CRIMINAL COURT

Hon. Madame Justice Dr. Consuelo-Pilar Scerri Herrera LL.D. Dip Matr., (Can), Ph.D.

Bill of Indictment Nr. 8/2022

THE REPUBLIC OF MALTA

vs

Kayode Kola Ogunleye

Today the 24th January, 2023

The Court,

Having seen the bill of indictment number eight (8) of the year two thousand and twenty-two (2022) brought against Kayode Kola Ogunleye holder of Nigerian Passport bearing number A03064786. **Wherein the Attorney General in the first and only count of the bill of indictment premised**:

> Whereas the Police received confidential information that on the seventeenth (17th) day of September 2014 a drug deal was going to take place in Naxxar involving the accused who resided at 54, Ave Maria, Triq Leli Falzon, Naxxar, Malta (hereinafter referred to as the **'residence'**). After having received such information, on the day of the seventeenth (17th)

September 2014, the police monitored the area and in fact on that day, during the early afternoon, the accused was seen walking out of his residence carrying a red paper bag. The accused walked towards the direction of the windmill, commonly known as the 'Tal-Għaqba Windmill' situated in Naxxar, in the same street where the accused resided. He sat down on the steps situated in front of the same windmill. After some time, the accused crossed the road with the red bag in his hands and after a while returned to the same place where he had previously been sitting, this time without the red bag in his hands. The accused monitored the red bag closely from across the street for approximately one hour. Thereafter, the accused crossed the road again, collected the same red bag that he himself had originally placed there, and started to walk back in the direction of his residence. It was at that moment that the police approached the accused on suspicion of committing a crime. After identifying the accused, the police looked into the red bag and identified a brown looking material, suspected to be heroine and the accused was arrested and given all his rights. The police then accompanied the accused to his residence, which they opened by means of a key which the accused had in his possession. A search was carried out in his residence and in the upper level of the residence, in a carpet in the washroom, the police found another three bags containing brownish material also suspected to be heroine. The Police also found a luggage bag which contained a false bottom and cash in the accused's residence in the amount of two thousand and eight hundred Euros (EUR 2,800);

Whereas, from the chemical analysis performed by the court-appointed expert on the above-mentioned drug, it resulted that:

1) The substance found in the possession of the accused when he was stopped by the Police consisted of the drug heroin in the amount six hundred and ninety (690) grams and had a purity level of 23%;
2) The substance which was found in one of the bags in the accused's residence also constituted of the drug heroin in the amount of one hundred and eighty-six (186) grams and had a purity level of 31%.
3) The substance found in the other two bags in the accused's residence contained a mixture of paracetamol and caffeine in the amount of 416.61 grams;

Whereas when taking into account the circumstances in which this drug was found and the amount of heroin that was found in the possession of the accused, it is evident that this dangerous drug was not intended for the accused's exclusive use.

Whereas the dangerous drug heroin is listed in Part 1 of First Schedule of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

Whereas the accused was not in possession of an authorisation or licence issued in terms of the Law that permits him to have this drug in his possession;

Whereas, it also resulted that when the accused was stopped by the Police he was within hundred (100) metres of the perimeter of a bar called 'Mill Snack Bar' which is a place where young people habitually meet;

Whereas by his actions, the accused **KAYODE KOLA OGUNLEYE** rendered himself guilty that on the seventeenth (17) day of September of

the year two thousand and fourteen (2014) and on the previous days, he had in his possession the drug heroin for which section IV of the Dangerous Medicines Ordinance, Cap. 101 of the Laws of Malta applies, when he was not in possession of an import or export authorization issued by the Chief Government Medical Officer in accordance with the provisions of Part VI of the said Ordinance, and when he was not in possession of a license or other authorization to manufacture or supply the said drug, and where he was not otherwise licensed by the Minister responsible for the Department of Health and was not authorized by the Internal Control of Dangerous Drugs Rules, Subsidiary Legislation 101.02, or by any authority granted by the Minister responsible for the Department of Health to have such drugs in his possession, and such drug was not supplied to him for his use by means of a prescription as provided for in the above-mentioned Rules, hence **this offence was committed under such circumstances which show that possession of the drug was not for his exclusive use and when he was within one hundred (100) metres of the perimeter of a place where young people habitually meet**.

In furtherance to the the above, the Attorney General in the name of the Republic of Malta therefore accuses **Kayode Kola Ogunleye** of being guilty of having, on the seventeenth (17th) day of September of the year two thousand and fourteen (2014) and during the previous days, been in possession the drug heroin for which section IV of the Dangerous Medicines Ordinance, Cap. 101 of the Laws of Malta applies, when he was not in possession of an import or export authorization issued by the Chief Government Medical Officer in accordance with the provisions of Part VI of the said Ordinance, and when he was not in possession of a license or other authorization to manufacture or supply the said drug, and where he was not otherwise licensed by the Minister responsible for the Department

of Health and was not authorized by the Internal Control of Dangerous Drugs Rules, Subsidiary Legislation 101.02, or by any authority granted by the Minister responsible for the Department of Health to have such drugs in his possession, and such drug was not supplied to him for his use by means of a prescription as provided for in the above-mentioned Rules, hence this offence was committed under such circumstances which show that **possession of the drug was not for his exclusive use and when he was within one hundred (100) metres of the perimeter of a place where young people habitually meet.**

Therefore the Attorney General in the name of the Republic of Malta further demands that the Accused be convicted in accordance with the law and therefore 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 four hundred and sixty-eight Euro and sixty-seven cents (€116,468.67) and the confiscation in favor of the Government of Malta of the objects which served for the commission of the offence as well as of any money or other movable and immovable property pertaining to the accused as stipulated and laid down in Articles 2, 9, 10(1), 12, 14, 15A, 22(1)(a)(1B)(2)(a)(3A)(a)(b)(c)(d)(7), 22A, 24A and 26 of the Dangerous Drugs Ordinance, Chapter 101 of the laws of Malta and rule 9 of the Internal Control of Dangerous Drugs Rules, Subsidiary Legislation 101.02 and in articles 23, 23A, 23B, 23C, 31 and 533 of the Criminal Code, Chapter 9 of the laws of Malta or for any other punishment that may according to law be given for the guilt of the accused.

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 1st July 2022 wherein the accused submitted:

1. The inadmissibility of his statement given to the police on the 17th of September 2014. This because this statement was solicited from the applicant in violation of his fundamental right to a fair trial.

2. The inadmissibility of those parts of Inspector Nikolai Sant's testimony were the Inspector expressed opinions.

3. The inadmissibility of procès-*verbal* found at folio 51 *et seq* of the record of the inquiry. This because the document is missing essential requirements which determines what constitutes evidence in Criminal Procedure.

4. Additionally, the inadmissibility of all the evidence which emanates from the document referenced in the preceding plea.

5. Without prejudice to the preceding pleas, the inadmissibility of documents referred to as '14CGU 201b, 14CGU202 u 14CGU 203' in Dok PC/MV. This because the prosecution has failed to ascertain the documents' chain of custody.

6. The inadmissibility of all the document/s or object/s vaguely referred to as 'exhibit' and 'exhibits'[1] in the record of the inquiry. This because the identity and more importantly the content of the 'exhibit/s' is unknown thereby making it impossible for the applicant to exert any control over the evidence, determine its nature and relevance and determine precisely where it originated from.

7. The impugnment of the Bill of Indictment. This because it was presented in violation of Article 432(1) of the Criminal Code. This in so far as such a defect constitutes a non-observance of the Criminal Code in terms of Article 432(2) of the Criminal Code.

Considers:

Having heard the parties make their respective oral submissions during the sitting of the 25th of October 2022, this Court, at this stage, will only decide on the first four preliminary pleas brought forward by the accused.

In his **first preliminary plea**, the accused is stating that the statement he gave the police on the 17th of September 2014 is inadmissible. This statement can be found a fol. 19 et. seq of the acts of the case and marked as Doc NS5. The caution was given by Inspector Nikolai Sant in the presence of PC 599 Clive Joe Mangion, and it stated the following:

[1] See by way of example verbal of the 11th of November, 2014 and that of the 14th of April, 2015

> *"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 other adjudicator if during the trial you will put forward any defence based on a fact which you did not state during interrogation".*

The accused confirmed in his statement that he consulted with his lawyer Dr Gianella Demarco and this prior to the interrogation. In the end, the accused signed his statement and declared that he gave the statement voluntarily, without fear of threats, intimidation and promises of advantages and after the statement was read out to him by Inspector Sant. The statement is also signed by Inspector Nikolai Sant and PC 599 Clive Joe Mangion.

Considers further:

There has been substantial development in Maltese jurisprudence when it comes to the right to legal assistance, particularly following the ECtHR's[2] judgment in the names **Borg v. Malta'.**[3] In this judgment, amongst other considerations, it was considered that:

> *'56. Early access to a lawyer is one of the procedural safeguards to which the Court will have regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the*

[2] European Court of Human Rights.
[3] App no. 37537/13 (ECtHR, 12 April 2016).

heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see Salduz v. Turkey [GC], no. 36391/02, § 54, ECHR 2008).

57. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz, cited above, § 55).

58. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (ibid., § 56).

(ii) Application to the present case

59. The Court observes that the post-Salduz case-law referred to by the Government (paragraph 53 in fine) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of legal provisions allowing for such assistance or from an explicit ban in domestic law.

60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, Salduz, cited above, § 56; Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, Dayanan v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013).

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see Salduz, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the

right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see Salduz, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention.'

In the judgment in the names **'Christopher Bartolo (KI 390981M) vs Avukat Generali Kummissarju tal-Pulizija'**,[4] the First Hall Civil Court (Constitutional Jurisdiction) considered that:

'*Fin-nota ta' sottomissjonijiet taghhom, l-intimati jargumentaw illi l-ilment tar-rikorrent fil-meritu huwa nfondat peress illi huwa kien inghata d-dritt li jikkonsulta ma' avukat qabel l-interrogazzjoni, u filfatt kien eżerċita dan id-dritt, u illi s-sentenza citati minnu fir-rikors promotur ma huma ta' l-ebda sostenn ghal l-ilment tar-rikorrent peress illi dawn jipprospettaw sitwazzjoni fejn l-interrogat ma thalliex ikellem avukat qabel ma ttehdulu l-istqarrija.*

l-Qorti rat pero illi l-ilment tar-rikorrent fir-rikors promotur tieghu m'huwiex illi ma thalliex jikkonsulta ma' avukat qabel ma ttehdietlu l-istqarrija (hlief fir-rigward tat-tieni wahda), izda proprju illi l-assistent legali tieghu ma kienx prezenti ***waqt*** *it-tehid tal-istqarrija, kif jidher per ezempju minn paragrafu 8 u 13 tar-rikors promotur.*

[4] Decided on the 23rd November, 2017 (App no: 92/2016 JPG)

M'huwiex ikkontestat illi r-rikorrent ma giex interrogat fil-presenza tal-avukat tieghu, anke ghaliex wara kollox, f'dak iz-zmien il-ligi stess ma kienitx tippermetti dan.

Fis-sentenza fl-ismijiet ***Panovits v. Cyprus*** *deciza mill-Qorti ta' Strasbourg fl-11 ta' Dicembru 2008 intqal illi: "...the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation.* ***The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings."***

Fuq l-istess linja ta' hsieb, fis-sentenza fl-ismijiet ***Dayanan v. Turkey*** *deciza mill-Qorti ta' Strasbourg fit-13 ta' Ottubru 2009 u citata fir-rikors promour tar-rikorrent intqal is-segwenti:*

"In accordance with the generally recognised international norms, which the Court accepts, and which form the framework for its case-law, an accused person is entitled, ***as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned*** *(for the relevant international legal materials see Salduz, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning,*

support of an accused in distress and checking of the conditions of detention.'

*Il-fatt illi l-gurisprudenza tal-Qorti ta' Strasbourg evolviet sussegwentement ghas-sentenza ta' **Salduz** b'mod illi l-interpretazzjoni tad-dritt ghal smiegh mill-Qorti bdiet tikkonsidra li huwa necessarju li l-arrestat jithalla jkollu l-assistenza ta' avukat waqt l-interogattorju hija kkonfermata bl-aktar mod car fis-sentenza fl-ismijiet **Brusco v. France** deciza fl-14 ta' Ottubru 2010, fejn il-Qorti ta' Strasbourg ibbazat il-konklużjoni tagħha mhux biss fuq l-fatt illi Brusco ma thalliex ikellem avukat qabel ma gie interrogat izda anke ghaliex ma kellux access ghal avukat waqt l-ewwel interogazzjoni tieghu u l-interogazzjonijiet l-ohra kollha ta' wara dik, u dan a kuntrarju ta' dak li jezigi l-Artikolu 6:*

"L'avocat n'a donc été en mesure ni de l'informer sur son droit à garder le silence et de ne pas s'auto-incriminer avant son premier interrogatoire ni de l'assister lors de cette déposition et lors de celles qui suivirent, comme l'exige l'article 6 de la Convention."

*Konferma terga aktar cara ta' dan, tinsab fis-sentenza fl-ismijiet **Navone and others v. Monaco** deciza mill-Qorti ta' Strasbourg fl-24 ta' Ottubru 2013, fejn il-Qorti ikkonkludiet illi l-ligi ta' Monaco, li kienet tippermetti biss konsultazzjoni ma' avukat qabel l-interrogatorju, u ma kienitx tippermetti illi l-avukat ikun prezenti waqt l-interogazzjoni,[5] kienet leziva tad-dritt ta' smiegh xieraq:*

[5] Just like the Maltese system during that time (This reference can be found at the bottom of page 2 of the judgment in the names **'Christopher Bartolo (KI 390981M) vs Avukat Generali**

"Or, en l'espèce, nul ne conteste qu'à l'époque des faits, le droit monégasque ne permettait pas aux personnes gardées à vue de bénéficier d'une assistance d'un avocat pendant les interrogatoires: une telle assistance était donc automatiquement exclue en raison des dispositions légales pertinentes. La Cour relève en effet que le droit interne ne prévoyait qu'une consultation avec un avocat au début de la garde à vue ou de la prolongation de celleci, pendant une heure maximum, l'avocat étant en tout état de cause exclu des interrogatoires dans tous les cas.

(…)

Par conséquent, la Cour ne peut que constater que les requérants ont été automatiquement privés de l'assistance d'un conseil au sens de l'article 6 lors de leur garde à vue, la loi en vigueur à l'époque pertinente faisant obstacle à leur présence durant les interrogatories."

The Court observed that even the Maltese Courts were already expressing their concern regarding the law as it was at that time and whether it adequately guaranteed the right to a fair hearing, considering that it did not allow for a suspect to be legally assisted during his interrogation. This can be seen in the judgment of the Criminal Court of dated the 6th October 2016 in the names **Il-Pulizija (Spettur Jesmond J. Borġ) vs Jason Cortis** where it was stated:

Kummissarju tal-Pulizija' decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 23rd November 2017 (App no. 92/2016 JPG).

"...jista' jkun hemm lok ghal-dibattitu dwar kemm il-provvedimenti tal-Kap 9 jirrispekkjaw d-dritt ghall-assistenza legali moghti lill-arrestat tenut kont ukoll illi dan id-dritt, kif ezistenti llum taht il-ligi taghna, huwa ristrett ghal siegha qabel l-interoggatorju u b'hekk jeskludi l-jedd tal-presenza tal-avukat waqt l-istess interrogatorju*. F'dak l-istadju l-arrestat huwa soggett ghal mistoqsijiet diretti u suggestivi bir-risposti taghhom, anke jekk jghazel li ma jwegibx, bit-traskrizzjoni tieghu tkun eventwalment esebita fil-proceduri kontrih fejn ikun meqjus innocenti sakemm pruvat mod iehor."*

*Huwa car ghalhekk illi skont il-gurisprudenza kostanti tal-Qorti ta' Strasbourg, hekk kif zviluppat u evolviet sussegwentement ghas-sentenza ta' Salduz, il-garanzija u protezzjoni ta' smiegh xieraq tirikjedi illi l****-arrestat jinghata l-possibilita li jkollu mieghu avukat tal-fiducja tieghu waqt, u mhux biss qabel, l-interogazzjoni.*** *Ghalhekk jidher illi l-argument tal-intimati illi dan l-ilment tar-rikorrent huwa nfondat ghaliex kienet inghata l-possibilita li jkellem avukat qabel l-ewwel interrogatorju huwa nsostenibbli ghaliex mill-gurisprudenza appena citata, jidher car illi l-arrestat ghandu jinghata l-possibilita' li jkollu avukat prezenti waqt l-interogazzjoni.*

M'huwiex kontestat, illi fiz-zmien in kwistjoni kien hemm ***restrizzjoni sistematika*** *li kienet timpedixxi lill-arrestat milli jkollu avukat tal-fiducja tieghu prezenti waqt l-interrogazzjoni. M'huwiex ikkontestat ukoll illi r-rikorrent ma thalliex ikollu avukat prezenti waqt l-ewwel interogazzjoni, u illi ma inghatax access ghall-avukat tieghu qabel jew waqt it-tieni interogazzjoni.*

Dan il-fatt wahdu, skont il-gurisprudenza tal-Qorti ta' Strasbourg, huwa bizzejjed biex tinstab lezjoni tad-dritt ta' smiegh xieraq.

Il-Qorti pero ma tistghax ma tirrilevax illi dan huwa kaz gravi u partikolari, fejn ir-rikorrent huwa afflitt minn marda serja u terminali, tant li fi zmien tal-interogazzjoni kien ikollu jaghmel sitt sieghat dialysis, fi granet alternattivi u filfatt kien gie arrestat hekk kif kien ghadu hareg minn sitt sieghat dialysis. Il-Qorti tinsab mhassba mmens illi l-pulizija ma zammew ebda record tal-kondizzjoni ta' sahha tar-rikorrent, b'mod illi ma jistghux jikkonfermaw jekk kienux taw cans lir-rikorrent jiekol u jixrob bejn sitt sieghat dialysis u l-interogazzjoni tieghu jew le, skont kif qed jallega r-rikorrent. Il-Qorti tfakkar illi sakemm ir-rikorrent kien fil-kustodja tal-pulizija, il-pulizija kienet responsabbli ghal sahhtu u ghalhekk kellha tara li jkollha informazzjoni sufficjenti dwar il-kondizzjoni medika tar-rikorrent sabiex tigi salvagwardjata sahhtu u li r-rikorrent ma jithalliex bil-guh u bil-ghatx wara sitt sieghat dialysis.

Il-Qorti hija tal-fehma illi mill-provi prodotti rrizulta l-kondizzjoni medika tar-rikorrent, li kienet tikkawzalu ugiegh kbir, ansjeta u depressjoni, dana kollu jirrendi r-rikorrent persuna vulnerabbli, specjalment ikkonsidrat illi l-ewwel interogazzjoni segwit sitt sieghat dialysis. Barra minn hekk, skont it-testimonjanza mhux kontradetta tal-psikologu Nicholas Briffa, a fol 128 – 129, ir-rikorrent huwa persuna suxxettibbli, u reza vulnerabbli minhabba l-kondizzjoni medika u d-depressjoni li minnha kien jbati. Di piu' l-fatt illi r-rikorrent ma kellu l-ebda esperjenza ta' interrogatorju, tirrendih aktar vulnerabbli.

Il-Qorti rat ukoll illi l-intimati ma ressqu l-ebda prova li kien hemm xi ragunijiet impellanti - "compelling reasons" - sabiex ir-rikorrent ma jithalliex ikollu avukat prezenti waqt l-interogazzjonijiet tieghu. Ghalhekk, ikkonsidrat li dak iz-zmien kien hemm restrizzjoni sistematika ghad-dritt ta' assistenza legali waqt l-interrogazzjoni, l-effetti ta' liema kienu aggravati f'dan il-kaz minhabba l-vulnerabbilita tar-rikorrent, u galadarba l-intimati ma ressqu l-ebda prova li kien hemm ragunijet serji u mpellenti li jistghu jiggustifikaw ir-restrizzjoni tad-dritt ta' assistenza legali sofferta mir-rikorrent, il-Qorti tikkonkludi illi l-ilment tar-rikorrent illi d-dritt tieghu ghal smiegh xieraq gie lez, huwa fondat.

Ghalhekk, il-Qorti tiddikjara illi r-rikorrent sofra lezjoni tad-dritt tieghu ghal smiegh xieraq minhabba restrizzjoni mhux gustifikata ghad-dritt tieghu ta' access ghal avukat.'

This judgment was appealed by the Attorney General and the Commissioner of Police. The Constitutional Court in its decision,[6] considered that:

36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil-proceduri kriminali, mhux in kwantu ghall-ammissjonijiet, izda in kwantu l-kontenut taghhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan ir-

[6] The judgment in the names 'Christopher Bartolo v. (1) Avukat Generali; u (2) Kummissarju tal-Pulizija' decided by the Constitutional Court on the 5th October, 2018 (App. no 92/16 JPG).

rigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jistax f'dan l-istadju jigi determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk il-proceduri, jekk l-istqarrijiet jithallew fil-process tal-proceduri kriminali, dawn wisq probabbilment ser isir uzu minnhom mill-Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil-kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.

37. Fid-dawl tal-premess it-tehid tal-istqarrijiet zgur li ser ikollhom impatt fuq l-ezitu tal-process kriminali u, la darba dan isir, x'aktarx ser isir ksur tad-dritt tal-rikorrent ghal smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mir-rikorrent fl-assenza ta' avukat li jassistih. Ghalhekk huwa xieraq li, filwaqt li f'dan l-istadju ma jistax jinghad jekk kienx hemm lezjoni ta' dan id-dritt fundamentali tar-rikorrent peress li l-proceduri kriminali ghadhom pendenti, dawn ma jithallewx jibqghu fl-inkartament tal-process kriminali'

For the abovementioned reasons, the Constitutional Court decided that in order not to violate the accused's rights, no more use shall be made of the two statements released by the accused in the criminal proceedings.

In the judgment in the names **'Il-Pulizija (Spettur Malcolm Bondin) kontra Aldo Pistella'**[7]it was stated that:

'Riferibbilment ghall-kaz in ezami, jirrizulta illi Aldo Pistella nghata dritt li jkellem lill-avukat ta` ghazla tieghu qabel irrilaxxja

[7]Decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 27th June, 2017 (Constitutional reference no: 104/16 JZM).

l-istqarrija lill-Ispettur Malcolm Bondin. L-ispettur koncernat ikkonferma li hekk kien il-kaz, kemm meta xehed fil-kors ta` dan il-procediment, kif ukoll meta xehed fil-kawza kriminali. In partikolari, fis-seduta tal-kawza kriminali tal-20 ta` Ottubru 2014 stqarr illi:-

"Minn hemm hekk komplejna bl-investigazzjonijiet mas-sur Aldo Pistella fejn jien tajtu d-drittijiet tieghu u fejn tajtu d-dritt tal-parir legali fejn xtaq li jkellem avukat u fil-fatt kien tkellem ma` l-avukat tieghu Dr Sarah Sultana personalment, kien tkellem l-ghada filghodu fejn kienet giet tkellmu gewwa l-kwartieri tal-Pulizija. Wara li ha lparir legali kont komplejt bl-investigazzjonijiet mieghu...." (ara fol 19 u 20 tal-process kriminali).

From the statement it also emerged that Pistella confirmed that he understood the warning given to him by the police and that he had spoken to his lawyer before releasing the statement. In fol 29 we can find:

"M: *Fhimtha t-twissija li ghadni kif tajtek?*
T: *Iva.*
M: *Tikkonferma li kellimt lil avukat tieghek Dr Sara Sultana u gejt moghti dokument bid-drittijiet kollha tieghek bil-lingwa taljana?*
T*: Iva.*

Madanakollu rrizulta wkoll illi Pistella ma kienx assistit mill-avukat ta` ghazla tieghu waqt it-tehid tal-istqarrija. Gara hekk ghaliex fiz-zmien meta Pistella kien qed jigi nvestigat, ma kienx

hemm dritt li min kien qed jigi nvestigat jitlob li jkun assistit minn konsulent legali waqt it-tehid ta` l-istqarrija.

Din hija propju l-kwistjoni mertu tar-referenza kostituzzjonali odjerna, ossija jekk il-kaz ta` persuna li ma jkollhiex assistenza legali fl-istadju meta tkun giet arrestata u interrogata jikkostitwix ksur tal-jedd ghal smigh xieraq kif tutelat bl-Art 6 tal-Konvenzjoni.

Il-Qorti hadet nota tal-fatt li Aldo Pistella ddikjara li talab l-assistenza ta` avukat izda dak l-avukat ma kienx prezenti waqt l-interrogatorju.

Irrizulta wkoll mix-xiehda tal-Ispettur Bondin fil-proceduri kriminali illi waqt li kien qed jaghti l-istqarrija, Pistella kkopera izda kellu problema bejn li ried jikxef il-persuni involuti u bejn li ma riedx; ghalhekk kien rega` nsista li jkellem lill-konsulent legali izda din it-talba kienet michuda.

L-ispettur xehed hekk a fol 25:-

"Is-sinjur ikkopera maghna bis-shih. Il-problema li kellu s-sinjur qisu bejn jixtieq jikkopera mal-pulizija u jghid verament min huma nvoluti n-nies u minn ghand min kien qed jixtri u jassistina f`dawk l-affarijiet u bejn qed jibza` minn dawn l-affarijiet. Ghax f`hin minnhom xtaq li jghinna u f`hin minnhom rega` talab biex jitkellem filfatt ma` l-avukat, ghidtlu li ma jistax."

Ghal din il-Qorti, il-fatt li persuna ma kinitx assistita minn avukat waqt l-interrogazzjoni jwassal ghal sitwazzjoni fejn l-uzu ta` l-istqarrija mehuda minghajr l-assistenza legali tammonta ghal lezjoni tad-dritt ghal smigh xieraq tal-imputat skont l-Art 6 tal-Konvenzjoni.

Din il-Qorti tqis li gall-kaz odjern ghandha tapplika l-gurisprudenza l-aktar ricenti tal-ECHR u tal-qrati taghna fejn inghad kjarament li d-dritt ta` l-applikant jigi rrimedjabbilment ippregudikat meta hu jirrilaxxa stqarrijiet waqt linterrogazzjoni meta ma kienx assistit minn avukat u in segwitu dawk l-istqarrijiet jintuzaw kontra tieghu. '

The same Court[8] Considered that:

'Fil-fehma ta` din il-Qorti, il-fatt li persuna ma kinitx assistita minn avukat waqt l-interrogazzjoni u waqt l-istess interrogazzjoni talbet li terga` tkellem lill-avukat u tali talba giet michuda, iwassal ghal sitwazzjoni fejn id-dritt ta` dik il-persuna, fil-kaz tal-lum Aldo Pistella, kien irrimedjabbilment ippregudikat stante illi huwa rrilaxxja stqarrijiet waqt l-interrogazzjoni meta ma kienx assistit minn avukat u in segwitu dawk l-istqarrijiet jintuzaw kontra tieghu.

Issa rrizulta wkoll illi l-kawza kriminali ghadha pendenti.

[8] In the judgment in the names 'Il-Pulizija (Spettur Malcolm Bondin) kontra Aldo Pistella' decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 27th June, 2017 (Constitutional reference no: 104/16 JZM).

Ghalkemm il-qorti ta` gurisdizzjoni kriminali eventwalment taghti decizjoni fil-mertu wara li jkun inghalaq il-gbir tal-provi, tenut kont tal-konsiderazzjonijiet kollha premessi, m`ghandux ikun illi l-kawza kriminali titkompla bl-istqarrija ta` Aldo Pistella lill-Ispettur Malcolm Bondin tkun taghmel prova ladarba rrizulta li waqt it-tehid tal-istqarrija ma kienx prezenti l-avukat ta` Aldo Pistella.

Del resto l-Avukat Generali u l-Kummissarju tal-Pulizija t-tnejn sostnew illi l-kaz tal-pulizija kontra Aldo Pistella mhuwiex fondat biss fuq l-istqarrija ta` l-akkuzat izda fuq provi ohra wkoll.

Ghalkemm jibqa` l-principju li procediment gudizzjarju ghandu jitqies fit-totalita` tieghu sabiex jigi determinat kienx hemm ksur tal-jedd ghal smigh xieraq, tibqa` l-konsiderazzjoni li m`ghandu jsir ebda uzu mill-istqarrija ta` Aldo Pistella fil-process kriminali sabiex meta jintemm il-process kriminali, ma jkunx mittiefes b`irregolaritajiet.'

The Constitutional Court[9]confirmed the judgment of the First Court, and considered that:

'14. Għalkemm, bħall-ewwel qorti, taqbel mal-appellanti illi f'dan l-istadju għadu ma seħħ l-ebda ksur tal-jedd għal smigħ xieraq,

[9] The judgment in the names Il-Pulizija (Spettur Malcolm Bondin) v. Aldo Pistella' decided on the 14 th December 2018 (App no: 104/2016/1 JZM).

madankollu, kif osservat fil-kaz ta' Malcolm Said,[10] *il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jitħalla jitkompla bilproduzzjoni tal-istqarrija tal-akkuzat Pistella ladarba din, għallinqas f'parti minnha, ittieħdet mingħajr ma Pistella kellu l-għajnuna ta' avukat. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smigħ xieraq, fiċ-ċirkostanzi huwa għaqli illi, kif qalet l-ewwel qorti, ma jsir ebda użu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniggeż b'irregolarità – dik li jkun sar użu minn stqarrija li ttieħdet mingħajr ma linterrogat kellu l-għajnuna ta' avukat – li tista' twassal għal konsegwenzi bħal tħassir ta-lproċess kollu.*

15. Il-fatt li, kif josservaw l-appellanti, hemm xiehda oħra fil-proċess barra l-istqarrija li tista' ssaħħaħ il-kaztal-prosekuzjoni ma huwiex argument kontra din il-konkluzjoni. Ifisser biss li l-kaz tal-prosekuzzjoni ma jiddgħajjifx bit-tneħħija tal-istqarrija waqt li jista' jingieb fixxejn jekk l-istqarrija titħalla fil-proċess u dan possibilment iwassal għal sejbien, eventwalment, ta' ksur tal-jedd għal smigħ xieraq.'

This Court also makes reference to the judgment in the names '**Ir-Repubblika ta' Malta v. Martino Aiello**'[11]where the following was considered:

'Illi t-tezi tar-rikorrenti hi semplici u lineari. Meta giet rilaxxata l-istqarrija dik il-persuna ma kellhiex id-dritt tal-prezenza ta' l-

[10] 24th June 2016. (This reference can be found at the bottom of page 2 of the judgment in the names 'Il-Pulizija (Spettur Malcolm Bondin) v. Aldo Pistella' decided on the 14th December 2018 (App no. 104/2016/1 JZM).
[11] Preliminary decision delivered by the Criminal Court on the 9th May, 2017 (Bill of Indictment no 13/2015).

avukat. Il-konkluzjoni allura hi li tali stqarrija ghandha tkun inammissibli.

Illi t-tezi tal-Avukat Generali hi daqstant lineari. Ir-rikorrenti gie moghti d-dritt li jikkonsulta avukat ta' fiducja tieghu. Hu rrifjuta tali dritt, ma kkonsulta lil hadd u liberament u volontarjament irrilaxxa l-istqarrija hawn fuq imsemmija.

Illi din il-Qorti josserva li s-sentenza Borg v. Malta (hawn fuq citata) ma kinitx biss jitkellem fuq id-dritt li wiehed ikollu l-jedd li jikkonsulta ma avukat qabel tigi rilaxxat stqarrija. Dik is-sentenza tghid illi f'kull stadju ta' l-investigazzjoni l-persuna susspettata jew akkuzata jrid ikollha d-dritt ta' l-avukat. Kien ghalhekk li gie promulgat l-Att numru LI ta' l-2016.

Illi fil-fehma ta' din il-Qorti l-istess principji li gew applikati fis-sentenzi hawn fuq imsemmija ghandhom japplikaw f'dan il-kaz ukoll. Dan ifisser li anki jekk r-rikorrenti rrifjuta d-dritt li jikkonsulta avukat ma jfissirx li hu kien ser jirrifjuta l-prezenza ta' avukat fl-istess kamra ta' l-interrogatorju, tenut kont tal-fatt li l-artikolu fuq citat isemmi li l-avukat prezenti ghall-interrogatorju "...jippartecipa b'mod effettiv fl-interrogazzjoni...". Kif wiehed jista' japprezza din hi sitwazzjoni kompletament differenti. Logikament, ma tistax tipenalizza persuna li ghamel ghazla fuq parametri kompletament differenti minn dawk li huma in vigore llum.

Ghaldaqstant, ghal dawn ir-ragunijiet din il-Qorti tilqa l-eccezzjoni tar-rikorrenti. Tiddikjara l-istqarrija tad-19 ta' Ottubru, 2014 rilaxxat mir-rikorrenti bhala nammissibbli. Tali

stqarrija ma tistax tigi prodotta waqt il-guri jew kopja taghha moghtija lill-gurati.'

The judgment was appealed and the Criminal Court of Appeal[12] did not confirm the judgment of the Criminal Court but considered:

'*19. Illi gjaldarba l-kwistjoni imqanqla la hija wahda frivola u lanqas vessatorja, din il-Qorti, wara li rat l-artikolu 46(3) tal-Kostituzzjoni u l-artikolu 4(3) tal-Kapitolu 319 tal-Ligijiet ta' Malta, qed tibghat lil-Prim'Awla tal-Qorti Civili, l-kwistjoni dwar jekk bl-uzu fil-guri kontra l-akkuzat appellat Martino Aiello tal-istqarrija rilaxxjata minnu lill-pulizija fid-19 ta' Ottubru 2014 jigix lez id-dritt tal-istess Martino Aiello ghal smigh xieraq sancit bl-artikolu 39(1)(3) tal-Kostituzzjoni u l-artikolu 6(1)(3) tal-Konvenzjoni għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali.*

20. Tiddiferixxi dan l-appell sine die sakemm tigi deciza definittivament il-kwistjoni fuq riferita.'

Subsequently, the First Hall Civil Court (Constitutional Jurisdiction)[13] decided on the Constitutional reference by declaring that in the circumstances of the case, the accused's right to a fair hearing will not be breached if the statement is used against him in the trial by jury. Amongst other things, the Court stated that:

'*Qabel xejn, din il-Qorti tgħid illi ma jirriżultax li kien hemm raġunijiet tajbin li jżommu lill-akkużat milli jkollu avukat*

[12] Decided on the 9th April, 2018 (Bill of Indictment 13/2015).
[13] In the names 'Ir-Repubblika ta' Malta vs Martino Aiello' 17th October, 2019 (Constitutional reference no: 38/2018 AF).

preżenti waqt l-interrogazzjoni u waqt li kien qiegħed jagħti listqarrija. L-uniku raġuni li Martino Aiello ma setax ikun mgħejjun minn avukat kienet li, dak iż-żmien, il-liġi ma kienitx tippermetti li l-akkużat ikun hekk mgħejjun f'dak l-istadju imma seta' jikkonsulta ma' avukat biss qabel l-interrogazzjoni, xi ħaġa li mhux kontestat li Martino Aiello rrifjuta li jagħmel.

Madanakollu, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-liġi ma kienitx tippermetti l-assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad-dritt għal smigħ xieraq, kif qiegħed jippretendi l-akkużat, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall-konklużjoni tagħha.

Kif diġà ntqal, dan il-każ huwa kemmxejn differenti mill-każ ta' Aldo Pistella in kwantu li Martino Aiello kien fil-fatt irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interogazzjoni jew waqt li kien qiegħed jirrilaxxja l-istqarrija.

*Proprju dwar ir-rinunzja, fil-każ ta' **Paskal vs Ukraine**, tal-15 ta' Settembru 2011, il-Qorti Ewropea qalet hekk:*

"neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial, as long as a waiver of the right is given in an unequivocal

manner and was attended by the minimum safeguards commensurate to its importance."

*L-akkużat naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Fil-fatt, meta xehed quddiem din il-Qorti, tista' tgħid li ma semma xejn dwar iċ-ċirkostanzi tal-arrest tiegħu flimkien ma' martu mal wasla tagħhom hawn Malta. Martino Aiello la kien minorenni u lanqas kien ibati minn xi forma oħra ta' vulnerabilità fiż-żmien in kwistjoni. Lanqas jirriżulta xi prova fis-sens li ċ-ċirkostanzi li fihom ittieħdet l-istqarrija kienu għalih intimidanti. L-istqarrija ngħatat volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont il-liġi, u ċioè li ma kienx obbligat jitkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jinġieb bħala prova kontrih. Lanqas ma ġie muri li l-akkużat ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Il-Qorti tinnota wkoll illi Martino Aiello ma qajjem l-ebda lment dwar listqarrija li kien irrilaxxja qabel ma ġie deċiż il-każ ta' Borg vs Malta imma huwa talab lill-Qorti Kriminali sabiex ikun jista' jressaq eċċezzjoni dwar l-inammissibilità tal-istqarrija biss*minħabba dak *deċiż mill-Qorti Ewropea fl-imsemmija każ. Imma kif rajna, din il-ġurisprudenza m'għadhiex applikabbli inkondizzjonatament safejn l-akkużat qiegħed jippretendi li l-istqarrija tiegħu mhijiex ammissibbli bħala prova abbażi tal-fatt waħdu li dak iż-żmien ma setax ikun assistit minn avukat waqt l-interrogazzjoni u waqt li kien qiegħed jirrilaxxja l-istqarrija. Anzi, għandhom jittieħdu in konsiderazzjoni diversi fatturi li flimkien jagħmlu ċ-ċirkostanzi tal-każ.*

Martino Aiello fl-ebda stadju ma kkontesta l-awtenticità tal-prova li ġabet il-Prosekuzzjoni kontrih, liema prova mhijiex limitata għall-istqarrija in kwistjoni. Lanqas ma oppona għall-preżentata ta' dik l-evidenza. L-assjem tal-provi ser ikun evalwat minn Imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija.

Finalment, il-Qorti tqis illi huwa indubbjament fl-interess pubbliku li jiġi investigat u imressaq sabiex jiġi ġudikat mill-Qrati ta' ġurisdizzjoni kriminali l-akkużat li nqabad in flagrante jittraffika d-droga f'Malta.

Għaldaqstant, il-Qorti ssib li l-akkużat Martino Aiello ma rnexxilux juri li tassew ser iġarrab ksur tad-dritt tiegħu għal smigħ xieraq bl-użu fil-ġuri kontra tiegħu tal-istqarrija li rrilaxxja fid-19 ta' Ottubru 2014.'

The judgment was appealed and the Constitutional Court in its judgment in the names **'Ir-Repubblika ta' Malta v. Martino Aiello'**[14] rejected the appeal and amongst other considerations stated that:

'*24. L-istqarrija ma ttieħditx bi ksur ta' xi dispozizzjoni ta' liġi u kien ċertament fl-interess pubbliku li każ dwar traffikar ta' drogi f'Malta, ikun investigat u jittieħdu proċeduri kriminali dwaru.*

25. M'hemm l-ebda indizju li l-appellant ġie mgiegħel jagħmel dik l-istqarrija. Fl-ebda stadju m'allega xi theddid jew wegħda biex għamilha.

[14] Decided by the Constitutional Court on the 27th March, 2020 (App no: 38/18 AF).

26. Fir-rigward ta' paragrafu (g) m'hemmx dubju li l-prosekuzzjoni trid li dik l-istqarrija tintuża bħala prova importanti tal-ġuri li għad irid isir, u dan b'riferenza għal dak li ġara f'Mejju u Ġunju, 2014 peress li fl-istqarrija Aiello ammetta li kien hemm darbtejn oħra f'dawk ix-xhur meta kien diġà` importa droga f'Malta. Fatt li saret riferenza espressa għalih fl-att tal-akkuża. Għalkemm il-ġuri għadu ma sarx, hu evidenti li dik l-ammissjoni f-listqarrija għandha importanza fil-proċess kriminali tant li saret riferenza għaliha fl-att ta-lakkuża.

27. Inoltre, dwar dan il-każ għad irid isir il-ġuri. Għalhekk huma l-ġurati li ser jiddeċiedu jekk l-appellant huwiex ħati tal-akkużi li hemm kontrih. Madankollu, ser ikun l-imħallef li fl-indirizz li jrid jagħmel lill-ġurati ser jigbor ix-xiehda tax-xhieda u l-provi li jkunu marbutin magħhom, kif ukoll ifisser ix-xorta u l-elementi tar-reati rilevanti għall-każ. Hu l-imħallef li jagħmel ".... kull osservazzjoni oħra li tiswa biex triegi u turi lill-ġuri kif għandu jaqdi sewwa d-dmirijiet tiegħu" (Artikolu 465 tal-Kap. 9).

28. Li hu żgur hu li f'dan il-każ l-appellant ingħata l-opportunita' li jitkellem ma' avukat, bit-telefon jew wiċċ imb'wiċċ, iżda irrifjuta. B'dak il-mod l-appellant ċaħħad lilu nnifsu mill-opportunita' li jkollu parir ta' avukat sabiex jipprepara ruħu għall-interrogazzjoni u sabiex jingħata tagħrif dwar il-vantaġġi u żvantaġġi li jitkellem jew jagħżel is-silenzju waqt linterrogazzjoni. Dan meta kien jaf li waqt l-interrogazzjoni ma kienx ser ikollu l-assitenza ta' avukat preżenti. Dan apparti li kien infurmat b'mod ċar bil-jedd li jibqa' sieket u ma jwegibx iżda

xorta agħżel li jwiegħeb liberament. Madankollu xorta agħżel li jwiegħeb għad-domandi li sarulu.'

The Court of Criminal Appeal (Superior Jurisdition), in the judgment in the names **'Ir-Repubblika ta' Malta vs Martino Aiello'**[15] the Court considered:

'*12. Illi d-difiża madanakollu xorta waħda għadha qed tinsisti fuq l-eċċezzjoni minnha ventilata dwar l-inammissibilita' ta'l-istqarrija tal-akkużat billi tisħaq illi din il-Qorti ta' kompetenza penali trid tħares lejn il-kwistjoni taħt ottika differenti minn dik tal-Qorti Kostituzzjonali, ukoll għaliex fl-istadju taċ-ċelebrazzjoni tal-ġuri ma għandux jiġi rimess għal ġudizzju tal-ġurija popolari jekk il-kriterji mfassla fid-deċiżjoni Beuze vs il-Belġju deċiża mill-Qorti Ewropea dwar id-Drittijiet tal-Bniedem ma ġewx osservati. Jisħaq illi għalkemm l-appellat inqabad f'okkażjoni waħda in flagrante jdaħħal id-droga ġewwa Malta, madanakollu fl-istqarrija rilaxxata minnu lil pulizija huwa jammetti għal żewġ okkażjonijiet oħra ta'importazzjoni liema fatt allura joħroġ biss minn din l-istqarrija u minn ebda prova oħra. Fil-fehma tad-difiża hija din il-Qorti f'dan l-istadju tal-proċeduri li għandha tara jekk il-kriterji imfassal fid-deċiżjoni Beuze jirriżultaw u jekk humiex ser iwasslu sabiex jivvizjaw listqarrija rilaxxata mill-appellat.*

13. Illi l-Qorti ma tistax taqbel ma din il-linja difenzjonali u dan għaliex kif diversi drabi affermat mill-qrati fir-rigward tal-prinċipju regolatur dwar l-ammissibilita' ta' prova fil-proċess penali, hija prassi adottata mill-ġurisprudenza illi prova ma

[15] Decided on the 27th January, 2021 (Bill of Indictment no: 13/2015).

titqiesx li hija inammissibbli sakemm ma jkunx hemm xi dispożizzjoni espressa tal-liġi li tipprekludi l-ammissjoni ta' dik il-prova. Illi għalkemm l-appellat jistieden lil din il-Qorti tqies l-ilment minnu ventilat mill-ottika tal-proċess ġudizzjarju penali u mhux minn dak ta' natura kostituzzjonali, madanakollu imbagħad ma jinvoka ebda regola tal-liġi penali li teskludi l-produċibilita' tal-istess stqarrija, iżda jisħaq unikament illi l-istqarrija hija nieqsa mill-valur probatorju tagħha għaliex meta interrogat huwa ma kellux avukat preżenti miegħu sabiex jassistieh u allura qiegħed issejjes din il-lanjanza fuq leżjoni potenzjali tal-jedd tiegħu għal smigħ xieraq, kwistjoni li issa ġiet determinat finalment mill-Qorti Kostituzzjonali li sabet li ma kien hemm ebda leżjoni f'dan is-sens. (...)'

In the same judgment,amongst other considerations it was considered that:

'*16. Magħmula dawn il-konsiderazzjonijiet u billi d-difiża qed issejjes l-eċċezzjoni tagħha dwar l-inammissibilita' ta' l-istqarrija ta' l-akkużat mhux fuq xi regola penali tal-evidenza li teskludi dik il-prova, peress li l-istess stqarrija kienet konformi mal-liġi penali viġenti dak iż-żmien, iżda fuq l-allegata leżjoni potenzjali tal-jedd tiegħu għal smigħ xieraq taħt l-artikolu 6 tal-Konvenzjoni Ewropea jekk isir użu minn dik l-istqarrija fil-ġuri, u peress ukoll illi mill-pronunzjament tal-Qorti Kostituzzjonali tali leżjoni ma tirriżultax, f'dan l-istadju tal-proċeduri l-imsemmija prova m'għandhiex tiġi skartata billi mhuwiex nieqes il-valur probatorju tagħha għaladarba ma hemm ebda regola li qed teskludi l-ammissjoni ta'l-istess.*'

Sentenza ta' ċertu importanza hija dik mogħtija mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza ***'Bueze vs Belgium'***[16] *fejn għamlet emfazi fuq il-fatt li l-proċeduri iridu jiġu evalwati fl-intier tagħhom sabiex jiġi determinat jekk kien hemm vjolazzjoni tad-dritt għal smiegħ xieraq. F'dik is-sentenza ġie meqjus li:*

'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, cited above, § 274, and Simeonovi, cited above, § 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;

[16] Decided by the Grand Chamber of the ECtHR on the 9th November, 2018 (App no: 71409/10)

(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.'

Fl-istess sentenza gie kkunsidrat li:

'193. In conclusion, re-emphasising the very strict scrutiny that must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the criminal proceedings brought against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage, among which the following can be regarded as particularly significant:

(a) The restrictions on the applicant's right of access to a lawyer were particularly extensive. He was questioned while in police custody without having been able to consult with a lawyer beforehand or to secure the presence of a lawyer, and in the course of the subsequent judicial investigation no lawyer attended his interviews or other investigative acts.

(b) In those circumstances, and without having received sufficiently clear prior information as to his right to remain silent, the applicant gave detailed statements while in police custody. He subsequently presented different versions of the facts and made statements which, even though they were not self-incriminating stricto sensu, substantially affected his position as regards, in particular, the charge of the attempted murder of C.L.

(c) All of the statements in question were admitted in evidence by the Assize Court without conducting an appropriate examination of the circumstances in which the statements had been given, or of the impact of the absence of a lawyer.

(d) While the Court of Cassation examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it focused on the absence of a lawyer during the period in police custody without assessing the consequences for the applicant's defence rights of the lawyer's absence during his police interviews, examinations by the investigating judge and other acts performed in the course of the subsequent judicial investigation.

(e) The statements given by the applicant played an important role in the indictment and, as regards the count of the attempted murder of C.L., constituted an integral part of the evidence on which the applicant's conviction was based.

(f) In the trial before the Assize Court, the jurors did not receive any directions or guidance as to how the applicant's statements and their evidential value should be assessed.

194. The Court finds it important to emphasise, as it has done in other cases under Article 6 § 1 of the Convention in which an assessment of the overall fairness of the proceedings was at issue, that it is not for the Court to act as a court of fourth instance (see Schatschaschwili, cited above, § 124). In carrying out such an assessment, as required by Article 6 § 1, it must nevertheless carefully look at how the domestic proceedings were conducted, and very strict scrutiny is called for where the restriction on the right of access to a lawyer is not based on any compelling reasons. In the present case, it is the combination of the various abovementioned factors, and not each one taken separately, which rendered the proceedings unfair as a whole.

(iv) General conclusion

195. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.'

Therefore, according to this judgment, not having access to a lawyer during an interrogation is not tantamount to a breach of the right to a fair hearing. The Court needs to consider the overall fairness of the proceedings to determine whether there has been a breach of the right to a fair hearing or not. In this regard, the Court of Criminal Appeal in its judgment in the names '**Il-Pulizija vs**

Maximilian Ciantar'[17] made reference to the judgment in the names **'Philippe Bueze v. Belgium'**[18] where it was stated:

> *'Illi ghalkemm illum kif inghad il-ligi regghet giet emendata u dan sabiex jigi fis-sehh fil-ligi domestika d-dritt komunitarju fir-rigward u sabiex ukoll ir-restrizzjoni sistematika dwar id-dritt ghall-avukat jigi regolat, madanakollu fiz-zmien meta giet rilaxxjata l-istqarrija tal-appellant kien hemm dritt, ghalkemm wiehed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiducja taghha fil-hin precedenti l-interrogatorju mill-pulizija. Illi allura din il-Qorti fid-dawl tal-pronunzjament surriferit tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ma tistax a priori tiskarta stqarrija ta' persuna li tkun inghatat l-jedd tikkonsulta ma' avukat qabel ma tigi interrogata, izda fejn l-avukat taghha ma kienx prezenti filwaqt tal-interogazzjoni, u dan ghaliex allegatament jista' jkun hemm lezjoni tad-dritt taghha ghal smigh xieraq, billi kif mistqarr f'dan il-pronunzjament kull kaz irid jitqies ghalih u cioe' allura billi jigi mistharreg f'kull kaz individwalment jekk bil-fatt illi l-persuna akkuzata ma kellhiex l-avukat prezenti waqt it-tehid tal-istqarrija dan setax impinga fuq issmigh xieraq iktar 'il quddiem tul il-proceduri penali istitwiti kontra taghha.*
>
> *Din il-Qorti ma ghandhiex funzjonijiet kostituzzjonali u allura ma ghandhiex il-poter tistharreg jekk ikunx sehh lezjoni tad-dritt ta' smigh xieraq jew jekk potenzjalment dan jistax isehh u dan f'kaz fejn xi forma ta' assistenza legali tkun giet moghtija. Ma tistax il-Qorti ta' kompetenza penali tiddeciedi a priori illi bil-fatt*

[17] Decided by the Court of Criminal Appeal on the 27th February, 2019 (Appeal no: 514/2017).
[18] Decided by the Grand Chamber of the ECtHR on the 9th November, 2018 (App no. 71409/10).

wahdu illi fiz-zmien li l-persuna akkuzata tkun giet interrogata ma kellhiex il-jedd ikollha l-avukat prezenti maghha dan awtomatikament kien vjolattiv tal-jedd taghha ghal smigh xieraq meta l-Qorti Ewropeja issa qed tidderigi il-qrati domestici jindagaw jekk il-proceduri fl-intier taghhom kenux gusti filkonfront tal-akkuzat bit-test allura li irid jigi segwiet fuq zewg binarji u cioe':

i. *the existence of compelling reasons for the right to be witheld*

ii. *the overall fairness of the proceedings.*

Jinghad biss f'dan il-kaz illi l-appellant kien abbilment assistit tul dawn il-proceduri kriminali istitwiti kontra tieghu. Fl-ebda mument tul il-proceduri ma jqanqal il-kwistjoni dwar il-valur probatorju tal-istqarrija minnu rilaxxjata biex b'hekk il-Qorti ghandha quddiemha prova li qatt ma giet ikkontestata. Illi maghdud dan madanakollu l-Qorti tosserva li l-appellant kien ikkonsulta mal-avukat tal-fiducja tieghu qabel ma gie interrogat. F'dak iz-zmien huwa kellu sitta u ghoxrin sena u diga` kellu irregistrati kontra tieghu hdax-il kundanna biex b'hekk ma jistax jitqies li kien bniedem vulnerabbli. L-appellant qatt ma jikkontendi illi hu jew l-avukat tieghu ma gewx mgharrfa mill-pulizija dwar in-natura tal-akkuzi migjuba fil-konfront tieghu jew tal-provi li l-pulizija kellhom f'idejhom. Fuq kollox dak mistqarr mill-appellant fl-istqarrija minnu rilaxxjata huwa biss korroborazzjoni ta' dak li jikkontendu l-vittmi billi dawn kienu x-xhieda ewlenija f'dan il-kaz meta jistqarru li gharfu lill-appellant bhala wiehed mill-hallelin.

Illi finalment ghalkemm il-ligi f'dak iz-zmien ma kenitx tippermetti lill-avukat li jkun prezenti waqt it-tehid tal-istqarrija, madanakollu ghandu jinghad illi l-ligi kif inhi illum ma tantx toffri dik l-assistenza effettiva bil-fatt illi l-avukat ikun prezenti mal-persuna suspettata waqt li din tkun qed tigi interrogata bil-proviso ghall-artikolu 355AUA (8)(c) talKodici Kriminali jiddisponi hekk:

"Id-dritt tal-avukat li jippartecïpa b'mod effettiv ma għandux jinftiehem bħala dritt tal-avukat li jostakola l-interrogazzjoni jew li jissuggerixxi twegïbiet jew reazzjonijiet oħra għall-interrogazzjoni u kull mistoqsija jew rimarka oħra mill-avukat għandha, ħlief f'cïrkostanzi eccezzjonali, issir wara li l-Pulizija Eżekuttiva jew awtorità oħra investigattiva jew awtorità ġudizzjarja jkunu ddikjaraw li ma għandhomx aktar mistoqsijiet."

Fil-fatt minn qari tad-Direttiva tal-Unjoni Ewropeja dwar id-Dritt tal-assistenza legali, ghalkemm din giet tramandata kwazi kelma b'kelma fil-ligi taghna, madanakollu dana lproviso ma jirriaffigura imkien fl-artikolu 3 tad-Direttiva, li gie trasportat fl-artikolu 355AUA tal-Kodici Kriminali.

Maghmula dawn il-konsiderazzjonijiet ghalhekk din il-Qorti ma issib l-ebda mottiv li jista' igieghlha titbieghed mill-fehma milhuqa mill-Ewwel Qorti li strahet fuq ix-xiehda tal-vittmi f'dan il-kaz abbinata mal-istqarrija rilaxxjata mill-appellant u dan sabiex sejset is-sejbien ta' htija fil-konfront tieghu.[1]

This Court is going to refer to the *joint concurring opinion* of judges Yudkivska, Vučinić, Turković u Hüseynov for the judgment in the names **'Beuze v. Belgium'**[19] where amongst other things they considered that:

> '22. *In sum, we believe that it is vital to make a distinction between the systematic defects and the particular defects which are found in individual cases as a result of targeted and context-specific restrictions (e.g. in terrorism cases) or as a result of mistakes and shortcomings in individual cases.* ***It is not correct for the Court to consider the overall fairness of an individual applicant's case when a systematic ban exists, affecting every other individual in the applicant's position and in the absence of any assessment by the relevant national authorities.***
>
> *23. The formulation of the exception is extremely clear: any derogation must be justified by compelling reasons pertaining to an urgent need to avert danger for the life or physical integrity of one or more people. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. In accordance with the Court's case-law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. Finally, derogations may only be authorised by a reasoned decision of a judicial authority.*

[19] Decided by the Grand Chamber of the ECtHR on the 9th November, 2018 (App no: 71409/10).

*24. **The Court must apply a strict approach to a blanket prohibition on the right to legal assistance; otherwise we will end up in conflict with the overall direction of both the case-law of the Court and EU law.'***

In the judgment in the names **'Paul Anthony Caruana v. Avukat Ġenerali, Kummissarju tal-Pulizija, Reġistratur tal-Qrati u Tribunali Kriminali'**[20] the Constitutional Court made reference to the abovementioned judgment in the names ' **Beuze vs Belgium'** and considered that:

'18. Din hija interpretazzjoni li hija eqreb mal-posizzjoni li kienet ħadet din il-qorti qabel is-sentenza ta' Borg milli mal-interpretazzjoni mogħtija mir-Raba' Sezzjoni f'Borg u effettivament tfisser li kellha raġuni il-Qorti Kostituzzjonali ta' Malta fil-posizzjoni li kienet ħadet fil-każta' Muscat u fis-sentenzi li segwew, qabel ma kienet kostretta tbiddel dik l-interpretazzjoni fid-dawl ta' Borg.

19. Uħud mill-imħallfin membri tal-qorti li tat is-sentenza ta' Beuze, f'opinjoni għalihom, ikkritikaw is-sentenza fejn qalet illi, f'kull każ, trid tqis il-proċess fit-totalità tiegħu u mhux biss in-nuqqas ta' għajnuna ta' avukat, għax dehrilhom illi, iżjed milli preċiżazzjoni tal-interpretazzjoni ta' Salduz fid-dawl ta' Ibrahim, is-sentenza ta' Beuze hija kapovolgiment ta' dik il-ġurisprudenza. Hu x'inhu, hijiex preċiżazzjoni, elaborazzjoni, evoluzzjoni jew kapovolgiment, din hija sa issa l-aħħar kelma, u tagħti raġun lill-

[20] Decided by the Constitutional Court on the 31st May, 2019 (App no: 64/2014 JRM).

Qorti Kostituzzjonali ta' Malta fil-ġuris-prudenza li segwiet is-sentenza ta' Muscat.

20. Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – sa fejn igħid illi "l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud.[1]

In this case, the accused released a statement on the 7th April, 2006. At that time suspects did not have the right to consult with their lawyers prior and during the interrogation. In the same case, the Court considered that there was a justified reason why the plaintiff was not allowed to consult his lawyer and this due to a *controlled delivery.* The Court also took into consideration the fact that no allegation was made that the statement was made in the circumstances mentioned in Article 658 of the Criminal Code. However, he than stated that he was intoxicated and drunk when the statement was released. Furthermore, it was considered that the statement was not the reason that led to the accused's conviction but because he had admitted that he was guilty. This admission was made in the presence of a lawyer after he had consulted with him. This also took place in the presence of a Magistrate who warned him about the consequences of the admission and gave him the opportunity to retract from the same admission. The Court confirmed that the right to a fair hearing was not breached in this regard.

This Court also makes reference to the judgment in the names **'Stephen Pirotta v. L-Avukat Ġenerali u l-Kummissarju tal-Pulizija'**[21] where the accused was not granted the right to speak to a lawyer prior to his interrogation. The Court considered that:

> *'14. Effettivament, dan ifisser illi – kontra dak li qalet l-ewwel qorti fis-silta migjuba fuq – il-fatt waħdu li ma tkunx tħalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, u dik l-istqarrija ntużat fil-proċess, ma huwiex bizżejjed biex, ipso facto, jinsab ksur tal-jedd għal smigħ xieraq: trid tqis il-proċess fit-totalità tiegħu ("having regard to the development of the proceedings as a whole").'*

The Court decided that the accused's right to a fair hearing was not breached and considered that:

> *'23. Fil-każ tal-lum ma jista' jkun hemm ebda dell ta' dubju li l-attur kien ħati tal-imputazzjonijiet imressqa kontra tiegħu, kif wara kollox għarfet l-ewwel qorti stess. L-ewwel qorti għarfet ukoll illi l-qrati ta' ġurisdizzjoni kriminali waslu għall-konklużjoni tal-ħtija tal-attur bis-saħħa ta' xiehda oħra barra l-istqarrija tiegħu. Meqjus il-proċess kriminali fl-intier tiegħu, ma jistax jingħad illi l-attur ma ngħatax smigħ xieraq: kellu għarfien tal-provi kollha mressqa kontrih u ma ntweriex li nżamm mistur xi tagħrif li kellha l-pulizija; kellu għajnuna ta' avukat waqt il-proċess quddiem il-qorti; kellu fakoltà jressaq xhieda u jagħmel konto-eżami tax-xhieda tal-prosekuzzjoni; instab ħati bis-saħħa*

[21] Decided by the Constitutional Court on the 27th September, 2019 (App no: 13/2016 JRM).

ta' xiehda ogġettiva li, ukoll jekk ma tqisx l-ammissjoni tiegħu, rabtitu mal-inċident u ma setgħetx tħalli dubju dwar il-ħtija tiegħu.'

In the judgment in the names '**Farruġia v. Malta**',[22] the ECtHR considered that:

'*98. Prior to the recent Beuze judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular,* ***Dayanan v. Turkey****, no. 7377/03, § 33, 13 October 2009 and* ***Boz v. Turkey,*** *no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation to the Maltese context in Borg (no.37537/13, 12 January 2016).*

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court had occasion to further examine the matter in ***Ibrahim and Others****,* ***Simeonovi*** *and more recently in* ***Beuze****, all cited above, where the Court departed from the principle set out in the preceding paragraph. In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.*

[22] Decided by the ECtHR on the 4th June2019 and declared final on the 7th October, 2019 (App no: 63041/13).

(i) Concept of compelling reasons

100. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. ***A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer.*** *The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Beuze, cited above, §§ 142-143).*[23]

(ii) The fairness of the proceedings as a whole and the relationship between the two stages of the test

[23] See also **Azarsanov and Borokov v. Russia** App no. 63160/13 and 33661/14 (ECtHR 19 July 2022): '*6. Yet, restrictions on access to a lawyer should be justified by compelling reasons and be permitted only in exceptional circumstances, they must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (Simeonovi v. Bulgaria [GC], no. 21980/04, § 129, 12 May 2017). According to the Government, these restrictions were based on a general state of the domestic legislation and practice. The Court thus concludes that this general reference excluded any individual assessment and therefore could not stand up to scrutiny in relation to the procedural requirements of the concept of "compelling reasons" (see Beuze, cited above, §§ 138 and 142).'*

101. 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 (see Beuze, cited above, § 145).

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against selfincrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. 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:

(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 (ibid., § 150).'

In the same judgment it was also considered:

'*118. However, the nature of the statements and their use is of particular relevance in the present case. The Court notes that they did not contain any confessions nor was their content self-incriminating. However, the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see, for example,* ***Schmid-Laffer v. Switzerland****, no. 41269/08, § 37, 16 June 2015). Indeed, the statements given by the applicant, at pre-trial stage in the absence of a lawyer, were relied on by the Court of Criminal Appeal in connection with the applicant's credibility. In particular, in its judgment the Court of Criminal Appeal had noted certain inconsistencies in his statements of 1 and 2 February 2002 (see paragraph 22 above) and it had considered that he was not reliable as the applicant had replied in an evasive and hesitant way to police questions concerning his business, profitability, rent, and profits of the previous year (see paragraph 26 above). Nevertheless, the Court cannot but note that the Court of Criminal Appeal had found that A.F.'s statements had been enough to determine the applicant's guilt. In consequence its assessment of the applicant's credibility on the basis of his pre-trial statements can be considered as having been made ex abundanti cautela (out of an abundance of caution). In the light of the Court of Criminal Appeal's finding concerning the*

sufficiency of A.F.'s statements, the Court considers that the use it made of the applicant's statements to assess his credibility cannot be considered as having substantially affected his position.

(iii) Conclusion

119. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

120. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.'

It is interesting to point out judges **Serghides u Pinto de *Albuquerque*** *joint dissenting opinion* where amongst other things they considered that:

'*10. In any event, we are of the view that the right to a lawyer at the pre-trial stage does not hinge, in any way or form, on the state of vulnerability of the defendant. Nothing in the Convention makes the Article 6 § 3 (c) right dependent on such vulnerability. Such an abusive and restrictive interpretation of that right contradicts its essence. Every defendant, vulnerable or not, has a right, at the pre-trial stage, to a lawyer who will advise him or her on the defence strategy to be followed.*

11. Secondly, the majority state that "The applicant did not allege, either before the domestic courts or before [the Court], that the Police had exerted any pressure on him, nor that the evidence obtained had been in violation of another Convention provision". [24]

12. We disagree with this argument. The fact that a defendant has not been pressured by the police does not limit his or her right to a lawyer. Legal assistance in a criminal procedure is indispensable not only to counter pressure by the police or any other evidence obtained in violation of the Convention, but to define a strategy for the defence and adapt it to every incident throughout the entire proceedings. The police are expected to act lawfully, regardless of the manner in which a defendant presents his or her defence, with or without the benefit of legal assistance. The one has simply nothing to do with the other. Lawful conduct by the police is not a valuable argument on which to restrict the exercise of a Convention right by the defence. Ultimately, this argument by the majority reflects a very restrictive conception of the role of the lawyer in criminal procedure.

13. Thirdly, the majority state that "in the present case, the applicant was informed repeatedly in a sufficiently explicit manner of his right to remain silent and the privilege against self-incrimination". [25]

[24] § 111 of the present judgment. (this can be found at the bottom of page fifteen (15) of the joint dissenting opinion of the abovementioned case)
[25] § 112 of the present judgment. this can be found at the bottom of page sixteen (16) of the joint dissenting opinion of the abovementioned case)

14. Again, we cannot accept this argument. ***The right to remain silent is not interchangeable with the right to a lawyer. These are two very different rights. Legal assistance at the pre-trial stage of a criminal procedure is essential to inform the defendant of the advantages and disadvantages, from the perspective of the defence strategy, of speaking out or remaining silent. In other words, the right to a lawyer is instrumental in effective protection of the right to remain silent (and of the privilege against self-incrimination).***

15. In short, the fact that the applicant was informed of his right to remain silent if he so desired and the fact that the applicant did not claim that any pressure was exerted on him have nothing to do with his procedural right under Article 6 § 3 (c) of the Convention to have access to a lawyer. Those facts are irrelevant for the purpose of curing the breach of this right. In our view, it is a fundamental mistake at stage two not to take seriously into account the finding of stage one, especially when the test applied should be a very strict scrutiny.[26] Otherwise, what is the point of having two stages!?'

Considered;

With reference to the abovementioned jurisprudence, this Court notes the different interpretations given by the ECtHR with regards to the right to a fair hearing. Amongst the various judgments where the Court assessed whether

[26] § 108 of the present judgment. this can be found at the bottom of page seventeen (17) of the joint dissenting opinion of the abovementioned case)

there was a violation to the right to a fair hearing, reference is made to the judgments in the names '**Beuze vs Belgium**'[27] and **'Farrugia vs. Malta'**.[28]

In the abovementioned jurisprudence, it cannot but be noted that certain judgments emphasise the inadmissibility of a statement when a suspect is not accompanied by a lawyer during the interrogation and this because such defect cannot be rectified. On the other hand, other judgments state that the fact that a suspect is not accompanied by a lawyer during the interrogation should not automatically mean that the released statement is inadmissible. Therefore, such proceedings must be evaluated in their totality and the overall fairness of the same proceedings should be considered.

This Court notes with regret that it certainly cannot be said that there is legal certainty about this issue.

The Court makes reference to the case in the names **'Ir-Repubblika ta' Malta vs Ahmed El Fadali Enan'**[29]where it was considered that:

> *'15. Illi l-pożizzjoni ta' dritt li tirregola it-teħid ta' stqarrijiet u dikjarazzjonijiet mis-suspettat taħt id-dritt penali nostran ra żviluppi sostanzjali fi snin reċenti. Illi fiż-żmien meta l-akkużat ġie arrestat u interrogat lura fil-bidu tas-sena 2010, huwa ma kellux il-jedd għall-ebda forma ta' assistenza legali la qabel u lanqas matul it-teħid tal-istqarrija. Illi kien seħħ bdil għal Kodiċi Kriminali permezz ta'l-Att III tal-2002 fejn il-leġislatur ħaseb sabiex "il-persuna li tkun arrestata u qed tinżamm taħt il-*

[27] Decided by the Grand Chamber of the ECtHR on the 9 th November, 2018 (App no: 71409/10).
[28] Decided by the ECtHR on the 4th June, 2019 and the final decision was handed down on the 7th October, 2019 (App. no: 63041/13).
[29] Decided by the Criminal Court of Appeal (Superior Jurisdiction) on the 27th January 2021 (Bill of Indictment no: 7/2018).

kustodja tal-Pulizija f'xi Għassa jew f'xi post ieħor ta' detenzjoni awtorizzata għandha, jekk hija hekk titlob, titħalla kemm jista' jkun malajr tikkonsulta privatament ma' avukat u prokuratur legali, wiċċ imb'wiċċ jew bit-telefon, għal mhux aktar minn siegħa żmien. Kemm jista' jkun malajr qabel ma tibda tiġi interrogata, l-persuna taħt kustodja għandha titgħarraf mill-Pulizija bid-drittijiet li għandha taħt dan is-subartikolu." Madanakollu dan il-bdil ma ġiex fis-seħħ ħlief snin wara u ċioe' fl-10 ta' Frar 2010 u għalhekk xahar wara li l-akkużat rrilaxxa l-istqarrija tiegħu. Imbagħad finalment b' trasposizzjoni fil-liġi tagħna ta' dak imfassal fid-Direttiva 2013/48/UE tal-Parlament Ewropew u tal-Kunsill tat-22 ta' Ottubru 2013 dwar id-dritt tal-aċċess għal avukat fi proċeduri kriminali u fi proċeduri tal-mandat ta' arrest Ewropew, is-suspettat ingħata il-jedd ikun assistit minn avukat filwaqt tal-interrogazzjoni tiegħu mill-pulizija.

However, this change took place on the 10th February, 2010, a month after the accused had released his statement. Even though the accused released this statement without having the right to consult his lawyer, amongst other things, the Criminal Court of Appeal (Superior Jurisdiction) stated the following:

'19. Dan magħdud, allura l-Qorti hija tal-fehma illi f'dan l-istadju bikri tal-proċeduri fejn il-proċess penali għad irid jinstema' mill-qorti kompetenti, ma jistax jingħad jekk il-kriterji indikati fil-kaz Beuze ġewx segwiti. Ukoll għaliex, kif tajjeb stqarret l-Ewwel Qorti, la dik il-Qorti u lanqas din il-Qorti ma għandhom funzjonijiet kostituzzjonali u allura ma għandhomx il-poter jistħarrġu f'dan l-istadju, jekk tkunx seħħet xi vjolazzjoni tad-drittijiet fondamentali tal-persuna akkużata jew jekk

potenzjalment dan jistax iseħħ u dan fid-dawl tal-linji gwida ġodda tramandati mill-Qorti Ewropea. Dan għaliex skont l-imsemmija pronunzjamenti dan n-nuqqas ma jwassalx awtomatikament għal lezjoni tal-jedd tagħha għal smigħ xieraq, meta l-Qorti Ewropea issa qed tidderiegi il-qrati domestici jindagaw jekk il-proceduri fl-intier tagħhom kienux gusti fil-konfront tal-akkuzat, bit-test allura li jrid jigi segwiet fuq iz-zewg binarji surriferiti.'

The Court in its judgment upheld the appeal of the Attorney General and revoked the part where the previous Court declared the accused's statement as inadmissible and where it had ordered for it to be expunged from the acts of the case together with any reference made to the same statement. Instead, the Court declared the accused's statement as admissible.

In contrast to the judgment in the names **'Ir-Repubblika ta' Malta vs Ahmed El Fadali Enan'**, this Court refers to the judgment in the names **'Graziella Attard v. Avukat Generali'**.[30] In this last judgment**, the issue was not just because the statement was released when the accused was not legally assisted but also because the accused did not have the opportunity to communicate with her lawyer before the statement.** The Constitutional Court stated that:

'persuna interrogata tista' ma tiħalliex tkellem avukat huma l-eċċezzjoni aktar milli r-regola, u din il-qorti għandha s-setgħa li tagħti rimedju fejn issib li disposizzjoni li tħares dritt fondamentali mhux biss "qiegħda tiġi" iżda wkoll meta "tkun x'aktarx sejra tigi miksura", din il-qorti hija tal-fehma, kif osservat fis-sentenza mogħtija fl-24 ta' Ġunju 2016 fl-ismijiet

[30] Decided by the Constitutional Court on the 27th September, 2019 (App no: 83/2016 LSO).

> ***Malcolm Said v. Avukat Ġenerali***,[31] *illi ma jkunx għaqli – partikolarment fid-dawl ta' inkonsistenzi fis-sentenzi tal-Qorti Ewropea li joħloq element ta' imprevedibilità, kif jixhdu l-posizzjonijiet konfliġġenti li ħadet fil-każ ta' Borg u f'dak ta' Beuze – illi l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija mogħtija mill-attriċi lill-pulizija għaliex tqis illi, fiċ-ċirkostanzi, in-nuqqas ta' għajnuna ta' avukat ma kienx nuqqas li ma jista' jkollu ebda konsegwenza ta' preġudizzju għall-attriċi, aktar u aktar meta fl-istqarrija ammettiet sehma fir-reat.*
>
> *1. Għaldaqstant tipprovdi dwar dan l-aggravju tal-avukat Ġenerali billi tgħid illi, għalkemm ma seħħ ebda ksur tal-jedd tal-attriċi għal smigħ xieraq meta tteħditilha stqarrija, madankollu dik l-istqarrija ma għand-hiex tibqa' fl-inkartament tal-kawża kontriha.*'

In the same judgment it was stated:

> '18. *Il-qorti tqis illi l-ordni li l-istqarrija titneħħa mill-inkartament, aktar milli rimedju għal ksur li, wara kollox, għadu ma seħħx, huwa garanzija tal-integrità tal-proċess u wkoll flinteress pubbliku, biex ma jiġrix l-proċess kontra l-attriċi jkollu jitħassar wara li jintemm, b'ħela ta' ħin u riżorsi, li tkun forma oħra ta' inġustizzja għax il-liġijiet għandhom iħarsu mhux biss lil min hu mixli b'reat iżda wkoll lil min jista' jkun vittma ta' reat.*

[31] App no. 74/2014. (this reference can be found in the bottom of the page numbered six (6) of the abovementioned judgment).

19. Il-qorti għalhekk terġa' ttenni li ma jkunx għaqli li jsir użu mill-istqarrija waqt il-proċess kriminali, u għal din ir-raġuni tiċħad ukoll dan l-aħħar aggravju.'

Considers further;

That as this Court will show, it results that the Constitutional Court and the Criminal Court of Appeal (Superior Jurisdiction), even in judgments given **on the same day**, came to a different decision regarding the admissibility or otherwise of the statement released at a time when suspects did not have the right to be assisted by a lawyer during the interrogation. In the judgment in the names **'Ir-Repubblika ta' Malta vs Rosario Militello**',[32] the Criminal Court of Appeal (Superior Jurisdiction) decided that:

'23. Għaldaqstant magħmula dawn il-konsiderazzjonijiet, l-aggravju sollevat mill-Avukat Ġenerali jistħoqqlu akkoljiment b'dan illi fil-kors taċ-ċelebrazzjoni tal-ġuri, wara li jinstemgħu il-provi kollha, fl-indirizz finali, l-Imħallef togat għandu jagħti dik id-direzzjoni opportuna lil ġurati dwar il-valur probatorju ta'l-istqarrija rilaxxati mill-akkużat jekk jirrizulta illi dawn ma ttieħdux skont il-liġi, jew jekk javveraw irwieħhom dawk iċ-ċirkostanzi elenkati fil-linji gwida stabbiliti fid-deċiżjoni Beuze hawn fuq iċċitata. Fuq kollox, għall-appellat dejjem jibqa' id-dritt tiegħu li jitlob reviżjoni tal-verdett u s-sentenza tal-Qorti Kriminali fl-eventwalita' li jkun hemm dikjarazzjoni ta' ħtija fil-konfront tiegħu.'

[32] Decided by the Criminal Court of Appeal (Superior Jurisdiction) on the 27th January, 2021 (Bill of Indictment no: 3/2018).

This Court makes reference to the judgment in the names **'Ir-Repubblika ta' Malta vs Hassan Ali Mohammed Abdel Raouf Josephine Wadi'**[33] where the accused had the limited right to consult with a lawyer prior to the interrogation but not during the interrogation itself. In this case the Court made reference to the judgment in the names **Doyle v. Ireland**[34] where the ECtHR stated the following:

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

[33] Decided by the Criminal Court of Appeal (Superior Jurisdiction) on the 27th January,2021 (Bill of Indictment no: 1/2019)
[34] Decided by the ECtHR on the 23rd May, 2019and declared final on the 23rd August, 2019 (App. no: 51979/17).

while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.

429. In addition, the Court has indicated that account must be taken, on a case-by case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for 48 questioning, support for an accused in distress, and verification of the conditions of detention (Ibid., § 136)."

In the judgment in the names '**Ir-Repubblika ta' Malta vs Hassan Ali Mohammed Abdel Raouf Josephine Wadi** the Court came to the same decision as that pronounced in the case in the names **Ir-Repubblika ta' Malta vs Rosario Militello**.

This Court put emphasis on the point that even though the legislator did not provide for a statutory law which excludes a statement released at a time when a suspect did not have the right to have a lawyer present during the interrogation, it considered that one cannot expect the legislator to indicate all the circumstances when a piece of evidence has no probative value. The decision whether a piece of evidence has probative value or not, should be left to the entire discretion of the Courts dealing with the case.

In the judgment in the names '**The Republic of Malta vs. Lamin Samura Seguba**'[35] the Court concluded that:

[35] Decided by the Court of Criminal Appeal on the 27th January, 2021 (Bill of Indictment: 11/2017).

> '... *this Court cannot a priori expunge a statement of a suspect who has been given the right to consult a lawyer before being interrogated, but where his lawyer was not present at the time, solely on the premise that this could potentially infringe his right to a fair hearing. The Court cannot create a blanket evidentiary rule of criminal law declaring a piece of evidence obtained lawfully, inadmissible in criminal proceedings on the basis that this could violate accused's right to a fair trial, all the more so, as already pointed out, where some sort of legal assistance had been given. As the European Court has guided domestic courts in dealing with pre-trials statements, each case must be dealt with individually thus taking into account, on a case by case basis, whether by the fact that accused person did not have a lawyer present when releasing the statement, although such person had obtained legal advice or at least had been given the right to obtain that advice, this could result at a later stage, during the criminal proceedings instituted against him, as a breach of his right to a fair hearing thus vitiating an otherwise legally obtained piece of evidence.*

On the other hand, in another judgment decided by the Constitutional Court **on the same day**, in the case of **'Morgan Onuorah v. L-Avukat tal-Istat'**[36] it was considered that:

> '25. *Fl-aħħar aggravju r-rikorrent argumenta dwar ir-rimedji. Isostni li: "Illi jiġi rilevat illi jekk hemm ksur tad-drittijiet fundamentali tal-bniedem minħabba kemm l-operat tal-Pulizija Investigattiva u kemm mill-Avukat Generali, awtomatikament il-proċeduri sussegwenti fil-konfront tal-appellanti kienu monki u*

[36] App no: 176/2019 FDP.

jilledu d-drittijiet fundamentali tal-bniedem peress li bdew u bbazati fuq ċirkostanzi leżivi għad-drittijiet fundamentali tal-bniedem. L-appellant jirrileva illi l-Qorti bħala Sede Kostituzzjonali għandha tiggarantixxi il-korrettezza tal-proċeduri meħuda u s-sentenza infushom fis-sens illi għandhom jiġu garantiti l-ħarsien ta' ċertu prinċipji proċedurali li huma indispensabbli għall-amministrazzjoni tajba tal-ġustizzja".

26. Kif diġà` issemma, il-fatt waħdu li saret l-interrogazzjoni mhux fil-presenza ta' avukat ta' fiduċja tal-attur m'huwiex biżżejjed sabiex jagħti lok għall-ksur tad-dritt fundamentali ta' smigħ xieraq. Madankollu l-użu ta' dik l-istqarrija fil-proċeduri kriminali, li fiha l-attur ammetta għal uħud mir-reati li akkużat biha, taf twassal sabiex iseħħ dak il-ksur tal-jedd fundamentali. Dan iktar u iktar meta tikkunsidra l-ġurisprudenza ampja tal-Qorti Ewropea tad-Drittijiet tal-Bniedem li issa ilha s-snin tirrepeti l-istess insenjament.

27. Li s-suspettat jitkellem ma' avukat qabel l-interrogazzjoni, l-assistenza ta' avukat wara li tkun saret l-interrogazzjoni u n-natura adversarial tal-kawża kriminali sussegwenti, m'humiex garanzija adegwata li jirrimedjaw għad-difett li s-suspett ma kienx assistit minn avukat waqt l-interrogazzjoni li saret meta kien taħt arrest. Fis-sentenza riċenti Mehmet Zeki Celebi v. Turkey (App. 27583/07) il-QEDB kompliet tisħaq:

"57. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal

advice. The Court also reiterates that it is only in very exceptional circumstances that it can conclude that a given trial has not been prejudiced by the restriction of an applicant's right of access to a lawyer (see Dimitar Mitev v. Bulgaria, no. 34779/08, 71, 8 March 2018)".

28. Irrispettivament taqbilx mar-raġunament ta' dik il-Qorti internazzjonali, jibqa' l-fatt li l-ġurisprudenza kienet ċara meta ngħatat is-sentenza ta' Salduz f'Novembru 2008 fis-sens li n-nuqqas ta' assistenza ta' avukat waqt interrogazzjoni tal-pulizija kienet difett proċedurali. *Dan għalkemm bis-sentenza Ibrahim and Others v. the United Kingdom tat-13 ta' Settembru 2016, il-Grand Chamber għamlet enfażi fuq l-'overall fairness' tal-proċeduri kriminali u fis-sentenza Beuze v. Belgium tad-9 ta' Novembru 2018 l-istess qorti kompliet tiċċara kif kellu jiġi applikat dak il-prinċipju.*

29. Fl-aħħar mill-aħħar il-qrati domestiċi ma jistgħux jippermettu li f'proċeduri kriminali li għadhom pendenti jitħallew stqarrijiet li jkunu saru fl-assenza ta' avukat u li l-QEDB ilha tiddeskrivih bħala difett proċedurali bil-periklu manifest li dak il-fatt jikkontamina l-proċess kriminali kollu.'

The Constitutional Court in the same judgment considered that:

'30. Kien id-dmir tal-Gvernijiet differenti matul is-snin li jaġġornaw ruħhom mas-sentenzi tal-Qorti Ewropea u ma jistennewx sal-2016 sabiex jintroduċu disposizzjoni fil-

Kodiċi Kriminali li s-suspettat għandu jedd għall-assistenza ta' avukat waqt l-interrogazzjoni li ssir meta jkun fil-kustodja tal-pulizija. Emenda li saret sabiex tittrasponi d-disposizzjoni tad-Direttiva 2013/48/UE tal-Parlament Ewropew (ara Art. 355AT tal-Kodiċi Kriminali), li fost miżuri oħra assigurat id-dritt tas-suspettat għall-assistenza ta' avukat waqt l-interrogazzjoni mill-pulizija.

Għal dawn il-motivi tiċħad l-appell, b'dan li tagħti direzzjoni lill-Qorti Kriminali sabiex fil-proċeduri kriminali The Republic of Malta v. Izuchukwu Morgan Onourah (att ta' akkuża numru 11/2015) ma tippermettix l-użu bħala prova tal-istqarrija li l-appellant kien ta waqt li kien fil-kustodja tal-pulizija.

(...)'

In the judgment in the names **'The Police v. Alexander Hickey'**[37] also decided on the 27th January, 2021, the court held that:

> '*15. It is a fact that the appellant was, according to law, given the opportunity to consult a lawyer prior to interrogation. He actually did consult a lawyer and therefore could prepare for his questioning beforehand with his lawyer. However this is not enough to remedy the lack of legal assistance during police interrogation. Amongst other things there is no proof of whether the lawyer was given any information by the police with regards to the alleged crimes committed by the appellant and proof that*

[37] Decided by the Constitutional Court on the 27th January, 2021 (141/2019RGM).

they had against the suspect (appellant). Information that was essential to place the lawyer in a position to properly advise his client.

16. Therefore, since the criminal proceedings are still pending, it is premature for a court to declare that the accused's right for a fair hearing was breached as a consequence of the fact that the evidence includes two statements he made in the absence of a lawyer.

17. ***This notwithstanding, judgments of this court have already made it amply clear that statements given by a suspect while in police custody and in the absence of a lawyer, should not be used as evidence against him due to the risk that it may lead to a breach of the accused's right to a fair hearing. Judgments that are based on clear judgments delivered by the ECtHR throughout the years, which although one might not agree with, have given a clear direction to domestic courts as to the stand it will continue to take if other similar complaints are made to that court.***

18. In this particular case the self-incriminating statements in issue were probably the reason why the appellant filed an early guilty plea.

19. Since at the time of the interrogations the appellant was still seventeen years old, was a student, had a clean criminal record and never had any previous contact with the police, there is a solid argument to conclude that he was a vulnerable suspect. The

appellant also referred to a report filed in the criminal proceedings by psychologist Bernard Caruana, an ex parte witness for the appellant. In the report it is stated that appellant:

i. Has certain symptoms of autism spectrum disorder;

ii. Has attention and emotional difficulties and felt that he was not accepted by others;

iii. Has difficulty to connect with others;

iv. From a young age had been making use of drugs and alcohol;

20. It is a fact that the psychologist's report states, "While his low score on Vulnerability indicates that he perceives himself as capable of handling himself in difficult situations". However, that is appellant's own perception.

21. The court concludes that there is enough evidence to conclude that at the time of the police interrogations appellant could be classified as a vulnerable person. On the other hand it is a fact that throughout the interrogations appellant's mother was present, evidently for support and assistance since he was a minor. This notwithstanding her presence was certainly not a sufficient remedy for the lack of presence of a lawyer.

22. It is a fact that in this particular case the appellant:

i. Was interrogated by the police on the 2nd April 2012 and 3rd April 2012 and charged on the 8th June 2015;

ii. Filed a guilty plea on the 16th November 2015 and was assisted by a lawyer, and warned by the court on the consequences of such a guilty plea and given time to consider whether he should confirm such a plea;

iii. Proposed to the court, in agreement with the prosecution, a punishment of three years imprisonment and €7000 fine;

iv. Produced evidence with regards to the issue concerning punishment and during the sitting of the 2nd December 2016 declared that he had no further evidence;

v. Changed counsel, and it was only at that stage that he first complained with regards to the statements he gave to the police in the absence of a lawyer (sitting of the 6th July 2017). At that point of the criminal proceedings appellant had already declared 56 that he had no further evidence.

vi. Was always assisted by a lawyer during the court hearings and at no stage of the criminal proceedings did he contest the authenticity of the statements made while in police custody;

23. It also seems that the interrogations were not recorded. Therefore it is not possible for the court to know exactly what went on in the interrogation room. On the other hand at no point did appellant allege that irregularities took place during the interrogations and that he was pressured to self-incriminate himself. Neither did he allege that he falsely self-incriminated himself.

24. This notwithstanding on consideration of the judgments delivered by the ECHR, the court is of the opinion that there can be no guarantee that the procedural shortcoming that occurred during the police interrogations can be remedied during the criminal proceedings per se. This especially when one considers that the appellant probably registered a guilty plea on the basis that he made two self incriminating statements while in police custody in the absence of a lawyer. In the recent judgment ***Mehmet Zeki Celebi v Turkey*** *(no. 27582/07) decided on the 28 January 2020, the ECtHR stated:*

"57..... The Court also reiterates that it is only in very exceptional circumstances that it can conclude that a given trial has not been prejudiced by the restriction of an applicant's right of access to a lawyer".

25. There is no doubt that had the appellant been assisted by a lawyer during interrogation, he might have been advised to remain silent or not to answer all self-incriminating questions.

The Constitutional Court in that judgment concluded that:

'1. The answer to the first question of the Court of Magistrates (Malta) as a Court of Criminal Judicature is:

i. It is premature to declare that the issue of the contested two statements by the appellant in the absence of legal counsel, constitutes a breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution.

ii. <u>It is likely that appellant's rights would be breached should the two statements (dated 2nd and 3rd April 2012) be used as evidence, and therefore it is recommended that the two statements are removed.</u>

2. The answer to the second question of the Court of Magistrates (Malta) as a Court of Criminal Judicature is that a judgment based on applicant's guilty plea filed during the sitting of the 15th November 2015, would likely constitute a breach of article 6(1) and (3) of the Convention and Article 39 of the Constitution.

3. Since the appellant made his complaint after the criminal proceedings had been adjourned for final submissions and in view of what has been decided in this judgment, both parties to the criminal proceedings are to be placed in the same position they were prior to appellant's guilty plea filed during the sitting of the 16th November 2015.

4. All judicial costs are to be shared between the parties as to 1⁄4 at the charge of the appellant and 3⁄4 at the charge of the respondent. A copy of this judgment is to be inserted in the file of the case The Police v. Alexander Hickey (485/2014). The Registrar is also to ensure that the court file of the criminal case is sent back to the Court of Magistrates (Malta) as a Court of Criminal Judicature.'

For these reasons, the Court recommended that the statements released by the accused should not be used as evidence despite the fact that they were sworn and an admission was also recorded.

The First Hall Civil Court (Constitutional Jurisdiction) n the judgment **'Clive Dimech vs Avukat Ġenerali'**[38] stated the following:

> *'Illi l-Qorti sejra tibda biex titratta t-tieni eċċezzjoni tal-intimat għaliex jekk din tintlaqa' ma jkunx hemm ħtieġa li teżamina l-eċċezzjonijiet l-oħrajn. Huwa skontat li m'hemm l-ebda jedd fundamentali taħt Art. 39 tal-Kostituzzjoni jew taħt Art. 6 tal-Konvenzjoni Ewropeja għall-assistenza t'avukat waqt l-interrogazzjoni bħala tali. Hemm jedd fundamentali għal smiegħ xieraq. Biex jiġi stabbilit ksur ta' dan il-jedd, irid jiġi eżaminat il-proċess – f'dan il-każ proċess kriminali – fit-totalità tiegħu u mhux jiġi maqsum biex issir enfasi fuq xi episodju partikolari*[39]*. F'dan il-każ il-proċeduri għadhom fil-bidu tagħhom u għalhekk mhux possibbli f'dan l-istadju li l-Qorti tbassar kif sejjer ikun l-iter proċesswali sħiħ. Dan ma jfissirx li element proċedurali partikolari ma jistax minnu nnifsu ikun tant deċiżiv li l-korrettezza tal-proċess ma tkunx tista' tiġi ddeterminata qabel*[40]*. Imma f'dan il-każ il-Qorti ma tista' ssib l-ebda ċirkostanza bħal din. Ir-rikorrent ġie avżat, skont id-disposizzjonijiet tal-liġi kif kienet dak iż-żmien, bid-dritt li jikkonsulta avukat qabel l-interrogazzjoni. Huwa rrinunzja għal dan id-dritt. Huwa minnu li waqt l-interrogazzjoni ma kienx assistit minn avukat u ma ġiex infurmat li għandu dritt bħal dan. B'danakollu ġie mwissi li kellu d-dritt li ma jweġibx għad-domandi u fil-fatt ir-rikorrent ma*

[38] Decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 14th July, 2020 (App no: 175/19 GM).
[39] See also 'Il-Pulizija v Dr Melvyn Mifsud 26.04.2013 and other quoted judgments; Ronald Agius vs Avukat Generali 30.11.2001 Constitutional Court (this reference can be found in the first note at the bottom of the page of the abovementioned judgment).
[40] Noel Arrigo v Malta 10.05.2005 ECtHR (this reference can be found in the second note at the bottom of the page of the abovementioned judgment).

wieġeb għall-ebda domanda li saritlu. Għalhekk ma jirriżultax – dejjem f'dan l-istadju -li r-rikorrent sofra xi nuqqas ta' smiegħ xieraq. Ma ressaq l-ebda prova li bis-silenzju tiegħu seta' nkrimina ruħu;'

Subsequently, the Constitutional Court in its judgment **'Clive Dimech v. Avukat Generali'**[41] dated the 27th January, 2021 provided that since the accused did not reply to any of the questions during his interrogation, the statement would not be prejudicial against him. Despite this, this Court still emphasised that it would be appropriate not to make use of the statement as evidence in the criminal proceedings.[42] For this reason, this judgment is of great significance.

In the recent judgment in the names '**Christopher Bartolo vs Avukat ta l-Istat**',[43] the Court decided the same was as it decided in the judgments of **Onuorah Morgan vs Avukat Generali** u **Clive Dimech vs Avukat Generali** indicated above. The Court stated that:

74. Daqshekk huwa importanti li stqarrija tittieħed bil-garanziji kollha li jħarsu d-drittijiet ta' min ikun qiegħed jirrilaxxja għaliex l-ammissjoni hija wara kollox ir-regina tal-provi. Di fatti Karen Reid fil-ktieb 'A practitioner's Guide to the European Convention on Human Rights' (Tielet Edizzjoni) f'paġna 70: "While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, ***a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall." Iġifieri,***

[41] Decided by the Constitutional Court on the 27th January, 2021 (App no: 175/2019 GM).
[42] See also Christopher Bartolo v. Avukat Generali et 5-10-2018 and Il-Pulizija vs Aldo Pistella 14.12.2018.
[43] Decided by the Constitutional Court on the 22nd June, 2021 (App no: 255/2020 TA).

prova waħda ottenuta kontra l-liġi, tista' waħedha tikkontamina l-proċess kollu.

The Court concluded with the following:

'79. Il-Qorti qed tipprova tirrinkonċilja l-fatt, fid-dawl ta' dak li ddeċidiet il-Qorti Kostituzzjonali fil-5 ta' Ottubru 2018. ***Dik il-Qorti ordnat, li biex ma jseħħx ksur tad-drittijiet tar-rikorrent ma jsirx aktar użu fil-proċeduri kriminali miż-żewġ stqarrijiet rilaxxjati mir-rikorrent. Fid-dawl ta' din l-ordni, din il-Qorti ma tistax tifhem b'liema tiġbid tal-immaginazzjoni tista' tasal għall-konklużjoni li l-konferma bil-ġurament ta' dawk l-istqarrijiet quddiem il-Maġistrat ma għandhomx ukoll ikunu mwarrbin. Kważi kwazi dan għandu xebħ mal-każ fejn dokument oriġinali jitwarrab iżda mhux il-kopja tiegħu. Il-konferma bil-ġurament hija unikament imsejsa fuq l-istqarrijiet u kwalunkwe ammissjoni kienet ukoll b'konsegwenza tal-istess.***

80. Għalhekk anke f'dan ir-rigward, din il-Qorti ssib li ġew leżi l-artikolu 39(1) u 6(1) tal-Kostituzzjoni u l-Konvenzjoni rispettivament.

On the other hand, in the case of '**Briegel Micallef vs Avukat Generali'**[44] the Court took a different direction than the above mentioned four judgments. The Constitutional Court stated the following in this regard:

[44] Decided by the Constitutional Court on the 10th June, 2021.

> *'13. **Hu minnu li din l-istess Qorti f'sentenzi oħrajn qalet li jkun floku li stqarrija li jkun ta imputat titneħħa mill-proċess tal-proċeduri Kriminali sabiex jiġi żgurat li ma jkunx hemm periklu li eventwalment isiru proċeduri Kostituzzjonali li jistgħu jwasslu biex jiġi annullat proċess sħiħ. Madankollu, filwaqt li hemm ukoll sentenzi fejn din il-Qorti għamlet sempliċement rakkomandazzjoni, wieħed irid jiftakar li kull każ għandu ċ-ċirkostanzi partikolari tiegħu. F'dan il-każ partikolari diġa' hemm sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali u li fiha sar apprezzament tal-provi kollha li tressqu quddiem dik il-Qorti fil-kors tal-proċess kollu. Ċirkostanza li ma kinitx teżisti f'każijiet oħra li ddeċidiet dwarhom din il-Qorti. Ovvjament dak l-apprezzament ser jiġi mistħarreġ mill-Qorti tal-Appell Kriminali.'***

This same reasoning was embraced in a recent judgment in the names **Jean Marc Dalli vs Il-Kummissarju tal-Pulizija et**[45] the Court made reference to the above mentioned judgment of **Briegel Micallef vs Avukat Generali'** and held that :

> *'Il-Qorti tqis li minn naha wahda, ir-rikorrent veru li ma kellux l-presenza ta' l-Avukat waqt illi rrilaxxja l-istqarrija, daqs kemm huwa minnhu illi l-istqarrija kienet, fiha nnifisha, tinkrimina lir-rikorrenti. Ukoll huwa minnhu illi r-rikorrent kellu 18 il-sena u kienet l-ewwel darba illi ttiehed l-ghassa tal-pulizija.*
>
> *Tqis pero` minn naha l-ohra illi r-rikorrent kien inghata u uza d-dritt li jikkonsulta ma' avukat qabel l-interrogazzjoni u anke*

[45] Decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 26th September, 2022.

nghata d-debita twissija. Tqis ukoll illi l-istess stqarrija kienet guramentata u fuq kollox huwa ferm evidenti minn qari tas-sentenza tal-Qorti tal-Magistrati (Malta) illi l-Qorti qieset provi ohra biex wasslet ghad-decizjoni taghha ta' htija. Il-Qorti ma tistax ma tirrimarkax illi l-prova li l-Prosekuzzjoni qed tfittex li tagħmel permezz tal-istqarrija magħmula mill-imputat ma tistghax titqies bhala waħda determinanti, peress illi minn qari akkurat tad-decizjoni tal-Qorti tal-Magistrati kif appellata quddiem il-Qorti Kriminali johrog evidenti illi l-gudizzju tal-ewwel Qorti u li issa ser ikun ukoll sindakat mill-Qorti tal-Appell Kriminali, jmur lil hinn mis-semplici stqarrija moghtija in kwantu illi l-Qorti qieset ukoll provi ohra, fosthom xhiedha okulari ta' ufficjali tal-Pulizija.

Il-Qorti tqis ukoll illi fl-eta' ta' 18 il-sena, l-imputat jista' jigi meqjus illi kien zghir fl-eta', u hekk hu anke jekk kellu l-eta' tieghu, pero` minn dak li nghad minnhu fl-istess stqarrija - verzjoni b'ebda mod kontradetta fil-kors tal-proceduri-, huwa kien mitlub minn terza persuna (Dweight) sabiex jipprovdi pilloli ecstasy, peress illi t-terz kien jaf illi l-imputat kien ser ikun fil-presenza ta' persuna (il-lahmi) li jkollu fuqu il-pilloli ecstasy, kif fil-fatt jidher illi kien il-kaz, ghaliex l-imputat jidher illi ottjeni l-pilloli u ghaddihom lit-terz. Ta' dik l-eta, zghira kemm hi zghira, anke hallas ghal dawk il-pilloli u gabar flusu lura

Il-Qorti tifhem illi ta' eta' tenera, ir-rikorrent kien ben konxju ta' dak li kien qed jaghmel, u ma kelliex tkun sorpriza ghalih illi jekk il-Pulizija sejjhitlu ghal dak li rat jigri, huwa jigi mitkellem u nterrogat wara illi kien ikkonsulta mal-Avukat tieghu.

Din il-Qorti tqis għalhekk illi r-rikorrent naqas milli juri li huwa għandu jitqies bħala persuna vulnerabbli. Lanqas ma tirriżulta xi prova fis-sens li ċ-ċirkostanzi li fihom sarulu l-mistoqsijiet kienu għalih intimidanti jew li ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Huwa għażel li jwieġeb volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont il-liġi u wara illi kkonsulta mal-Avukat tieghu.

Finalment, il-Qorti tqis illi r-rikorrenti ghaddha minn process giudizzjajru fl-ewwel istanza u ma jirrizulta minn mkien lezjoni tad-drittijiet fondamentali tarrikorrenti. Il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali presjeduta minn Maġistrat, iddeċidiet il-kawża Kriminali wara li semgħet u qieset il-provi kollha u għalhekk kienet fl-aħjar pożizzjoni sabiex tiddeċiedi l-kawża fil-mertu. Fis-sentenza tal-Qorti hemm ir-raġunijiet ta' x'wassalha sabiex issib lill-attur ħati. Ghaliex il-Qorti kienet f'pożizzjoni tqis l-provi kollha li tressqu quddiemha, anke u rrispettivament ta' x'setgħa qal lill-pulizija l-imputat fl-istadju tal-investigazzjoni. Quddiem il-Qorti tal-Maġistrati, l-imputat ngħata kull opportunita` li jressaq il-provi li ried u jagħmel kontro-eżamijiet ta' xhieda tal-prosekuzzjoni li ried.

Process fl-ewwel istanza, illi issa fuq kollox ser ikun skrutinat mill-Qorti talAppell Kriminali, illi ma hemmx dubbju illi ser tevalwa u tqis l-aggravji kollha li ressaq l-hemmek appellant.'

The Court concluded that interrogating the applicant without his lawyer being present does not breach his right to a fair hearing as enshrined in Article 6 of the European Convention and Article 39 of the Maltese Constitution.

Considered further:

By virtue of Directive 2013/48/EU of the European Parliament and of the Council of the 22nd October, 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, there was a substantial change in what the right of access for a lawyer in criminal proceedings includes. Article 3 of the Directive provides:

> ***'The right of access to a lawyer in criminal proceedings***
>
> *1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.*
>
> *2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*
>
> *(a) before they are questioned by the police or by another law enforcement or judicial authority;*
>
> *(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;*
>
> *(c) without undue delay after deprivation of liberty;*

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.'

At present, sub-articles (1) and (2) of Article 355AUA of the Criminal Code as amended by means of Act LI of 2016 provide the following:

'(1) The suspect or the accused person shall have the right of access to a lawyer in such time and in such a manner so as to allow him to exercise his rights of defence practically and effectively.

(2) The suspect or the accused person shall have access to a lawyer without undue delay. In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the Executive Police or by another law enforcement or judicial authority in respect of the commission of a criminal offence;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with sub-article(8)(e);

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

Furthermore, Article 355AUA(8) of the Criminal Code reads as follows:

The right of access to a lawyer shall entail the following:

(a) the suspect or the accused person, if he has elected to exercise his right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall not be less than one hour before questioning starts;

(b) the suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or by another law enforcement or judicial authority;

(c) the suspect or the accused person shall have the right for his lawyer to be present and participate effectively when questioned. Such participation may be regulated in accordance with procedures which the Minister responsible for Justice may by regulations establish, provided that such procedures shall not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using where

possible in the opinion of the interviewer audiovisual means in terms of paragraph

(d): Provided that the right of the lawyer to participate effectively shall not be interpreted as including a right of the lawyer to hinder the questioning or to suggest replies or other reactions to the questioning and any questions or other remarks by the lawyer shall, except in exceptional circumstances, be made after the Executive Police or other investigating or judicial authority shall have declared that it has no further questions; (d) questioning, all answers given thereto and all the proceedings related to the questioning of the suspect or accused person, shall where possible in the opinion of the interviewer be recorded by audio-visual means and in such case a copy of the recording shall be handed over to the suspect or the accused person following the conclusion of the questioning. Any such recording shall be admissible in evidence, unless the suspect or the accused person alleges and proves that the recording is not the original recording and that it has been tampered with. No transcription need be made of the recording when used in proceedings before any court of justice of criminal jurisdiction, nor need the suspect or the accused person sign any written statement made following the conclusion of the questioning once all the questions and answers, if any, are recorded on audiovisual means;

(e) the suspect or the accused person shall have the right for his lawyer to attend the following investigative or evidence-gathering acts if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of an offence

The accused was given all the rights in force at the time when the statement was taken. Even though the accused had the right to consult his lawyer prior to the interrogation, the accused did not have the right for a lawyer to be present during his interrogation. Furthermore, the released statement was not in violation of the law that was in force at the time.

It is not within this Court's remit to consider whether the right to a fair hearing has been infringed. This Court must only decide whether the accused's statement should continue to form part of the criminal proceedings during the trial. The accused did not bring forward any allegations with regards to his vulnerability or the way the interrogation took place, or any other allegations as stated in the case of *Beuze v. Belgium* quoted above.

Regarding the concept of legal certainty which is of great importance for the rule of law in a democratic country, the Constitutional Court in its judgment in the names **il-Pulzija vs Alfred Camilleri**[46] explained this concept and stated that:-

> "***Filwaqt li huma minnu lil-Qrati nostrana m'humiex marbuta bil-ligi tal-precedent, huma jutilizzaw il-principju auctoritas rerum similiter judicatarum sabiex tigi kreata certezza legali u dan hafna aktar determinant fil-kamp kriminali. Huwa minnu wkoll li c-certezza tad-***

[46] Decided by the Constitutional Court on the 14th December, 2018 (App no: 21/2015AF).

dritt tista tkun flessibbli fis-sens illi l-Qrati jistghu f'xi hin jaghtu interprettazjonijiet godda. *Izda, l-Qorti Ewropeja kellha diversi okkazzjonijeit sabiex tanalizza l-elementi li jistghu iwasslu ghal-lezjoni kif qieghed jigi sotttomess l-esponent. F'dan is-sens issir referenza ghas-sentenza fl-ismijiet* ***Beian vs Romania*** *(Applikazzjoni nru. 30658/05) decided on the 6th December 2007 whereby this Court stated: "*

37. Admittedly, divergences in case-law are an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. ***However, the role of a supreme court is precisely to resolve such conflicts*** *(see Zielinski and Pradal and Gonzalez and Others v. France [GC], nos. 24846/94 and 34165/96 to 34173/96, § 59, ECHR 1999-VII).*

"38. In the instant case it is clear that the HCCJ was the source of the profound and lasting divergences complained of by the applicant. "

39. The practice which developed within the country's highest judicial authority is in itself contrary to the principle of legal certainty, a principle which is implicit in all the Articles of the Convention and constitutes one of the basic elements of the rule of law (see, mutatis mutandis, Baranowski v. Poland, no. 28358/95, § 56, ECHR 2000-III). Instead of fulfilling its task of establishing the interpretation to be followed, the HCCJ itself became a source of legal uncertainty, thereby undermining public confidence in the judicial system (see, mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 97, ECHR

2002-VII, and Păduraru, cited above, § 98; see also, by contrast, Pérez Arias v. Spain, no. 32978/03, § 27, 28 June 2007)." (enfasi tal-esponent).

"Ghar-rigward tal-principji stabbiliti mill-istess Qorti, issir referenza wkoll ghas-sentenza fl-ismijiet ***Albu u Ohrajn vs Romania*** *moghtija fl-10 ta' Mejju 2012, fejn a para 34 insibu ssegwenti:*

"(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts ruling at last instance are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see Iordan Iordanov and Others, cited above, §§ 49-50; see also Beian (no. 1), cited above, §§ 34-40; Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; Schwarzkopf and Taussik, cited above, 2 December 2008; Tudor Tudor, cited above, § 31; and Ştefănică and Others, cited above, § 36);

"(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst other authorities, Beian (no. 1), cited above, § 39; Iordan Iordanov and Others, cited above, § 47; and Ştefănică and Others, cited above, § 31);

> *"(v) The principle of legal certainty, guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see Paduraru v. Romania, § 98, no. 67 63252/00, ECHR 2005-XII (extracts); Vinčić and Others v. Serbia, nos. 44698/06 and others, § 56, 1 December 2009; and Ştefănică and Others, cited above, § 38);*

It is not the first time that this Court has made reference to the divergences in the interpretations given by the Constitutional Court and the Court of Criminal Appeal (Superior Jurisdiction). In the absence of a Court of Cassation, the Constitutional Court has the duty to eliminate any uncertainty and not create the same. This Court here makes refence to a recent judgment of an inferior court in the names **Il-Pulizija vs Liam Cauchi**[47] where the Court of Magistrates stated:

> *'Fil-każ odjern huwa evidenti illi n-nuqqas li l-imputat jingħata l-jedd li **jottjeni parir legali waqt l-interrogatorju tiegħu**, ma kienx nuqqas li ma sarraf fl-ebda preġudizzju għalih, stante li huwa għamel dikjarazzjonijiet inkriminanti, li a bażi tagħhom huwa ġie akkużat b'reati serji, mertu tal-imputazzjonijiet (a) u (b) li jwasslu għall-piena ta' priġunerija tassattiva. Mhux biss, iżda l-Qorti qed tqis ukoll illi l-istqarrija tal-imputat, kemm il-darba dikjarata ammissibbli, hija l-unika prova determinanti li tista' twassal għas-sejbien ta' ħtija tiegħu dwar dawn ir-reati.*

[47] Decided on the 12th April, 2022.

> *Skartata din l-istqarrija, ma jibqax biżżejjed provi, li jistgħu jwasslu għal sejbien ta' ħtija fl-imputat dwar l-istess reati, fil-grad rikjest mil-liġi.* ***Il-Qorti għalhekk tqis illi fiċ-ċirkostanzi, ikun iżjed għaqli li timxi fuq il-passi li mxiet fuqhom il-Qorti Kostituzzjonali fis-sentenzi fuq ċitati, kif ukoll il-Qorti Kriminali fis-sentenza fuq imsemmija, u tiskarta l-kontenut tal-istqarrija meħuda lill-imputat mingħajr il-jedd li jottjeni parir legali waqt l-interrogatorju tiegħu, bħala prova inammissibbli.***'

The principle of '*legal certainty*' is one of great importance. It is a fact that judgments given on the same day, as this Court already pointed out, took a conflicting direction, so much so that the Court of Criminal Appeal (Superior Jurisdiction) provided a different direction from that of the Constitutional Court on the 27th January, 2021.

As considered in the judgment of the Criminal Court in the names **'The Republic of Malta vs Lamin Samura Seguba'**[48] the following was stated:

> '*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*

[48] Decided by the Criminal Court on the 11th June, 2020 (Bill of Indictment no: 11/2017).

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;'

Subsequently, the Court of Criminal Appeal (Superior Jurisdiction) in the judgment in the names **The Republic of Malta vs. Lamin Samura Seguba**'[49] considered that:

> *'10. In its reasoning the First Court laments the lack of legal certainty which the domestic courts have had to face in decisions regarding the probative value of pre-trial statements where the suspect did not have a lawyer present during his interrogation, and this in line with current legislation which saw the transposition into Maltese law of Directive 2013/48/EU of the European Parliament and of the Council dated 22 October 2013, and this by means of Act LI of 2016. This Court concurs with the objections put forward by the First Court to the ever-evolving situation regarding the legal validity of pre-trial statements obtained without a lawyer's assistance. Indeed, both our jurisprudence and that of the European Court present differing and often contradictory dicta on the matter. And it is precisely this legal uncertainty that led the First Court to uphold accused's preliminary plea regarding the inadmissibility of his pre-trial statements as evidence in the criminal proceedings brought against him. The Court thus states in its judgment:*
>
> *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*

[49] Decided by the Criminal Court of Appeal on the 27th January, 2021 (Bill of Indictment: 11/2017).

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 2013/48 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.

11. This Court however cannot accept the line of reasoning of the First Court, as it is its duty to lay down rules where the law fails to do so to provide that legal certainty which every accused person has a right to. This does not necessarily amount to the removal

from the records of the case of all pre-trial statements, all the more where the said statements were released according to law.

12. The regulatory principle as to the admissibility of evidence in criminal proceedings presupposes the existence of an express provision of law which regulates the admission of such evidence in a court of law. Evidence is consequently deemed to be inadmissible only if the law precludes its production.'

The Criminal Court of Appeal (Superior Jurisdiction) upheld the appeal of the Attorney General and revoked where the First Court had upheld the first preliminary plea of the accused and therefore it rejected all the preliminary pleas brought forward by the accused.

However, at this point this Court would like to make refence to the relativelyecent case in the names '**Ir-Repubblika ta' Malta vs Kevin Gatt u Omissis'**[50] where the Criminal Court of Appeal (Superior Jurisdiction) stated the following:

'6. Illi għalhekk il-Qorti tażżarda tgħid illi lanqas hemm il-konfliġġenza lamentata u l-konsegwenti inċertezza ta' dritt, bejn id-deċiżjonijiet ta' din il-Qorti u dawk tal-Qorti Kostituzzjonali, billi dawn huma kollha konkordi fil-fehma illi sakemm il-proċess penali ma jkunx ġie finalment determinat sabiex il-kriterju tal-overall fairness ikun jista' jiġi mistħarreġ, ma jistax jingħad illi hemm xi lezjoni taħt l-artikolu 6 tal-Konvenzjoni. Huwa r-rimedju mogħti li huwa differenti u dan għaliex filwaqt li l-Qorti Kostituzzjonali qed tidderiġi lil Qorti Kriminali sabiex

[50] Decide by the Criminal Court of Appeal on the 27th October, 2021 (Bill of Indictment: 05/2017).

preventivament ma ġġibx dik l-istqarrija a konjizzjoni tal-ġurati waqt iċ-ċelebrazzjoni tal-ġuri, fil-parametri tas-setgħat lilha mogħtija fl-artikolu 46 tal-Kostituzzjoni, u dan sabiex ma jkunx hemm il-periklu li l-proċeduri jkunu mittiefsa meta xi kundanna eventwali tiġi imsejsa fuq prova li tista' tkun ivvizjata, din il-Qorti qed tagħti direzzjoni xort'oħra lil Qorti Kriminali, fil-parametri tas-setgħat lilha mogħtija bil-liġi, billi tidderigieha tapplika il-kriterji imfassal fid-deċiżjoni Beuze qabel ma tgħaddi biex tiskarta prova li hija legalment valida u ammissibbli, u dan sakemm dan l-eżercizzju dwar l-overall fairness ma jkunx jista' isir minn din il-Qorti preventivament minn eżami tal-atti kumpilatorji. Dan meta l-Qorti Ewropea issa qed tidderieġi il-qrati domestiċi jindagaw jekk il-proċeduri fl-intier tagħhom kienux ġusti fil-konfront tal-akkużat, bit-test allura li jrid jiġi segwiet fuq iż-żewġ binarji surriferiti. Dan ifisser illi bil-fatt illi din il-Qorti qed tagħti rimedju xort'oħra minn dak mogħti mill-Qorti Kostituzzjonali f'każijiet analoġi, ma jfissirx illi teżisti dik l-inċertezza fil-liġi lamentata mill-appellant billi l-ġurisprudenza hija illum konkordi fil-fehma illi fl-istadju bikri tal-proċeduri mhux dejjem jista' jiġi determinat jekk seħħitx dik leżjoni tal-jedd tal-persuna akkużata għal smigħ xieraq.

In this judgment the Court of Criminal Appeal stated the following regarding the admissibility of a statement released by an accused **prior to the 10th of February, 2010**, when an accused had no legal assistance whatsoever, neither prior nor during the interrogation:

'Illi fil-fehma tal-Qorti, mingħajr ma tinoltra ruħha fil-mertu tal-każ, dawn it-tweġibiet jistgħu jkunu inkriminatorji billi min huwa imsejjaħ biex jiġġudika jista' jinferixxi li l-appellant allura verament kien a konoxxenza tan-negozju ta' traffikar ta' droga mertu ta' dawn il-proċeduri. Illi dawn it-tweġibiet ingħataw minnu meta huwa ma kellu jedd għall-ebda difiża u għalhekk meta kien injar mill-konsegwenzi legali li din il-linja ta' tweġibiet setghet iggib fuqu. ***Illi allura minn dan il-kwadru ta' fatti marbuta mal-interrogatorrju tal-appellant, meta huwa ma kellu ebda dritt li jiddefendi ruħu permezz ta' xi forma ta' assistenza legali, jemerġi mhux biss illi fl-ewwel stadji tal-investigazzjonijiet huwa ġie interrogat mingħajr ma ingħata ebda twissija, iżda imbaghad meta mogħti it-twissija vigenti skont il-liġi f'dak iż-żmien, injar mill-konsegwenzi tal-mod kif kien qiegħed iwieġeb għal mistoqsijiet li kienu qed isirulu, seta' inkrimina ruħu u dan mingħajr ma kellu dik id-difiża adegwata.*** *Dan jista' isarraf f'preġudizzju irrimedjabbli għall-appellant għalkemm fl-istadju taċ-ċelebrazzjoni tal-ġuri huwa ser ikun assistit minn avukat u ser ikollu l-opportunita' iressaq id-difiża tiegħu. Illi allura, għalkemm l-istqarrija tat-13 ta' Otturbu 2008 ġiet rilaxxata skont il-liġi viġenti f'dak iż-żmien, madanakollu huwa indubitat illi din il-prova li ittieħdet meta l-appellant ma kellux il-jedd li jiddefendi ruħu hija prova determinanti tant illi, bil-mod kif l-appellant wieġeb għal mistqosijiet li sarulu huwa seta' inkrimina ruħu irrevokabbilment u dan bi preġudizzju serju għar-retta amministrazzjoni tal-ġustizzja.* ***Dan ifisser illi għalkemm għad irid jiġi iċċelebrat il-ġuri, madanakollu huwa bil-wisq evidenti f'dan l-istadju tal-proċeduri, meta il-Qorti hija mogħnija bil-provi kkumpilati, illi l-prova li l-***

Prosekuzzjoni qed tfittex li tagħmel, kemm permezz tad-dikjarazzjonijiet verbali magħmula mill-appellant, kif ukoll dawk magħmula fl-istqarrija rilaxxata minnu lil pulizija, tista' tkun vvizzjata minħabba il-fatt illi l-appellant ma setax jiddefendi ruħu kif xieraq u għalhekk din il-prova għandha tiġi imwarrba. *F'dan il-każ, il-Qorti hija tal-fehma illi n-nuqqasijiet minnha ravviżati ma jistgħu bl-ebda mod jiġu sanati għaliex l-Imħallef togat neċessarjament irid iwissi lil ġurati fl-indirizz finali tiegħu b'dawn l-imsemmija nuqqasijiet, li x'aktarx ser jivvizjaw l-istqarrija u dikjarazzjonijiet magħmula mill-appellant miksuba mingħajr ma kellu ebda difiża, sabiex b'hekk ikun ferm riskjuż li huma jistrieħu fuqha meta jiġu biex jagħmlu il-ġudizzju aħħari tagħhom. Dan minħabba l-fatt li meta din il-Qorti twieżen il-valur probatorju ta' din l-istqarrija meta komparat mal-pregudizzju irrimedjabbli li ser ibati l-appellant f'kaz l-istess tiġi ammess, huwa indubitat illi il-preġudizzju rekat jiżboq il-valur probatorju tagħha. Il-Qorti għalhekk qed titbiegħed mill-fehma milħuqa mill-Qorti Kriminali f'dan ir-rigward, ukoll għaliex il-fattispecje ta' dan il-kaz ma għandhom xejn x'jaqsmu ma' dawk li isawwru il-każ minnha iċċitat fis-sentenza appellata u li fuqu straħet biex sejset id-deċiżjoni tagħha.*

22. Għaldaqstant magħmula dawn il-konsiderazzjonijiet, dan l-ewwel aggravju sollevat mill-appellant jistħoqqlu akkoljiment u għalhekk tordna illi l-prova li l-Prosekuzzjoni trid tagħmel permezz tad-dikjarazzjonijiet kemm verbali kif ukoll bil-miktub magħmula mill-appellant meta huwa ġie arrestat u interrogat għandha tigi

imwarrba u ma tingiebx a konjizzjoni tal-ġurati matul iċ-ċelebrazzjoni tal-ġuri.'

The Court of Criminal Appeal in the judgment '**Ir-Repubblika ta' Malta vs Ismael Habesh et'**,[51] applied the same reasoning when an appeal was filed by the Attorney General. It held that:

*'16. Dan qed jingħad għaliex, għalkemm f'dan l-istadju din il-Qorti, bħal Qorti Kriminali qabilha, ma għandhiex is-setgħa tidħol biex tqis il-provi fil-mertu, madanakollu dan l-eżercizzju qed isir għaliex l-Avukat Ġenerali jilmenta mill-fatt illi l-Qorti Kriminali ma daħħlitx biex tezamina jekk il-kriterji imfassla fid-deċiżjoni Beuze humiex sodisfatti fir-rigward tal-istqarrijiet mertu ta' dan l-appell**. **Il-Qorti Kriminali kienet tal-fehma illi l-fatt waħdu illi l-appellat ma ngħata ebda forma ta' assistenza legali meta rrilaxxa l-istqarrijiet tiegħu lura fis-sena 2005 u l-2009, u dan għaliex il-liġi ma kenitx tagħtih dan id-dritt, kienet raġuni sufficjenti sabiex tqies illi dawn l-istqarrijiet kellhom jitwarrbu mill-atti proċesswali billi jkun perikoluż ferm illi il-ġudizzju aħħari isir fuq prova li inkisbet meta s-suspettat ma kellux jedd għal ebda forma ta' difiża. Illi l-Qorti fliet bir-reqqa il-kontenut tal-istqarrijiet mertu ta' dan lappell u tqis illi għalkemm huwa minnu illi l-appellat caħad kategorikament l-involviment tiegħu fl-omiċidju, madanakollu huwa jwieġeb għal mistqosijiet kollha li jsirulu meta jintalab jagħti dettalji dwar dak li għamel fil-lejla in kwistjoni, fejn anke biddel għal darba darbtejn xi dettalji mill-verżjoni tiegħu tal-***

[51] Decided by the Criminal Court of Appeal on the 22nd September, 2021 (Bill of Indictment 14/2017).

fatti. Dan għamlu meta huwa ma kellu ebda forma ta' difiża, fejn allura ċertu inkonsistenzi jistgħu jdagħjfu l-kredibbilita' tiegħu, biex b'hekk bil-fatt illi huwa rrinunzja għall-jedd tiegħu ghas-silenzju f'ċirkostanzi fejn ma kellu ebda forma ta' difiża, dan jista' jissarraf f'preġudizzju irrimedjabbli.'

'20. Illi hija l-fehma tal-Qorti allura, stabbilit li ma kienx hemm ragunijiet impellenti li wasslu sabiex id-dritt ghall-assistenza legali jigi miċħud u adottat il-kriterju tal-"overall fairness of the proceedings" imfassal fil-kaz Beuze vs il-Belgju, ***għalkemm l-istqarrijiet mertu tal-appell inkisbu skont il-liġi viġenti f'dak iż-żmien, madanakollu dan ma jistax jeradika mill-fatt illi l-appellat irrilaxxa diversi stqarrijiet li l-Prosekuzzjoni bi ħsiebha tressaq bħala prova fil-ġuri, meta dawn ġew rilaxxati mingħajr ebda forma ta' għajnuna legali sabiex tiggwida lill-appellat. Dan iktar u iktar, jerġa' jiġi emfasiżżat, meta l-istħarriġ tal-pulizija ħa bixra differenti minn dak inizjali meta allura l-appellat ma kienx għadu ġie mgħarraf li qed jiġi indagat b'relazzjoni ma' akkuży dwar omiċidju, tant illi kif ingħad, fl-istqarrijiet li ġew wara li bdiet l-indaġini dwar l-omiċidju, l-appellat jibda' ibiddel xi dettalji minn dak mistqarr minnu inizjalment. L-istess ma jistax jingħad, kif ġustament stqarret il-Qorti Kriminali, fir-rigward tal-istqarrija li imbagħad ġiet rilaxxata fis-sena 2013 meta ftit wara l-appellat ġie mixli bl-omiċidju ta' Simon Grech. Dan għaliex fl-ewwel lok huwa kien mgħarraf dwar ir-raġuni li kien qed jiġi interrogat, ingħata il-jedd jikkonsulta ma' avukat, u mhux biss, iżda bit-trapass taż-żmien meta llura***

kien jaf bl-evidenza li kellhom f'idejhom il-pulizija, kellu kull opportunita' jieħu dak il-parir meħtieġ konsapevoli li kien qed jiġi indagat dwar l-omiċidju ta' Grech.

21. Illi d-direzzjoni li qed tiġi mogħtiija mill-Qorti Ewropeja dwar id-Drittijiet talBniedem hija univoka u ċioe' illi kull każ irid jitqies għalih billi jiġi mistħarreġ f'kull każ individwalment jekk, bil-fatt illi l-persuna akkużata ma kellhiex jedd għal ebda forma ta' assistenza legali, jew inkella, bil-fatt illi ma kellhiex l-avukat preżenti waqt it-teħid tal-istqarrija, għalkemm dik il-persuna tkun kisbet parir legali jew għall-inqas ingħatat il-jedd li jkollha dak il-parir, dan setax impinġa fuq is-smigħ xieraq iktar 'il quddiem tul il-proċeduri penali istitwiti kontra tagħha. ***F'dan il-każ, il-Qorti hija tal-fehma illi n-nuqqasijiet minnha ravviżati, bħalma ġew ravviżati ukoll mill-Qorti Kriminali qabilha, ma jistgħu bl-ebda mod jiġu sanati għaliex l-Imħallef togat neċessarjament irid iwissi lil ġurati fl-indirizz finali tiegħu b'dawn l-imsemmija nuqqasijiet, li x'aktarx ser jivvizjaw l-istqarrijiet tal-appellat miksuba mingħajr ma kellu ebda difiża, sabiex b'hekk ikun ferm riskjuż li huma jistrieħu fuqha meta jiġu biex jagħmlu il-ġudizzju aħħari tagħhom.***

22. Illi allura għal motivi hawn fuq miġjuba, b'żieda mal-fehma milħuqa mill-Qorti Kriminali fis-sentenza appellata, jkun għaqli li f'dan l-istadju bikri tal-proċess gudizzjarju, din il-prova magħmula mill-Prosekuzzjoni permezz ta'l-istqarrijiet li ġew rilaxxati mill-appellat Ismael Habesh lura fis-snin 2005 u 2009, meta ma kellu jedd għall-ebda forma ta' assistenza legali, jiġu imwarrba u ma

> ***jingiebux a konjizzjoni tal-ġurati matul iċ-ċelebrazzjoni tal-ġuri.'***

Comnsidered further,

This Court, as a criminal court, cannot decide whether a statement released in the absence of a lawyer infringed the right of the accused to a fair hearing since it is not within this court's remit to decide this issue.

In view of the above, it seems that while the emphasis is that each case needs to be individually evaluated, recently it seems that statments that were taken before the 10th February, 2010, when suspects and accused individuals had absolutely no right to legal assistance, are being declared inadmissable and this due to the fact that the accused or suspected person had no form of defense, which can lead to irreperable prejudice. The same cannot be said for statements released after the 10th February, 2010, given that after this date the accused or suspected person had a form of legal assistance, albeit limited.

The judgment in the names **Ir-Repubblika ta' Malta vs Jonathan Roger Portelli**[52] the court declared the statements of the accused inadmissible and consequently ordered that they should be expunged from the acts of the case. However, on the 22nd September, 2021, the Criminal Court of Appeal (Superior Jurisdiction) revoked this part of the judgment and amongst other things stated the following:

> *'14. Illi l-pożizzjoni ta' dritt li tirregola it-teħid ta' stqarrijiet u dikjarazzjonijiet mis-suspettat taħt id-dritt penali nostran ra żviluppi sostanzjali fis-snin reċenti.* ***Illi fiż-żmien meta l-akkużat ġie arrestat u interrogat lura fis-sena 2013, huwa***

[52] Decided by the Criminal Court of Appeal on the 23rd September, 2020.

ma kellux il-jedd li jkollu l-avukat preżenti miegħu matul it-teħid tal-istqarrija u dan għaliex, kif ingħad, dan il-bdil għal Kodiċi Kriminali kien konsegwenza ta' trasposizzjoni fil-liġi tagħna ta' dak imfassal fid-Direttiva 2013/48/UE tal-Parlament Ewropew u tal-Kunsill tat-22 ta' Ottubru 2013 dwar id-dritt tal-aċċess għal avukat fi proċeduri kriminali u fi proċeduri tal-mandat ta' arrest Ewropew, bdil allura li seħħ fiż-żmien wara li l-akkużat kien ġie interrogat. Illi fiż-żmien meta ġiet rilaxxata l-istqarrija mill-appellat kien hemm dritt, għalkemm wieħed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiduċja tagħha fil-ħin preċedenti l-interrogatorju mill-pulizija. *Dan id-dritt ġie lilu konċess u l-appellat użufruwixxa minnu, biex b'hekk l-istqarrija sussegwentement rilaxxata, hija in konformita' mal-liġi viġenti f'dak iż-żmien.* ***Di fatti, l-leġislatur fl-artikolu l-ġdid maħluq bl-Att III tal-2002 ħaseb sabiex "il-persuna li tkun arrestata u qed tinżamm taħt il-kustodja tal-Pulizija f'xi Għassa jew f'xi post ieħor ta' detenzjoni awtorizzata għandha, jekk hija hekk titlob, titħalla kemm jista' jkun malajr tikkonsulta privatament ma' avukat u prokuratur legali, wiċċ imb'wiċċ jew bit-telefon, għal mhux aktar minn siegħa żmien. Kemm jista' jkun malajr qabel ma tibda tiġi interrogata, l-persuna taħt kustodja għandha titgħarraf mill-Pulizija bid-drittijiet li għandha taħt dan is-sub-artikolu." Għalhekk inħolqot sitwazzjoni ġdida għar-rigward tal-istqarrijiet li ġew rilaxxati mid-data li nġiebu fis-seħħ dawk l-emendi 'l quddiem, sitwazzjoni, kif ingħad, fejn ingħata il-jedd tal-parir legali qabel l-interrogatorju. Illum fid-dawl tal-iżviluppi legali u***

ġurisprudenzjali, madanakollu, ma jistax jiġi ritenut li dwar dawn l-istqarrijiet tapplika xi regola esklużjonarja ta' dritt penali proċedurali li tirrendi dawk l-istqarrijiet inammissibbli, għaliex dawn kienu konformi mal-liġi penali viġenrefusti fiż-żmien relevanti.

...

17. Dan magħdud, madanakollu, il-Qorti hija wkoll tal-fehma illi f'dan l-istadju bikri tal-proċeduri fejn il-proċess penali għad irid jinstema' mill-qorti kompetenti ma jistax jingħad jekk il-kriterji indikati fil-kaz Beuze ġewx segwiti. Ukoll għaliex la din il-Qorti u lanqas il-Qorti Kriminali qabilha ma għandhom funzjonijiet kostituzzjonali u allura ma għandhomx il-poter jistħarrġu f'dan l-istadju, jekk tkunx seħħet xi vjolazzjoni tad-drittijiet fondamentali tal-persuna akkużata jew jekk potenzjalment dan jistax iseħħ, iktar u iktar f'dik is-sitwazzjoni fejn l-assistenza legali tkun ġiet mogħtija skont il-kriterji previsti mill-Liġi viġenti fiż-żmien rilevanti, u b'mod partikolari meta l-ġudikabbli jkun għamel użu minn dak id-dritt billi jkun kiseb dik l-assistenza legali qabel ma jkun irrilaxxja xi stqarrijiet lill-investigaturi. Ma tistax il-Qorti ta' kompetenza penali tiddeċiedi a priori illi tiskarta prova li f'dan l-istadju għadna valur probatorju, bil-fatt waħdu illi fiż-żmien li l-persuna akkużata tkun ġiet interrogata ma kellhiex il-jedd ikollha l-avukat preżenti magħha waqt it-teħid tal-istqarrija. Dan għaliex skont l-imsemmija pronunzjamenti dan n-nuqqas ma jwassalx awtomatikament għal leżjoni

***tal-jedd tagħha għal smiegħ xieraq, meta l-Qorti Ewropea issa qed tidderieġi il-qrati domestiċi jindagaw jekk il-proċeduri fl-intier tagħhom kienux ġusti fil-konfront tal-akkużat, bit-test allura li jrid jiġi segwiet fuq iż-żewġ binarji surriferiti. Kif ukoll minħabba l-fatt li l-jedd tal-assistenza legali matul l-interrogatorju kienet estensjoni tad-definizzjoni tal-jedd tal-assistenza legali li ma kienetx teżisti fiż-żmien meta l-akkużat kien ġie miżmum u mitkellem mill-Pulizija u b'hekk dik l-estensjoni tal-jedd tal-assistenza legali ma kienetx għadha parti mid-definizzjoni tal-jedd tal-assistenza legali viġenti fil-Liġi Maltija u li ġiet offruta u użufruwita mill-akkużat f'dan il-każ. Din l-amplifikazzjoni tal-jedd tal-assistenza legali li allura ġiet tinkludi l-possibilita tal-assistenza legali anke matul ir-rilaxx ta' stqarrijiet mill-persuna indagata ġiet fis-seħħ wara li l-akkużat f'dan il-każ kien ġie interrogat. Ma kienx possibbli għalih li jingħata dak il-livell t'assistenza legali mhux għax il-Pulizija ċaħditu minnu, iżda għaliex il-Liġi regolanti l-assistenza legali dak iż-żmien ma kienx tipprevediha. Din il-Qorti ma tistax tqis li dawn l-istqarrijiet huma inammissibbli bħala prova fi proċeduri kriminali minħabba l-fatt li fiż-żmien li fihom ingħataw il-jedd għall-assistenza legali viġenti ma kienx ukoll jinkludi l-assistenza legali matul l-interrogatorju – inklużjoni fl-estensjoni tad-dritt tal-assistenza legali li daħlet fis-seħħ snin wara. Din id-distinzjoni per se mhix raġuni skont il-Liġi penali Maltija li twassal għall-esklużjoni tal-istqarrijiet de quo milli jservu ta' prova fil-proċeduri penali.** *Apparti minn hekk, kif diġa intqal, l-akkużat kien mogħti dak il-jedd tal-assistenza legali skont il-Liġi viġenti*

fiż-żmien rilevanti u hu aċċetta dan il-jedd u għamel użu minnu billi qabel ma rrilaxxja l-istqarrijiet tiegħu ħa lpariri legali li kellu jieħu.

…

21. Illi l-Qorti tistqarr illi hija konsapevoli tal-pronunzjamenti reċenti li ġew mogħtija mill-Qorti Kostituzzjonali fis-sentenzi tas-27 ta' Jannar 2021 fejn ingħatat direzzjoni lil Qorti Kriminali sabiex ma tqisx bħala prova stqarrijiet li jkunu ġew rilaxxati mingħajr id-dritt tal-assistenza legali billi jinsorġi l-periklu li jkun hemm difett proċedurali jekk jinstab illi dawn jilledu id-dritt tal-persuna akkużata għal smiegħ xieraq.[53] Hija konsapevoli wkoll ta' pronunzjamenti oħra, b'wieħed aktar recenti,[54] fejn il-Qorti Kostituzzjonali kienet tal-fehma kuntrarja,[55] u għalhekk din il-Qorti hija tal-fehma, meta tinsab mogħnija bil-provi kkumpilati u mingħajr ma tinoltra ruħha f'indaġini dwar il-mertu, li kull każ jimmerita indaġini għalih innfisu sabiex jiġi mistħarreġ jekk teżistix il-biża' li fil-proċess ġudizzarju il-persuna akkużata issofri nuqqas ta' smigħ xieraq bl-ammissjoni bħala prova ta' stqarrija li b'xi mod tista' tkun waħda mittiefsa minn xi difett mhux sanabbli anke meta wieħed jieħu in konsiderazzjoni "the overall fairness of the proceedings". Illi l-Qorti Kostituzzjonali stess fil-pronunzjamenti kollha minnha magħmula stqarret ċar u

[53] Clive Dimech vs Avukat Generali, The Police vs Alexander Hickey, Morgan Onuorah vs l-Avukat ta'l-Istat.
[54] Micallef Briegel vs Avukat Ġenerali Kost. 30th June, 2021.
[55] Kost: Ir-Repubblika ta' Malta vs Martino Aiello – 27th March, 2020.

tond illi kien prematur f'dan l-istadju tal-proċeduri tiddikjara illi kienet seħħet leżjoni billi l-proċess ġudizzjarju fl-intier tiegħu kien għadu ma ġiex konkluż, għalkemm f'uħud mill-kazijiet tat direzzjoni lil Qorti Kriminali sabiex tisfilza il-prova ta'l-istqarrija, izda dan sar aktar bhala forma ta' rimedju prekawzjonarju minhabba xi leżjoni potenzjali, u mhux għax fil-fatt kienet seħħet dik il-leżjoni lamentata. Illi din il-Qorti fil-kompetenza tagħha ta' natura penali, madanakollu, ma tistax tagħti din id-direzzjoni lil Qorti Kriminali u dan għaliex kif ingħad l-imsemmija prova mhijiex nieqsa mill-valur probatorju tagħha ġaladarba ma hemm ebda regola ta' dritt penali li qed teskludi l-ammissjoni ta'l-istess u ġaladarba ukoll il-proċess ġudizzjarju fl-intier tiegħu għadu ma seħħx biex b'hekk lanqas jista' jiġi stabbilit f'dan listadju bikri jekk kienx hemm xi vjolazzjoni tal-persuna akkużata tad-drittijiet kostituzzjonali tagħha, jew jekk potenzjalment dan jistax iseħħ. Dan ifisser għalhekk illi f'dan l-istadju tal-proċeduri ebda prova oħra marbuta ma' din l-istqarrija ma għandha tiġi estromessa mill-att. '*[56]

This Court is aware of these judgments, however, begs to differ with their reasoning. In the present case, the 'caution' was given to the accused according to the law *in vigore* at that time. The statement was released on the 17th September, 2014, during a time when the accused did not have a right to be

[56] Another judgment by the Court of Appeal (Superior Jurisdiction) on the same day, i.e. the 22nd September, 2011 decided in the same manner as the judgment in the names **The Republic of Malta vs Christopher Doll**.

assisted by a lawyer during the interrogation. The accused consulted with his lawyer prior to the interrogation and should he have been given the right to be assisted by a lawyer during the interrogation, he might have also exercised that right**. Therefore, the accused may still be prejudiced.**

The Court considers that to this day it cannot be said that the question of whether a statement should remain in the acts of a case even though it was taken at a time when the law did not provide for the right of a suspect or accused person to be assisted by a lawyer is crystalized. Indeed, as shown in the above mentioned judgments, the courts have given different directions on this matter.

This Court, while in no way declares that the statement released by the accused infringes his right to a fair hearing, considers that in view of the fact that since the Courts to this day grant different directions regarding the use to be made of a statement released at the time when the accused did not have the right to have a lawyer present during the interrogation, in the interests of justice and integrity, is consistent in its approach and consequently declares the accused's statement as inadmissible and in addition also declare inadmissible any reference made to it. Subsequently, this Court orders the expungement of the statement together with any refence made to it from the acts of the proceedings.

For these reasons, this Court is accepting the first preliminary plea brought forward by the accused and is therefore declaring the accused's statement released on the 17th September, 2014 and any reference made to it, as inadmissible.

The **second preliminary plea** brought forward by the accused concerns the inadmissibility of those parts of Inspector Nikolai Sant's testimony were the Inspector expressed opinions. Even though the Attorney General is right when

stating that this preliminary plea is too generic, on the 24th September, 2014, the defence had minuted the following:

> *'Dr Giannella DeMarco would like to minute that when Inspector Sant* ***described the luggage as having a false bottom, this is an opinion and should be struck off his testimony since opinions are not allowed****;*
>
> *Secondly Dr Giannella De Marco for the defence would like to point out that when the luggage in question Dok NS11 was opened, what could be seen is that part of the lining could be attached.'*

The issue here revolves around the fact that Inspector Sant described the luggage as having a false bottom. The defence disagree and emphasise that this is a value judgement while also distinguishing between ordinary and expert witnesses. This Court here refers to the judgment in the names **Ir-Repubblika ta' Malta vs. Yorgen Fenech**[57]where the Criminal Court stated the following:

> *'Illi fit-tieni lment imqanqal mill-akkużat fir-rigward tad-deposizzjoni tax-xhud Melvin Theuma, huwa joġġezzjona għal dik il-parti tax-xiehda fejn dan ix-xhud,* ***fil-fehma tiegħu, seta' esprima opinjoni****, u jindika permezz ta' nota ippreżentata fit-08 ta' April 2022 l-istanzi f'din id-deposizzjoni twila fejn dan ix-xhud ma żammx mal-fatti, iżda wera xi opinjoni jew fehma mhux ibbażata fuq fatti ippruvati, jew li jistgħu jkunu ppruvati. Illi f'din in-nota, iżda, l-akkużat jindika diversi paġni fix-xiehda ta' Melvin Theuma mingħajr ma jirreferi għal dawk l-estratti mix-*

[57] Decided by the Criminal Court on the 9th December, 2022 (Bill of Indictment: 17/2021).

xiehda fejn, fil-fehma tiegħu, ix-xhud qiegħed jesprimi xi opinjoni. ***Illi l-Qorti rat din ix-xiehda li fl-essenza tagħha tidher li tirreferi għal fatti li kienu magħrufa lix-xhud. Issa jekk din ix-xiehda hijiex waħda kredibbli u attendibbli mhijiex fil-manzjoni riposta f'idejn il-Qorti f'dan l-istadju.*** ***Li hu zgur huwa, kif tajjeb jissottometti l-Avukat Ġenerali fis-sottomissjonijiet tiegħu, illi huma biss l-esperti maħtura mill-Qorti li jistgħu jesprimu xi fehma jew opinjoni u kwindi il-ġurati għandhom ikunu mogħtija direzzjoni sabiex jinjoraw kwalsiasi fehma jew opinjoni li jista' jagħti xhud li mhuwiex espert maħtur mill-Qorti.*** ***Fuq kollox jerġa' jiġi ribadit illi ix-xhud Melvin Theuma ser jerġa jiddeponi mill-ġdid matul iċ-ċelebrazzjoni tal-ġuri, meta allura l-Imħallef togat stess għandu jidderiġi lix-xhud sabiex jixhed fuq il-fatti lilu magħrufa u sabiex ma jesprimi l-ebda opinjoni mhux ibbażata fuq fatti ippruvati. Illi l-Qorti tal-Appell fil-kawza il-Pulizija vs Renard Cassar, deċiża fl-24 ta' Settembru, 2009 irritjeniet illi:***

"Hija prattika sancita mill-ligi, li ***xhieda ordinarja u cioe mhux persuni mahtura bhala espert mill-Qorti, ma jistghux jaghtu jew jesprimu opinjoni imma jistghu jiddeponu biss fuq dak illi huma kkonstataw bis-sensi taghhom. Meta jkun mehtieg xi hila jew sengha specjali biex jigi ezaminat xi oggett, ghandha tigi ordnata perizja (artikolu 650(1) tal-Kap 9).***

Illi allura in linja mal-ispirtu tal-liġi, huwa indibutat u indisputat illi ebda xhud ma huwa ser jitħalla jesprimi xi opinjoni fil-kors tal-ġuri, għajr għal dawk l-esperti

> ***nominati mill-Qorti, u l-ebda parti tad-deposizzjoni tax-xiehda tax-xhud Melvin Theuma mogħtija fl-Istruttorja fejn dan seta' esprima xi opinjoni ma għandha tintwera lil ġurati. Għal dawn il-motivi, salv dak li qed jiġi deċiż, din l-eċċezzjoni qed tiġi miċħuda ukoll.'***

Inspector Nicolai Sant is indicated in the list of witnesses of both the prosecution and the defence and therefore he shall be testifying once again during the trial by jury. As already stated above, only expert witnesses are allowed to express opinions. Furthermore, it is not within this court's remit to evaluate whether Inspector Sant is credible or not. The judge presiding the jury shall advise the witness to testify on facts known by him and that he shall refrain from expressing opinions not based on proved facts. Hence, in view of the above, this Court is rejecting the accused's second preliminary plea.

In his **third preliminary plea** the accused is asking this court to declare the *proces-verbal* inadmissible since it is missing essential requirements which determines what constitutes evidence in criminal procedure. The Attorney General stated that the *proces-verbal* is regularly drawn up and referred to Article 550(5) of the Criminal Code which stipulates:

> *(5) The procès-verbal shall be deemed to have been regularly drawn up if it contains a short summary of the report, information or complaint, a list of the witnesses heard and evidence collected, and a final paragraph containing the findings of the inquiring magistrate.*

On the other hand, the defence are emphasizing the fact that there is no indication of who presented the procès-verbal, the description of the procès-verbal is not indicated and an oath of who presented the procès-verbal is also missing. The

defence insists that without these three essential requisites, the procès-verbal cannot constitute evidence against anyone, let alone someone being charged with a criminal offence.

Reference is here made to the judgment in the names **ir-Repubblika ta' Malta vs George Degorgio et**[58] where The Criminal Court of Appeal (Superior Jurisdiction) stated that:

> *89. Il-Qorti ezaminat is-sentenzi citati sia mill-ewwel Qorti kif ukoll mill-Avukat Generali fir-risposta tieghu izda fuq kollox ezaminat* ***bir-reqqa l-artikoli tal-ligi li jirregolaw l-mod kif il-proces verbal ghandu jsib ruhu fl-atti kumpilatorji u li dan isir kif titlob il-ligi la darba dan jitqies bhala prova fi proceduri gudizzjarji kif ravvizat fl-artikolu 550 tal-Kodici Kriminali.***
>
> *90. Huwa palezi u ma jehtieg ebda spjega ulterjuri li la l-konkluzzjoni tal-Magistrat Inkwirenti, f'dan il-kaz proces verbal kif distint minn repert, ghandu jintbaghat lill-Avukat Generali kif fil-fatt intbaghat. Minn hemm 'l quddiem, jekk l-Avukat Generali jidhirlu li jkun jehtieg li dak il-proces verbal ghandu jifforma parti mill-provi f'kumpilazzjoni kontra persuna quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja jew bhala Qorti ta' Gudikatura Kriminali, ghandu jaghmel hekk bil-mezz kif jitlob l-artikolu 569(2) u (4) tal-Kodici Kriminali li jiddisponi hekk: 569 (2) L-Avukat Generali ghandu jibghat lura dawk l-atti lill-magistrat jew lill-magistrat tal-kompilazzjoni meta jkun jinhtieg li l-investigazzjoni tissokta.* ***(4) Ghall-fini tas-***

[58] Decided by the Court of Criminal Appeal (Superior Jurisdiction) on the 22nd September, 2021.

subartikolu(2) ta' dan l-artikolu, dawk l-atti ghandhom jintbaghtu lura permezz ta' nota li tigi pprezentata fil-Qorti tal-Magistrati u, minkejja kull haga li tista' tinstab f'dan il-Kodici, l-Avukat Generali ma ghandux jitharrek sabiex jesebixxi dawk l-atti.[59]

91. Issa, kif juri t-timbru fuq l-ewwel faccata tal-proces verbal u kif wara kollox ammess mill-appellanti, dan kien prezentat fir-Registru tal-Qorti tal-Magistrati u ricevut mid-Deputat Registratur, allura f'isem ir-Registratur tal-Qrati. In-nota tal-Avukat Generali ai termini tal-artikolu 569(4) kienet takkumpanja l-proces verbal numru 813/17 maghluq

92. Illi xhieda tal-fatt appena rilevat huwa l-verbal talQorti Istruttorja tas-7 ta' Frar, 2018 fejn jinghad hekk:

Xehedet bil-gurament Susan Fenech li esebit il-proces verbal mmarkat SF.

<u>Issa, ghalkemm u kif kostantement ritenut mill-Qrati taghna f'dan il-grad, huwa dejjem aktar desiderabbli li meta jkun esebit dokument, issir dejjem xi forma ta' deskrizzjoni tieghu, qasira kemm tkun qasira, li f'dan il-kaz kien jimmerita tal-anqas n-numru tal-proces verbal jekk mhux ukoll isem il-Magistrati Inkwirenti u d-data tieghu, ma hemm l-ebda dubju li l-proces verbal hemm riferit huwa dak mertu tal-appell odjern. Ventilat dan, il-kwistjoni issa tippernja fuq l-allegazzjoni illi in atti ma hemmx traskrizzjoni tad-deposizzjoni ta' Susan Fenech;</u>

[59] Fol. 51 of the acts of the proceedings.

93. Dwar dan jehtieg qabel xejn li jkun osservat illi fl-udjenza in kwistjoni kienu prezenti l-imputati debitament assisti mill-avukati difensuri taghhom. Ir-registrazzjoni tal-fatt tad-deposizzjoni ta' Susan Fenech sar fil-miftuh u hadd ma lissen xi lment dwaru. Fis-seduta li ssoktat wara dik ludjenza, hadd ma allega xi rregolarita f'dan il-fatt. *Issa, izda, l-akkuati jallegaw illi "mhuwiex minnu illi f'dik l-udjenza xehedet certa' Susan Fenech illi allegatament ipprezentat listess proces verbal bil-gurament..." fol 17 tar-rikors talappell ta' George Degiorgio). L-appellanti jatribwixxu dan in-nuqqas bhala dovut ghall-fatt li ma hemmx traskrizzjoni tax-xiehda in atti u li t-tibru fuq imsemmi juri li l-proces verbal kien esebit minn Dr. Elaine Mercieca (li dak iz-zmien kif spjegat mill-Avukat Generali fis-sottomisjonijiet tieghu kienet addetta mal-Ufficcju tal-Avukat Generali li tiehu hsieb tipprezenta l-inkjesti – ara fol 738 atti kumpilatorji). Jallegaw imbaghad l-appellanti illi mhux minnu li Susan Fenech xehdet u li hadet il-pedana tax-xhieda u lanqas kien somministrat lilha l-gurament;*

94. Il-Qorti tikkunsidra din tal-parti ta' dan l-aggravju bhala wiehed frivolu ghar-raguni illi ghalkemm il-Kapitolu 284 tal-ligijiet ta' Malta fl-artikolu 3 tieghu jiddisponi li l-Qorti tista' tordna l-procedimenti taghha jew xi parti minnhom jkunu registrati b'mezzi elettro-manjetici, jekk isir hekk, ma jfissirx b'daqshekk illi trid issir registrazzjoni ta' dak li jghid kull xhud minn hemm 'l quddiem. L-andament tal-kawza huwa f'idejn il-Qorti u jekk jidrilha illi dak li xehed xhud jista' jkun registrat b'mod li jkun deskritt dak li qal ixxhud, allura dak il-fatt ma jkunx wiehed censurabbli. Filkaz odjern jidher li l-Qorti Istruttorja

> *ghazlet, b'mod prattiku, li tirregistra dak li qalet id-Deputat Registratur bilgurament f'linja wahda fil-verbal tal-udjenza. Kwantu laggravju msejjes fuq il-fatt li ma saret ebda traskrizzjoni ma jfissirx b'daqshekk illi Susan Fenech qatt ma ddeponiet kif allegat mill-appellanti. Del resto ma hemm xejn x'josta' lillakkuzati milli jressqu lix-xhud in kontro-ezami dwar dak li xehdet jekk jidrilhom hekk mehtieg u la darba ma kienet infranta l-ebda formalita' essenzjali, ma tistax takkolji din ilparti ta' dan l-l-aggravju numru disa';*

In the minutes of the 29th October 2014[60] the following was minuted:

> *'When the case was called there appeared the Prosecuting Officer Insp Nicolai Sant and the accused assisted by Dr Gianluca Caruana Curran.*
>
> *Deputy Registrar exhibited a Proces Verbale relating to suspected brown substance found on the person and in the residence of accused on 17.09.2014 drawn up by Mag Doreen Clarke. Court confirms all experts therein already nominated.'*

Even though there is no indication of who the deputy registrar is who presented the *process-verbal* and there is also no number of the same *process-verbal*, a brief description was minuted together with the name of the Magistrate who had drawn up the *proces-verbal*. However, there is no doubt that the *proces-verbal* referred to in the minutes of the 29th October, 2014 is the same one presented in the acts of this case.[61] Furthermore, it needs to be observed that during the sitting dated 29th October, 2014, the accused was duly assisted by his lawyer, the

[60] Fol. 50 of the acts of the proceedings.
[61] Fol. 53 et seq of the acts of the proceedings.

minutes were recorded in open court, and nobody complained about what was being minuted and neither was any irregularity alleged. Moreover, even if the minutes are not detailed and precise, it does not mean that the *proces-verbal* should be considered as null, inadmissible, and consequently removed from the acts of the proceedings. However, it is then the defence's duty to address the jurors on the probative value and reliability of the same *procès-verbal*. Having seen the above, this Court is also rejecting this preliminary plea. Moreover, this Court is also rejecting the fourth preliminary plea brought forward by the accused since it concerns the inadmissibility of evidence which emanates from the document referenced in the third preliminary plea.

Consequently, for the above-mentioned reasons, this Court is accepting the first preliminary plea brought forward by the accused and is therefore declaring the accused's statement released on the 17th September, 2014 and any reference made to it, as inadmissible. Consequently, the Court orders that the statement and any reference made to it be expunged from the acts of the proceedings. Furthermore, the Court is rejecting the second (2nd), third (3rd) and fourth (4th) preliminary pleas brought forward by the accused.

Consuelo Scerri Herrera

Judge