Malti ma ddisponiex espressament dwarhom jew provda ghalihom, li huma aljeni ghas-sistema guridika nostrana. Dan huwa hekk l'ghaliex dak li trid il-ligi, tghidu espressament abbazi tal-massima "ubi lex voluit, lex dixit".*[12] *Il-ligi procedurali domestika, fis-skiet tal-ligi, ddur ghall-ispirazzjoni ghall-principji u dawk in-normi li jsawwru r-regoli procedurali Inglizi.*[13] *Ghalhekk, wiehed idur biex jara kif tali materja giet*

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[12] *32 Referenza ghall-massimi u precetti derivanti mid-Dritt Ruman huma pertinenti ghax kif maghdud fid-decizjoni in re* ***Dr. Giovanni Messina ed altri v. Com. Giuseppe Galea ed altri*** *(Prim'Awla, 5 ta' Jannar, 1881 – Decizjoni No 122 riportata f'Kollez. Vol. IX–308), il-Ligi Rumana kienet, u ghadha, l-"ius comune" (ligi komuni) ta' Malta u "nei casi non proveduti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane". Bhala ezempju fejn saret referenza ghal u applikazzjoni tal-principji mid-Dritt Ruman, ara, inter alia,* ***Vincent Curmi noe v. Onor. Prim'Ministru et noe et*** *(Qorti Kostituzzjonali, 1 ta' Frar, 2008);* ***John Patrick Hayman et v. Edmond Espedito Mugliett et*** *(Appell Superjuri, 26 ta' Gunju, 2009);* ***Anthony Caruana & Sons Limited v. Christopher Caruana*** *(Appell Superjuri, 28 ta' Frar, 2014);* ***Coleiro Brothers Limited v. Karmenu Sciberras et*** *(Prim'Awla, 13 ta' Frar, 2014); u* ***Sebastian Vella et v. Charles Curmi*** *(Appell Superjrui, 28 ta' Frar, 2014). (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata tlieta (3) fid-digriet citat.)*

[13] *It-Tribunal josserva li r-rit procedurali civili taghna jsib il-fons tieghu fid-dritt Ingliz. Il-Kodici ta' Organizzazzjoni u Procedura Civili (Kapitolu 12 tal-Ligijiet ta' Malta) kien modellat, fil-gran parti tieghu, fuq in-normi procedurali Anglo-Sassoni, normi illi gew imhaddna fl-ordinament domestiku fi zmien id-dominju Ingliz f'Malta. Fil-fatt fil-monografija "Storia della Legislazione in Malta", l-gurista Malti PAOLO DE BONO (Malta, 1897) ifisser li taht l-Imperu Ingliz, "Varie altre leggi parziali, riguardanti l'organizzazione, il procedimento, le prove giudiziarie, furono pubblicate sino al 1850. Nel quale anno la commissione legislativa nominata il 7 agosto 1848 presentò il progetto del codice di leggi organiche e di procedura civile." (p.320) u noltre illi, "Il diritto probatorio è in gran parte modellato sul sistema inglese, giá introdotto nell'isola sin dall'anno 1825. Ma i singoli provvedimenti sono alcune volte superiori a quelli delle leggi inglesi medesime." (p.322) Importanti ferm illi l-imsemmi awtur, f'footnote ghal din l-ahhar citazzjoni, jghid, inter alia, hekk: «Ma lo studio delle opera de' giuristi inglesi è in questo ramo indispensabile. Ai giovani raccomando specialmente la lettura del BEST, 'The principles of the law of evidence' 8th edizione curata dal LELY (Londra 1893). È un'opera che tratta metodicamente la materia, esponendo i canoni fondamentali del diritto probatorio inglese, tracciandone le sorgenti, e mostrandone il nesso.» (pp.322–323). Bhala ezempju tangibbli ta' dak illi qed jigi maghdud, wiehed jirreferi ghas-sentenza in re* ***Lawrence sive Lorry Sant v. In-Nutar Guze' Abela*** *(Prim'Awla, 27 ta' April, 1993) fejn naraw illi din l-Onorabbli Qorti ghamlet referenza ampja ghad-duttrina Ingliza ghal dak li ghandu x'jaqsam mal-law of evidence relattivi ghax-xhieda. Fis-sentenza gie kwotat l-awtur Peter Murphy ("Modern Law of Evidence", 2nd edition) u l-opra intitolata "Cross on Evidence" (2nd Australian edition). Addizzjonalment, il-Prim'Awla tal-Qorti Civili, fil-proceduri in re* ***Michael Agus v. Rita Caruana*** *(Prim'Awla, 10 ta' Marzu, 2011; digriet kamerali) ghamlet referenza ampja ghar-regoli ta' evidenza Inglizi f'dak li jirrelata ma' produzzjoni ta' evidenza dokumentarja u l-valur probatorju taghha. Inoltre, fid-*

kunsidrata fis-sistema Ingliza u s-segwenti huma ftit kaptazzjonijiet ghar-rigward. Insibu ritenut illi, "The law in this area is complex and still developing. Statute occasionally provides rules governing the admissibility of evidence obtained by particular methods. Where the statute is silent, or there is no relevant legislation, the general rule at common law applies. ***This rule states that the admissibility of evidence is not affected by the means used to obtain it.*** *The use of illegal or unfair techniques to obtain evidence does not generally make otherwise relevant and admissible evidence inadmissible" (IAN DENNIS, "The Law of Evidence", Sweet & Maxwell 2010; 4th ed., §8.2, p. 301). L-istess awtur ikompli jghallem illi, "The general rule at common law was and remains clear and unambiguous. The means by which evidence is obtained does not affect its admissibility as a matter of law.* ***Provided the evidence is relevant it is admissible in law, and it is not rendered inadmissible because illegality or unfairness is used to obtain it****. A classic statement of the attitude of nineteenth-century judges was the terse observation of Crompton J. in Leatham [(1861) 8 Cox C.C. 498 at 501]: «It matters not how you get it; if you steal it even, it would be admissible in evidence». The inspiration for this common law position came largely from civil cases, where the court has traditionally conceived its function as that of doing justice between the parties according to the evidence the parties choose to present. From this standpoint it is immaterial how the*

decizjoni in re ***Robert Hornyold Strickland v. Allied Newspapers Ltd*** *(Appell Superjuri, 31 ta' Jannar, 2019) naraw kif l- Qorti ghamlet espressament referenza ghal-Ligi anglosassona [vide pagna 13 ta' dik is-sentenza]. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata erbgha (4) fid-digriet citat.)*

parties come by their evidence." (ibid. §8.3, p. 302). Utili hafna dak misjub fil-ktieb ta' J. D. HEYDON intitolat "Cross on Evidence" (Butterworths 2010, 8th ed., §27230, p. 988) fejn insibu asserit li, "Lord Goddard rejected the submission that evidence obtained illegallly was for that reason inadmissible (Kuruma v R [1955] AC 197): ... the test to be applied in considering whether evidence is admissible is where it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained ...".

Din il-posizzjoni tidher abraccjata fis-sistema domestika. Il-qrati taghna kellhom okkazzjoni jitrattaw u jindirizzaw aspetti analogi ghat-tematika odjerna u f'dan ir- rigward, it-Tribunal jaghmel referenza ghassenjalazzjonijiet rilevanti maghmula fid- decizjoni in re ***Ir-Repubblika ta' Malta v. Meinrad Calleja*** *(Qorti ta' Appell Kriminali, 3 ta' Mejju, 2000)[14]:*

« Issa, apparti li ma hemmx prova – jew, jekk hemm, din ma ingabitx a konjizzjoni ta' din il-Qorti fil-kors tat-trattazzjoni orali – ***li r-registrazzjoni saret bi ksur ta' xi ligi, anke li kieku kien hekk (jigifieri li r-registrazzjoni saret bi ksur tal-ligi) dan ma jfissirx li dik ir-registrazzjoni ma hix ammissibbli bhala prova. Il-gurisprudenza kostanti tal-qrati taghna kienet dejjem li prova hi ammissibbli***

[14] *Fis-sentenza fl-ismijiet 'Ir-Repubblika ta' Malta vs Meinrad Calleja' deciza fit-3 ta' Mejju, 2000 mill-Qorti tal-Appell Kriminali (Att ta' Akkuza numru: 20/97) il-Qorti kienet ghamlet referenza ghal dak li l-Ewwel Qorti fis-sentenza appellata datata l-14 ta' Dicember 1998 kienet ikkunsidrat dwar l-eccezzjonijiet imressqa. Ghalhekk din il-Qorti qieghda tifhem li r-referenza maghmulha f'dan iddigriet tat-Tribunal ghal Talbiet Zghar ghas-sentenza 'Ir-Repubblika ta' Malta vs Meinrad Calleja' jirreferi ghal dak imnizzel fis-sentenza tat-3 ta' Mejju 2000 fejn f'dik il-parti kienet qieghda tikwota ssentenza tal-14 ta' Dicembru 1998.*

minkejja li biex wiehed jikseb dik il-prova tkun inksiret xi ligi ohra, u dan konformement mar-regola tal-"common law" Ingliza in materja *(ara f'dan is-sens* ***Il-Pulizija v. Grezzju Spiteri****, App. Krim. 8/3/84; ara wkoll* ***P. v. Josephine Bonello****, App. Krim. 16/10/42 u* ***s-sentenzi citati f'Harding's Recent Criminal Cases Annotated, Malta, 1943, p. 198****). Din il-Qorti taghmel referenza in partikolari ghas-sentenza tal-Qorti tal-Appell Ingliza tal-15 ta' Marzu, 1968 fejn gie ritenut illi "recordings of conversations obtained through telephone tapping by private individuals are admissible in evidence" (****R. v. Senat*** *and Sin, 52 Crim. App. R. 282). Minkejja li fl-Ingilterra il-'Police and Criminal Evidence Act, 1984' tat espressament il-qrati diskrezzjoni li jistghu, f'certi kazi, jeskludu provi "obtained improperly or by trick" (ara l-Artikolu 78 ta' dik il-ligi), ir-regola generali ghadha li "evidence obtained unlawfully, improperly or unfairly is admissible as a matter of law" (Blackstone's Criminal Practice, 1991, pagna 1689, para. F.2.6). Fi kliem Lord Chief Justice Goddard fil-kaz Kuruma, son of Kaniu v. The Queen (1955) AC 197: "... ... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it, and in their Lordships' opinion it is plainly right in principle." (p. 203).*

« Din il-Qorti tara li ghal dak li jirrigwarda l-ammissibilità ta' prova miksuba illegalment, din hi wkoll il-posizzjoni taht il-ligi taghna. Kif inghad mill-Qorti tal-Appell Kriminali fis-sentenza tad-19 ta' Jannar, 1996 fl-ismijiet ***Ir-Repubblika ta' Malta v. Eugenio sive Genio Gaffarena****: "fis-sistema taghna dik li hija komunement imsejjha bhala l- 'Exclusionary Rule' fl-Amerika, ghad m'hijiex radikata u r-regola generali fis- sistema taghna hija* ***li provi illi jkunu gew ottenuti b'mod censurabbli fuq skala kemm morali kif ukoll possibilment anke legali, xorta huma ammissibbli.****"*

« Jizdied jinghad li fl-Ingilterra, minkejja l-Att tal-1984 aktar 'il fuq imsemmi, il- House of Lords fil-kaz ***R. v. Khan*** *(Sultan) (1996) 3 WLR 162, "upheld the decision of the Court of Appeal that evidence obtained by a bugging device, attached by the police to a private house without the knowledge of the owner or occupiers, as admissible and should not have been excluded under section 78 ... ... The crime being investigated was one of great gravity; in the circumstances the invasion of privacy, with attendant trespass and damage, was outweighed by the lack of pressure or oppression by the police, the absence of incitement, the fact that the defendant had not been arrested and the existence of a tape recording of the conversations" (ara Archbold, 1997, para. 15–503).*

« Din il-Qorti tirribadixxi illi f'dan il-kamp, il-ligi taghna ma tistax tigi ekwiparata ma' ligijiet ohra fejn il-principju huwa divers u fejn il-gurisprudenza segwiet linji kompletament

opposti ghal dawk nostrani. Tirrepeti in oltre li dik l'hekk imsejjha 'exclusionary rule' li tezisti f'certi gurisdizzjonijiet hija aljena ghas-sistema taghna ... ... Similment, l-appellant qieghed jissottometti illi "l-Prosekuzzjoni qed titlob lill-Qorti bhala istituzjoni legali, li f'dan il-process legali, tikser il-ligi u tkun kompartecipi f'dan il-ksur tal-ligi, jew li tissana ksur ta' ligi." Apparti milli, kif tajjeb osservat l-Ewwel Onorabbli Qorti, din l-allegazzjoni l-appellant qieghed jaghmilha minghajr ma almenu ressaq hjiel ta' prova jew indikazzjoni ta' prova illi dak li sar, sar illegalment da parti tal-awtorità tal-pulizija, jigi osservat illi l-bazi tal-eskluzjoni mis-sisema taghna tal-'excluionary rule' huwa proprju r-rifjut tas-sistema taghna illi jallaccja l-valur probatorju u l-ammissibilità ta' prova mal-mod kif tkun giet ottenuta hlief ghal dak li jirrigwarda konfessjonijiet da parti tal-akkuzat li huma regolati specifikatament u differentement mill-Kodici. Fuq dan l-aspett legali, din il-Qorti taghmel riferenza ghas-sentenza taghha in re Repubblika ta' Malta v. Eugenio sive Genio Gaffarena deciza fid-19 ta' Jannar, 1996. »

In kongunta ma' dak appena osservat, fid-decizjoni in re ***Repubblika ta' Malta v. Ibrahim Ramandan Ghamber Shnishah***[15] *inghad illi,*

"Kull dokument (u kull prova) li permezz tieghu (jew taghha) parti jew ohra tista' taghmel prova ta' dak li gara jew ma garax riferibbilment ghall-«facts in issue» – jigifieri kull dokument

[15] *Deciza mill-Qorti tal-Appell Kriminali nhar is-26 ta' April 2001*

(jew prova) li jaghmel (jew taghmel) "more or less probable a fact in issue" ***– hu (hi) ammissibbli in kwantu relevanti, kemm-il darba ma jkunx hemm xi regola tal-ligi, jigifieri «an exclusionary rule of evidence», li jirrendi dak id-dokument (jew dik il-prova) inammissibbli." Dan ikompli jsahhah l-osservazzjoni maghmula precedentement illi l-legislatur Malti jimpurtah aktar mir-rilevanza ta' l- evidenza u x'jista' jkun il-kontribut ta' l-istess evidenza ghall-kaz, milli l-forma taghha jew kif l-evidenza tigi akkwistata jew ottenuta.'***

In Malta, we do not adhere to the doctrine of the *fruits of a poisoned tree* which stipulates that if evidence is acquired illicitly, this will render illegal anything emanating from such illicitly obtained evidence. At this point, it is irrelevant whether the Inquiring Magistrate fails to accede to the crime scene or not, even if she was legally obliged to do so. Notwithstanding such failure, the *proces-verbal* is still deemed to be admissible evidence. Therefore, for these reasons, this Court is rejecting the second (2nd) preliminary plea brought forward by the accused.

In his **third (3rd) preliminary plea**, the accused is asking this Court to declare the testimony of expert Dr. Godwin Sammut and his report marked as Doc. GS1 as inadmissible and consequently expunge it from the acts of the proceedings and this due to the fact that the laboratory used by Dr. Sammut to conduct the relative scientific forensic examinations is not an accredited drug testing lab according to ENIS/IEC 17025 and consequently fails to comply with the requirements set-out in Council Framework Decision

2009/905/JHA and the corresponding Subsidiary Legislation 460.31 of the Laws of Malta.

The Court here makes references to the decree in the names **The Republic of Malta vs Izuchukwu Morgan Onuorah**[16] where the following was provided:

> *'The first Article of the Council Framework Decision 2009/905 JHA on Accreditation of forensic service providers carrying out laboratory activities dated 30th November 2009*[17] *stipulates that:*
>
> *'The purpose of this Framework Decision is to ensure that the results of laboratory activities carried out by accredited forensic service providers in one Member State are recognised by the authorities responsible for the prevention, detection and investigation of criminal offences as being equally reliable as the results of laboratory activities carried out by forensic service providers accredited to EN ISO/IEC 17025 within any other Member State.*
>
> *This purpose is achieved by ensuring that forensic service providers carrying out laboratory activities are accredited by a national accreditation body as complying with EN ISO/IEC 17025.'*

[16] Delivered by the Criminal Court on the 28th September, 2021.
[17] Corresponding to Article 4 of Subsidiary Legislation 460.31.

The Council Framework Decision mentioned above was transposed to Maltese law by means of Subsidiary Legislation 460.31 on the 29th March, 2016. Moreover, Article 2 of the Council Framework Decision and Article 3 of the aforementioned Subsidiary Legislation both provide that ***the framework decision shall apply to laboratory activities resulting in DNA-profile and dactyloscopic data, both of which have nothing to do with drugs analysis.*** *When scientist Godwin Sammut testified before this Court on the 24th March, 2021 he confirmed this when asked by the defence why the laboratory was not accredited:*

There is no obligation till to date 2021 jigifieri for the government to accredit any forensic laboratory except for the council decision which states that DNA profiles and dactyloscopic data. *The council decision I am referring to in 2009/905/JHA of the 30th November, 2009 which implements and sets out criteria for the government follow this council decision. I have performed a search with the European Union and Malta is in line with this council decision. In fact n 14th May, 2020 the European Union issued a security union to Belgium and Greece who were the only two states from the European Union which had not yet fully transposed and implemented this European Commission decision.* ***However, Malta is in line with this decision, there is no obligation for the Government of laboratory to accredit their laboratory, except for DNA and fingerprints which Malta is line with.'***

At this point this Court also makes reference to the case in the names **Christopher Bartolo vs l-Avukat tal-Istat**[18] where the Court stated the following:

> *'30. Sa fejn jirrigwarda dan l-ilment għalhekk il-Qorti taqbel ma' dak li intqal diġa' minn dawn il-Qrati u cioe' li din il-liġi 'tapplika esklussivament għall-attivitajiet tal-laboratorji li jirriżultaw fi (a) profil ta' DNA u (b) data dattiloskopika u mhux analiżi ta' droga, u dan kif imfisser fir-regolament 3 tal-Leġislazzjoni Sussidjarja 460.31. Mhux biss iżda r-regolament 6 jiddisponi illi dan "l-Ordni huwa mingħajr ħsara għal dispożizzjonijiet legali li jikkonċernaw il-valutazzjoni ġudizzjarja tal-evidenza," biex b'hekk l-ammissibbilita` o meno tal-prova li trid issir permezz tar-riżultanzi forseniċi magħmula mill-espert Mario Mifsud għandha issir fit-termini taldritt penali fir-rigward.' (ara digriet tal-Qorti tal-Appell Kriminali Onor. Per Imħallef Dr. Edwina Grima LL.D. Appell Numru: 6/2014* ***Il-Pulizija (Spettur Johann Fenech) -vs- Mario Buhagiar*** *tas-26 ta' Ġunju, 2020)'*

Dr. Godwin Sammut conducted forensic examinations on the alleged drugs. He did not carry out any forensic examinations on DNA profiles and dactyloscopic data and so in view of the above, this Court is also rejecting the third 3rd preliminary plea brought forward by the accused.

[18] Decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 22nd June, 2021.

The **<u>fourth 4th and final preliminary</u>** plea brought forward, the accused is asking this Court to declare the testimony of expert Dr. Godwin Sammut and his report marked as Doc. GS1 as inadmissible and consequently expunge it from the acts of the proceedings and this since the alleged illicit substances exhibited were stored in the court building and not in 'a safe place' by the person designated by Legal Notice 121 of 2002, i.e, by the Director of Health.

Regulation 2 of Legal Notice 121 of 2002 provides the following:

> *'The following persons **shall hold**, on behalf of the Registrar of the Criminal Courts, the property designated next to their names:*
>
> - *The Commissioner of Police: arms and ammunition, including parts thereof;*
> - *The Brigadier of the Armed Forces Explosives: detonators, dangerous chemicals, and other substances or combustible materials;*
> - ***The Director of Health: dangerous drugs;***
> - *The Director of Museums: articles of a historical or artistic value;*
> - *The Governor of the Central Bank: monies, financial certificates, gold, silver, gemstones, and other precious articles'*

Reference is also made to Article 667 of the Criminal Code which stipulates the following:

> *'Any property connected with criminal proceedings **shall**, subject to the following provisions of this Title, **be held by the registrar** until the conclusion of such proceedings including any proceedings of appeal.'*

Furthermore, Article 668(1) and Article 669 of the Criminal Code, respectively provides that:

> *'668(1) All property connected with criminal proceedings shall be delivered by the court to the registrar and **shall**, subject to the following provisions of this Title, **remain in the custody of the registrar** except when required by the court for the hearing of such proceedings'*
>
> *669. (1) The registrar shall ensure that **all property delivered to him is properly catalogued, stored and preserved and kept in a secure place to be determined by the registrar**.*
>
> *(2) For the purposes of this article, **the registrar may**, with the approval of the Minister responsible for justice, appoint other persons to hold property or classes of property on his behalf under such terms and conditions as the Minister may think fit provided that the names of such persons shall be published in the Gazette.'*

Reference is made to the recent decree in the names **The Police vs Robert-Iosif Galambos**[19] where the Court, after making reference to the above-

[19] Delivered by the Court of Magistrates as a Court of Criminal Judicature on the 11th April, 2022.

mentioned laws, quoted Sir Anthony Mamo and also made refence to jurisprudence:

> '*With regards to the interpretation of laws Professor Sir Anthony Mamo sets out the basic principle that:*
>
> *The law is the will of the legislature and the most fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of them that made it.*[20]
>
> *This basic principle has been consistantly applied by our Courts. In the judgement given by the Court of Civil Appeal on the 15th December 1945 in the case* ***Emanuele Bonello et vs Edmund Percy Larchin*** *it was held that the Court must not simply apply the law but it must, regard being had to the special circumstances of any given case, see what the intention of the legislator must have been in those specific circumstances, and that it must apply and interpret any given provision of law in way that would reconcile it with other provisions of the law.*
>
> *il-gudikant ghandu jiddeciedi l-kazijiet skond il-ligi u skond il-fattezzi specjali taghhom … Id-dover tal-gudikant huwa mhux sempliciment dak li japplika l-ligi imma anki li jara minhabba c-cirkostanzi specjali tal-kaz, x' inhija l-probabbli intenzjoni tal-legislatur f' dawk ic-cirkostanzi u li japplika l-ligi u*

[20] *Notes on Criminal Law Year 1 page 19.*

jinterpreta b' mod li jista' jikkonciljaha mal-ligijiet l-ohra biex l-applikazzjoni tagħha ma tigix ingusta.

Similarly, in a more recent judgement given in the case ***George Edward Spiteri vs Marsaxlokk Football Club et***[21], the First Hall of the Civil Court, after referring to prevalent jurisprudence regarding interpretation of laws[22], held that:

billi hija regola ta' interpretazzjoni li ebda liġi ma għandha titqies kontradittorja fiha nnifsiha, meta jkun hemm dubju fuq hekk, huwa kompitu tal-ġudikant li jindaga u jinterpreta s-sens skont l-intenzjoni tal-leġiżlatur u b'quddiem għajnejh ir-raġunijiet li ġiegħlu lill-leġiżlatur jiddetta l-liġi. Il-ġudikant għalhekk għandu jirrikorri għall-mens legis biex jagħti dik l-interpretazzjoni li tikkorrispondi għall-ispirtu informatur tal-liġi.

In a much more recent judgement given by the Court of Magistrates[23] on the 1st October 2021, and with specific reference to the interpretation of subsidiary legalisation, it was held that this may never conflict with the enabling legislation.

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[21] A judgement given on the 15th July 2016.
[22] It referred to "Emmanuele Micallef vs. Vincent Scerri", 15th May 1953 and the above quoted case Bonello vs Larchin.
[23] In its Civil Jurisdiction in the case "fl-atti tal-Ittra Ufficjali 68/2020 prezentata fil-Prim'Awla tal-Qorti Civili fl-ismijiet: Carmelo sive Charles Bianco ghan-nom u in rapprezentanza tas-socjeta Western Company Limited vs Clayton Sciberras".

> ***Issa hu principju ben assodat fil-kazistika tal-Qrati taghna li ligi sussidjarja ma tistax tkun konfliggenti mal-ligi principali***[24]. *Fis-sentenza* ***Il-Pulizija vs George Pace*** *deciza fil-15 ta' Mejju 1937, il-Qorti tal-Appell Kriminali irriteniet hekk:*
>
> *"Huwa elementari illi r-regolament mahrug mill-poter ezekuttiv bis-sahha tal-ligi li awtorizzat li jaghmel dak ir-regolament ma jistax johrog barra mil-limiti tal-istess ligi, u ma jistax jikkontradici ghal-ligi stess, tant illi lill-Qorti gie dejjem rikonoxxut il-jedd li jezaminaw jekk regolament mahrug bis-sahha ta' ligi hix "intra" jew "ultra vires."*

In view of the above, Subsidiary Legislation cannot be read in isolation and must be read in conjuction with the primary legislation, which in this case was the Criminal Code. Therefore, it can be concluded that it was within the Registrar's discretion to choose whether or not to delegate the holding of the exhibits. Had she opted to exercise this discretion then he would have been obliged to hand the alleged dangerous drugs to the Director of Health. Just like in the case quoted above, there is no doubt that, in this case, the Registrar did not exercise this discretion and, as duty bound in terms of the Code, lawfully held the exhibits herself. For all the above-mentioned reasons, this Court is also rejecting the fourth and final preliminary plea brought forward by the accused.

[24] *Emphasis of this Court.*

Consequently, this Court is rejecting the first (1st) preliminary plea brought forward by the accused but orders a correction in the first (1st) count of the bill of indictment, specifically where there is mentioned '*Eventually a total of forty seven (47) packets were elevated from said vehicle*', which should be replaced by the following '*Eventually a total of thirty seven (37) packets were elevated from said vehicle*'. Furthermore, this Court is rejecting the second (2nd), third (3rd) and fourth (4th) preliminary pleas in their entirety.

(ft) Consuelo Scerri Herrera
Judge

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Nadia Ciappara
Deputy Registrar