The Court of Criminal Appeal

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

The Hon.Justice Dr Edwina Grima LL.D.

The Hon.Justice Dr Aaron Bugeja M.A. (LAW) LL.D. (MELIT)

Today the 4th day of October of the year 2023

Bill of Indictment No : 10/2018

The Republic of Malta

vs.

Omar Bah

The Court:

1.Having seen the Bill of Indictment bearing number 10 of the year 2018 filed against appellee Omar Bah, wherein he was charged:

> **In the First Count** of having, on the 13th of December of the year 2014 and in the preceding weeks, rendered himself guilty of conspiring to trafficking in dangerous drugs in breach of the provisions of the Dangerous Drugs Ordinance or of promoting, constituting, organizing or financing the conspiracy.

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

2. Having seen the note of preliminary pleas of the accused filed in the registry of this Court on the 24th of July 2018.

3. Having seen the judgment of the Criminal Court of the 16th of May 2022 wherein the said Court upheld the first plea raised by accused Omar Bah and consequently ordered that no use thereof be made of the statement of the accused in folio 8 to 13 of the records nor to any other verbal declaration he may have made and that no witness shall make any mention of such statement or content thereof; dismissed accused's second plea, and accused's request to bring forward as witnesses Omar Sanyang, Ibrahim Tunkara, Lean Mifsud and a person nicknamed "Kontriman" was also dismissed.

4. Having seen the appeal application filed by the Attorney General on the 20th of May 2022, wherein the Court was requested to vary the judgment of the First Court as following:

> a) to confirm that part where the Criminal Court dismissed the second preliminary plea and dismissed the accused's request to bring forward as witnesses Omar Sanyang, Ibrahim Tunkara, Lean Mifsud and a person nicknamed "Kontriman"; and
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> b) to revoke that part of the judgment where the Criminal Court upheld the first preliminary plea of the accused and that part where it ordered that "*no use thereof be made of the statement of the accused in folio 8 to 13 of the records nor to any other verbal declaration he may have made and that no witness shall make any mention of such statement or content thereof*",and subsequently to declare the first preliminary plea to be unfounded and to proceed to deal with the matter in question according to law, and this in the best interests of justice.

5. Having heard oral submissions by the parties.

6. Having seen all the acts of the case.

Considers:

7. That the Attorney General has registered her objection to the judgment delivered by the Criminal Court and this with regard to the determination of the first preliminary plea put forward by the accused to the bill of indictment filed against him, which plea was upheld resulting in the expunging from the court records of the pre-trial statement released by him when he was arrested and interrogated by the police, ordering also that no reference be made to such statement during the trial by jury.

8. It is appellant's firm view, put forward in her one and only grievance, that the pre-trial statement made by accused was released by him according to the law applicable at the time, wherein he was given the right to legal assistance prior to being interrogated which right he did exercise, proceeding to release voluntarily and without any threats or coercion his statement to the investigating officer. Appellant asserts that the Criminal Court was not tasked to determine whether the statement was issued in line with articles 355AT and 355AU of the Criminal Code, accused not contesting the fact that he was given the right to consult with a lawyer prior to his interrogation, as well as not contesting the fact that he actually made use of this right when he sought the advice of Dr. Noel Bartolo. Consequently, since there was no grievance in this regard, any considerations made by the Criminal Court regarding the validity of the statement in terms of the law existing at the time was uncalled for and, thus, superfluous. Moreover contrary to what was decided by the Criminal Court, the law necessitates that a declaration be entered by the investigating officer only in those instances where the suspect chooses not to avail himself of his right to consult with a lawyer, such declaration not being necessary when the right is exercised and this as laid out in article 355AT(9) of the Criminal Code. Accused attacks the probative value of his statement solely on the premise that his legal counsel was not present throughout the interrogation, asserts the Attorney General, which plea should not have been upheld by the Criminal Court since the same was released according to the law in force at the time. And this apart from the fact that all issues regarding the probative value of any evidence falls within the remit of the

jurors during the trial itself. She finally relies, in her appeal, on the judgment delivered by the European Court of Human Rights in the case *Farrugia vs Malta* of the 4th of June 2019, and the two-fold test set out in the said decision, wherein it was decided that the fact that a person did not have the right to have a lawyer present during interrogation did not amount to an automatic breach of his right to a fair hearing according to law, since the overall fairness of the proceedings should be a determining factor in the court's assessment. Once the Criminal Court did not find a breach of the accused's fundamental human rights and once the statement was issued according to law, the Attorney General maintains, that it does not follow that the statement should be expunged from the court records. Citing the guide-lines laid out in the *Beuze* judgment by the ECtHR, the Attorney General asserts that none of the criteria were met in this case, accused was not deemed to be a vulnerable person at the time, the legal frame-work governing pre-trial statements was adhered to, accused having the opportunity to challenge the authenticity of the evidence in court, such statement however having been deemed according to law, with accused never retracting or modifying the said statement, apart from the fact that the evidence in the acts does not rest solely on accused's statement.

9. From the evidence gathered during committal proceedings, and more specifically from the statement of accused, together with the testimony of the officers present during the release of the same, it is uncontested that accused was administered his rights according to the law in force at the time, accused availing himself of this right and consulting with Dr, Noel Bartolo. Accused, also, does not contest the fact that he, in actual fact, consulted with a lawyer, nor does he contest the validity or nature of the advice tendered. The Attorney General, thus, rightly criticizes the part of the judgment of the Criminal Court wherein the Court delved into the legal framework governing the manner in which accused was administered his rights at law and the manner in which such rights were exercised, since this was not the grievance put forward by accused in his first preliminary plea. Accused asks that his statement be declared inadmissible for the sole reason that he did not have a lawyer present with him throughout his interrogation by the police and thus in a situation where he could have released incriminating declarations which will be used against him in

court. The Criminal Court in its decision relies heavily on its judgment in the case *The Republic of Malta vs Lamin Samuna Seguba*, which judgment was reversed on appeal, and thus concludes:

> **9. This judgment was however reversed by the Court of Criminal Appeal on the 27 January 2021 but the debate on the right of access to legal assistance did not stop there and has remained the subject of further decisions by our Courts taking into consideration both the ECHR judgments Farrugia vs Malta of the 4 June 2019 and Philippe Beuze v. Belgium of the 9 November, 2018 (Grand Chamber 71409/10). This notwithstanding, the First Hall Civil Court in its Constitutional Jurisdiction in the case Ir-Repubblika ta' Malta vs Rosario Militello of the 18 November, 2021 per Hon. Justice Dr. Robert G. Mangion (Rik Kost 404/2021 RGM) following a reference by the Criminal Court, decided that use of the statement released by the accused could lead to a breach of his fundamental human rights and therefore ordered that no use thereof be made in his trial. This case also concerned the release of a statement taken in 2014 in circumstance similar to the case at hand including the caution given by the investigating inspector as reproduced above;**
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> **10. Although the latter judgement is under review by the Constitutional Court following an appeal by the Attorney General, further developments have taken place on this issue with the latest judgments both of the Constitutional Court and the Court of Criminal Appeal ordering that no use of statements be made thereof in the respective trials where such statements were made in the absence of legal assistance during the interrogation. Reference is made to the judgement in the case Christopher Bartolo vs l-Avukat ta'l-Istat (Constitutional Court 26 April, 2022) and to that decided by the Court of Criminal Appeal Ir-Repubblika ta' Malta vs Andrew Mangion on the 4 of May, 2022. In the latter case the Court dismissed the appeal of the Attorney General requesting a reversal of the judgement of the the Criminal Court which declared as inadmissable the statement of the accused and ordered that it be expunged from the records. The statement merits of that case was made in 2016 after the suspect having spoken to his lawyer of choice prior, however, to the interrogation but not during the interrogation per se in that the law at that time did not allow for a lawyer to be present and participate in the interrogation;**
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> **11. Now in the case under consideration, the accused is said to have been given the right to speak to a lawyer prior the interrogation which right, however, was limited to a one hour face-to-face encounter or over the phone as detailed above. This is evidenced by the answer of the accused on the said statement when asked: "Am I right to say that while under this arrest, before being interrogated you consulted with your lawyer Dr. Noel Bartolo LL.D. legal aid?" where the accused replied "Yes". During the evidence tendered by the investigating inspector and the police constable who was a witness thereof, Inspector Malcolm Bondin declared the following under**

oath (folio 57 of the records): "Omar Bah was given his rights on site and also later on when he was brought to my office where I gave him once again the letter of rights so that he can read it in English as well to talk to his lawyer for legal advice where he took the legal advice and spoke to Dr. Noel Bartolo". This is followed by a confirmation by PC 1348 as already noted above where the latter confirmed the accused was in his presence given his right to speak to a lawyer before being interrogated;

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

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

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

10. Now accused was interrogated on the 14th of December 2014. At the time there was no legal framework allowing a suspect to be assisted by a lawyer during interrogation since the amendments to the Criminal Code occurred after a transposition into our law of Directive 2013/48/EU of the European Parliament and

of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in procedures of the European arrest warrant, a change which therefore came about after accused was interrogated. The law in force in 2014 envisaged a more restricted right to legal assistance, wherein the suspect could confer with the lawyer of his choice, or in default with a legal aid lawyer provided by the State, for an hour in private, prior to being interrogated. In fact, the legislator in the new disposition of law[1] created by Act III of 2002 conferred the right to "*a person arrested and held in police custody at a Police Station or other authorized place of detention shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour. As early as practical before being questioned the person in custody shall be informed by the Police of his rights under this sub-article*." Contrary however to what the Attorney General asserts in his appeal application, article 355AT(2) as applicable at the time, necessitated the registration of this request by suspect person wherein it is thus stated:

> "**A request made under sub-article(1) shall be recorded in the custody record together with the time that it was made unless the request is made at a time when the person who makes it is at court after being charged with an offence in which case the request need not be so recorded.**"

11. Now although it is amply clear from the evidence found in the acts that accused was administered his rights at law as applicable at the time, and although it is also uncontested that he availed himself of such right before being questioned by the police, however there is no evidence in writing of this request as outlined in article 355AT. This being premised, however, as the Attorney General rightly points out respondent's plea is directed towards the lack of legal assistance during interrogation and not prior to being questioned, the manner and duration of the exercise of this right not being put into question by accused himself.

12. Now, accused in this case, as in the other cases cited by the Criminal Court in its judgment, does not attack the probative value of the statements on any particular

[1] Section 355AT(1) as introduced by Act III of 2002, which section of the law came into force on the 10th of February 2010.

rule of penal law empowering the Court to reject it, but relies solely on the presumption that admitting this piece of evidence would prejudice his right to a fair hearing, having been denied the right to have his lawyer present during interrogation, resulting therefore, in his opinion, to a denial of his right to mount a defence in a situation where incriminating statements were made to the police.

13. Reference is being made to two recent judgments which, in this Court's opinion, shed a clear light on the correct interpretation of how a statement released by a suspect without legal assistance at interrogation stage should be considered, when assessing the weight to be given to this piece of evidence.

14. "Farrugia vs Malta" (63041/13 decided on the 7th October 2019 and "**Stephens vs Malta"** (35989/14) decided on the 14th January 2020, set out the principle that 'systematic restrictions on the right of access to a lawyer did not lead to an *ab initio* violation of the right to a fair hearing'. These judgments confirmed the position taken by the Grand Chamber in the Beuze (9th November 2018) case that in order to establish whether a statement taken without the assistance of a lawyer is deemed to violate the accused's constitutional right to a fair hearing, one must apply a two-stage test, namely whether there are compelling reasons to justify the restriction, together with an examination of the overall fairness of the proceedings, the Court thus establishing a test to be carried out on a case-by case basis, rather than laying out general rules and principles which are to govern this alleged violation where the right to legal assistance has been withheld. Each case, thus, has to be examined on its own merits by applying the *Beuze* guidelines to the specific facts presented in every individual case being assessed.

15. Regarding the first test relating to the concept of 'compelling reasons' the European Court in the above-mentioned cases stated that:

> ***"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".

16. Referring to the domestic case in issue, it is clear that this test has not been satisfied, since no compelling reason was put forward to justify the lack of the presence of a lawyer during interrogation, other than the fact that it was not permissible by law at the time when it was released by accused.

17. However this test alone does not automatically render such a statement inadmissible at law since the second test laid out by the ECtHR has to be overcome when deciding whether a statement should or should not be expunged from the records of the proceedings. The 'overall fairness' assessment of the proceedings must be examined in order to assess the weight which is to be given to the statement released at interrogation stage, as a piece of evidence when reaching judgement. The ECtHR provided the following non exhaustive list of factors to 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).*

18. Since in the present case the proceedings are still at pretrial stage it would be outside the remit of this Court, at this juncture, to examine whether these criteria have been satisfied since the trial has not taken place, and also because the Court cannot, at this stage enter into the merits of the case and comment on the weight to be given to any evidence found in the acts, such exercise entrusted solely to the jury at the trial, with this Court also precluded from addressing any matter having constitutional ramifications. Having thus premised, however, if at this stage of the proceedings it results to the Court that any one or more of the criteria laid out by the ECtHR constitute a serious and blatant prejudice to the administration of justice then this would justify the expunging of the statement released by the accused from the acts prior to the celebration of the trial by jury, and this in the supreme interest of justice.

19. In this particular case, however, during committal proceedings, accused did not allege that the police had exerted pressure on him during interrogation, or that his statement was obtained by means of promises or suggestions of favour. He did not allege that he was in a vulnerable state prior to releasing his statement, nor did he allege that he was not explained his rights at law, foremost amongst which his right to silence. Moreover, it does not appear that accused is alleging that his statement was released in violation of article 658 of the Criminal Code. Neither did accused, during committal proceedings, request to bring forward any evidence suggesting otherwise and this as was his right in terms of article 405(5) of the Criminal Code.

20. The Court has taken judicial notice of the recent judgments delivered by the Constitutional Court of the 31st of May 2023[2] wherein it was thus decided:

> **10. Il-Qorti tagħraf li kemm fil-ġurisprudenza ta' din il-Qorti u kif ukoll fil-ġurisprudenza tal-Qorti Ewropea, il-fatt waħdu li s-suspettat ma kellux il-**

[2] Emmanuele Spagnol vs l-Avukat Generali et (16/2018) and Jean Marc Dalli vs Kummissarju tal-Pulizija et. (674/2021)

possibilità li jkun assistit minn avukat waqt l-interrogazzjoni ma jfissirx awtomatikament li l-użu ta' dik l-istqarrija fil-proċeduri kriminali kontra tiegħu illeda, jew x'aktarx ser jilledi, id-dritt fundamentali tiegħu għal smigħ xieraq. Dan fil-fatt jaċċettah l-attur stess.

11. Fil-każ odjern m'hemmx dubju li l-liġi kif kienet viġenti fiż-żmien relevanti ma kinitx tippermetti li s-suspettat jiġi assistit minn avukat waqt li jkun qed jiġi interrogat mill-pulizija. Dak iż-żmien però l-liġi kienet tippermetti li s-suspettat jikkonsulta privatament ma' avukat, wiċċ imb'wiċċ jew bit-telefon, għal żmien ta' siegħa, qabel ma jiġi interrogat. Il-Qorti tosserva wkoll li l-attur kellu d-dritt li ma jirrispondix għad-domandi magħmula lilu waqt l-interrogazzjoni. ....

13. Din il-Qorti reġgħet għarblet sew il-pozizzjoni tagħha fuq din it-tema ta' intempestività tal-ilment kostituzzjonali. Tagħmel riferenza għaż-żewġ sentenzi tal-Qorti Ewropea Għad-Drittijiet tal-Bniedem, Martin Dimech v. Malta tat-2 ta' April 2015 u Tyrone Fenech et v. Malta tal-5 ta' Jannar 2016, dwar ilmenti li jixxiebħu ħafna għal dawk tal-lum dwar it-tehid ta' stqarrija mingħajr konsultazzjoni minn qabel ma' avukat, għalkemm f'dan il-każ il-konsultazzjoni kienet waħda limitata.

14. F'dawk is-sentenzi l-ilment tas-smigħ xieraq tressaq meta l-proċeduri kriminali kienu għadhom pendenti. Billi l-proċeduri kriminali kienu għadhom mexjin, il-Qorti Ewropea saħqet li kien kmieni biex jiġi deċiż jekk kienx hemm smigħ xieraq jew le. Fi kliem il-Qorti Ewropea: "applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simons v. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant's possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected, pursuant to Article 35 I and 4 of the Convention, for non exhaustion of domestic remedies"

15. Essenzjalment din id-difiża hija msejsa fuq il-premessa illi allegazzjoni ta' nuqqas smigħ xieraq teħtieg li l-proċess li minnu jkun qed isir l-ilment jiġi eżaminat fit-totalita tiegħu u mhux jiġi maqsum u jsir enfasi fuq inċident wieħed partikolari.

16. <u>Naturalment ladarba f'dan il-każ il-proċess kriminali għadu ma ġiex mitmum, għadu mhux magħruf kif u taħt liema ċirkostanzi l-appellant ser</u>

jiġi żvantaġġjat. Huwa ċertament barra minn loku illi l-ilment *de quo agitur* jiġu diskussi f'dan l-istadju *in vacuo*. Il-Qorti Kriminali għadha trid tevalwa l-istqarrijiet li saru u jekk saru jkunx hemm vjolazzjoni tad-dritt ta' smigħ xieraq minħabba l-mod kif ittieħdu tenut kont iċ-ċirkostanzi partikolari tal-każ li jvarjaw minn każ għall-ieħor. Hemmx leżjoni tad-dritt għalhekk ser jiddependi mill-mod kif il-Qorti Kriminali tkun trattat l-istqarrijiet u l-piż mogħtija lilhom fl-assjem tal-provi kollha[3]. Għal dak li jiswa jista' jkun il-każ li l-Qorti Kriminali fl-aħħar mill-aħħar ma ssibux ħati u għalhekk ħafna mill-preokupazzjonijiet tiegħu dwar l-istqarrijiet jisfaw fix-xejn. Dan biex ma jingħadx ukoll li anke wara s-sentenza tal-Qorti Kriminali hemm il-possibbilità li jsir appell quddiem il-Qorti tal-Appell Kriminali, li ghandha s-setgħa li ddawwar l-affarijiet. Jiġi b'hekk, li l-ilment jekk seħħx virtwalment xi ksur ta' drittijiet fundamentali f'dan l-istadju huwa għal kollox prematur.

17. L-appellant ma jistax jagħmilha bħala fatta li huwa mhuwiex sejjer ikollu smigħ xieraq minħabba l-mod ta' kif ittieħdet l-istqarrija tiegħu. Ladarba l-proċeduri kriminali għadhom mexjin, allura huwa jgawdi mill-preżunzjoni tal-innoċenza. Tassew il-prosekuzzjoni għad trid tipprova l-akkuzi tagħha kontra tiegħu u l-istess akkużat għad għandu kull opportunità li jiddefendi lilu nnifsu.

18. Għalhekk il-fatt waħdu li saru stqarrijiet ma ssostnix l-ilment ta' ksur ta' jedd ta' smigħ xieraq għaliex din waħidha mhijiex determinanti tal-kwistjoni minnu sollevata, b'dana li l-ilment huwa għal kollox intempestiv u prematur.

19. Il-Qorti tirreferi hawnhekk l-aktar sentenzi riċenti fuq is-suġġett, viz. Beuze v. Il-Belġju deċiża mill-Grand Chamber fid-9 ta' Novembru 2018 u s-sentenza Carmel Joseph Farrugia v. Malta deċiża mill-Qorti Ewropea Għad-Drittijiet tal-Bniedem fl-4 ta' Ġunju 2019.

20. Dawn iż-żewġ sentenzi ħolqu numru ta' kriterji mhux tassattivi li wieħed għandu jqis biex jara jekk in-nuqqas ta' assistenza legali fl-istadju. tat-teħid tal-istqarrija jwassalx għall-ksur tal-jedd ta' smigħ xieraq. Dawn il-kriterji jistgħu jiġu determinati biss wara li jintemm il-proċess kriminali.

21. Hija għalhekk il-fehma meqjusa ta' din il-Qorti meta jittieħed kont ta' kif il-Qorti Ewropea issa qed tindirizza l-kwistjoni mhuwiex floku li l-Qrati Kostituzzjonali joqogħdu jindaħlu f'temi li jmissu mas-siwi tal-evidenza. Bħalma sewwa qalet il-Qorti Ewropea fil-każ Carmel Camilleri v. Malta deċiż fis-16 ta' Marzu 2000 li kienet dwar is-siwi ta' stqarrija mogħtija minn terzi:

> **«The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for**

[3] Sottolinjar tal-Qorti

the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see the Doorson v. the Netherlands judgment of 26 March 1996, Reports of Judgments and Decisions 1996-11, p. 470, S 67; the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, 34). Furthermore, the Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict (see the above-mentioned Doorson judgment, p. 472, §78) »

22. L-għaqal li din il-Qorti tieħu din id-deċiżjoni dwar l-ilqugħ tal-eċċezzjoni tal-intempestività, jinsab imsaħħaħ ukoll minn dak li ġara fl-aħħar sentenza Roderick Castillo v. Avukat Generali et deċiża mill-Qorti Kostituzzjonali fl-20 ta' Lulju 2020. F'din is-sentenza ġara li waqt li kienu mexjin il-proċeduri kostituzzjonali, ġew mitmuma l-proċeduri kriminali u Roderick Castillo gie meħlus mill-akkużi miġjuba kontrih. Minħabba din il-ġrajja, il-Qorti Kostituzzjonali qalet li:
"Bis-sentenza tal-Qorti tal-Appell Kriminali l-appellat ingħata rimedju definittiv u effettiv. B'hekk minkejja dak li ġara fl-istadju meta l-appellat tal-istqarrija, xorta 'on the whole' kellu smigħ xieraq b'dak li ġara flistadju tal-appell"[4]

21. In another recent judgment the Constitutional Court reiterated:

10. Il-ġurisprudenza hi ċara li l-fatt li persuna suspettata li kkommettiet reat tagħmel stqarrija mingħajr l-assistenza ta' avukat ma jwassalx bilfors għal ksur fil-jedd fundamentali għal smigħ xieraq fil-proċeduri kriminali li jittieħdu kontra dik il-persuna.[5]

In both instances although proceedings were still pending, the Spagnol case before the Court of Magistrates and the Dalli case before the Court of Criminal Appeal, the Constitutional Court did not pass on to order the removal of the statement from the acts of the said proceedings, declaring that the question whether there has been an actual violation of accused's right to a fair hearing will depend on the weight which the Criminal Court will place on the pre-trial statement in the light of all the

[4] Emmanuel Spagnol vs Avukat Generali et – Constitutional Court – 31/05/2023

[5] Jean Marc Dalli vs Kummissarju tal-Pulizija – Constitutional Court – 31/05/2023

evidence produced during the trial. Furthermore in the case Ir-Repubblika ta' Malta vs Rosario Militello decided recently on the 22nd of June 2023, the Constitutional Court clarified its position with regards to the direction given to the Criminal Court with regards to the expungment of the statement from the records as a precautionary measure:

> **24. Hu minnu li hemm sentenzi fejn din il-Qorti rrakkomandat jew ordnat li titneħħa l-istqarrija li jkun ta l-akkużat fl-istadju qabel ikun tressaq il-Qorti. Rimedju jingħata fejn qorti tkun sabet ksur ta' jedd fundamentali jew x'aktarx ksur tiegħu. Però dik ir-rakkomandazzjoni jew ordni ssir biss biex kemm jista' jkun tkun evitata l-possibbiltà li b'xi mod ikun imptappan il-proċess kriminali, u għalhekk *ex abundanti cautela*. Rakkomandazzjoni jew ordni li mhumiex rimedju per se ġialadarba m'hemmx dikjarazzjoni li seħħ ksur jew x'aktarx iseħħ ksur tal-jedd għal smigħ xieraq. Għalhekk l-argument tar-rikorrent li b'dak li ddeċidiet il-Qorti tal-Appell Kriminali fis-27 ta' Jannar, 2021, qiegħed joħloq inċertezza legali minħabba dak li ddeċidiet din il-Qorti fl-istess jum fl-appell Morgan Onuorah v. L-Avukat tal-Istat (176/2019) hu skorrett. Fiċ-ċirkostanzi l-fatt li tkun saret rakkomandazzjoni jew ingħatat ordni simili ma jfissirx li hekk għandu jibqa' jsir u li jekk ma jsirx hekk ikun ifisser li m'hemmx ċertezza legali. Hu x'inhu kull każ għandu jiġi eżaminat skont iċ-ċirkostanzi partikolari tiegħu. M'hemmx dubju li meta tqis iċ-ċirkostanzi kollha s-sentenza talQorti tal-Appell Kriminali tas-27 ta' Jannar, 2021, ma kisritx il-jedd fundamentali ta' Militello għal smigħ xieraq u lanqas ma jista' jingħad li x'aktarx ser tikser dak l-istess jedd. Dan apparti li l-Qorti tal-Appell Kriminali tat gwida lill-Qorti Kriminali dwar kif għandha tipproċedi sabiex anzi jiġi aċċertat li ma jkun hemm l-ebda periklu ta' ksur tal-jedd għal smigħ xieraq għal dak li jikkonċerna l-istqarrija li ta l-akkużat."**

22. The Court thus concludes that each and every case has to be examined on its own merits taking into account the particular circumstances in which the statement was released by the accused. In this case accused failed to show, at this stage of the proceedings, the manner in which his statement released during interrogation is going to seriously prejudice his right to a fair hearing. The fact that the statement was given in the absence of a lawyer does not in itself, in the light of the circumstances relevant to this case, render this evidence inadmissible at law.

Consequently for the above-mentioned reasons the Court declares the grievance put forward by the Attorney General to be well-founded and upholds the same. Therefore revokes the judgment of the Criminal Court and orders that the said statement be adduced as evidence in the trial by jury.

The Chief Justice Mark Chetcuti

Judge Edwina Grima

Judge Aaron Bugeja