The Court of Criminal Appeal

His Honour the Chief Dr Justice Mark Chetcuti LL.D.

The Hon. Judge Dr Edwina Grima LL.D.

The Hon. Judge Dr Giovanni Grixti Ll.D.

Sitting of the 26th of April 2023

Bill of Indictment No: 6/2022

The Republic of Malta

Vs

Daniel Muka

The Court,

1.Having seen the bill of indictment bearing number 6 of the year 2022 filed against Daniel Muka, wherein he was charged with having:

> **In the First Count** - On the eighteenth (18) of August of the year twenty-twenty (2020), in Sliema, Malta, maliciously, with intent to kill or to put the lives of Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI in manifest jeopardy caused the death, of the same Christian Pandolfino and Ivor Piotr Maciejowski.
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> **In the Second Count** - On the eighteenth (18) of August of the year twenty-twenty (2020), in Sliema, Malta, committed theft of jewellery and/or other items, which theft was accompanied with wilful homicide hence therefore aggravated

by 'Violence', and also aggravated by 'Means', by 'Amount' that exceeds the amount of two thousand and three hundred and twenty-nine euros and thirty-seven cents (€2,329.37), by 'Place' and by 'Time' to the detriment of Christian PANDOLFINO, Ivor Piotr MACIEJOWSKI and/or other persons and/or entity or entities.

In the Third Count - In light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this Bill of Indictment, of having, without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend offenders, arrested, detained or confined Christian PANDOLFINO and/or Ivor Piotr MACIEJOWSKI against their will, during which arrest, detention or confinement, Christian PANDOLFINO and/or Ivor Piotr MACIEJOWSKI was/were subjected to bodily harm, or threatened with death and/or with the object of extorting money or effects, or of compelling them to agree to any transfer of property belonging to such person/s.

In the Fourth Count - On the eighteenth (18th) of August of the year two thousand and twenty (2020) in Sliema, whilst committing crimes against the person and of theft, and on the twenty sixth (26th) of August of the year two thousand and twenty (2020), in Floriana, whilst he was being arrested for a crime, had on his person an arms proper and/or ammunition and/or any imitation thereof, and this without otherwise proving that he was carrying the firearm or arms proper for a lawful purpose.

In the Fifth Count - In light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this Bill of Indictment, of having, made use of an identification number ('JET 082') other than that allotted by the police or by an Authority in relation to a particular motor vehicle, and therefore on the eighteenth (18th) of August of the year two thousand and twenty (2020), at a time around quarter past ten (22:15) and half past ten (22:30) in the evening, in Sliema, and in the preceding days, made use of an identification number other than that allotted by the police or by an Authority in relation to a particular motor vehicle.

In the Sixth Count - in light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, of having, kept in any premises or in his possession, under his control or carried outside any premises or appurtenances, any firearm or ammunition without a licence from the Commissioner of Police, and therefore for having, on the twenty-sixth (26th) of August of the year two thousand and twenty (2020) and in the past days and/or weeks, in the Maltese islands, with several acts committed at different times and which constitute violations of the same provision of the law, and committed in pursuance of the same design kept in any premises or had in his possession, under his control or carried outside any premises or appurtenances a firearm and/or ammunition listed in Schedule II of Chapter 480 of the Laws of Malta, without a licence under the same Chapter 480 of the Laws of Malta.

In the Seventh Count - In light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, accuses the mentioned Daniel MUKA, of knowingly receiving or purchasing a property which has been stolen, misapplied or obtained by means of any offence, specifically the vehicle of the make Volkswagen Tiguan, or has knowingly taken part, in any manner whatsoever, in the sale or disposal of the same aforementioned vehicle, and therefore for having, on the eighteenth (18th) of August of the year two thousand and twenty (2020) and in the past days and/or weeks, in the Maltese islands, with several acts committed at different times and which constitute violations of the same provision of the law, and committed in pursuance of the same design, knowingly received or purchased property, that is a vehicle of make Volkswagen Tiguan, which had been stolen, or obtained by means of any offence, whether committed in Malta or abroad, or, knowingly took part, in any manner whatsoever, in the sale or disposal of the same vehicle of make Volkswagen Tiguan.

In the Eight Count - In light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, accuses the mentioned Daniel MUKA, guilty of having on the third (3rd) of August of the year two thousand and twenty (2020) in St. Julian's, committed theft of number plates with registration number 'JET 082', which theft is aggravated by the 'Nature of the Thing Stolen', and this to the detriment of Aaron Agius.

In the Ninth Count - In light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, accuses the mentioned Daniel MUKA of committing theft of number plates with registration number 'CCB 042', which theft is aggravated by the 'nature of the thing stolen', and this to the detriment of Brian Cutajar and/or Regina Auto Dealer and/or any other persons or entities that may qualify, and therefore for having in the past two (2) months prior the eighteenth (18th) August of the year two thousand and twenty (2020), committed theft of number plates with registration number 'CCB 042' which theft is aggravated by the 'Nature of the Thing Stolen', to the detriment of Brian Cutajar, Regina Auto Dealer and/or other persons and/or entity or entities that may qualify.

In the Tenth Count - In light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, of having, on the twenty fifth (25th) of August of the year two thousand and twenty (2020) and in the preceding days, failed to observe conditions imposed by the Criminal Court in its decree by Hon. Madame Justice Dr. Consuelo Scerri Herrera LL.D. dated on the twenty fourth (24th) of July of the year two thousand and nineteen (2019) granting bail and also for having committed a crime not of an involuntary nature whilst on bail.

2. Having seen the preliminary pleas filed by accused Daniel Muka on the 18th of May 2022.

3. Having seen the judgment of the Criminal Court of the 18th of October 2022, wherein the Court rejected the first preliminary plea, and the preliminary pleas number two to seven. The Court did not consider the reports listed as Dok RG and Dok NM1 respectively as having been drawn up in breach of the applicable provisions at law or that the fairness of the proceedings against the accused had been prejudiced and therefore rejected preliminary pleas number eight and nine. The Court ordered the Registrar to produce a translation of the documents mentioned by Defence in this plea in the English language and to ensure that the said translations be served on the accused and duly inserted in the records of the proceedings. The Court rejected the tenth preliminary plea, and rejected the preliminary pleas numbered eleven, twelve, thirteen and fourteen. The Court acceded to the fifteenth preliminary plea in part in the sense that no reference to the past criminal conduct of the accused could be made by Inspector James Grech during the course of his testimony unless this was rendered necessary by any one of the circumstances required by Articles 459A and 489 of the Criminal Code or unless the jury arrived to a verdict of guilt in relation to the accused, in which case proof relating to the tenth accusation would have to be produced by the Prosecution unless the accused would exempt them from so doing at that stage.

4. Having seen the appeal application filed by accused Daniel Muka on the 25th of October 2022 wherein this Court was requested to vary the judgment of the Criminal Court by confirming that part where it acceded to appellant's preliminary plea in part, while annulling and revoking the remainder of the judgment and upholding all other preliminary pleas raised by appellant.

5. Having seen the reply of the Attorney General filed on the 23rd of November 2022 wherein he requested that the Court reject all the grounds of appeal in their entirety and consequently to confirm the judgment delivered by the Criminal Court on the 18th of October 2022.

6. Having heard oral submissions by the parties.

7. Having seen all the acts of the case.

Considers,

8. Appellant feels aggrieved by the judgment of the Criminal Court wherein all his preliminary pleas were rejected bar the fifteenth plea which was acceded to only in part. The Court will deal with the grievances filed by appellant in the order in which they appear in his appeal application, his grievances essentially targeting all his preliminary pleas.

A. The nullity of the acts of the inquiry as from the 8th of April 2021 due to an omission by the Criminal Court to accede to the request filed by the Attorney General in terms of article 432 of the Criminal Court requesting an extension of the one-month time limit established at law for the filing of the bill of indictment.

9. The Criminal Court rejected this plea on the premise that the law does not leave any discretion to the said Court in granting the Attorney General's request for an extension to the one-month time limit for the filing of the indictment, thus lengthening it for a further fifteen-day time period, once the request is entered into by the Attorney General. Furthermore, the Criminal Court, after taking judicial notice of the records found in the registry of the said court, established that in actual fact the request filed by the Attorney General had been acceded to by a decree of the 8th of April 2021. Finally, the Court also relied on the provisions of article 597(4) of the Criminal Code, read in conjunction with articles 432(1) and 602, which lays down those circumstance where there results a nullity in the bill of indictment or in the records of the inquiry, and concluded that the objection entered by appellant was not provided for in the said article of law.

10. Appellant, however, aggrieved by this decision, insists that this omission by the Criminal Court to accede to the Attorney General's request constitutes a defect in the acts of the inquiry which defect cannot be rectified since the consequence of such default would bring about the filing of the indictment beyond the one-month time frame established at law. Furthermore, he reiterates that the decree granting such an

extension must result from the acts of the proceedings and not from the acts found in the registry of the Criminal Court, relying on the Latin dicta *quod non est in actis non est in mundo*. The absence of the corresponding decree to the request of the Attorney General in the acts themselves, consequently, in his opinion, can only lead to a defect in the proceedings bringing about their nullity and this from the 8th of April 2021, being the date when the request was filed by the Attorney General in terms of article 432 of the Criminal Code.

11. The Attorney General reaffirms his position at law, that once the request in terms of article 432 of the Criminal Code was filed in time, no nullity can arise solely because there is no record in the acts of the inquiry of the Court's decree granting the extension since this operates *ipso iure* upon the request being filed, the Court having no discretion in the exercise of its powers in terms of law.

12. In our legal system, when a person is accused by the Executive Police of a crime that exceeds the original competence of the Court of Magistrates as a Court of Criminal Judicature, the Court of Magistrates proceeds with the compilation of evidence. In fact, the Court of Magistrates has two attributes, one as a court of criminal judicature and another as a court of criminal inquiry, the latter being a form of judicial investigation that has two main purposes (a) to collect and preserve the evidence that will eventually be brought before the Criminal Court in the trial by jury and (b) to decide if there are sufficient reasons for the issuance of a bill of indictment against the accused (Art. 401(2), Cap. 9). In any case the inquiry shall be concluded within the term of one month.

13. The powers of the Attorney General, being the chief prosecutor in such cases, are laid out in Title III, Part I of Book Second of the Criminal Code, wherein his functions commence from the day on which the record of the inquiry is remitted to his office by the Court of Magistrates. From this date the Attorney General has more than one option available to him, in those cases where upon the conclusion of the inquiry the Court of Criminal Inquiry has decided that there is *prima facie* evidence for the accused to be sent to trial, one of them being that envisaged in article 405(1) of the Criminal Code which entitles the Attorney General to demand the Court to

collect more evidence. In any case the Attorney General shall be allowed the term of one month for the filing of the indictment, to run from the day when the acts are remitted to him by the Court, which term shall, on the demand of the Attorney General, be extended by the court to an additional period of fifteen days (art.432(1)).

14. In this case, appellant is of the firm opinion that the records of the inquiry are defective due to a non-observance of this disposition of the law. Although he concedes that the Attorney General filed his request within the one-month time frame, however, in the records of the inquiry there is no evidence to indicate that this request was granted by the Criminal Court.

15. The Court examined the records of the inquiry, from where it results that on the 8th of April 2021 a request was filed by the Attorney General in terms of article 432 of the Criminal Code asking for an extension as aforesaid. The document, being the application filed by the Attorney General supporting this request, is not found in its original in the records of the inquiry, with the document clearly indicating that this is only a copy of such original. From the face of this 'copy', as appellant rightly points out, there is no indication that this request was acceded to by the Criminal Court. The original request is filed in the registry of the Criminal Court and retained by the Registrar in the records of that Court. This fact was attested to by the Criminal Court itself and also judicial notice of it was taken by this Court. The original of the said document is held in the registry of the Criminal Court on which document is found the decree of the Criminal Court upholding the request, indicated by the phrase – "**Akk[1].08.iv.21**", with the judge's signature attesting the decree. The Court need not add anything further to its considerations regarding this grievance. It is clear that although in the records of the inquiry only a copy of the application can be found, however there is no doubt that this request was granted and thus the time limit extended by a further fifteen days, the Attorney General then sending back the records of the inquiry to the Court of Criminal Inquiry on the 15th of April 2021[2],

[1] Abbreviation of the Maltese term – "Akkordat" meaning that the demand was upheld.

[2] Folio 1797 of the records of the inquiry

thus within the fifteen-day extension granted. Furthermore, appellant's grievance that the decree found only in the Registry of the Criminal Court is tantamount to an absence of the said court order from the acts of the case is completely unfounded. Suffice it to say that the acts of the inquiry do not amount to the acts of the proceedings in their entirety. And notwithstanding that the original application and court order are filed in the registry of the Criminal Court, they still do form part of the acts of the proceedings as a whole, the original being retained in the records of the Criminal Court (from which Court the decree was issued) with a copy sent to the Court of Magistrates to be inserted in the inquiry for the sake of completeness. Consequently, there is no defect in the records of the inquiry as envisaged by appellant in his plea, all time limits having been adhered to, and thus his first grievance is being rejected as completely unfounded.

B. Pleas regarding documentary hearsay evidence which are numbered from 2 to 7.

16. Appellant registers his objection to the testimony of several witnesses, being mostly investigating police officers, who referred in their testimonies to the CCTV footages seized during the police investigations, which evidence details the route taken by the getaway car after the commission of the offence of homicide with which appellant is charged. He maintains that the owners of the various establishments from whom this footage was seized by the police were never brought to testify confirming the authenticity of these documents, thus rendering all information emanating from this documentary evidence as hearsay, and thus inadmissible at law.

17. The Attorney General in his reply affirms that the authenticity of the said surveillance footages is attested to in the report filed by the experts appointed during the course of the magisterial inquiry, the scene of crime officers being authorised to seize the said footage, download its contents, and compile a report on their findings. Thus since the chain of custody of this evidence is established in the records of the inquiry, the reports compiled and filed by the experts appointed in the *in genere* to seize, download and make the necessary extractions from the said

footage, with the experts being authorised by the inquiring magistrate to communicate with the investigating officers in order to provide them with evidence as to its contents, renders such documentary evidence admissible at law, not amounting to hearsay as alleged by appellant.

18. It must be pointed out that the evidence being contested by the defence amounts to what at law is known as 'real' evidence, as opposed to documentary evidence or testimonial or direct evidence. Real evidence is often much more reliable than testimonial evidence because it is harder to dispute or fake.

19. In his book Cross, On Evidence (6th edition) gives a detailed definition of what amounts to real evidence:

> ***'Things are an independent species of evidence as their production calls upon the court to reach conclusions <u>on the basis of its own perception</u> and not on that of witnesses directly or indirectly reported to it ...***

20. The author Murphy, in his book 'A Practical Approach to Evidence' (3rd Ed) defines' 'Real evidence' as (fol. 7):

> ***'A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses. The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person or animal, the demeanour of witnesses (which may or may not be offered or presented to the court by design), views of the locus in quo or of any object incapable of being brought to court without undue difficulty and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum total of their contents as such ... What is of importance in each case is the visual, aural or other sensory impression which the evidence, by its own characteristics produces on the court, and on which the court may act to find the truth or probability of any fact which seems to follow from it'. ...***
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> ***'The court may look at and draw any proper conclusions from its visual observation of any relevant material object produced before it ... The tribunal of fact is entitled to act on the results***

of its own perception, even where it conflicts with other evidence given about the object ...'.

.....

'The court must, before admitting recordings as evidence be satisfied that the evidence which may be yielded is relevant and that the recording produced is authentic and original ... The above principles apply to the use of film produced by hidden, automatic security cameras installed in banks and elsewhere for the purpose of recording robberies and other incidents. The jury are entitled to consider the film as identification evidence of the persons recorded on it, subject to the foundational requirements stated above" see eg 'R v Dodson; R v Williams [1984] Crim LR 489; see "Taylor v Chief Constable of Cheshire [1986] 1 WLR 1979'.

21. Now it is debatable whether the rule regarding hearsay can apply to real evidence, especially in those instances where it is not the product of human intervention, like for example inputting information into a computer, thus requiring human input for the completion of the exercise and the resulting information or data extracted from this piece of real evidence. The same, however, cannot be said for footages emanating from a closed-circuit camera, the inputting of information not necessitating any form of human intervention. Human intervention in this context means that such material has passed through a human mind and is simply reflective of human input. Footages or digital images captured by a surveillance camera do not necessitate any form of human intervention and consequently if the data is retrieved by the court appointed experts, it is not plausible and highly unlikely that such evidence can amount to hearsay. However, its provenance and authenticity must be established, as must any other material requirement normally associated with real evidence, such as relevance or probative value of the same. Ultimately, as the Criminal Court rightly points out, as with any piece of admissible evidence, its weight, value and credibility are matters for the jury to decide and not *a priori* for the trial judge at this stage of the proceedings, such evidence being relevant and having probative force.

22. Furthermore, in its judgment, the Criminal Court established the evidentiary force of this documentary evidence and has examined step by step the provenance,

and the subsequent chain of custody of the said evidence gathered by a team of experts who would have established the authenticity of the mechanisms installed and the workings of the cameras registering the footage utilised in the investigations and the magisterial inquiry, and this in order to identify the person or persons who could be involved in the commission of the crime. Above-all, both PS1147 Antoine Fenech and WPC 140 Christy Cremona, appointed as experts in the magisterial inquiry, both in their report[3] and their testimony[4], provide a detailed and concise step-by-step account of the manner in which the evidence was gathered, and the means used by them to establish their authenticity. During the trial there is no doubt that the defence will be in a position to control this evidence so that its authenticity and reliability may be assessed.

> **"Fil-ktieb ta' HARRIS, O'BOYLE, BATES & BUCKELY intitolat "Law of the European Convention on Human Rights" (Oxfrod University Press, 2014; pp. 418–419) 5 jinghad hekk: "In Schenk v. Switzerland, the Court stated that Article 6 'does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.' Accordingly, it 'is not the role of the Court to determine, as a matter of principle, whether particular types of evidence ... may be admissible ... The question for the Court instead is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. Accordingly, evidence may be admitted even if illegally obtained if this does not render the proceedings unfair. In the Schenk case, there was no breach of Article 6(1) when a tape recording of a conversation between the applicant and another person, P, that was obtained in breach of Swiss criminal and other laws, and that incriminated the applicant, was admitted in evidence. This was because the proceedings as a whole were not unfair, for the following reasons. First, the right of the defence had not been disregarded. In particular, the defence had the opportunity to challenge both the authenticity of the recording and its admission as evidence, and to examine both P and the police officer who had instigated the recording. Secondly, the recording was not the only evidence on which the conviction was based. The Schenk case was applied in Khan v. UK, in which again no breach of Article 6 was found. There, a conversation between the applicant and X on the latter's premises has been recorded by an electronic listening device secretly installed on the premises by the police. The recording was admitted in evidence at the applicant's trial for a drug trafficking offence. In contrast to the Schenk case, the**

[3] Document AFCC1 at folio 997et seq of compilation of evidence.

[4] Folio 992 er seq of records of inquiry

installation and use of the device were not contrary to national criminal law, although it was obtained in breach of Article 8 of the Convention. The recording was the only evidence on which the applicant's conviction was based, but this consideration was discounted by the Court on the basis that the recording had in fact also been important, possibly decisive evidence. Moreover, the applicant had, as in the Schenk case, been able to challenge the authenticity and admissibility of the recording and the national courts at three levels of jurisdiction had rejected claims that it should be excluded as rendering the proceedings unfair. As emerges from these cases, whether the use of evidence obtained in breach of Article 86 of the Convention renders a trial unfair in breach of Article 67 depends on the circumstances, including whether the rights of the defence have been respected and the strength of the evidence.[5]"

23. Thus, rather than being a question of hearsay, what appellant is contesting is the authenticity of the real evidence brought forward by the prosecution, the hearsay rules being applicable, as already pointed out, in those instances where the evidence being tendered is subject to some form of human intervention as outlined above. Therefore, although the Court is of the opinion that this evidence was properly obtained in the course of a magisterial inquiry by experts specifically appointed to seize such evidence from its source and carry out all the necessary examinations to establish the authenticity and reliability of this surveillance footage, and the extractions made therefrom, it is finally up to the jury to establish the value of this evidence and the weight to be given to it, and this after having been duly instructed by the trial judge as to the rules of evidence applicable at law. Ultimately, the testimony of the various police officers and the court appointed experts who testified about the content of this footage can be ascertained directly by the jurors themselves with the application of their senses once the said footage will be viewed and examined *ictu oculi* by them during the course of the trial. Consequently, this grievance is also being rejected.

C. The admissibility of documents produced in the Maltese language as outlined in preliminary pleas numbered 8 and 9.

24. This grievance is directed towards the probative value of two documents found in the records of the inquiry, being Documents RG and NM1, appellant

[5] Tribunal ghal Talbiet Zghar (KCX) – Daniel Zammit vs Rocco Bartoluccio digriet moghti 03/02/2020

claiming that the said documents are not filed in the language used in the proceedings. He relies on sections 534AD and 516 of the Criminal Code and section 5(3) of the Constitution giving accused the right for proceedings to be conducted in the English language, and thus in a language that he understands, once he has no knowledge of the Maltese language, together with the right to have all documents translated in the same language.

25. The Attorney General rebuts this grievance by affirming that once the Criminal Court has ordered that a translation of the said documents in the English language be compiled and served upon appellant by the Registrar of Courts, this grievance is thus completely unfounded.

26. Whilst referring to sections 534AD of the Criminal Code and sections 3(d)(e) of Chapter 189 of the Laws of Malta, the Criminal Court concluded that the law establishes the right of the defence to obtain a translation only of those documents which are 'essential' to the proceedings and not to every document found in the acts. Moreover, it emphasised that accused had never filed a request before the Court of Criminal Inquiry requesting a translation of the said documents when the reports were presented in court. It added:

> "**There was no indication that Defence Counsel or the accused did not understand the content of the reports or that this lack of translation served as an obstacle to the accused or Defence in preparing for an adequate defence, thereby prejudicing the accused's right to fair proceedings.**
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> **55. But more importantly, as a matter of substance, the reports which these two expert witnesses were tasked to prepare were:**
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> > **(a) video-recording of the autopsies of both victims; and**
> >
> > **(b) preparation of plans of the premises where the crimes were allegedly committed, respectively.**
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> **56. In both cases the actual report content was visual, and the language issue did not really feature much.**
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> **57. As for PC415 Randle Gili's report, the content of his report was the video-footage depicting the autopsies and/or the relative stills. The explanation of the autopsies was not part of the remit of this task and was**

to be carried out by other Court experts, if need be, during the course of the trial, which, all things being equal, will take place in English.

58. As for the report drawn up by Architect Nicholas Mallia, it resulted that apart from some pictures showing the rooms in this house, the plans forming part of the report – which is the main task in this case – were drawn up in English.

59. Additionally, these experts were indicated by the Attorney General as witnesses of the Prosecution during the trial by jury. This meant that Defence still had the right to question these witnesses with regard to the content of their reports once these reports would have been exhibited on oath by their respective authors during the trial.

60. Having made these considerations, this Court therefore did not consider the reports listed as Dok. RG and Dok NM1 respectively as having been drawn up in breach of the applicable provisions at law or that the fairness of the proceedings against the accused had been prejudiced and therefore rejected preliminary pleas numbered 8 and 9. However, to set the accused's mind at rest and ensure that he clearly understands the content of all documents, including the ones mentioned by him, the Court orders the Registrar to produce a translation of the documents mentioned by Defence in this plea in the English language and to ensure that the said translations be served on the accused and duly inserted in the records of the proceedings."

27. Any further comments by this Court would be superfluous. Not only did appellant omit to request that the said documents be translated into the English language, when he had every opportunity to do so during the compilation of evidence before the Court of Magistrates, but moreover the Criminal Court has provided for a remedy, ordering the Registrar of Courts to provide appellant with a translation of the same, although, as rightly pointed out by the Criminal Court, the ability to understand the content of these reports is possible through a visual examination of the same, one report containing a videorecording of an autopsy, and the other containing site plans and photos of the scene of the crime, proof which definitely necessitates no translation. For these reasons, and the reasons given in the judgment of the Criminal Court, this grievance is being rejected.

D. The admissibility as evidence of documents produced by injured party since the same are not authenticated.

28. Once again appellant erroneously misconstrues the probative value of a piece of evidence with matters relating to its admissibility in a court of law. He is objecting to the production of the documents consisting of still images captured from a surveillance camera outside the premises "Dolce Sicilia" and marked as Documents AB1, AB2 and AB3[6], which images were exhibited by Dr. Joseph Giglio, and which were shown to the witness Angelo Bucolo[7], who confirmed the veracity of the content of the said images having been present in the cameras view when the images were captured. These images are also mentioned in the court expert's PS1147 Anton Fenech and WPC 140 Christy Cremona's report, which experts confirm that the images are identical to those seen in the footage seized by them during the magisterial inquiry. Both the experts and Bucolo are indicated as witnesses for the Prosecution and will therefore be produced to testify during the trial with regard to these images, appellant who will be ably assisted by his lawyer also being able to control the veracity of this evidence.

29. As already pointed out by the Court when dealing with the second grievance, images captured on a closed-circuit camera are of themselves real evidence which will be presented during the trial to the jury, who will be able to evaluate *ictu oculi* the veracity of the contents of the images captured by the camera. Moreover, the witness, Bucolo, can testify in real time as to its contents. Ultimately, it is left in the hands of the jury, after being properly instructed by the trial judge to determine the weight to be placed upon the evidence after determining that there has been no contamination of or tampering with the same. The Court, at this stage of the proceedings, however, will not declare such evidence as inadmissible, such evidence being relevant to the facts in issue, the authenticity, reliability, and the veracity of the same being a matter to be determined by the jury after hearing all the evidence brought forward by all the parties to the suit. For these reasons the Court finds that the reasoning regarding this preliminary plea made by the Criminal Court is legally

[6] Folio 1943, 1944 and 1945.

[7] Vide testimony of the witness at folio 1935 of the inquiry.

correct and will thus not vary its conclusions. This grievance is also being rejected as unfounded.

E. The admissibility of opinions put foward by ordinary witnesses, as outlined in preliminary pleas numbered 11 to 14.

30. Appellant in this grievance objects to any opinions expressed by the witnesses PC156 Ian Farrugia, PS169 Jurgen Schembri together with the testimony and analysis carried out by Francesco Zampa, and this prior to this last witness having been appointed as court expert.

31. In the first-place appellant objects to the testimony of PC156 Ian Farrugia since he was never appointed as a ballistic expert either by the inquiring magistrate or by the Court of Criminal Inquiry. The Criminal Court concedes that the witness was never appointed to act as an expert, however he assisted the ballistic expert PC1525 Patrick Farrugia[8], and consequently deemed the same to be a competent witness, whose testimony, however, has to be limited to the facts brought to his knowledge without however giving any opinions with regard to the expertise concerning ballistics, this task to be entrusted solely to PC1525 Patrick Farrugia being the expert appointed in this case, as aforesaid. Consequently, this Court is perplexed that appellant has raised this grievance once the Criminal Court had acknowledged that the witness, who will testify anew during the trial, will have to limit his testimony solely to the facts brought to his attention without expressing any opinion in connection to the said facts. Moreover, all ballistic evidence collected from the crime scene was duly photographed both by PC Farrugia as well as by the scene of crime officers, thus presenting a clear picture as to the exact location where this evidence was located and collected, and by whom.

32. Secondly, with regard to the testimony tendered by PS169 Jurgen Schembri and his report Document JS1[9], appellant is not only objecting to the testimony of this witness and to the production of his report, such witness not being one of those

[8] Vide testimony of PC1525 and PC156 at folio 1052.

[9] Vide report at folio 1510 of inquiry.

appointed by the court or the inquiring magistrate, but also objects to the report and findings of fingerprint identification expert Joseph Mallia who carried out a comparative exercise of the fingerprints found at the crime scene by the said witness with those of accused. In his report, exhibited and marked as Document JS1, this police officer clearly states that his task was performed as part of 'police work' during the course of the investigations into this double homicide, the officer being stationed at the Forensic Science Laboratory within the Malta Police Force. The Criminal Court concludes that although the task entrusted to the witness was one of analysis, however the process involved was a factual one, PS169 merely identifying from the documents passed on to him any finger mark which he proceeded to photograph. The Criminal Court thus concluded:

> **80. There was therefore no legal impediment for PS169 to carry out his police work in trying to determine whether certain items passed on to him contained any fingerprints. The process to determine whether certain items contained or developed fingerprints on them indeed required a certain degree of expertise. But this task was part and parcel of the fact-finding mission which was also part and parcel of police investigations in similar cases. The facts established by PS169 - that is the alleged observation of fingermarks on some of the items analysed by him – were the results of his investigations on those same items. He did not express any opinion in relation thereto – and nor he could do so. As for the opinion whether those marks were really fingerprints, and if affirmative, who did those fingerprints belong to, the involvement of an expert witness was required.**
>
> **81. The expert witness that was appointed, Joseph Mallia, then carried out the comparative analysis of the fingerprints taken from the accused with, inter alia, the papillary marks developed by means of chemical treatment on items which were found in the car, Volkswagen Tiguan and which were carried out by PS169. In any case as can be seen from a comparison between these documents and the fingerprint forms DM1 and DM2 and palm prints DM3 they gave negative results.**

33. In all the instances where a crime has been committed, the investigations by the police kick off immediately upon the said crime being reported. These investigations will then run parallel with the magisterial inquiry, should this become necessary when the crime being investigated carries a term of imprisonment exceeding three years. The aim of the investigators would be that of identifying as

soon as possible the perpetrators of the crime and this through the deployment of various police officers each tasked in their line of duty with a particular branch of the investigation. The magisterial inquiry, or as it is known as the *in genere* inquiry, is tasked with the preservation of all evidence which can be collected both from the scene of the crime as well as from other sources relating to the investigation, experts being appointed where the preservation and identification of the evidence necessitates an expertise analysis. This will be done also with the aim of identifying a person or persons who may be liable to criminal proceedings, and if they cannot be identified, then the police will be requested to continue with their investigations. This emanates from the role of the Inquiring Magistrate which is limited to the collection and preservation of all the material traces of the crime, both direct and indirect, which can establish whether the crime being denounced or any other crime really occurred, and also can establish whether, in the course of this inquiry, it is possible to identify the person or persons who should be further investigated by the Executive Police or who should be charged with the commission of a crime. Thus, when an *in genere* inquiry is launched, the Executive Police will not halt their investigations, since these must necessarily proceed independently of the inquiry, even necessitating an authorization by the Inquiring Magistrate for them to be able to communicate with the experts nominated in the inquiry so as to assist them in identifying the culprit. Now, as the Criminal Court rightly points out, although it is true that PS 169 never formed part of the *in genere* inquiry, however he was tasked by the investigating officer to carry out investigative works with the aim of identifying any fingerprints from the documents seized by the police in the course of these investigations. These marks were then passed on to the fingerprint identification expert tasked with analysing the same and comparing them with those of accused.

34. Consequently, the Court concurs with the reasoning made by the Criminal Court that the evidence of PS169 Jurgen Schembri and his report Document JS1 is admissible as evidence, this being part of the investigative work carried out by this police officer stationed at the Forensic Unit of the Police Force, the subsequent analysis being entrusted to expert Joseph Mallia duly appointed by the Court to give

his expert opinion with regard to any possible identification. For these reasons even this grievance is being rejected.

35. Finally appellant objects also to the testimony and reports presented by Francesco Zampa regarding the evaluation of jewellery and gold items allegedly stolen by accused and his accomplices. He asserts that the witness was never appointed as a court expert in these proceedings, although he was thus appointed in concurrent proceedings taking place against his accomplice.

36. The Attorney General rebuts this allegation stating that it is minuted in the records of the inquiry that accused did not object to the Prosecution's request that the testimony and reports presented by Zampa in the proceedings against Viktor Dragomanski, his co-accused, be adduced as evidence also in this case.

37. The Criminal Court concludes in its judgment:

> " **89. That there was nothing at Law precluding the Court of Magistrates as a Court of Criminal Inquiry in this case from receiving the testimony of Francesco Zampa – who was appointed as expert by the Court of Magistrates as a Court of Criminal Inquiry in the proceedings against Victor Dragomanski – who is being charged with his involvement in the same double wilful homicide et al. Indeed in this case, the Court of Magistrates as a Court of Criminal Inquiry acknowledged the fact that Zampa was appointed in that capacity and that it was also prepared to accept his expert testimony. Even the Attorney General went along these same lines, as can be seen from the written demands in question. In this case the Court of Magistrates as a Court of Criminal Inquiry confirmed Zampa as a witness, albeit expert witness in the case, in relation to a matter that was of common relevance both to this case as much as it was in the case where he was also appointed as an expert.**
>
> **90. Hence there was nothing in the appointment of witness Francesco Zampa or in his confirmation as expert witness in this case that went against the provisions of Article 650 of the Criminal Code, thus rendering the evidence given thereby as inadmissible in these proceedings."**

38. The Court has examined the acts of the inquiry and the relevant parts of the testimony of Francesco Zampa together with his reports. Appellant does not contest the fact that Zampa is in fact a court appointed expert, although, in his opinion, the fact that he was appointed in criminal proceedings against his co-accused and not in these proceedings renders him an *ex parte* expert, and thus inadmissible at law. What

appellant omits to mention however, is that the Court of Criminal Inquiry itself confirmed the expert testimony as part of the evidence in these proceedings and this upon the expert taking the witness stand presenting both his reports as evidence and confirming his qualifications and expertise upon a specific request by the defence[10].

39. The Court reiterates that although the accused has a right to due process according to law, his rights to a fair hearing to be safeguarded throughout the entirety of the proceedings, however the principle of equality of arms applies equally to the Prosecution as well as the defence. The defence, therefore, having been satisfied that the expert had been duly qualified to carry out his task, which task was carried out upon the instructions of the same court, however as otherwise presided in the case against the co-accused, did not register a timely objection to the testimony and the reports, leading both the Court and the Prosecution to believe that there was no further objection to his testimony. It is against the course of administration of justice that such objection was registered at this stage of the proceedings when no remedy is now available to the Prosecution in connection with this piece of evidence, when accused had accepted the experts reports and this, as already pointed out, after requesting the expert to confirm his qualifications to act as such.

> **"Bhalma fissret ruhha l-Qorti Kostituzzjonali fis-sentenza taghha fil-kaz ta' Harrington (supra), huwa ferm ingust u certament mhux konducenti ghar-retta amministrazzjoni tal-gustizzja li meta qorti tkun innominat perit, minn ikollu xi oggezzjoni ghal dik in-nomina, flok ma jgib 'l quddiem dik l-oggezzjoni minnufih sabiex il-qorti tkun tista' tikkunsidrha u, jekk ikun il-kaz tappunta lil xi hadd iehor, ihalli kollox ghaddej, imbghad fi stadju inoltrat, meta possibilment lanqas ikun aktar possibbli jew utili li ssir perizja gdida, jivventila l-oggezzjoni tieghu. Kif tajjeb osservat dik il-Qorti fis-sentenza taghha fil-kaz ta' Nicholas Ellul, ghalkemm "akkuzat ghandu dritt ghal smiegh xieraq izda dan is-smiegh xieraq waqt li jipprotegi l-presunta innocenza tal-akkuzat, ghandu wkoll ikun fair mas-socjeta' li tkun giet oltraggata bid-delitt[11]"**

Therefore, this grievance is also being rejected.

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[10] Vide testimony at folio 2034 wherein witness confirms he was appointed as court expert by Magistrate Joe Mifsud, and report exhibited as Document FZ2 at folio 2043 et seq of inquiry together with minutes of the sitting of the 07/10/2021.

[11] Ir-Repubblika ta' Malta vs Carmelo Spiteri App. Sup. Deciza 19/04/2001

40. Consequently, for the above-mentioned reasons, the Court rejects the appeal filed by appellant Daniel Muka and confirms the judgment of the Criminal Court in its entirety.

The Court orders that the acts be remitted to the Criminal Court so that the case against accused Daniel Muka may proceed according to law.

The Chief Justice Mark Chetcuti

Mrs. Justice Edwina Grima

Mr. Justice Giovanni Grixti