# THE CRIMINAL COURT

## Hon. Mr. Justice Dr. Aaron M. Bugeja M.A. (Law), LL.D. (melit)

**The Republic of Malta**
**vs.**
**Jesper Gejl KRISTIANSEN**

Bill of Indictment number 19/2022

Today the 16th February 2023

The Court,

1. Having seen the bill of indictment filed against Jesper Gejl KRISTIANSEN, 32 years old son of Bjahrne Gejl and Charlotte Kristiansen, born in the Kingdom of Denmark on the 12th June, 1990 and residing at Corradino Correctional Facility, Paola holder of Danish passport number 211428434 who was accused of:

**THE First (I) COUNT**

***Complicity in wilful homicide of Christian Pandolfino and Ivor Piotr Maciejowski***

**The Facts:**

Whereas on the eighteenth (18th) of August of the year two thousand and twenty (2020) at about half past ten in the evening (22:30 hrs), the Homicide Squad within the Malta Police Force was informed through the Police Control Room that a shooting incident had occurred at the address '22, Locker Street, Sliema'. At that point in time, the information was that three (3) male persons had allegedly been seen entering the aforementioned residence and, subsequently to that fact, gunshots were heard coming from inside the concerned residence. Immediately after these gunshots were heard, the three (3) male persons were allegedly seen leaving the area in a white vehicle, with a license plate 'JET 082';

Whereas officers from various branches of the Malta Police Force reported immediately at the address, whereby from a preliminary stage of the investigation it resulted that the persons living in the residence, Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI, were shot dead inside same residence. Christian PANDOLFINO was found lying on the floor, at the entrance of said residence, specificallyon the ground floor, whilst Ivor Piotr MACIEJOWSKI was found lying dead near the stairs between the ground floor and the first floor level of the residence. At that stage it was also noted that the victims have had jewellery snatched from their physical persons, as there were other parts of such jewellery scattered near and around the bodies. Even at that stage, the evidence was indicating that the crime in question was that of an armed robbery which for some reason escalated into a double homicide;

Whereas further investigations discovered that the main door of the residence had visible marks of a recent break-in, suggesting that the perpetrators had gained access to the residence by forcing the door open. Preliminary evidence also indicated that once inside, the perpetrators must have somehow immediately encountered Christian PANDOLFINO near the entrance, who was then shot five (5) times. It appeared that the perpetrators then proceeded upstairs and shot MACIEJOWSKI dead with a single (1) shot close to the forehead. From the available evidence at that stage, it seemed that MACIEJOWSKI was rushing to proceed downstairs after hearing the commotion (including the gunfire aimed at Christian PANDOLFINO) and ended up getting shot by the perpetrators;

Whereas the investigators proceeded to interview various neighbours and witnesses who were in the area at the time, and it was further established that two (2) males were seen proceeding to the targeted residence and gaining entry, and soon afterwards gunfire was heard. Momentarily afterwards, one (1) of the perpetrators was seen proceeding outside again and approached the car from where a third (3rd) male looking person came out. The third person accompanied the other perpetrator directly back inside the targeted residence that was being robbed. After some time, all three (3) persons were seen leaving together, one (1) of them carrying what looked like being a brown bag, towards the same white vehicle in which they had arrived with on the scene. One of such witnessed further stated that he came out of his residence after hearing gunfire and noticed the three (3) men leaving in a white vehicle. At that stage, the information investigators had was that this vehicle was likely to be some sort of Volkswagen crossover, with the registration number 'JET 082', and this vehicle was seen leaving the crime scene through Tigne Street, Sliema;

Whereas a criminal inquiry was immediately opened and various experts were appointed for the preservation and examination of evidence. It was determined at an early stage that the cartridges possibly used by the concerned firearms were of nine millimeter (9mm) calibre and possibly compatible with the ammunition that is used for a Glock semi-automatic pistol. After the forensic experts concluded their preliminary inquires, the investigators and other court-appointed experts proceeded inside the house in search of the CCTV recording system, which was located and preserved for further analysis.

Whereas upon permission of the inquiring magistrate, the investigators spoke to the court appointed expert in regards to the CCTV footage whereby the investigators were informed that the footage showed Christian PANDOLFINO, returning home on his quadbike at ten (10) minutes past ten in the evening (22:10hrs). The suspect white vehicle was observed on the CCTV footage scouting the area, stopping at upper Locker Street, some eighty (80) meters from the targeted residence. A tall male person, followed by a shorter and stocky male, wearing

distinguishable clothing, proceeding from the white suspect vehicle and entering the targeted residence. After a while, the stocky person with the distinguishable clothing, was observed coming out and walking towards the suspect vehicle and proceeding to the targeted residence again together with the third (3rd) suspect. Then all three (3) suspects were recorded leaving together, one of them holding a small bag and fleeing in the said white suspect vehicle towards Tigne Street;

Whereas from further enquires it resulted that registration number plates ‘JET 082’ were reported to having been stolen on the third (3rd) of August of the same year two thousand and twenty (2020) from a parking area in St. Julian's from a vehicle of the make Seat Cordoba. With the assistance of other authorities, the investigators were informed that on the fourteenth (14th) of August of the same year two thousand and twenty (2020), the said number plates ‘JET 082’ were recorded on a vehicle of the make Peugeot 107. It was established that after the homicidal armed robbery, the white suspect vehicle proceeded through the localities of Sliema, Kappara, Santa Venera, Msida and Pieta, arriving at the final destination minutes after the concerned incident;

Whereas on the twentieth (20th) day of August of the same year two thousand and twenty (2020) a white Volkswagen Tiguan in the parking area situated in Pieta, in the vicinity of St. Luke’s Hospital, was located by a CID patrol. At the time of this discovery, this Volkswagen Tiguan (that looked closely identical of the suspect white vehicle, even by certain features and marks of the particular model) had license plates ‘CCB 042’. According to the available information at that time, these particular licence plates had also been reported as stolen. The same forensic team as appointed by the Inquiring Magistrate were called on site where the Volkswagen Tiguan was discovered and a search was executed on said vehicle. From this search, a brown female handbag was discovered, containing, amongst others, several items connected with Paula PANDOLFINO, who happens to be the sister of the aforementioned victim Christian PANDOLFINO, as well as other items similar to items which were noticed in the residence where the homicidal incident occurred;

Whereas most significantly, the licence plates ‘JET 082’ which were used during the commission of the voluntary homicide were found folded in said vehicle, further confirming that this was the same Volkswagen Tiguan that was used in the homicidal armed robbery. Furthermore, several items were found inside the back storage of the vehicle. These items consisted of wigs, clothes, masks, gloves and realistic firearm imitations that at stage were deemed to have been procured or used for the purposes of the armed robbery. Consequently, all these above mentioned items were preserved and the vehicle was taken into custody for further forensic examination.

Whereas from examination of further CCTV footages obtained from the parking area where the abovementioned Volkswagen Tiguan was found by the Police, it was observed that on the night of the homicidal armed robbery no cars came out of the said parking area for a long time but eventually three (3) persons fitting the description as those seen on the CCTV in the area where the armed robbery occurred, were observed. A trail of CCTV footage from different cameras was followed and examined by the investigators, where the same three (3) persons were practically followed via CCTV footage up to the bus stop in Marina Street, Msida. Once in Marina Street, one of the perpetrators, precisely the one identified as having a ‘stocky’ build, entered the establishment Dolce Sicilia in the area and asked for access to the establishment’s wireless internet (wifi), and such process was even caught on the establishment’s security cameras, granting the investigators a much closer and illuminated look at the ‘stocky’ perpetrator. Eventually, these three (3) persons were observed via CCTV footage stopping at the bus stop in said Marina Street. At that stage, it was closely observed that one (1) of these three (3) persons had an elbow support sleeve;

Whereas further enquiries lead to police intelligence that a certain person who fitted closely the physical description of the tall person seen in the CCTV footage was observed in a different location two (2) days before the incident wearing an elbow support sleeve and driving a Peugot 106 identical to the one ascertained in data provided to the investigators by other governmental authorities. This gave the investigators a strong

hypothesis that this person must be further closely investigated. At that stage, the other two (2) perpetrators could not be fully identified, although investigators took careful note of the clothes they were observed wearing in the CCTV footage being investigated.

Whereas following further investigations, which included information given by the 'tall' perpetrator who was taken into custody, lead to the identification of one of the co-perpetrators(precisely the person who stayed in the Volkswagen Tiguan during the shooting),

Whereas after being arrested, informed of the reasons for his arrest, and informed of all applicable rights in accordance with the law, the suspected co-perpetrator voluntarily expressed his anger at the whole situation in front of his arresting officers, claimed that he was lured into this whole situation, that the killing of those two (2) men Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI was not desired by him, and declared his willingness to speak freely with the investigators. He explained that on the day of the incident, he was approached by the one identified as the 'tall' perpetrator (who coincidentally at that time was driving a white Volkswagen Tiguan) and another person (precisely the other co-perpetrator who in the CCTV footage was marked as the stocky figure wearing the distinguishable clothing), where the latter asked him to join them on a particular 'job'. The co-perpetrator explained to the investigators that he accepted and joined these two (2) persons, however soon realised that there was no clear plan on how to execute the 'job'. Upon reaching Locker Street in Sliema, the 'tall' perpetrator informed him of the intended robbery and pinpointed the targeted residence. It was also claimed that as soon as the 'tall' perpetrator stepped out of the car, it was visible that he was in possession of a firearm, and was warned by the third perpetrator (who was recruited) to exercise caution and not use the firearm in vain.

Whereas the co-perpetrator explained to the investigators that the two other perpetrators, the 'tall' one and the 'stocky' one with distinguishable clothing, proceeded to the targeted residence, and whilst he was in the

car, he heard gunfire. Momentarily afterwards, one of the perpetrators, precisely the 'stocky' one, came out of the targeted residence and proceeded to ask him to go with him in the targeted residence. This particular co-perpetrator, explained to the investigators that he immediately followed the 'stocky' co-perpetrator back into the targeted residence, without protest, and as soon as he entered the targeted residence, he first noticed the body of one of the victims, Christian PANDOLFINO, and moments after, the body of the other victim Ivor Piotr MACIEJOWSKI. When one of the perpetrators, precisely the 'tall' co-perpetrator declared that the 'job' is done and they should leave, they all left the residence upon such instruction and fled from the area;

Whereas furthermore the co-perpetrator confirmed with the investigators that all three of them drove off from the area by means of the Volkswagen Tiguan which they had used to arrive at the crime scene, and eventually parked in that very place where the vehicle was in due course found by the investigators. Once the Volkswagen Tiguan was parked they changed some of the clothes they were wearing whilst committing the homicidal robbery, the perpetrators proceeded to change the number plates from those 'JET 082' to those 'CCB 042'. As soon as they were done, all three (3) perpetrators then proceeded on foot towards the Msida waterfront where the aforementioned bus stop was mentioned in the course of the investigations, whereby they eventually ordered a taxi and were transported to one of the perpetrators' abode in Sliema;

Whereas furthermore, this second perpetrator under arrest gave full access to his cellphone to the investigators, which enabled the identification of the third perpetrator of the 'stocky' build who at the time was still at large. The perpetrator who was second to be arrested, and who gave the details of the 'stocky' co-perpetrator on the run, remained consistent in his version, and on the twenty-seventh (27th) of August of the same year two thousand and twenty (2020), he gave three (3) audiovisual statements where it was ascertained that the 'tall' perpetrator was driving the vehicle, and that he had stayed in the car whilst the gunfire was occurring in the targeted residence, and the first two (2) co-perpetrators to enter the targeted residence, the 'tall' one and the 'stocky'

one with distinguishable clothing, were those who had initially approached him to assist them in this particular homicidal robbery, and when he entered the residence with one of the co-perpetrators, at that stage the victims were already murdered;

Whereas the perpetrator who was arrested second also confirmed with the investigators that the 'tall' co-perpetrator made use of the same wig that was found by the investigators whilst searching the aforementioned Volkswagen Tiguan, and when shown pictures of the realisitc firearm replicas that were found in the said vehicle, he also confirmed to know about those. He also confirmed that he was promised money by the 'tall' perpetrator, and although he received a sum of over three hundred euros (€300), and was due to receive more amounts however the remainder never arrived;

Whereas further enquires revealed that the 'stocky' perpetrator was Danish national Jesper Gejl KRISTIANSEN, who resided in Gżira, Malta. On the twenty seventh (27th) of August of two thousand and twenty (2020), the Inquiring Magistrate was requested to issue a search and arrest warrant against Jesper Gejl KRISTIANSEN and a Schengen Information System (SIS) Alert was issued so that KRISTIANSEN will be denied from exiting Maltese territory. Investigators also communicated with their Danish counterparts where further information and intelligence on KRISTIANSEN was exchanged;

Whereas investigators managed to trace KRISTENSEN's social contacts in Malta, and searches in different addresses were made, with negative results. Upon further enquiries, where it was eventually established that KRISTIANSEN had made his way to the airport from where he left the Maltese islands to an unknown destination.. In due course, investigators then learnt that KRISTIANSEN had left to Barcelona, Spain with an airline ticket that was booked on the twenty seventh (27th) of August of two thousand and twenty (2020), and this precisely after the arraignment of the co-perpetrator who was second to be arrested by the Maltese authorities.

Whereas furthermore investigators received confirmation that KRISTIANSEN's cellphone number was the same one that was provided to them by the 'tall' co-perpetrator who was first to be arrested. They were also shown the pictures taken from the CCTV footage of the establishment Dolce Sicilia reproduced below and confirmed that the depicted person was the same KRISTIANSEN. In due course, investigators also received confirmation from taxi service provider BOLT that on the eighteenth (18th) of August of that year, after the homicidal robbery occurred, a taxi was booked by Jesper KRISTIANSEN, via a particular cellphone number and the destination was the residential address of the co-perpetrator who was eventually second to be arrested.

Whereas the inquiring magistrate issued a European Arrest Warrant against accused Jesper Gejl KRISTIANSEN. He was eventually arrested by the Spanish authorities and extradited back to Malta. The accused Jesper Gejl KRISTIANSEN was interviewed by the investigators on the nineteenth (19th) of November of the year two thousand and twenty (2020), however, the accused chose not to answer any of the questions brought forward by the investigators or cooperate with the investigations;

Whereas in consideration of all the above, it became abundantly clear that the accused Jesper Gejl KRISTIANSEN voluntarily and intentionally involved himself in the homicide of Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI, and he did so:

i. By joining said co-perpetrators and actually partaking in the 'recruitment' of one of other two co-perpetrators to participate in an unlawful 'job', therefore increasing not only their manpower but by extention also their general volition to make their way towards the targeted residence for their nefarious purposes;

ii. By failing to desist from taking part in the unlawful activity even when being **fully aware** of the presence and possible use of firearms for

the execution of the so called 'job', when in fact such use of firearms materialized, leaving two (2) persons dead in their own abode;

iii. By breaking into and entering the targeted residence with another armed co-perpetrator, and also engaged in a confrontation which involved the use of firearms that ultimately resulted in the murder of Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI;

iv. By leading one of the co-perpetrators inside the targeted residence where the double homicide occurred, and this after the gunshots occurred inside the targeted residence;

v. By leaving the crime scene and subsequently fleeing the area together with the other co-perpetrators, and this also when instructed to by one of the co-perpetrators;

vi. By assisting a co-perpetrator in necessary procedures to disguise evidence and any corpus delicti such as the getaway vehicle of the make Volkswagen Tiguan and by procuring a means of transport for the perpetrators to be transported to one of the perpetrators' abode;

vii. By deciding to evade justice and leave Maltese territory as soon as he realised that the Maltese authorities had arrested his two (2) co-perpetrators;

**The Consequences:**

Therefore, with his own actions, the accused Jesper Gejl KRISTIANSEN is guilty of complicity in wilful homicide, meaning that 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, and this by the following acts: by instigating the commission of the crime by means

of promises, machinations, and by giving instructions for the commission of the crime; by procuring the weapons, instruments or other means used in the commission of the crime, knowing that they are to be so used; by knowingly aiding or abetting in any way whatsoever the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed; and finally also by inciting or strengthening the determination of the other co-perpetrators to commit the crime, or by promising to give assistance, aid or reward after the fact;

**The Accusation:**

Therefore, the Attorney General, on behalf of the Republic of Malta, in light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, accuses the mentioned Jesper Gejl KRISTIANSEN, as guilty of complicity wilful homicide, 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 and this by instigating the commission of the crime by means of promises, machinations, and by giving instructions for the commission of the crime; by procuring the weapons, instruments or other means used in the commission of the crime, knowing that they are to be so used; by knowingly aiding or abetting in any way whatsoever the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed; and finally also by inciting or strengthening the determination of the other co-perpetrators to commit the crime, or by promising to give assistance, aid or reward after the fact;

**The Requested Punishment:**

As a consequence of the above, the Attorney General is requesting that the aformentioned Jesper Gejl KRISTIANSEN is, according to the law, sentenced to life imprisionment in accordance with the content of articles

17, 31, 42(b)(c)(d)(e), 211 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or for any other sentence according to law that can be given to the aformentioned accused.

**THE SECOND (II) COUNT**

***Theft accompanied by Wilful Homicide,***

***aggravated by 'Violence', 'Means', 'Amount', 'Place' and 'Time'***

**The Facts:**

Whereas owing to the nature of the circumstances which took place on the eighteenth (18th) of August of the year two thousand and twenty (2020) and in the subsequent days afterwards, as indicated in the First (I) Count of this Bill of Indictment, it clearly resulted that the accused Jesper Gejl KRISTIANSEN involved himself and participated in what turned out to be a homicidal armed robbery at the targeted residence in the address '22, Locker Street, Sliema', and made off with an amount of jewellery together with the other co-perpetrators.

Whereas in the course of investigations, it resulted that the accused Jesper Gejl KRISTIANSEN participated in the theft of the concerned jewellery which involved the external breaking into a dwelling-place whilst accompanied by two (2) other persons, doing so whilst being armed and making use of a disguise of garment and/or appearance and of masks, and such theft eventually leading to the homicide of two (2) persons that is, the homicide of Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI.

Whereas in the course of the investigations, it resulted that the accused Jesper Gejl KRISTIANSEN joined and assisted one of the co-perpetrators in the breaking in of the targeted residence, participated in the violence that erupted upon break and entry of said targeted residence, summoned the third co-perpetrator to join him and enter back the targeted residence, and eventually fled the scene with other co-perpetrators and the res furtiva, including the jewellery concerned with this case.

Whereas the total value of the amount of jewellery stolen from the targeted residence where the homicidal robbery took place was confirmed at a subsequent stage of the investigation that it exceeded the amount of two thousand and three hundred and twenty-nine euros and thirty-seven cents (€2,329.37). This theft took place at a time after ten o' clock in the evening (22:00 hrs / 10 pm) during August in Malta, therefore occurring at night, that is to say between sunset and sunrise.

**The Consequences:**

Therefore, with this own actions, Jesper Gejl KRISTIANSEN is guilty for having, on the same date, during the same time, at the same place, and in the same circumstances as those explained in the previous First (I) Count and this Count, 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.

**The Accusation:**

Therefore, the Attorney General, on behalf of the Republic of Malta, in light of the circumstances, timeframe, reasoning and facts which have

already been mentioned above in this Bill of Indictment, accuses the mentioned Jesper Gejl KRISTIANSEN, guilty for having 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

**The Requested Punishment:**

As a consequence of the above, the Attorney General is requesting that the aformentioned Jesper Gejl KRISTIANSEN is, according to the law, sentenced to life imprisionment, in accordance with the content of articles 17, 31, 211, 261(a)(b)(c)(e)(f), 262(1)(a)(b), 263(a)(b), 264(1), 267, 269(g), 270, 272, 272A, 275, 276, 277, 278, 279(a), 280, 280(a)(b) and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or for any other sentence according to law that can be given to the aformentioned accused.

**THE THIRD (III) COUNT**

***Use of an identification number other than that allotted by the police or by an Authority in relation to a particular motor vehicle***

**The Facts:**

Whereas owing to the nature of the circumstances which took place on the eighteenth (18th) of August of the year two thousand and twenty (2020) and in the subsequent days afterwards, as indicated in the First (I) and subsequent Counts of this Bill of Indictment, it resulted that the

perpetrators were using a stolen vehicle registration number plate, ‘JET 082’, that was reportedly stolen from a Seat Cordoba whilst parked in St. Julian’s on the third (3rd) of August of the same year two thousand and twenty (2020). These registration plates, which were registered on that particular Seat Cordoba from which they were lifted and stolen, ended up on the white Volkswagen Tiguan that was driven by one of the perpetrators and used by himself and the other perpetrators not only to arrive on the scene of the homicidal armed robbery, but also to flee from the area once the criminal act was done. This was amply confirmed by eyewitness accounts and CCTV footage examined by the investigators;

Whereas these vehicle registration number plates ‘JET 082’ were eventually found bent and discarded in the back storage of the same aforementioned white Volkswagen Tiguan, thus validating the observations of eyewitness accounts in this regard. Furthermore, even from facts established in the course of the investigation, in particular subsequently to the arrest of the mentioned ‘tall’ co-perpetrator, there was little doubt that the accused Jesper Gejl KRISTIANSEN, on the night of the homicidal armed robbery, boarded and therefore made use of the white Volkswagen Tiguan whilst it was bearing the stolen registration number plates ‘JET 082’. It was established in the course of the investigations that the concerned Volkswagen Tiguan was registered with the Maltese authorities as bearing vehicle registration number ‘CRS 240’;

**The Consequences:**

Therefore, with his own actions, the accused Jesper Gejl KRISTIANSEN is guilty of having made use of an identification number, specifically ‘JET 082’ and ‘CCB 042’ respectively, other than that allotted by the police or by an Authority in relation to a particular motor vehicle, specifically the Volkswagen Tiguan, which was registered with the relevant authorities with the vehicle registration number ‘CRS 240’;

**The Accusation:**

Therefore, the Attorney General, on behalf of the Republic of Malta, in light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this Bill of Indictment, accuses the mentioned Jesper Gejl KRISTIANSEN, of having, made use of an identification number ('JET 082' and 'CCB 042') 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), in Sliema, and in the preceeding 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;

**The Requested Punishment:**

As a consequence of the above, the Attorney General is requesting that the aformentioned Jesper Gejl KRISTIANSEN is, according to the law, sentenced to a term of imprisonment not exceeding six (6) months or to a fine (multa) not exceeding one thousand and two hundred euros (€1,200), or to both such term not exceeding six (6) months and fine (multa) not exceeding one thousand and two hundred euros (€1,200), and this in accordance with the content of Articles 17, 31, and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, and in accordance with the contents of Articles 2 and 15(1A) of the Traffic Regulation Ordinance, Chapter 65 of the Laws of Malta, or for any other sentence according to law that can be given to the aformentioned accused.

**THE FOURTH (IV) COUNT**

***Knowingly received or purchased property which has been stolen, misapplied or obtained by means of an offence committed in Malta, or has knowingly taken part, in any manner whatsoever, in the sale or disposal of same property***

## The Facts:

Whereas owing to the nature of the circumstances which took place on the eighteenth (18th) of August of the year two thousand and twenty (2020) and in the subsequent days afterwards, as indicated in the First Count of this Bill of Indictment (I) and subsequent Counts of this Bill of Indictment, it became manifestly clear during the investigation that the accused Jesper Gejl KRISTIANSEN had knowingly taken part in the use and disposal of a property which has been stolen or obtained by means of any offence, specifically the white Volkswagen Tiguan that was used by the perpetrators to reach Locker Street in Sliema where the targeted residence was situated;

Whereas this is being stated even in view of the vast amount of evidence the investigators accumulated that shows that the accused Jesper Gejl KRISTIANSEN rode in this Volkswagen Tiguan with the other perpetrators during the commission of the crimes in question (and this includes CCTV footage, DNA results, fingerprint examinations and information retrieved in the course of the investigation), and it is an irrefutable fact that the concerned Volkswagen Tiguan was the same one as that which had been reported stolen by Malcolm Fava. On the fourteenth (14th) of September of the year two thousand and eighteen (2018), Malcolm Fava had attended at the Sliema Police Station to report that his vehicle had been stolen, that was essentially the same Volkswagen Tiguan which at that time displayed the vehicle registration number plates ‘CRS 240’, whereby

the investigation at that time proved to be fruitless and no progress was made in the tracing back of said vehicle Volkswagen Tiguan;

Whereas furthermore, it has also resulted during the investigation that the accused Jesper Gejl KRISTIANSEN helped the other perpetrators 'disguise' the getaway vehicle Volkswagen Tiguan by changing the vehicle registration number plates from 'JET 082' to 'CCB 042', prior to abandoning (which is a form of disposal) said vehicle in Pieta, and therefore involved himself in the use of an incorrect identification number for the purposes of avoiding as much as possible their detection and apprehension, including that of the vehicle;

Whereas ultimately it resulted that the accused Jesper Gejl KRISTIANSEN has knowingly taken part, in any manner whatsoever, in the disposal of the vehicle Volkswagen Tiguan, and this by helping one of the co-perpetrators to change the vehicle registration number plate as part of a disguise before abandoning such vehicle, hence before disposing of such vehicle. This vehicle in question, the Volkswagen Tiguan which was being used by the perpetrators in this case, had been stolen, and this as reported by its legitmate owner Malcolm Fava.

**The Consequences:**

Therefore, with this own actions, Jesper Gejl KRISTIANSEN is guilty for knowingly taking part, in any manner whatsoever, in the disposal of property, precisely the vehicle Volkswagen Tiguan, which has been stolen, misapplied or obtained by means of any offence;

**The Accusation:**

Therefore, the Attorney General, on behalf of the Republic of Malta, in light of the circumstances, timeframe, reasoning and facts which have

already been mentioned above in this bill of indictment, accuses the mentioned Jesper Gejl KRISTIANSEN, guilty of knowingly receiving or purchasing property which has been stolen, misapplied or obtained by means of any offence, precisely the vehicle of the make Volkswagen Tiguan, or has knowingly taken part, in any manner whatsoever, in the sale or disposal of the same Volkswagen Tiguan, 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 the 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.

**The Requested Punishment:**

As a consequence of the above, the Attorney General is requesting that the aformentioned Jesper Gejl KRISTIANSEN is, according to the law, sentenced to a term of imprisionment from thirteen (13) months to ten (10) years, and this in accordance with the content of Articles 17, 18, 31, 261(c), 267, 279(b), 334 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or for any other sentence according to law that can be given to the aformentioned accused.

**THE FIFTH (V) COUNT**

***Unlawful detention and confinement of***

***Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI againt their will***

***whilst subjected to bodily harm with the object of extortion of money or effects***

Whereas owing to the nature of the circumstances which took place on the eighteenth (18th) of August of the year two thousand and twenty (2020) and in the subsequent days afterwards, as indicated in the First (I) Count of this Bill of Indictment and subsequent Counts to that, it clearly resulted that Jesper Gejl KRISTIANSEN, whilst participating in the homicidal armed robbery at the targeted residence in the address '22, Locker Street, Sliema', he came in very close contact and proximity with one of the victims, Christian PANDOLFINO, precisely in the hallway immediately after breaking into the targeted residence;

Whereas in view of the facts as established by the whole investigation, it became abundantly clear that Jesper Gejl KRISTIANSEN participated in the unlawful and unauthorised detention and confinement, even if instantaneous, of Christian PANDOLFINO against his will and in his own residence, before proceeding to the slaying of the latter. The same could be said with respect to the other victim Ivor Piotr MACIEJOWSKI. In order to have successfully executed this, Jesper Gejl KRISTIANSEN, alongside with the other perpetrator present with him in the targeted residence during the confrontation, detained and/or confined the abovementioned victims;

Whereas it became abundantly clear from all the circumstances and evidence that the investigators encountered in this case, that such detention and confinement of the above mentioned victims Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI was made by Jesper Gejl KRISTIANSEN principally for the purpose of extorting money or effects, and also, during such detention and/or confinement, these victims were mercilessly subjected to bodily harm of deadly proportions. Therefore, in those circumstances, Jesper Gejl KRISTIANSEN was responsible for 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;

**The Consequences:**

Therefore, with this own actions, the accused Jesper Gejl KRISTIANSEN is guilty 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;

**The Accusation:**

Therefore, the Attorney General, on behalf of the Republic of Malta, in light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this bill of indictment, accuses the mentioned Jesper Gejl KRISTIANSEN, 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;

**The Requested Punishment:**

As a consequence of the above, the Attorney General is requesting that the aformentioned Jesper Gejl KRISTIANSEN is, according to the law, sentenced to a term of imprisionment from thirteen (13) months to six (6) years, in accordance with the content of articles 17, 31, 86, 87(1)(c)(e), 88 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or for any other sentence according to law that can be given to the aformentioned accused.

**THE SIXTH (VI) AND FINAL COUNT**

***Possession of a firearm during the commission of an offence***

**The Facts:**

Whereas owing to the nature of the circumstances which took place on the eighteenth (18th) of August of the year two thousand and twenty (2020) and in the subsequent days afterwards, as indicated in the First (I) and subsequent Counts of this Bill of Indictment, it clearly resulted that Jesper Gejl KRISTIANSEN, whilst making his way to the concerned targeted residence in the address '22, Locker Street, Sliema', to participate in the homicidal armed robbery, had in his effective possession (within the concerned vehicle Volkswagen Tiguan), replicas of two particular firearms (Thompson submachine gun and AK-47 Kalashnikov assault rifle). From such circumstances, it appeared clearly that these items were intended by the perpetrators to provide some form of backup or serve as extra equipment specifically for the purposes of executing the armed robbery that resulted in the double homicide;

Whereas it became abundantly clear from all the circumstances and evidence available, that Jesper Gejl KRISTIANSEN was responsible of possessing a firearm imitation at the time when he was committing a crime against the person and of theft, that is the concerned homicidal armed robbery in Sliema

**The Consequences:**

Therefore, with this own actions, the accused Jesper Gejl KRISTIANSEN is guilty of having, at the time of committing crimes against the person and of theft, was in possession of a firearm imitation;

**The Accusation:**

Therefore, the Attorney General, on behalf of the Republic of Malta, in light of the circumstances, timeframe, reasoning and facts which have already been mentioned above in this Bill of Indictment, accuses the mentioned Jesper Gejl KRISTIANSEN, of having, 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, 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;

**The Requested Punishment:**

As a consequence of the above, the Attorney Generali is requesting that the aforementioned Jesper Gejl KRISTIANSEN is, according to the law, sentenced to a term of imprisonment not exceeding four (4) years, and this in accordance with the content of Articles 17, 31, 64 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, and also in accordance with the contents of Article 2 and 55, 56, 57 and 60 of the Arms Act,

Chapter 480 of the Laws of Malta, or for any other sentence according to law that can be given to the aforementioned accused.

2. Having seen the note of preliminary pleas submitted by the accused KRISTIANSEN on the 19th September 2022 wherein he raised the following pleas:

1. **The bill of indictment is legally defective in its First Count for the following reasons**:

a. In facts of the First Count (page 5 et seq of the bill of indictment) ample reference is made to the statements made by a co-accused which is clearly inadmissible. These references to inadmissible evidence have ought to be expunged from the bill of indictment.

b. In the Facts of the First Count (page 7) in point "ii" the words "fully aware" are in highlight and bold. This highlighting is intended to draw special attention to this alleged full awareness of the accused. This is procedurally wrong as the bill of indictment should state permissible facts and include the charge. No special punctuation to unduly influence a jury ought to be admitted.

2. **The nullity of the First Charge for the following reasons**:

a. With the expunging of the statements of co-accused as per plea I above, which evidence is inadmissible according to law, the First Charge does not contain any facts or evidence to support a charge of the accused acting as co-principal and/or accomplice to the crime of wilful homicide;

b. Without Prejudice to the foregoing there is a legal defect in the First Charge and a glaring legal contradiction on the legal responsibility of the accused. Whereas in the Facts, the accused (on the basis of inadmissible evidence) is identified as a co-principal ("Co-perpetrator" mentioned inter alia in pages 5 & 6), in The Accusation, the Attorney General is requesting the finding of guilt for "... complicity (in) wilful homicide..." (page 9 of the bill of indictment). The Attorney General therefore fails to identify whether the Accusation levelled is one as co-principal or that of an accomplice in terms of law - each giving rise to different legal

consequences. This legal contradiction brings about the nullity of the First Charge with its Accusation.

c. Without prejudice to the foregoing, in the event that the Accusation is one for complicity, the Bill of Indictment fails to indicate the way in which the accused became an accomplice in terms of law;

3. **The Bill of Indictment is Defective in its Second Count for the following reasons:**

a. The Second Count is clearly relying on the Facts of the first Count (see page 10 "as indicated in the First (1) Count of this Bill of Indictment"... and in the Consequences"... and in the same circumstances as those explained in the previous First (1) Count... "), which includes reference to the statements made by a co-accused which is clearly inadmissible. These references to inadmissible evidence have to be expunged from the bill of indictment.

4. **The Nullity of the Second Count for the following reasons:**

a. With the expunging of the statements of co-accused as per plea 1 and 3 above, which evidence is inadmissible according to law, this Count does not contain any facts or evidence to support the Accusation levelled in the Bill of Indictment;

b. The Accusation fails to identify whether the Accusation levelled for aggravated theft is one of acting as co-principal or accomplice in terms of law (and in what way he became an accomplice in terms of law)

c. The Accusation fails to address the plurality of offenders in terms of law and the Accusation (as stated in plea 4(b)) fails to address correctly the circumstances described by the same Attorney General in the bill of Indictment.

5. **Conflicting Charges - Nullity of the First and Second Counts**

Without Prejudice to the foregoing, the Attorney General indicates the accused as an accomplice to wilful homicide (as per the Accusation of the First Charge) and as guilty of theft aggravated inter alia with wilful homicide, in the Second Charge. The offences

are not of the same type or nature (not even komprizi u involuti), each requirement different mens rea and common design.

The accused cannot have had 2 separate disctinct mens rea and/or common design.

Therefore, quite apart from the conflict raised in the Bill of Indictment as to whether the accused is a co-principal or an accomplice, there is a deeper failure in the whole bill of indictment - the bill of indictment indicates separate mens rea and potentially different common designs in the First and Second Counts. The Counts therefore cannot be alternate and the two Counts together pose a legal conflict leading to the nullity of both charges.

6. **Nullity of the Third and Fourth Counts - lack of evidence/ facts to support those Counts**

Nowhere in the facts of any of the Counts is there any relevant fact to support the Accusations that the accused "made use" of the identification numbers "JET 082" or "CCB-042"; that he was at any time aware of any issue relating to these plates on any vehicle or that he "disposed" or even had "received" any stolen propertiesThe lack of evidence or facts leads to the nullity of the Counts themselves.

7. **The Bill of Indictment is Defective in its Fifth Count for the following reasons:**

a. The fifth Count is clearly relying on the Facts of the first Count (see pages 15 and 16), which includes reference to the statements made by a co-accused which is clearly inadmissible. These references to inadmissible evidence have to be expunged from the bill of indictment.

8. **The Nullity of the Fifth Count for the following reasons:**

a. With the expunging of the statements of co-accused as per plea 1 and 7 above, which evidence is inadmissible according to law, this Count does not contain any facts or evidence to support the Accusation levelled in the Bill of IndictmentThere is no evidence to suggest that Kristiansen was even in the building when the offences took placeThe suggestion by the Attorney General of placing the

accused in close proximity to Pandolfino and Maciejwosko, or in the hallway at that time is gratuitous.

b. Equally there is no evidence to suggest any confinement or extortion for purpose of money or effects;

c. Without prejudice to the foregoing, even the legal notion raised of "instantaneous" confinement is legally incorrect. Confinement has clear legal implications, which of their very nature would exclude an "instanteous" form. Any legal argument to the contrary would mean that this offence of "confinement" would arise practically in every social context or commission of any crime.

9. **The Bill of Indictment is Defective in its Sixth Count for the following reasons:**

a. The Sixth Count is clearly relying on the Facts of the first Count (see pages 17), which includes reference to the statements made by a co-accused which is clearly inadmissible. These references to inadmissible evidence have to be expunged from the bill of indictment.

10. **The Nullity of the Sixth Count for the following reasons:**

a. With the expunging of the statements of co-accused as per plea 1 and 9 above, which evidence is inadmissible according to law, this Count does not contain any facts or evidence to support the Accusation levelled in the Bill of Indictment. Kristiansen was not in possession of any firearm or arms proper.

b. The charge of possession of a firearm relates to a person physically carrying an arms proper. The fact that third parties may have had an arms proper (even if that were true) does not mean that the accused is guilty of being in possession of a firearm (when this was in the possession of a third party).

c. The charge is null and void and this charge really highlights the confusion in the bill of indictment-as to whether the accused was a co-principle or accomplice and in what crime/s.

The inadmissibility of those parts of Inspectors' testimony where the Inspectors expressed opinions.

The requested punishment within the Second Count makes reference to Article 280(a) and (b) of Chapter 9 of the Laws of Malta, which article does not exist.

4. Having heard the oral submissions of the parties with regards to these preliminary pleas raised by the accused KRISTIANSEN:

**Considers as follows:**

**<u>The First Preliminary Plea – The First Count of the Bill of Indictment is legally defective.</u>**

5. That in his first preliminary plea the accused KRISTIANSEN argues that the bill of indictment is legally defective in its First Count and this for two reasons:

    a) the facts contained in the narrative which the Attorney General made use of in this First Count make ample reference to the **statements made by the other two co-accused on this case** – Victor Dragomanski and Daniel Muka respectively – and these references are inadmissible at law.
    b) the facts of the case in this First Count are in highlight and in bold which emphasis would only serve to draw special attention to these facts and unduly influence the jury.

6. During the submissions made by Defence on the sitting dated 10th November 2022, it was argued that evidence which the law itself precludes from being produced in criminal proceedings should not be relied on by the Prosecution/Attorney General and made use of as part of the narrative contained in this First Count of the Bill of Indictment, and this irrespective of the value which this evidence could acquire further on in subsequent stages of these proceedings.

7. The nullity of a bill of indictment takes place only if the bill of indictment contains a substantial defect of form which cannot be cured by an amendment. So, any defects or errors that can be amended in the course of the trial cannot lead to the nullity of the bill of indictment.[1] The fact that a plea of nullity is raised does not prevent the correction of the bill of indictment.

[1] Vide **Rex vs. Camilleri** decided by the Criminal Court on the 2nd May 1905.

8. The cause of nullity of the bill of indictment must appear from the face of the bill of indictment itself. This Court cannot be called to inquire into the truth or material accuracy of the facts stated in the bill of indictment. The Court assesses whether the formal requirements established by law would have been complied with. The nullity of the bill of indictment cannot be granted by the Court due to reasons touching on the merits of the case but rather when it is shown that from the face of the bill of indictment there results to be substantial defects that cause irremediable prejudice to the accused. **Where any such plea of nullity is raised, the Court examines the bill of indictment itself independently of the evidence and of the merits of the case**.[2]

9. The Court understands that the pleas raised by Defence, entail an assessment of the evidence on which the narrative part was built. Defence is basing this first part of this first preliminary plea on the provisions of Articles 661 and 636(b) of the Criminal Code, which read as follows:

> 661. A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person.
>
> 636. No objection to the competence of any witness shall be admitted on the ground –
> (b) That he was charged with the same offence in respect of which his deposition is required, when impunity was promised or granted to him by the Government for the purpose of such deposition.

10. Article 661 of the Criminal Code makes it **inadmissible** to produce as evidence against a third party all those confessions or declarations made by another person and any such confessions or declarations are only to be considered admissible with respect to the person making them.[3] Defence is attacking statements made by two other persons Victor Dragomanski and Daniel Muka who, like the accused KRISTIANSEN, are being charged albeit in separate proceedings#, inter alia with the double wilful homicide merits of this case.

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[2] Vide **Rex vs. Strickland** decided by the Criminal Court, collegially composed on the 21st March 1923, Vol. XXV.IV.833

[3] An exemption to this cardinal rule of criminal proceedings is only allowed under the drug law regime, as contemplated in Article 30A of Chapter 101 of the Laws of Malta and Article 121B of Chapter 31 of the Laws of Malta.

11. Defence is correct in arguing that at the stage of the drafting and the filing of the Bill of Indictment by the Attorney General, the respective proceedings against Dragonmanski and Muka were still 'sub-judice'. This argument needs to be assessed in the light of the status of all the alleged co-participants at the moment in time when the bill of indictment was filed, the current stage of the proceedings, the prosecution powers of the Attorney General, as well as the historical context within which such an exclusionary rule was developed.

12. The Attorney General enjoys certain prerogatives when he exercises his duties of public prosecution. When confronted with a number of co-participants in the commission of a criminal offence, the Attorney General may decide to prosecute them together or separately. The default position is that he prosecutes each co-participant separately. When the Attorney General prosecutes co-participants separately, he has powers that may lawfully influence which co-participant is tried first. This can be done simply by determining the timing when he files the bill of indictment in the registry of the Criminal Court. Two important provisions of the Criminal Code then buttress this position:

> 590.(1) The indictment shall be filed in the registry of the court, and the registrar shall note down at the foot thereof the day on which it is filed.
>
> 439.Causes shall be tried in rotation, according to the date of the filing of the indictment: Provided that it shall be lawful for the court, if it sees good reason for so doing, to postpone the trial of a cause which is next in rotation, and proceed to try another cause.

13. As a rule, the case of the co-participant whose bill of indictment is filed first, is tried first. This is not an absolute rule as the Criminal Court may still derogate from this rule. Even the Attorney General may subsequently decide to change tack.

14. While whenever the Attorney General decides to proceed against a plurality of co-participants in the commission of criminal offences, the Law grants him the power to proceed against each one of them on a separate bill of indictment, conversely, the Attorney General may join charges - against two or more persons as principals or accomplices in the same offence or as guilty of divers offences connected with each other - in the same indictment and try

them at the same trial, even though some one of such offences is of an inferior jurisdiction.[4]

15. On the otherhand, the court may also, upon the demand of the Attorney General, order a separate trial for each accused, when two or more are joined in the same indictment.[5] Then whenever the Attorney General proceeds against a plurality of offenders by separate bills of indictment, whether filed at the same time or at different times, in cases where the divers offences are deemed to be connected with each other as per article 592 of the Criminal Code, the Law grants him also the power to request joinder of bills of indictment so that a plurality of accused may be tried together in one trial by jury.[6]

16. In spite of these powers and prerogatives, the default position rests the same, in that the Attorney General has the power to proceed against co-participants in the commission of criminal offences separately through different and separate bills of indictment and he is not obliged to prosecute the criminal action against them via one and the same bill of indictment or trial by jury. This Law may be perceived as granting the Prosecutor a procedural tactical advantage over the accused; yet it finds its justification in the necessity of the State to facilitate public prosecution of criminal offenders.

17. One such tactical advantage would see the Attorney General first try to determine the criminal trial of one co-participant so that after that the case against the first tried co-participant would have become final and conclusive, then the Attorney General could use the testimony of the first tried co-participant as evidence against any other co-participant whose trial is held subsequently. This is a lawful way by means of which the Attorney General can secure the lawful use of the testimony of the first tried co-participant against the other co-participants. From the moment that the case against the first co-participant reaches final and conclusive status, all objections and exceptions to his competency as a witness cease and the first co-participant becomes a competent witness against the other co-participants, there being no more fear of further incrimination and punishment on his end.

[4] Article 591 of the Criminal Code.
[5] Article 594 of the Criminal Code.
[6] Article 595 of the Criminal Code.

18. This is the current predominant position in Maltese jurisprudence. In this regard this Court refers to the judgment **Il-Pulizija vs. Omissis u Saada Sammut,**[7] where the Court of Criminal Appeal maintained as follows:

> Hekk di fatti kien gie ritenut mill-Qorti Kriminali b'Digriet tat-22 ta' Dicembru, 1998 fil-kawza **"Ir-Repubblika ta' Malta vs. Ian Farrugia**". Dik il-Qorti, f'dak id-Digriet, wara li ghamlet riferenza ghall- gurisprudenza hemm citata, rriteniet li persuna li tkun akkuzata, kemm bhala komplici kif ukoll bhala ko-awtur, bl-istess reat migjub kontra dak l-akkuzat liehor ma tistax tingieb bhala xhud favur jew kontra dak l-akkuzat liehor sakemm il-kaz taghha ma jkunx gie definittivament deciz u li dan il-principju japplika sija jekk dik il-persuna tkun giet akkuzata fl-istess kawza tal-akkuzat l-iehor – b' mod li jkun hemm "ko-akkuzati" fil-veru sens tal-kelma – u sija jekk tkun akkuzata fi proceduri separati. Il-bazi ta' dan il-principju hu l-argument "a contrario sensu" li jitnissel mill-paragrafu (b) tal-Artikolu 636 tal-Kodici Kriminali. Konsegwentement dik il-Qorti kienet iddecidiet li dak ix-xhud li kien akkuzat bhala ko-awtur bl-istess reat li bih l-akkuzat kien jinsab akkuzat, ma hux kompetenti li jixhed, qabel ma l-kaz tieghu jghaddi in gudikat. (Ara ukoll fl-istess sens Digriet tal-Qorti Kriminali fil-kawza "**Ir-Repubblika ta' Malta vs. Brian Vella**" [4.2.2004] u ohrajn.). L-unika eccezzjoni ghal dir-regola hi proprju dik kontenuta fl-art. 636 (b) li tirrendi tali xhud kompetenti biex jixhed ghalkemm ikun imputat tal-istess reat li fuqu tkun mehtiega x-xhieda tieghu, meta l-Gvern ikun weghdu jew tah l-impunita' sabiex hekk ikun jista' jixhed.

19. Reference is also being made to other Court of Criminal Appeal judgments in the names of **Ir-Repubblika ta' Malta vs. Domenic Zammit, Martin Zammit, Joseph Fenech, Lawrence Azzopardi u Gino Calleja**[8] wherein it was held as follows:

> Kwantu għal dawn ix-xhieda li qed jintalbu mill-ko-akkużati, il-ġurisprudenza, ibbażata fuq il-liġi kif ukoll fuq il-buon sens, hi ċara. Persuna li tkun akkużata, kemm bħala kompliċi kif ukoll bħala ko-awtur, bl-istess reat miġjub kontra akkużat ieħor ma tistax tinġieb bħala xhud favur jew kontra dak l-akkużat **sakemm il-każ tagħha ma jkunx ġie definittivament deċiż. Dan il-prinċipju japplika sia jekk il-persuna tkun akkużata fl-istess kawża tal-akkużat l-ieħor b'mod li jkun hemm ko-akkużat fil-veru sens tal-kelma-u sia jekk tkun ġiet akkużata fi proċeduri separati**. [9]

20. Also, in the judgment **Il-Pulizija vs. Omissis, Jeremy Farrugia** decided on the 23rd May 2001, the Court of Criminal Appeal retained the following:

> Din l-ahhar regola hi desunta a contrario sensu minn dak li jipprovdi l-paragrafu (b) ta' l-Artikolu 636 tal-Kodici Kriminali, u giet kostantement applikata mill-qrati taghna, fis-sens li l-ko-akkuzat isir xhud kompetenti firrigward ta' ko-akkuzat iehor biss wara li l-kaz fil-konfront tieghu jkun gie

[7] Decided on the 16th November 2006
[8] Decided on the 31st July 1998
[9] Emphasis of this Court.

> definittivament deciz (ara f'dan is-sens Sua Maesta` il Re v. Carmelo Cutajar ed altri Qorti Kriminali, 18 ta' Jannar, 1927; Il-Pulizija v. Toni Pisani Appell Kriminali, 11 ta' Novembru, 1944; Il-Maesta` Tieghu ir-Re v. Karmenu Vella Qorti Kriminali, 3 ta' Dicembru, 1947; The Police v. Alfred W. Luck et. Appell 3 Kriminali, 25 ta' April, 1949; Ir-Repubblika ta' Malta v. Faustino Barbara Appell Kriminali, 19 ta' Jannar, 1996; Il-Pulizija v. Naser Eshtewi Be Hag et. Appell Kriminali, 2 ta' Frar, 1996; Il-Pulizija v. Carmelo Camilleri u Theresa Agius Appell Kriminali, 11 ta' Lulju, 1997; u passim Ir-Repubblika ta' Malta v. Domenic Zammit et. Appell Kriminali, 31 ta' Lulju, 1998).

21. Therefore, as a matter of procedural law, at the moment of drafting of the bill of indictment the legal position of the three alleged co-participants in this case was that of "co-accused", albeit in separate judicial proceedings. Consequently it was not possible for the Prosecution to bring any one of the alleged co-participants as a witness in the proceedings against any of the others, simply because they are deemed to be incompetent to tender evidence in the cases against the other alleged co-participants.

22. But the Law does not contemplate this status of incompetence of the co-accuseds as an absolute rule. So much so that that it does not preclude the use of testimony made by any other co-accused **at a subsequent moment in time** when the criminal proceedings against that particular co-accused would have been determined in a final and absolute manner. Therefore, the exclusionary rule of evidence created by the judicial interpretation of article 636(b) of the Criminal Code, interpreted a 'contrario-senso', is not absolute.

23. This rule was even stricter in the past than it is at law nowadays thanks to the amendments introduced by means of Act XVI of 2006 to article 639(3) of the Criminal Code. Originally, this article used to read as follows:

> Quando il solo testimonio contro l'accusato fosse un complice, la cui testimonianza non fosse sufficientemente sostenuta da altre circostanze, tale testimonio non sara` competente per convincere tale accusato.

24. Before the introduction of Act XVI of 2006, this provision stated that when during criminal proceedings:[10]

[10] Except for the crimes mentioned in articles 112 till 118, 120, 121, 124 to 126, and 138 of the Criminal Code.

the only witness against the accused is the accomplice, whose evidence is not sufficiently corroborated by other circumstances, the evidence of such single witness shall not be sufficient for the conviction of the accused.

25. But now, after the amendment introduced by Act XVI of 2006, this provision reads:

> Where the only witness against the accused for any offence in any trial by jury is an accomplice, the Court shall give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused.

26. After this amendment, a co-participant in a criminal offence can be convicted on the strength of the single evidence of an other co-participant (in this case referred to as an "accomplice") without there being the need for this evidence to be corroborated in any manner : provided however that prior to the jury reaching its conviction, the Court would have directed the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused. This is also the principle emerging from jurisprudence, such as the Court of Criminal Appeal judgment in the names of **Ir-Repubblika ta' Malta vs. Ramon Fenech** decided on the 23rd February 2017:

> Di piu`, issa li l-kaz tax-xhud Sancto gie deciz u ghadda in gudikat ma hemm xejn x'josta lil dan ix-xhud milli joffri id-deposizzjoni tieghu fl-istadju tal-guri u dan dejjem bil-kawteli stabbiliti fil-ligi fl-artikolu 639 tal-Kodici Kriminali. Dan ifisser allura illi ix-xhieda ta' Sancto ma tista' qatt titqies bhala xhieda inammissibbli fit-termini tal-ligi. Ghal dawn il-motivi anke din l-eccezzjoni qed tigi michuda.[11]

27. While the Attorney General cannot be precluded from including as witnesses - in the list of witnesses - those co-accused who at the preliminary stages of the proceedings before the Court of Magistrates as a Court of Criminal Inquiry, refuse to take the witness stand to testify in observance of their fundamental right against self-incrimination, on the otherhand, the Attorney General cannot include in the list of witnesses any one of the co-accused who at the time of the filing of the bill of indictment would not have had their cases determined in a final and absolute manner.

> 438(1) An official copy of the indictment and of **the list referred to in article 590(2)** shall be served on the accused.

[11] Emphasis of this Court.

> 590(2) With the indictment the Attorney General shall also file the record of the inquiry together with **a list of the witnesses**, documents and other exhibits **which he intends to produce at the trial.**[12]

28. The reasons is that until that stage, the co-accused are deemed to be incompetent to tender evidence against any other co-accused, whether in the same or in separate proceedings unless and until the case of the co-accused whose testimony is sought would have been determined in a final and absolute manner.

29. The Court of Criminal Appeal judgment in the names **Ir-Repubblika ta' Malta vs. Angelo Bilocca u Priscilla Cassar** decided on the 16th October 2019 held:

> 69. Dan premess, huwa minnu illi f'dan l-istadju tal-proceduri il-koakkuzat Angelo Bilocca ma jistax jitqies li huwa xhud kompetenti filkonfront tal-appellanti Priscilla Cassar (fl-ewwel lok ghaliex ma jistax ikun imgieghel jaghti x-xiehda tieghu dment li ghadu jitqies bhala "akkuzat" billi huwa sakrosant id-dritt tieghu ghas-silenzju, u fit-tieni lok ghaliex li kieku kellu jaghzel li jirrinunzja ghal dak id-dritt dak li jghid ikun jista` jiswa ghalih biss bla ma jkun jikkostitwixxi prova la favur u lanqas kontra l-persuna li tkun akkuzata mieghu) madanakollu tibqa` d-diskrezzjoni tal-Avukat Generali kif jaghzel li jixli lil persuni akkuzati b'reat u l-ordni li fih ghandhom isiru dawn il-proceduri. Din il-Qorti ma tistax b'xi mod tirregola jew tissanzjona din is-sitwazzjoni jekk mhux b`talba tal-Avukat Generali stess.
>
> 70. Ghalhekk anke dan l-aggravju qed ikun michud.[13]

30. So during the proceedings leading to the drafting and filing of the bill of indictment, neither Victor Dragomanski nor Daniel Muka were included in the list of witnesses filed by the Attorney General in terms of articles 438(1) and 590(2) of the Criminal Code. Neither did Victor Dragomanski and Daniel Muka, ever take the witness stand during the course of the compilation proceedings. This position taken by the Attorney General falls in line with the Law as the status of the co-accused vis-a-vis the status of the other separately tried co-accuseds in this case. But this position regarding these co-accused standing as witnesses can be changed after the filing of the bill of indictment and list of witnesses, should the status of any of the co-accused change in the meantime, and provided that certain procedural steps are taken and other procedural safeguards are followed by the Criminal Court. In the

[12] Emphasis of this Court.
[13] Emphasis of this Court.

criminal appeal **Il-Maesta Tiegħu r-Re vs. Karmnu Vella** decided on the 3rd December 1947 it was held as follows:

> Illi hu ċar li l-Prosekuzzjoni fiż-żmien li ppreżentata in-nota tax-xhieda skond l-art. 452 Kap. 12, ma setgħetx allura tikkomprendi fost l-ismijiet tax-xhieda dak ta' Kalċidonja Abdilla, għaliex dina kienet allura mhux legalment produċibbli bħala ko-akkużata f'att ta' akkuża wieħed;
> Illi skont il-liġi (art. 452(5)(6) Kap. 12), ebda xhud li ismu ma jkunx fin-nota tax-xhieda ma jista' jingieb mingħajr permess speċjali tal-Qorti; u dana l-permess jingħata biss meta jinsab li l-prova hija rilevanti, u l-akkużat ma jkunx bata ħsara billi l-prova ma tkunx ġiet mogħtija fin-nota'
> Illi l-Qorti hi ta' fehma illi x-xhieda ta' Kalċidonja Abdilla hijs rilevanti għall-każ;
> Illi, kwantu għall-kelma "ħsara" użata fil-liġi, ġie ripetutament ritenuto minn dawna l-Qrati illi dina l-ħsara ma tikkonsistix fl-"effikaċja" tal-prova; għaliex kieku kien hekk, allura ma kien ikun hemm qatt lok għal dana l-permess la darba l-prova għandha tkun rilevanti. Bil-kelma "ħsara" l-liġi riedet tfisser illi ma għandux ikun hemm sorpriża li tivvjola l-lealta' u l-bwona fede tad-diskussjoni, b'mod illi l-parti avversa tkun imqegħda f'diffikulta' li tikkontrapponi difiża valida kontra dik il-prova;
> Ikkunsidrat;
> Illi fil-każ in ispeċje l-Qorti ma ssibx li kien hemm la din s-sorpriża u lanqas dana l-preġudizzju; għar-raġunijiet segwenti:-
>
> 1. Kif ġa ntqal, il-Prosekuzzjoni ma setgħetx, fiż-żmien mogħti mill-liġi, tindika isem Kalċidonja Abdilla fin-nota preskritta mill-art. 452 KAp 12, għaliex f'dak iż-żmien Abdilla ma kienetx legalment ammissibbli bħala xhud;
> 2. Il-ġudizzju għadu fi stadju li fih il-Prosekuzzjoni għadha qiegħda tagħmel il-provi tagħha, u d-difiża għadha ma bdietx il-parti tagħha;
> 3. Il-Prosekuzzjoni fin-nota tax-xhieda kienet ikkomprendiet xhieda (e.g. Calcedonia Barbara u Tonina Mifsud) li fid-deposizzjoni tagħhom fil-Qorti tal-Maġistrati bħala Qorti Istruttorja kienu rripetew dikjarazzjonijiet ta' Kalċideonja Abdilla (allura imputata), u għalhekk id-difiża ma jistax ma kellhiex minn dak iż-żmien nozzjoni tax-xorta ta' dikjarazzjoniet ta' Abdilla. Sal-lum, jiġifieri sa meta bid-digriet tagħha tal-lum il-Qorti rrepinġiet il-prova ta' dawn id-dikjarazzjonijiet ripetuti minn ħadd ieħor, id-difia kellha l-aġju li tippremunixxi ruħha kontra tagħhom; u appuntu dawna d-dikjarazzjonijiet jikkostitwixxu x-xhieda ta' Abdilla li qiegħda tiġi issa offerta;
> 4. Il-Prosekuzzjoni, sakemm ma ngħatax id-digriet tal-lum fuq imsemmi, setgħet sperat li l-Qorti tammetti bħala prova d-dikjarazzjonijiet ta' Abdilla ripetuti minn ħaddieħor, u għalhekk għar-raġunijiet li dehrilha spedjenti, ma rritenietx li kellha ssejjah lil Abdilla bħala xhud qabel il-pronunċja tal-Qorti;
> Illi l-Qorti tista' dejjem, jekk titlob id-difiża, tagħtiha intervall biex tipprepara ruħha kontra l-prova ġdida u tikkontrapponi provi oħra għad-diskariku;
> Ikkunsidrat;
> Illi, apparti dan kollu, l-istess Qorti tħoss illi, wara d-digriet tagħha fuq imsemmi respinġenti l-prova tad-dikjarazzjonijiet ta' Abdilla bir-relazzjoni ta' ħadd ieħor, inħolqot in-neċessita' li tiġi mismugħa bħala xhud l-istess Abdilla, sabiex fl-interessi supremi tal-ġustizzja l-ġurati jkollhom

quddiemhom il-fatti kollha kemm huma; u hu risaput illi l-Qorti għandha, skont l-art. 452(7) Kap. 12, il-jedd li tordna l-produzzjoni ta' xhud f'ċirkustanzi simili;

31. This means that the production of the alleged co-participants as witnesses **after the filing of the Bill of Indictment and after the lapse of the statutory time limit within which the accused was to file the note as is contemplated in Article 438(2) of the same,** is subject to the provisions of Article 440(3) and (4) of the Criminal Code. There is therefore still the possibility for this Court to admit the other two alleged co-participants as witnesses in this case, should this Court be satisfied that the production of the other two co-accused – at a stage where they would have acquired the status of competent and compellable witnesses – would pass the two-fold test of: i) relevance of the witness to the facts at issue and ii) that the default of these persons from the said list or the default in filing the note in accordance with Article 438 of the Criminal Code, would not cause prejudice to the accused.[14]

32. In the submissions made on the 10th November 2022, the Attorney General said the following:

> However, we do not believe that at this stage of the proceedings these references should be removed, and I am going to explain why. Because if the case against the co accused becomes res judicata, jigifieri Daniel Muka or Victor Dragomanski, if their case has been decided upon, then they are competent witnesses. Then whatever they say can be used as evidence against the accused. **And it is the intention of the Prosecution to summon them as witnesses to testify against the accused.[15]**

33. So this clearly shows that the Attorney General intends to bring the these two co-accused to the witness stand once that this can take place according to law. The law however goes further and in article 440(5) of the Criminal Code extends the power of the Criminal Court to summon, 'ex officio', in the course of the trial, any such witness as the necessity arises and which was not indicated in the list mentioned in Article 438 of the Criminal Code.

34. For the reasons abovementioned, until this stage of the proceedings, neither Victor Dragomanski nor Daniel Muka testified in Court. And neither could they testify and nor could their

[14] See also the decree of this Court in the proceedings Ir-Repubblika ta' Malta vs. Bernice Camilleri decided on the 3rd May 2021 by reference to a request for the production of the testimony of two other co-accused whose cases were decided in a final and absolute manner prior to that of accused Camilleri.
[15] Emphasis of this Court.

statements be used as evidence in this case. And the key-word here is “evidence”.

35. The police investigating this case did make interviews with the other alleged co-participants Dragomanski and Muka. While the accused availed himself of the right not to reply to questions posed by the investigative authorities, the other two alleged co-participants did release statements. And the Police did also make use of certain declarations and statements released by them. For the reasons explained above, the Court cannot consider these statements as being in any way admissible evidence in the case against KRISTIANSEN.

36. However on the otherhand, it is, and it was not possible for this Court to exclude the police investigating this case from making use of the information gathered from various sources, including from the other alleged co-participants in order to be able to gather as much evidence as humanly possible for them to seek the truth as to what happened on the day of the alleged crimes.

37. A distinction has therefore to be drawn between the information released by any of the co-participants to the police during the course of the investigations and the use of this information per se as evidence in these proceedings on the one hand. And a further distinction has to be drawn by reference to the evidence gathered by the investigating police in furtherance to the information that was tendered to them by any one of the alleged co-participants. The records show that the Police did follow the information supplied also by the other alleged co-participants such that then the Police – through their own powers and as they were duty bound – ultimately verified that information and worked on it to obtain further separate evidentiary results.

38. While it is not possible for this Court at this stage to admit any statement or declaration released by any other alleged co-participant as evidence in this case, this Court cannot censure the Prosecution from relating, expressing or testifying on any resultant evidence collected by it as a result of its further investigations in furtherance to the information or leads given to it by the other alleged co-participants. It is not legally permissible to exclude from the body of evidence testimony or other evidence, documentary or otherwise gathered by the Police following the receipt of information or leads, even if received from other alleged co-participants; while

at the same time it is legally imperative for the Court to exclude the actual statements made by the alleged co-participants themselves. This on the basis that there is a net difference between intelligence and information gathering on the one hand and the transformation of that intelligence or information into admissible evidence on the other.

39. The bill of indictment per se is not evidence, and does not form part of the body of evidence in this case. The narrative part of the bill of indictment does not constitute evidence. The narrative part of the bill of indictment must be based on the evidence compiled before the Court of Magistrates as a court of criminal inquiry. However neither does it bind the Attorney General, nor does it bind the Court or the jury, for that. What the Attorney General states in the narrative part of the bill of indictment needs to tally with the accusatory part – and that is for sure. It is the duty of the Attorney General to ensure that the narrative part faithfully reflects the evidence – the admissible evidence at the time of the trial – that he would be planning to produce during the trial. Any disconnect, discrepancy or inconsistency resulting between the narrative part and the admissible evidence produced in the course of the trial may have serious negative implications for the Prosecution's case. But that does not mean that there may not be differences between the narrative in the bill of indictment and the resultant evidence. Trial judges invariably explain to the jury these legal aspects regulating the bill of indictment in their speeches to the jury.

40. The Attorney General may use certain generic terms or references to the substance of witness testimony in the narrative part to avoid to mention the names of the persons recounting the facts included in the narrative part. References to what the investigators found, to what neighbours or persons granting information said, to what information they received, further enquiries made, examination or further examination of CCTV footages, and to other works done and findings reached by the investigators may be retained in the narrative part of the bill of indictment without there being any specific legal problem. However during the course of the trial it is then imperative for the Prosecution to substantiate these generic terms or references by the specific testimony of the particular persons involved. Failure on the part of the prosecution to do so may have fatal consequences for their case.

41. The admissibility of these statements will have to be assessed when the trial of the accused will eventually be celebrated depending on the status of the acts and the status of the co-accused at that specific moment in time.

42. Now also, with reference to this first part of the preliminary plea, the accused argues that the narrative part of the Bill of Indictment contains facts which were based on police investigation or police intelligence, which according to the accused is tantamount to hearsay because it is what the investigating officers gathered from other sources, sometimes not readily identifiable to the accused to properly prepare for his defence.

43. Information gathered by the Police or Police intelligence may be disclosed as evidence of the information received but not necessarily as evidence of the truthfulness or correctness or precision of the information received. The truthfulness or correctness or precision of the information received would most of the time need to be investigated further by the Police from other independent sources. Then the results of these further investigations may be transformed in admissible evidence before a court of law, such as through witness interviews or forensic analysis of documents etc. Police intelligence or police information may or may not be deemed to fall under the hearsay evidence exclusionary rule depending on the circumstances of the case. As a rule, the results of police investigations do constitute admissible evidence, but on their own would not be sufficient basis for conviction.

44. The hearsay evidence exclusionary rule in Maltese Law, is regulated by Articles 598 and 599 of Chapter 12 of the Laws of Malta rendered applicable to criminal procedure by means of the application of Article 645 of the Criminal Code:

> 598(1) As a rule, the court shall not consider any testimony respecting facts the knowledge of which the witness states to have obtained from the relation or information of third persons who can be produced to give evidence of such facts.
> (2) The court may, either ex officio or upon the objection of any party, rule out or disallow any question tending to elicit any such testimony.
> (3) Nevertheless the court may require the witness to mention the person from whom he obtained knowledge of the facts to which any such question refers
>
> 599.The court may, according to circumstances, allow and take into consideration any testimony on the relation of third persons, where such

relation has of itself a material bearing on the subject-matter in issue or forms part thereof; or where such third persons cannot be produced to give evidence and the facts are such as cannot otherwise be fully proved, especially in cases relating to births, marriages, deaths, absence, easements, boundaries, possession, usage, public historical facts, reputation or character, words or deeds of persons who are dead or absent and who had no interest to say or write a falsehood, and to other facts of general or public interest or of public notoriety

45. The doctrine of hearsay evidence was also explored by the Criminal Court in the ruling **Ir-Repubblika ta' Malta vs. George Degiorgio, Alfred Degiorgio u Vincent Muscat** dated 30th October 2020 where reference was also made to the ruling **Ir-Repubblika ta' Malta vs. Mario Azzopardi** handed down on the 24th October 2011:

Il-każ li mhux l-ewwel darba li ġie ċitat b'approvazzjoni dwar il-hearsay rule f'kawżi ta' natura kriminali huwa **Subramaniam v. Public Prosecutor** fejn insibu dan il-kliem:

"'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.'

Jekk wieħed jeżamina l-ewwel sentenza tal-artikolu 599 tal-Kap 12, wieħed jista' jikkonkludi li l-hearsay rule fil-Liġi tagħna mhix daqshekk assoluta. U fil-fatt hekk qalet il-Qorti Kostituzzjonali hija u tiddeċiedi il-każ **'Joseph Mary Vella et versus Il-Kummissarju tal-Pulizija'** (13 ta' Jannar 1988) fejn il-Qorti kkonfermat digriet tal-Prim'Awla biex jitħalla jixhed Prokuratur Legali li kien marbut bis-sigriet professjonali. Dan tħalla jixhed mingħajr ma kellu jikxef isem it-terza persuna li kienet qaltlu biex il-fatti li fuqhom kellhom jixhed il-Prokuratur Legali.

Peress li d-depożizzjoni, li tista' tkun hearsay, tista' tkun prova diretta li ntqal xi ħaġa, ma tistax tiġi eskluża fl-istadju tal-eċċezzjonijiet preliminari. (sottolinjar tal-Qorti)

F'dak li huma deċiżjonijiet kriminali, il-Qrati tagħna issa ilhom sew isegwu l-prattika dwar il-hearsay rule. (Ara dwar dan il-punt: Ir-Repubblika versus Meinrad Calleja9 ). Reċentement il-Qorti tal-Appell Kriminali diversament preseduta qalet hekk: Appell Kriminali Ir-Repubblika ta' Malta v. Meinrad Calleja, 26 ta' Mejju 2005:

"Kwantu ghax-xiehda ta' Clarissa Cachia l-ewwel Qorti kienet ċara meta spjegat li l-kontenut ta' dak li qalet lill-Pulizija, fl-assenza tax-xiehda diretta tagħha, ma kienx jagħmel prova la kontra u lanqas favur lakkużat. Mill-banda l-oħra spjegat korrettement li ċ-ċirkostanza li qalet ċertu diskors setgħet tittieħed bhala ċirkostanza li tikkorrobora dak li seta' qal ħaddieħor."

Fil-limiti tal-użu li għamlet l-ewwel Qorti tal-okkorrenza msemmija, ma hemm xejn irregolari. Hu ben stabbilit li waqt li prova hearsay ma hix prova tal-kontenut ta' dak li jiġi rapportat li ntqal, hi prova li dak rapportat li ntqal fil-fatt intqal fiċ-ċirkostanzi, data, post u ħin li ntqal u in kwantu tali hi ċirkostanza li meħuda ma' provi u ċirkostanza oħra tista' wkoll tikkontribwixxi għall-apprezzament li tagħmel il-Qorti.' (1 ta' April 2011 'Il-Pulizija versus Fabio Schembri' preseduta mis-S.T.O. il-Prim Imħallef Dr Silvio Camilleri)."

Fis-sentenza tagħha tal-5 ta' Lulju 2012 fl-istess ismijiet, mbaghad, il-Qorti tal-Appell kienet ikkummentat hekk:

"18. … Ilu ben stabbilit minn din il-Qorti, kif anki rilevat mill-ewwel Qorti fis-sentenza tagħha, li mhux kull relazzjoni ta' x'qal ħaddieħor tikkostitwixxi hearsay evidence iżda jekk dak rapportat hux hearsay evidence jew le jiddependi mill-użu li wieħed jippretendi li jsir minn dak rakkontat. Jekk dak rakkontat jiġi preżentat bħala prova tal-kontenut tiegħu allura dak ikun hearsay evidence u bħala tali inammissibbli iżda jekk dak rakkontat jiġi preżentat mhux bħala prova tal-kontenut tiegħu iżda bħala prova li dak li ntqal verament intqal fiċ-ċirkostanzi ta' data, post u ħin li fihom intqal allura dan ma jkunx hearsay evidence u huwa ammissibbli għal ċerti għanijiet legali legittimi bħal sabiex tiġi kontrollata x-xiehda diretta tax-xhud li l-kliem tiegħu ikun qiegħed jiġi rapportat jew, fiċ-ċirkostanzi idoneji, anki sabiex tiġi korroborata xiehda diretta oħra. Huma għal dawn ir-raġunijiet, kif tajjeb spjegat l-ewwel Qorti, li din it-tip ta' xiehda ma tistax tiġi eskluża a priori iżda d-deċiżjoni dwar l-opportunita` o meno li titħalla tingħata dik ix-xiehda u titqiegħed quddiem il-ġurija trid neċessarjament tiġi rimessa lill-Imħallef togat li jippresjedi l-ġuri li jkun tenut jagħti d-deċiżjoni tiegħu skont iċ-cirkostanzi li fihom jiżvolġi l-ġuri u skont l-esiġenzi evidenzjarji u proċedurali tal-proċess. ….. (sottolinjar tal-Qorti)

21. Iżda huwa proprju għalhekk li l-proċess tal-ġuri huwa presedut mill-Imħallef togat sabiex dan jassigura li tali abbuż ma jsirx. L-abbuż hu possibbli għar-rigward ta' kull regola legali tal-evidenza iżda dan ma jfissirx li minħabba tali possibilita` ta' abbuż dik ir-regola għandha tiġi skartata. Ir-rimedju hu dak li pprovdiet il-liġi u ċioe` li l-Imħallef li jkun jippresjedi l-ġuri ma jħallix l-abbuż jiġri suġġett dejjem għas-salvagward aħħari tad-dritt tal-appell tal-akkużat fl-eventwalita` li l-Imħallef jonqos milli jeżerċita sew is-setgħat tiegħu skont il-liġi.

46. In this ruling, the Criminal Court was faced with a number of preliminary pleas where the evidence given by the investigating officer Inspector Keith Arnaud was attacked as inadmissible on the

grounds of it being hearsay. The main drift of this argument was that Arnaud testified on documents or information which was not extracted or analysed by him (preliminary pleas numbered 4 to 25 and number 104). Here the Court saw how the evidence given by Inspector Keith Arnaud consisted of an exposition of facts that he acquired throughout the course of the investigation including information relative to cell phone contents and localisations which were referred to him by experts appointed by the Inquiring Magistrate to that effect.

47. The ruling given by the Criminal Court was confirmed by the Court of Criminal Appeal (Superior Jurisdiction) in the judgment **Ir-Repubblika ta' Malta vs. George Degiorgio, Alfred Degiorgio, Vincent Muscat** decided on the 22nd September 2021 wherin it was held as follows:

> Illi r-regola dwar il-hearsay evidence jehtieg li tkun ukoll, jekk mhux qabel kollox, vista mill-ottika ta' dak li jigri fil-prattika u fl-assjem tal-process kriminali kollu. Meta xhud jirrakkonta l-verzjoni tieghu u jesprimi haga li qallu haddiehor hemm l-impressjoni zbaljata li jew il-gudikant jew il-magistrat fil-vesti kumpilatorja jaqbzu fuqu u jiddikjaraw l-inammissibilita' ta' dak li jkun qal. **Dak li jigri fir-rejalta' hu, bhal fil-kaz odjern, li l-ufficjal prosekutur qua xhud, spjega kif gabar l-informazzjoni kollha minghand l-esperti u s-subalterni tieghu u ta stampa tal-investigazzjoni sabiex, bhalma invariabilment jigri fi processi ta' din in-natura, dak li jkun jista' jaqbad art u jifhem il-komplessita' tal-kaz. Issa meta jixhed viva voce quddiem il-guri, xhud mhux necessarjament, anzi difficli, jirrakkonta kelma b'kelma u bl-istess sekwenza dak li jkun iddepona quddiem l-Istruttorja. Allura mhux inaspettat li jghid ukoll hwejjeg li jistghu jammontaw ghall-hearsay**.[16] U hafna drabi ukoll ma tqumx il-kwistjoni sakemm in kontro-ezami l-persuna fuq il-pedana tkun mistoqsija kif saret taf jew ma tafx dak li qalet hi stess jew jekk qalitx hekk ghaliex semghatu minghand terz jew terzi. **Xjigri, f'dak il-kaz, iqum chaos shih waqt il-guri?; jkun xolt il-guri?; tintalab sottomissjoni u decizjoni dwar punt ta' ligi fl-assenza tal-gurati? – xejn minn dan**. **Dak l-"incident" ikun rimess ghall-gudizzju tal-gurati fil-hin tad-deliberazzjoni taghhom wara li l-Imhallef, kif obbligat, jkun spjega lill-gurati r-regola tal-hearsay evidence u dik dwar il-valur probatorju sabiex jiddeciedu huma jekk dak li ntqal u li kien maghruf tramite terzi kienx segwit b'xhieda li jikkonfermaw il-kontenut ta' dak li jkun ddepona x-xhud.[17]**

48. In this particular case the narrative of the bill of indictment mirrors the depositions tendered by the main investigating officers of the case, Superintendent James Grech and Inspector Colin

[16] Emphasis of this Court.
[17] Emphasis of this Court.

Sheldon. Their depositions contain a detailed account of the investigations that led to the apprehension and arrest of all three suspects Dragomanski, KRISTIANSEN and Muka. As in the **Mario Azzopardi** ruling above, any references therein made to CCTV cameras, cell phone localisations and witnesses spoken to, is all evidence which was extracted and duly examined by the relative Court-appointed experts who will all testify at trial stage. Their testimony and reports have already been submitted at compilation stage. The accused already has clear visibility of what this evidence entails. During trial stage, the accused will have every opportunity to challenge that information which police officers and other witnesses, testified about during compilation stage.

49. By way of corollary to this, this Court cannot agree with that part of the accused's submissions wherein he contested the admissibility of those facts as recounted by the Attorney General in this First Count of the Bill of Indictment as hearsay evidence and allows for these references to remain as so drafted therein. As highlighted above, it is up to the Attorney General to attach a name, surname and testimony to the generic references he mentioned in the bill of indictment, failing which, the Attorney General's case will face inevitable serious repercussions.

**Having made the above considerations, the Court is partly rejecting the first preliminary plea indicated as 1(a) and determines it as follows, and since:**

a. **Defence is correct in claiming that (i) the other co-accused cannot be produced as witnesses against the present accused since they are at this stage not competent to testify against him and (ii) that the bill of indictment forms the formal and solemn document at the basis of the criminal trial;**
b. **given that the Law grants the Attorney General not only the prerogative of drafting and filing the bill of indictment but also of affecting the timing of trial by jury of cases involving more than one accused, and in fact the Attorney General filed the bill of indictment against Muka by bill of indictment number 6/2022 and Dragomanski by bill of indictment number 7/2022/1;**
c. **and given that the trial by jury for the accused has not been appointed, while the proceedings against the other co-accused are still pending,**
d. **since it is possible for the proceedings against the other co-accused or any one of them to be concluded prior to the trial**

**by jury of the accused, once that they were filed before the bill of indictment in this case and as a rule causes are tried by rotation according to the date of the filing;**

**e. then it follows that the other co-accused Dragomanski and Muka can still be requested to be summoned to testify at a subsequent stage in these proceedings, as the failure of the Attorney General to include Dragomanski and Muka as witnesses in the trial by jury in terms of Articles 590(2) and 438(1) of the Criminal Code was justified at that particular procedural stage of these proceedings and this situation can still be rectified with a request made in terms of Article 440(4) of the same.**

**f. In any case, the necessity of any such witnesses may be decided upon by this Court 'ex officio' in terms of Article 440(5) of the Criminal Code without the need of a specific request being made by the Attorney General, albeit always subject to the two-fold test contained in Article 440(4) of the Criminal Code.**

**Consequently:**

**(a) it is premature for this Court to exclude or expunge any of the findings and investigative results that the investigators reached and which were then transformed into admissible evidence by the Police and Attorney General before the Court of Magistrates as a court of criminal inquiry even if the original information was given to the Police by any one of the other alleged co-participants.**

**(b) While the Court cannot therefore exclude or expunge from the narrative part of the bill of indictment any reference which reflects the findings of the Police obtained from separate and independent testimony or evidence, documentary or otherwise collected by them, <u>even if these were the result of, or consequent to, information obtained by the Police from the statements released by any of the alleged co-participants,</u> on the otherhand, the Court orders the correction of the bill of indictment in those parts where reference is explicitly being made to facts <u>whose sole source was any one of the other alleged co-participants</u> such that while reference to the specific information obtained by the Police may at this stage be retained in the narrative part of the bill of indictment, any reference to who divulged that information or where the Police got it from and under what circumstances are to be deleted.**

**(c) Eventually, at trial stage, <u>if</u> the cases against Dragomanski or Muka would have been concluded in a final and absolute manner, then the Prosecution would be in a position to request the production of their testimony; and if their request would be acceded to, the Prosecution would be in a position to produce the testimony of these alleged co-participants from whom they would have obtained that specific information. In this case, those parts of the narrative in the bill of indictment <u>resting solely</u> on that specific information given by Dragomanski or Muka would remain in the narrative part. This on the basis that there would be no further impediment for the testimony of these two witnesses (or any one of them) on the subject matter of this case as they would then be not only competent to testify but also to be subject to control by any declarations previously made by them.**

**(d) On the otherhand, if at trial stage, the cases against Dragomanski or Muka would <u>not</u> have been concluded in a final and absolute manner, then the Prosecution would not be in a position so to produce the testimony of the alleged co-participants (or any one of them) and from whom they would have obtained that specific information found in the narrative which is subject to this preliminary plea. In this case, that information that <u>would</u> have been transformed in admissible evidence through independent assessment and verification by the Prosecution at compilation stage through the production of other admissible evidence albeit stemming from that information would still remain in the narrative part of the bill of indictment. But those parts of the narrative in the bill of indictment <u>resting solely</u> on that specific information related by Dragomanski or Muka in their statements which would not also have been independently obtained from other sources or transformed in admissible evidence through independent assessment and verification by the Prosecution at compilation stage, would have to be expunged on the basis that the Prosecution would not be, at that stage, in a position to base and substantiate that part of its narrative on those same statements, given that Dragomanski or Muka (as the case may be) would still be deemed not competent to testify in these proceedings; and hence no reference would be possible to be made to their statements or even be controlled by the same.**

**Considers further:**

50. This Court agrees with the second part of this first preliminary plea, indicated as 1(b). While all the facts contained in the narrative part of the Bill of Indictment should be based on the evidence gathered at compilation stage, no particular fact should be singled out from the rest through the use of unnecessary punctuation such as is the case with the use of 'bold' or 'underline'. The jury is only called to decide on the facts as will be brought before them at trial stage and it is only that evidence which is presented for their evaluation during the jury which should shape their judgment and nothing else.

51. While this Court considers the phrase "fully aware'' as a particular interpretation of the Attorney General relating to the alleged state of mind and awareness of the accused, the ultimate question whether the accused was really fully aware or otherwise was a question of fact that will have to be assessed by the jury during trial stage. It is up to the jurors, based on the evidence that will be produced at trial stage, who have to determine whether it is true or not that KRISTIANSEN was, 'fully aware' of the presence and possible use of firearms as outlined by the Attorney General in page 7 of the Bill of Indictment. No amount of bold or underlining of the wording used should serve to unduly influence the jury in its decision-making process.

**Consequently this Court is hereby upholding preliminary plea indicated as 1(b) as raised by the accused. Therefore, in the part of the First Count on page 7, in the point "ii" the words "fully aware" highlighted in bold must be changed such that the same phrase is retained in normal type, that is neither hightlighed or in bold.**

**The Second Preliminary Plea – The Nullity of the First Count of the Bill of Indictment**

52. In the first part of this second preliminary plea, **indicated as 2(a)**, the accused argues that due to the expunging of the statements made by the other co-accused from the narrative part of the Bill of Indictment as per plea I above, the first charge does not contain any facts or evidence in support of the accused being charged as co-principal or accomplice to the crime of wilful homicide. The same argument was presented by the accused in preliminary plea indicated as 2(c) relative to the failure of the

narrative of the Bill of Indictment in this First Count to contain reference to the accused's role as an accomplice to the fact.

53. The Court reiterates the basic principle expounded earlier on that the annulment of a bill of indictment can take place only if the bill of indictment contains a substantial defect of form which cannot be cured by an amendment. [18] The cause of nullity of the bill of indictment must appear from the face of the bill of indictment itself. Where any such plea of nullity is raised, the Court examines the bill of indictment itself independently of the evidence and of the merits of the case.[19]

54. As stated during the assessment of the first preliminary plea, the facts as narrated by the Attorney General in this First Count can be divided into two categories:

i) facts which the Attorney General based on the depositions given by the investigating officers as resulting from **the investigations** they conducted including interviewing key witnesses, viewing of CCTV camera recordings, examination of cell phone localisations and vehicle number plate recognition and

ii) facts – contained in pages 5 et seq of the Bill of Indictment – based on those statements of the other co-accused which the Attorney General referred to as the 'co-perpetrator' and the 'second perpetrator'. The Court is here again referring to the above-made considerations in relation to the first preliminary plea.

55. The facts as recounted by the Attorney General – and this even independently of what the facts the Attorney General attributed to the alleged co-participants - are in line with the requirements contained in Article 589 (c) of the Criminal Code in that the recollection by the Attorney General of the findings of police investigation and of those experts as appointed by the Inquiring Magistrate, support and substantiate the charge of the accused acting as co-participant in the acts that led to the wilful homicide. The Bill of Indictment contains references to CCTV footages, examination of cell phone localisations and depositions collected by the police or obtained through different witnesses, which evidence

[18] Vide **Rex vs. Camilleri** decided by the Criminal Court on the 2nd May 1905.
[19] Vide **Rex vs. Strickland** decided by the Criminal Court, collegially composed on the 21st March 1923, Vol. XXV.IV.833

was described by the Attorney General as police investigations which led to the apprehension of KRISTIANSEN as a suspected co-participant in the acts that led to the wilful homicide of Pandolfino and Maciejowski in their residence in Sliema.

56. The question whether the facts as recounted by the Attorney General in the First Count of this Bill of Indictment will be sufficiently supported by the evidence during the trial by jury is a question of fact that will have to be tackled by the jurors during the trial by jury itself. In this regard, the teachings of the Court of Criminal Appeal (superior jurisdiction) in the judgment **Ir-Repubblika ta' Malta vs. Grazio Azzopardi** decided on the 23rd June 2021 were clear:

> 13. Issa jekk dawk il-fatti humiex ippruvati o meno, jew jekk il-prova li fuqha huma bażati dawk il-fatti għandhiex valur probatorju o meno, hija kwistjoni li trid tiġi determinata biss mill-ġurati fil-kors tal-ġuri.

**Consequently the first part of this second preliminary plea indicated as 2(a) is being rejected.**

**<u>Preliminary pleas 2(b) and 2(c)</u>**

57. Long-standing jurisprudence considers the narrative part of the Bill of Indictment as the Attorney General's rendering of the facts emerging from the compilation proceedings. The narrative is not part of the evidence. It does not bind the jurors. Only evidence binds the jury. The Attorney General is yet to bring the evidence in support of his narrative during the trial by jury. As for the different aspects touching the facts of the case, in the judgment In the case **Ir-Repubblika ta' Malta vs. Grazio Azzopardi** decided on the 23rd June 2021 it was held as follows:

> Fuq kollox dawk il-fatti li l-Avukat Ġenerali jislet mill-atti kumpilatorji sabiex fuqhom jibni l-parti narrattiva tal-Att tal-Akkuża **bl-ebda mod ma jorbtu lil min hu imsejjaħ biex jiġġudika u l-ġurija popolari dejjem tiġi imwissija f'dan is-sens mill-Imħallef togat, kif hekk għandu jsir ukoll f'dan il-każ.**[20]

58. In the case **Ir-Repubblika ta' Malta vs. Ali Mehemed Kreta** decided on the 24th November 2003 the Court of Criminal Appeal in its Superior Jurisdiction it was also held:

[20] Emphasis of this Court.

Sakemm fatt imsemmi fl-att ta' l-akkuza ma jikkostitwix element essenzjali tar-reat addebitat lill-akkuzat, b'mod li jekk ma jigix ppruvat tali fatt l-akkuzat ma jkunx hati ta' tali reat, il-fatti nnifishom kontenuti fin-narrativa jew il-parti espozitiva ta' l-att ta' l-akkuza huma intenzjonati biss biex jispecifikaw in-natura tal-kaz tal-prosekuzzjoni, l-atti principali li minnhom l-Avukat Generali jistieden lill-gurati jikkonkludu li sehh reat u li l-akkuzat kien il-persuna li kkommettiet tali reat. B'hekk, kif jinghad f'Blackstone's Criminal Practice 2001 (para. D9.8 pag. 1266):

"Particulars of offence were not like the words of a statute, **such that failure of the facts proved to fall precisely within them was fatal. It seems that the test to apply in relation to incorrect particulars is whether the defence were prejudiced by the erroneous description of the offence".**

59. The narrative of the Bill of Indictment serves to lay out clearly the nature of the offence with which the accused stands charged by denoting the particulars relating to the offence such as the place and time in which the facts took place together with all other relevant circumstances as to give to the accused the basis for the preparation of an adequate defence.

60. On the otherhand, in the accusatory part of the Bill of Indictment in terms of Article 589(d) of the Criminal Code the Attorney General then delineates the parameters of the offence. The accusatory part must necessarily contain a description of the offence as it stands at law based on the facts as gathered in the compilation proceedings.

61. In this case, the accused laments a contradiction between the narrative part of the Bill of Indictment and the accusatory part thereof and for this reason is requesting the nullity of this First Count, the reason being that in the narrative part the Attorney General referred to the accused as a co-perpetrator while in the accusatory part the Attorney General accused him as an accomplice. The Defence claims that the accused cannot be referred to as a co-perpetrator and accomplice at the same time, given the different legal consequences emerging from these two different capacities.

62. While it is true that the Attorney General referred to the accused as being a perpetrator or co-perpetrator in the narrative part, in the same narrative part the Attorney General proceeds also to indicate, in no uncertain terms, that he was considering the accused as an accomplice to the wilful homicide. This reference can be found in the paragraph entitled “The Consequences” which is not part of the Accusatory Part of the bill of indictment and which,

therefore, falls under the narrative part of the same bill of indictment. The Accusatory Part the follows this qualification of the accused's alleged participation in the wilful homicide de quo.

63. The use of the terms "co-perpetrator" or "perpetrator" was criticised by Defence on account of the fact that their understanding of the term is that of "principal", rather than "accomplice". More precision on the part of the Attorney General about the use of the term perpetrator would have avoided this complaint on the part of Defence.

64. However despite this, the intention of the Attorney General clearly transpires from the way he describes the involvment of the accused in this case, as well as from the manner in which he ties this description with the content of the paragraph entitled "The Consequences". Taken together, the narrative part, especially in page 7 and 8 show what are the facts that the Attorney General attributes to the accused and how he ties them to the various legal hypotheses found in article 42 of the Criminal Code and which make up complicity in a criminal offence.

65. The Accusatory part then crystallises the Attorney General's position when he charges accused KRISTIANSEN with complicity in terms of Article 42(b)(c)(d)(e) of the Criminal Code. In fact the wording used by the Attorney General in 'The Consequences' and 'The Accusation' also mirror the wording used by the law in Article 42(b)(c)(d)(e) of the Criminal Code.

66. This is in conformity with the requisites contained in Article 589(d) of the Criminal Code, which requires a summary of **the offence**[21] as specified or described at law with which the accused is charged. In the Accusatory Part the Attorney General clearly specifies that he is accusing the accused "as guilty of complicity wilful homicide", giving the particulars of the date and place where this occurred and qualifies this charge with the legal definition of wilful homicide as contemplated in Article 211 of the Criminal Code.

[21] It is also an established principle in the case law of our courts – see **Ir-Repubblika ta' Malta vs. Victor Galea u Joseph Galea** decided on the 4th May 1998 and **Ir-Repubblika ta' Malta vs. Lawrence Gatt and Omissis** decided on the 22nd May 2003 - that the nullity of the Bill of Indictment is brought about when there is more than one offence listed by the Attorney General in the same count: ''Ghalhekk ukoll, kap fl-Att ta' Akkuza jista' jikkontjeni biss akkuza ta' reat wiehed; jekk jikkontjeni akkuza ta' aktar minn reat wiehed, dan ikun null. ara is-sentenza tal-Qorti Kriminali tal-4 ta' Mejju, 1998 fl-ismijiet Ir-Repubblika ta' Malta v. Victor Galea u Joseph Galea. Tajjeb li wiehed izid jghid li anke fl-Ingilterra din hi wkoll ir-regola: "If a count alleges more than one offence, it is said to be bad for duplicity, and should be quashed before arraignment" (Blackstone's Criminal Practice – 2001, para. D9.16, p. 1272).''

67. The law does not also contemplate the nullity of the Bill of Indictment where this does not contain reference to the **role of the accused** - be it that of accomplice or perpetrator – as long as the Bill of Indictment contains a summary of **the offence** as described at law in terms of Article 589(d) of the Criminal Code, in the accusatory part thereof. As a corollary to this, one finds that Article 467(2) of the Criminal Code allows for a person charged as a principal to be found guilty as an accomplice to the fact or of conspiring to commit the offence with which he was charged in the Bill of Indictment or **vice versa**.[22] In **Il-Pulizija vs. Emanuel Camilleri u Manweli sive Manuel Farrugia** decided on the 23rd November 2001 wherein it was maintained as follows:

> Pero` huwa wkoll principju elementari li meta persuna tkun akkuzata b'reat bhala awtur ta' dak ir-reat, qorti ta' gustizzja kriminali tista` ssib lil dik il-persuna hatja mhux bhala awtur izda bhala komplici f'dak ir-reat, jew inkella flok hatja tar-reat ikkunsmat hatja biss ta' tentattiv ta' dak ir-reat. Ir-regoli imsemmija fis-subartikoli (2) u (4) tal-Artikolu 467 tal-Kodici Kriminali gew dejjem ritenuti li japplikaw ghall-Qrati ta' Gustizzja Kriminali kollha

68. That, this principle was also expounded by the Court of Criminal Appeal in the judgment **Ir-Repubblika ta' Malta vs. Ali Mehemed Kreta**[23] wherein it stated as follows:

> L-ewwel osservazzjoni li trid taghmel din il-Qorti fir-rigward ta' dan l-ewwel aggravju hu li hija l-ligi taghna stess li tippermetti li persuna akkuzata bhala awtur ta' reat tista' tigi dikjarata hatja invece ta' komplicita` f'dak l-istess reat.
>
> …/….
>
> Dan is-subartikolu ma jaghti lok ghal ebda ekwivocita`. Ghalhekk, ghalkemm l-akkuzat ma giex originalment akkuzat b'komplicita` fir-reati addebitati lilu fl-att ta' akkuza izda gie akkuzat bhala l-awtur taghhom, a bazi tal-ligi u anke a bazi tat-teorija ta' related criminality huwa legalment korrett li l-gurati jiddikjarawh hati ta' komplicita` f'dawk l-istess reati kemm-il darba hekk jirrizulta mill-provi.

69. Despite the use of the term "perpetrator" or "co-perpetrator" in the narrative part, in substance, there is no contradiction between the narrative part and the accusatory part of the bill of indictment. Then, whether the accused participated in the commission of the

[22] Subject to the proviso immediately thereafter relating to the quantity of punishment imposed on the accused in the case of the delivery of a verdict of guilty as a principal where one would have been charged by the Attorney General as an accomplice.
[23] Decided on the 24th November 2003.

wilful homicide and whether the accused fits the designation of "co-perpetrator" found in part of the narrative part or that of an "accomplice" in another part of the narrative part and also in the accusatory part is a question of fact that is submitted to the evaluation of the jurors in the trial by jury. The reference in the bill of indictment to the accused as a "co-perpetrator" and/or as an "accomplice" is not binding on the jurors. Despite that more precision ought to have been exercised by the drafter of the bill of indictment, the accusation is clear. Then the presiding judge will guide the jurors in reaching their verdict based on the provisions of the law, including article 467(2) of the Criminal Code.

**Consequently, this Court finds no substantial contradiction in the manner in which the Attorney General has drafted the accusatory part of the Bill of Indictment wherein the role of the accused was clearly defined as being an accomplice in accordance with the legal description of that legal institute and therefore the second preliminary plea, in this second part indicated as 2(b) and 2(c) are being rejected.**

**Further considers:**

**<u>The Third Preliminary Plea – The Second Count of the Bill of Indictment is legally defective.</u>**

70. In his **third preliminary plea indicated as 3(a)** the accused attacks the Second Count of the Bill of Indictment as relying on those facts contained in the First Count of the Bill of Indictment wherein the Attorney General referred to the inadmissible statements released by the other co-accused.

**Consequently this preliminary plea being the same in substance and form as the one indicated as preliminary plea 1(a) above, reference is being made to the considerations made in relation thereto. This Court is therefore here rejecting this third preliminary plea 3(a) for the same reasons mentioned by reference to preliminary plea 1(a) while aligning it with the same conclusions.**

**Further considers:**

**<u>The Fourth Preliminary Plea – The Nullity of the Second Count of the Bill of Indictment</u>**

71. In the first part of his **fourth preliminary plea indicated 4(a)**, the accused attacks the facts contained in the First Count of the Bill of Indictment where reference was made therein to the statements released by the other co-accused with the police and where reference thereto was again made in this Second Count of the Bill of Indictment. The accused argues that with the expunging of the statements of the co-accused, the narrative of the Bill of Indictment in this Second Count contains no facts or evidence to support the charge of theft aggravated by violence, means, amount, place and time and as accompanied by wilful homicide.

72. Reference is made to the considerations made above in relation to preliminary pleas indicated as 1(a) and 2(a) and here again aligns the considerations made in the second count of the bill of indictment with the conclusions reached by reference to the said preliminary pleas; and in particular to facts based on the findings of the police investigation. The nullity of a bill of indictment takes place only if the bill of indictment contains a substantial defect of form which cannot be cured by an amendment. So, any defects or errors that can be amended in the course of the trial cannot lead to the nullity of the bill of indictment.[24] The fact that a plea of nullity is raised does not prevent the correction of the bill of indictment. The cause of nullity of the bill of indictment must appear from the face of the bill of indictment itself. This Court cannot be called to inquire into the truth or material accuracy of the facts stated in the bill of indictment. The Court assesses whether the formal requirements established by law would have been complied with. The nullity of the bill of indictment cannot be granted by the Court due to reasons touching on the merits of the case but rather when it is shown that from the face of the bill of indictment there results to be substantial defects that cause irremediable prejudice to the accused. **Where any such plea of nullity is raised, the Court examines the bill of indictment itself independently of the evidence and of the merits of the case**.[25]

73. The Second Count of the Bill of Indictment reveals a narrative - page 10 et seq of the Bill of Indictment – which contains references to a 'homicidal armed robbery at the targeted residence in the address 22 Locker Street Sliema' which the accused participated in and 'made off with an amount of jewellery together with the other

[24] Vide **Rex vs. Camilleri** decided by the Criminal Court on the 2nd May 1905.
[25] Vide **Rex vs. Strickland** decided by the Criminal Court, collegially composed on the 21st March 1923, Vol. XXV.IV.833

co-perpetrators'. The Attorney General here too refers to the findings of police investigation where he recounts how from 'the course of investigations' it resulted that the accused KRISTIANSEN participated in the theft of the concerned jewellery which theft:

> 'involved the external breaking into a dwelling place whilst accompanied by two (2) other persons, doing so whilst being armed and making use of a disguise of garment and/or appearance and of masks, and such theft eventually leading to the homicide of two (2) persons that is, the homicide of Christian Pandolfino and Ivor Piotr Maciejowski.
>
> 'whereas in the course of investigations, it resulted that the accused Jesper Gejl KRISTIANSEN joined and assisted one of the co-perpetrators in the breaking in of the targeted residence, participated in the violence that erupted upon break and entry of said targeted residence, summoned the third co-perpetrator to join him and enter back the targeted residence, and eventually fled the scene with other co-perpetrators and the res furtiva, including the jewellery concerned with the case'
>
> 'whereas the total value of the amount of jewellery stolen from the targeted residence where the homicidal robbery took place was confirmed at a subsequent stage of the investigation that it exceeded the amount of two thousand and three hundred and twenty nine euros and thirty seven cents (€2,329.37). This theft took place at a time after ten o'clock in the evening (22:00 hrs/ 10pm) during August in Malta, therefore occurring at night, that is to say between sunset and sunrise.'

74. The facts as presented by the Attorney General in this Second Count of the Bill of Indictment contain a detailed summary of the evidence that emerges from the depositions given during the compilatory stages of these proceedings of the investigating officers of the case and any such facts clearly figure the accused's involvement in the armed robbery aggravated by time, place, means, amount and as accompanied by violence: wilful homicide. These same facts then shape the accusatory part of the Bill of Indictment in this Second Count where the Attorney General requested the accused to be found guilty of the offences as described at law.[26]

75. The Attorney General observed the requisites contemplated in Article 589 of the Criminal Code and there is no legal basis for the declaration of nullity of this Second Count given that the facts stated

[26] With regards to the articles quoted by the Attorney General in 'The Requested Punishment' part of the Second Count, on page 63 of the submissions made by the Attorney General, a request for correction was made.

in the indictment constitute in substance of the offence of theft as aggravated by violence, means, place, time and amount.

**Consequently the Court is therefore rejecting this fourth preliminary plea indicated as 4(a).**

**Further considers:**

76. That, in **preliminary plea indicated as 4(b)**, the accused requests the nullity of the Second Count of this Bill of Indictment on the grounds that it fails to identify whether the Attorney General is accusing him of aggravated theft as a co-principal or as an accomplice in terms of law. The Attorney General on the other hand argues that the accusatory part of the Bill of Indictment is clear in requesting for a declaration of guilt for the charge as proffered in this Second Count of the Bill of Indictment as a co-perpetrator not as an accomplice to the fact.

77. That, for the avoidance of repetition, this Court is here referring to the considerations it made hereabove in relation to preliminary plea indicated as 2(a), which considerations also apply to the preliminary plea indicated as 4(b).

78. However, this Court adds the following to what was said in preliminary plea 2(a), which considerations are, mutatis mutandis, also applicable thereto.

79. Whoever carries out the act considered against the Law with the intention of carrying out that act, is called the actor of the crime or the “principal”, or the originator, the one who starts or gives rise to an act or thing, the perpetrator of the crime. When the crime is committed by one person alone, there is little to add. The one who commits the criminal offence is considered its principal. When two or more persons take part in the commission of a criminal offence the question of nature and degree of participation becomes an important factual and legal issue that would need to be assessed. Not every person may have participated in the same way and in the same capacity in the commission of the crime. There are several different ways and levels of participation that can give rise to a different legal status between one participant and another in the commission of a criminal offence.

80. Two or more persons may take an active part together in the commission of a crime. They can both be material executors of the crime by committing the crime together in a direct way - albeit by different means - but at the same time, with both of them having the pre-agreed intention to commit the crime. In this case these may be deemed not only to be co-participants in the commission of the crime, but also as co-principals.

81. It is possible that one of the co-participants in the commission of the crime is the material executor while the other would have provided physical, direct, material participation to the material executor of the crime. A person can be considered a co-principal in a crime when it is satisfactorily proven by the prosecution, beyond a reasonable doubt, that there was his material participation with the executor or direct executors of the crime, but above all that he provided the direct and essential co-operation for the execution of the crime.

82. This then necessarily implies that there must be an agreement reached beforehand between those two or more people who have taken part in the commission of the crime with the specific aim of committing that crime. If this common intention, that is the meeting of the minds between two or more people is missing, then it cannot be said that these two people would have acted as co-principals in the commission of the crime.

83. The Prosecution must prove beyond any reasonable doubt that between co-participants in the commission of a crime there was the common intention to do that crime, and even if the co-participants contributed directly to the commission of the crime albeit to different degrees or capacities. What must result is the material act that indicates the physical presence of the accused at the scene of the crime as well as his active participation in the commission of the crime, coupled with the "*common design*" between the co-participants to commit the crime.

84. The material fact alone that a co-participant only helped in the commission of the crime therefore cannot qualify him as co-principal, though it may qualify him as an accomplice in the commission of the crime, provided certain legal criteria are met. The co-principal must necessarily have played an active part in the commission of the crime and did not simply offer his help in the

preparation for the commission of the crime or for the material act of the execution of the crime for it to be successful.

85. If both co-participants are present on the scene of the crime but only one of them performs a specific act that is tantamount to a criminal offence, if it is proved that they shared the common intention for the commission of the facts constituting that particular crime then both the one who performs the act as well as the one who does not perform the act but is present when the act is committed and shared the common intention with the one who acts to commit that specific act constituting a crime, then they are still deemed to be co-principals in the commission of that crime. The figure of the co-principal in that scenario is not restricted only the one who was the direct executor of the act that constitutes the crime but also includes those who participate in direct and essential cooperation with the material executor of the crime for the execution of that particulat crime. Hence it was held that whoever persuades another person to commit theft, and while that person commits the theft the other distracts those who are present, is also guilty of theft as a co-principal in that theft. The reason is that the crime took place thanks to his material participation in the commission of that theft. They are co-principals inasmuch as the co-principal is not only the one who is the direct executor of the act constituting the crime, but it also includes anyone who in some other way provides direct and essential co-operation for the execution of the crime theft in those particular circumstances.

86. The concept of Complicity is similar, but different. First of all, the concept of complicity in Maltese Law is a legal institute of autonomous application in the sense that it can be applied to any crime and extends also to contraventions. A person is considered an accomplice in a crime if he –

(a) has given an order to another to commit the crime; or

(b) instigates the commission of the crime by means of bribes, promises, threats, tricks, or deceit, or by abuse of authority or power, or has given instructions to commit the crime; or

(c) has given weapons, tools or other means that have been used in the commission of the crime, when he knew that they were to be used that way; or

(d) while not being one of the persons mentioned in paragraphs (a), (b) and (c), in any way has, knowingly, helped or assisted the perpetrator or perpetrators of the crime in the acts by which the crime has been prepared or completed; or

(e) has incited another or strengthened his will to commit the crime, or promised to assist, aid or reward him after the fact.

87. A corollary to this principle is that when two or more people take part in a crime, the circumstances that relate only to the person of any of them individually, whether they are principals or accomplices, and which may exclude, aggravate or mitigate the punishment in regard to him, does not operate either in favour or against the others concerned in the same crime.

88. The figure of the accomplice implies participation in the commission of the crime, but which participation is not actually manifested in the material execution of the crime. It can imply a moral presence in the participation of the crime or it can imply a form of logistical support for the commission of the crime. The moral presence can be reflected in the person in question being the mandator of the crime, that is the person who gives the order for the commission of the crime, albeit he does not execute it himself. There is no need for this person to participate physically in the execution of the crime to participate even logistically in the commission of the crime. It is sufficient for this person to be an accomplice with the material executor of the crime when, in fulfillment of the agreement between them, the accomplice has in some way knowingly helped or assisted the material executor in the acts by which the crime was prepared or consumed; or he has encouraged the executor of the crime or strengthened his will in order to commit the crime or else promised him assistance, aid or reward after the fact.

89. In these cases, the accomplice is not present on the crime scene with the material executor of the crime. However, once the accomplice acted with a common design, with an agreement reached beforehand, with the material executor of the crime, the accomplice is deemed to be a co-participant in the commission of the crime in his capacity as an accomplice to it. This agreement does not need to take a formal or complicated form: it can arise both from a well thought and designed plan of action reached time before the execution of the crie, or it can be made in the blink of an eye.

90. For complicity to arise, there must be correlation and communication with the principal or principals of the crime. But there may be circumstances where an act done by a co-principal or by an accomplice render the crime more serious. So when two or more

people take part in a crime as principals or accomplices, any act done by one of them and which makes the crime more serious, is imputable only -
(a) to the person who does the act;
(b) to the person who knew about the act before it was done; and
(c) to the person who, despite being aware of the act at the time it was being done, and still being able to prevent it, allowed it to be done.

91. So if a person, with the aim of helping to the material executor to commit theft, assists the executor in his quest to commit the theft fully knowing that the executor was going to commit the theft armed with a weapon, which, if need be would be used to facilitate the execution of the theft, use the weapon to facilitate the robbery, this person would be considered co-responsible for the violence-aggravated theft if he is present on the scene of the crime of theft, should the executor use that weapon against any person in pursuance of their intention to commit the theft in that particular fashion. In that case this person would be deemed to be a co-principal together with the material executor for the violence-aggravated theft.

92. On the other hand, if the person helps and assists the executor in the commission of the theft but he does not physically go together with the executor to carry out the robbery, but he knew the executor was going to commit the theft and this person wanted the executor to commit the theft while fully knowing that the executor was armed so that if necessary he would use it to facilitate the robbery, and in fact the executor uses that weapon when he is is committing the theft, the person can be considered an accomplice with the executor in this violence-aggravated theft.

93. But if the person wanted the theft and assisted the executor to commit this theft by helping and encouraging him, but he did not know that the executor was going to be armed so that if need arose the executor would use it against any person coming in the way, that circumstance which aggravates the crime of theft with violence cannot also be used and attributed also against the accomplice. The accomplice can be held responsible in the commission of the crime of theft, but not also in the aggravation created by the executor's use of violence in the perpetration of the crime of theft. While the accomplice could foresee and expect that in order for the executor to enter the victim's house, he would have to break and damage the

victim’s property, on the other hand one cannot expect him also to necessarily foresee that the executor would present himself armed and also use the weapon against any person coming in his way. If the accomplice had no knowledge of the carrying and use of the weapon before the act of use thereof the accomplice cannot also be held responsible for the aggravation of violence used by the executor; although he remains an accomplice with the executor in the theft qualified by means, given that he knew or reasonably expected the executor to have to break in the victim’s house to commit the theft.

94. Thus, when the executor caused an event or caused results more serious than what was agreed upon beforehand with the accomplice or caused events or results that the accomplice could reasonably presume were going to be carried out, the jury must consider whether:

i. the executor deliberately committed a crime that is completely different from that ordered by or agreed with the accomplice; in which case the accomplice would not be responsible for the crime committed by the executor without his knowledge or their prior agreement;

ii. In all other cases, a distinction is made between what is called excess in the means ("eccesso nei mezzi") and excess in the purpose ("eccesso nel fine").

95. The excess in the means is when the executor uses different means than those agreed between them. For example, the common design entailed the executor using a stick to beat any person coming his way during the commission of the theft, but instead the executor uses a gun a knife and kills a person approaching to stop him. In this case the responsibility for the more serious result is entirely that of the executor.

96. There is an excess of purpose where the means are those actually agreed between the accomplice and the executor, but they produce a more serious result than that originally contemplated. In any such case, if the most serious event results as a natural and foreseeable consequence of the means used or due to negligence on the part of the executor, the responsibility for the more serious result will be also contracted by the accomplice because it is considered to be communicated on to him; even though he may not have expressly desired that result, yet he maliciously willed the means which by their very nature might cause that result.

97. Maltese Law extends responsibility in relation to the aggravating act to all persons taking part in the criminal enterprise where the action was carried out with their previous knowledge; and extends even to those who, when they become aware of the aggravating act at that moment in time when it was being executed and could prevent it, they do not do so.

98. So whoever is proven beyond any reasonable doubt that he was at the scene of the crime and had a direct and essential role - even if not the main one - in the execution of the crime, is considered to be a co-principal in the commission of the crime and not an accomplice.

99. But he can also be considered both an accomplice and a co-principal in the case where for example the accomplice has formed the plan or enticed the executor to commit the crime, but then ends up going with the executor to the scene of the crime and he also participates directly and essentially in the commission of the crime itself.

100. As already noted, all these considerations depend on the evidence that will be produced during the trial. As far as the Second Count of the bill of indictment is concerned, the Attorney General did not qualify the nature of participation of the accused in the commission of the criminal offence, though he states that this crime was committed with other co-perpetrators. Consequently, in that event, the accused is by default considered to be a co-principal in the commission of that offence.

101. But if during the course of the trial, it is proven beyond a reasonable doubt that the accused co-participated in the commission of the crime but not as co-perpetrator, but who was in common agreement and shared a common design in the commission of the crime in that specific manner, then even if the accused would have been charged as a co-principal, the jury can still find him guilty as an accomplice with the executor if it is proven beyond a reasonable doubt that he shared the same intention with the executor for the commission of that specific offence in that specific manner before the execution of that crime.

102. On the other hand, when two or more people are accused of committing a crime and it is proven that this crime was committed by one or more of them, but it is not proven by which one or some

of them it was committed, the jury can declare all the accused guilty as accomplices in the crime, if it has been proven that they all took part in the crime enough to make them accomplices.

103. When the crime as alleged in the indictment is not proven, but from the trial it is found that the same crime was committed but of a less aggravating character or a lesser crime or only an attempt of it would have been committed, provided that they are included or involved in some part of the act of accusation, the jury can either exclude the aggravating circumstances or add those circumstances that make the crime of a less aggravating nature, or find the accused guilty of a lesser crime or attempt, or of the facts that make that lesser crime or attempt, as the case may be.

104. If the jury is of the opinion that the accused is not guilty in any way as stated above, it must find the accused "not guilty".

**Consequently for these reasons this Court is hereby rejecting preliminary plea indicated as 4(b).**

105. That **in preliminary plea indicated as 4(c)**, the accused attacks the nullity of the Second Count of the Bill of Indictment on the grounds that the accusatory part thereof fails to address the plurality of offenders in terms of law. In other words, this Court understands that in this fourth preliminary plea – 4(c) - the accused laments a lack of continuity between the facts/narrative contained in this Second Count of the Bill of Indictment and the accusatory part of the same.

106. The narrative part of the second count contains a detailed description of the facts constituting the offence. There is reference to the particulars relating to the weapons used, the numbers of persons involved in the commission of the offence with which he is charged in this Second Count, the time, place, the means used for the perpetration of the offence as well as the persons against whom the offence was committed. There is also a clear description of the violence allegedly perpetrated by the participants against the victims through the mention of the theft resulting in a ‘homicidal armed robbery’ carried out at 22, Locker Street Sliema by the accused and another two persons (page 10 of the Bill of Indictment).

107. Article 262(1)(a)(b) read as follows:

262.(1) A theft is aggravated by "violence" –
(a) where it is accompanied with homicide, bodily harm, or confinement of the person, or with a written or verbal threat to kill, or to inflict a bodily harm, or to cause damage to property;
(b) where the thief presents himself armed, or where the thieves though unarmed present themselves in a number of more than two;

108. The Attorney General's narrative reflects in substance the elements of the offence of theft as aggravated in terms of Article 261(1)(a) of the Criminal Code. The provisions of Article 589(c) of the same have been observed to this effect. It is the jury who has to determine whether this narrative is grounded in the evidence that will eventually be produced during the trial stage.

109. In **Ir-Repubblika ta' Malta vs. Grazio Azzopardi** decided by the Court of Criminal Appeal on the 23rd June 2021, the accused raised the plea that the narrative part of the Bill of Indictment did not reflected the accusatory part in relation to an aggravating circumstance under the provisions of Article 204C(2) of the Criminal Code. That Court ruled as follows:

> Illi jingħad minnufih illi tirriżulta nullita` jew difett kif ravviżat fl-Artikolu 449(5)(b) tal-Kodiċi Kriminali meta l-fatti kif deskritti fil-parti narrattiva ma jkunux jammontaw fis-sustanza għar-reat li bih l-akkużat ikun qed jiġi mixli. Bilkelma "reat" wieħed għandu neċessarjament jifhem ir-reat bl-aggravji kollha skond il-Liġi li jkunu qed jiġu dedotti.
> ..../.....
> Illi jikkonsegwi li l-appellant ma għandux raġun f'dan l-aggravju, fl-ewwel lok għax l-elementi tar-reat maħsub fl-artikolu 204Ċ tal-Kodiċi Kriminali jemerġu mill-parti narrattiva tal-Att tal-Akkuża, kif ukoll għax jirriżultaw dawk l-elementi meħtieġa sabiex jissussisti l-aggravanti li dwaru jinsab mixli.

110. That the same was maintained by the Court of Criminal Appeal in the case **Ir-Repubblika ta' Malta vs Dominic Bonnici** decided on the 22nd April 2004:

> Din il-Qorti tara li dana l-appell huwa wiehed fieragh. Jibda biex jinghad li fit-tieni Kap ta' l-Att ta' Akkuza lappellant qed jigi akkuzat b'serq kwalifikat bil-vjolenza (omicidju volontarju u sekwestru tal-persuna), mezz (ghata tal-wicc), valur (aktar minn mitt lira izda anqas minn elf lira), hin u lok (dar ta' abitazzjoni). L-appellant qed jikkontesta dana l-Kap – in linea ta' eccezzjoni preliminari – mhux in kwantu ghall-kwalifika ta' l-omicidju volontarju jew xi kwalifika ohra, izda biss in kwantu ghal dik tas-sekwestru tal-persuna. Ghandu jigi wkoll precizat li l-akkuzat jidher li zvija kompletament lill-ewwel Qorti blinsistenza tieghu fuq l-Artikolu 589(c) tal-Kodici Kriminali. Huwa veru li din id-disposizzjoni tghidlek x'ghandu jkun fiha l-parti espozittiva tal-Att ta'

> Akkuza (jew ta' kull Kap tal-Att ta' Akkuza meta dan ikun maqsum f'kapi differenti), izda proprjament l-eccezzjoni kellha tkun ibbazata fuq ilparagrafu (b) tal-proviso ghas-subartikolu (5) tal-Artikolu 449. Din id-disposizzjoni tipprovdi li jkun hemm nullita` flAtt ta' Akkuza (jew f'kap partikolari) "meta l-fatt migjub flatt ta' l-akkuza ma jkunx jikkostitwixxi, fis-sustanza, ir-reat migjub jew deskritt f'dak l-att." Hija din id-disposizzjoni, u mhux l-Artikolu 589, li l-appellant kellu jinvoka quddiem lewwel Qorti in sostenn ta' l-eccezzjoni tieghu dwar innullita` ta' (jew difett fi) it-tieni Kap. **Il-gurisprudenza f'dan ir-rigward hija ormaj kopjuza u din il-Qorti ma tarax li ghandha ghalfejn toqghod tahli zmien ticcita d-diversi pronunzjamenti taghha in materja. Ikun hemm nullita` jew difett kif ravvizat fl-Artikolu 449(5)(b) meta l-fatti kif deskritti ma jkunux jammontaw fis-sustanza ghar-reat li bih l-akkuzat ikun qed jigi akkuzat. Bil-kelma "reat" wiehed ghandu necessarjament jifhem ir-reat bl-aggravji kollha li jkunu qed jigu dedotti skond il-ligi. F'dan il-kaz, ghalhekk, wiehed irid jara jekk, fil-parti espozittiva tat-tieni Kap, hemmx fis-sustanza l-elementi tas-serq u tal-kwalifiki aktar 'l fuq imsemmija, fosthom dik tas-sekwestru tal-persuna.**[27]

**Consequently for the above reasons, this Court is hereby rejecting preliminary plea indicated as 4(c).**

**Considers further:**

**<u>The Fifth Preliminary Plea – The Nullity of the First and Second Counts of the Bill of Indictment</u>**

**That this Court has taken cognisance of the submissions made by the Defence in the sitting dated 10th November 2022 whereby it was declared that it was withdrawing the Fifth Preliminary Plea raised by the accused, and therefore this Court abstains from taking further cognisance of the same.**

**Considers further:**

**<u>The Sixth Preliminary Plea – The Nullity of the Third and Fourth Counts of the Bill of Indictment</u>**

111. In this **sixth preliminary plea**, the accused pleads the nullity of the Third and Fourth Counts of the Bill of Indictment on the grounds of these being devoid of any facts supporting the fact that the accused made use of the identification number plates JET 082 or CCB 042 and that he was at any time aware of any issue relating

[27] Emphasis of this Court

to these plates on any vehicle or that he disposed of or even had received stolen properties. The accused laments that this lack of evidence leads to the nullity of the Third and Fourth Counts of the Bill of Indictment.

112. In line with its reasons outlined in relation to the preliminary pleas 1, 2, 3 and 4, the nullity of the Bill of Indictment or of parts thereof can only be successfully pleaded where the facts stated in the narrative of the respective counts in the Bill of Indictment do not constitute, in substance, the offence stated or described in the indictment. In essence the narrative part and the accusatory part must be read together with the accusatory part being the logical legal consequence of the facts stated in the narrative part.

113. In the **Third Count**, the accused is being charged with the offences mentioned by Article 15(1A) of Chapter 65 of the Laws of Malta, the Traffic Regulation Ordinance, which reads as follows:

> (1A) Any person who **makes use of an identification number other than that allotted by the police or by the Authority in relation to a particular motor vehicle**[28] shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding one thousand and two hundred euro (€1,200) or to imprisonment not exceeding six months or to both such fine and imprisonment.

114. Pages 11 and 12 of the Bill of Indictment, contain a detailed synopsis of the elements contained in the offence sanctioned under the provisions of Article 15(1A) of Chapter 65 of the Laws of Malta. The evidence which the Attorney General made use of in the narrative is based on the findings of police investigation namely through the interviewing of witnesses and the examination of CCTV footages. Reference is made to this Courts findings and reasons outlined by reference to its decision regarding preliminary pleas 1(a), 2A, 3(a) and 4(a) and once again the Court aligns its reasoning in the case of this preliminary plea number 6 with that made in connection with these preliminary pleas, including and in particular to those situations where the nullity of the bill of indictment can be successfully pleaded.

115. However from a reading of the narrative part of this count of the bill of indictment, and more specifically on page 11, the Attorney General refers to the fact that:

[28] Emphasis of this Court.

i) that the registration plates JET 082 belonged to a SEAT Cordoba and these same plates were reported to have been stolen on the 3rd August 2020 whilst the car was parked in St. Julians. **The number plates JET 082 were therefore officially issued by the police or the Authority to be used in relation to the SEAT Cordoba and no other vehicle.**

ii) That these same number plates were then fixed onto a Volkswagen Tiguan that was driven - and therefore **made used of** - by the perpetrators to arrive on the scene of the armed robbery and to flee from the same after the completion of the fact. The number plates JET 082 were **not fixed to the particular motor vehicle to which these were officially allotted by the police or by the Authority.**

iii) These facts were acquired by the police through police reports filed by the persons suffering victim of these stolen vehicles and/or number plates and from eyewitness accounts and CCTV footages examined by the investigators.

116. On page 12 of the bill of indictment, the Attorney General describes how the same number plates "JET 082" (that had been allegedly seen in the CCTV footage to be affixed to that same car which was made use of by the accused and the other co-participants in the commission of the homicidal armed robbery), were then found discarded in the back storage compartment of the same vehicle. The Attorney General also recounted that the Volkswagen Tiguan used as aforesaid, was registered with the Authority as bearing number plate registration number "CRS 240". According to the Attorney General, this vehicle was made use of by the co-participants while carrying a number plate that was different from that which was allotted to it by the police or the Authority.

117. The facts recounted by the Attorney General in this Third Count of the bill of indictment are based on the evidence tendered during the compilatory stages of these proceedings by representatives of Transport Malta, experts appointed as part of the Magisterial Inquiry for the analysis of CCTV footage, eyewitness depositions, the depositions of representatives of insurance agencies and the depositions given by the investigating officers of the case.

118. In the **Fourth Count of the bill of indictment**, the accused KRISTIANSEN is charged with the offence mentioned in Article 334

of the Criminal Code of knowingly receiving or purchasing stolen propertyz, namely the vehicle Volkswagen Tiguan which had been reported missing on the 14th September 2018 by its owner. The said Article 334 reads as follows:

> Whosoever shall in Malta knowingly receive or purchase any property which has been stolen, misapplied or obtained by means of any offence, whether committed in Malta or abroad, or shall knowingly take part, in any manner whatsoever, in the sale or disposal of the same, shall, on conviction, be liable ..

119. In **Il-Pulizija vs Darren Debono,**[29] ample reference was made to local jurisprudence that elaborates the elements of this offence as follows:

> Illi skond il-gurisprudenza sabiex persuna tinstab hatja ta' ricettazzjoni hu mehtieg li jikkonkorru is-segwenti tlitt rekwiziti u cioe' :
> 1. il-provenjenza llegittima tal-oggett in kwistjoni ossia li jkun insteraq, jew gie mehud b' qerq jew akkwistat b' reat iehor;
> 2. l-akkuzat irid ikun laqa' ghandu jew xtara tali oggett li ghandu provenjenza llegittima w
> 3. fil-mument tal-akkwist, l-akkuzat kien jaf bilprovenjenza llegittima tal-oggett in kwistjoni (ara App. Krim "Il-Pulizija vs. Bugelli" [24.1.1942]; "Il-Pulizija vs. Giovanni Grima" [25.10.2002])
>
> L-element formali ta' dar-reat hu li l-akkuzat kien konsapevoli tal-provenjenza illecita tal-oggett suggett tarricettazzjoni. Dan ir-rekwizit jista' jigi pruvat kemm minn provi diretti kif ukoll minn provi indizjarji. Hekk fl-Appell Kriminali "Il-Pulizija vs. John Briguglio" [24.6.1961] (per Harding J.) kien gie ritenut li :-
>
> "Min jakkwista oggett taht cirkostanzi li fihom imissu jissuspetta li dak l-oggett kellu provenjenza illegittima, u ntant ma jaghmel xejn biex jikkontrolla dik il-provenjenza, u jaghalaq ghajnejh, huwa hati ta' din in-negligenza u kwindi ta' ricettazzjoni."
>
> Gie ukoll ritenut li dan l-element formali tar-reat in dizamina ikun jissussisti anki jekk l-akkuzat ikun irceva jew xtara l-oggett fil-waqt li jkollu jew inkella imissu kellu suspett li l-persuna li taghtu dak l-oggett setghet giet f' pussess ta' dak l-oggett b' mod illecitu w b' dana kollu xorta jilqa' ghandu jew jixtri tali oggett minghajr ma jaghmel xejn biex jivverifika u jaccerta ruhu li l-pussess ta' dik il-persuna l-ohra kien wiehed legittimu u mhux kif kien qed jissusspetta hu. (ara App. Krim. "Il-Pulizija vs. J. Briguglio" [24.6.1961]; "Il-Pulizija vs. John Dimech" [24.6.1961]; "Il-Pulizija vs. George Tabone" [24.6.1961] u "Il-Pulizija vs. Tancred Borg" [26.10.1998])

[29] Decided on the 15th January 2009 by the Court of Criminal Appeal.

S' intendi ix-xjenza mehtiega fir-ricettatur tirrigwarda lprovenjenza kriminuza generika u ma tirreferix ghad-dettalji specifici tar-reat principali. (Ara App. Krim. "Il-Pulizija vs. Joseph Piscopo" [21.3.1953]; "Il-Pulizija vs. Nazzareno Zarb" [16.12.1998] u ohrajn)

Kif jghid il-KENNY : "The knowledge : The prisoner must have received the stolen goods with knowledge then of their having been stolen.. Such knowledge may be presumed prima facie if he knew of circumstances so suspicious as to convince any reasonable man that the goods had been stolen - e.g. …when an unlikely vendor offers them for an unlikely price … His subsequent conduct may be evidence of such knowledge - e.g. .. selling them surreptitiously … or making no written entry of having bought them."

Illi kif qalet din il-Qorti diversament preseduta (per V. De Gaetano J., fl-Appell Kriminali : "Il-Pulizija vs. Emanuel Seisun et."[26.8.1998]); it-teorija Ingliza "of unlawful possession of recently stolen goods" issib ukoll applikazzjoni fis-sistema legali taghna, ghax in tema ta' "law of evidence" il-gurisprudenza taghna ssegwi hafna dik Ingliza. Din it-teorija ma hi xejn hlief l-applikazzjoni tal-buon sens ghal cirkostanzi partikolari li jkunu jirrizultaw pruvati, fis-sens li meta jigu ppruvati certi fatti, dawn jistghu wahedhom iwasslu ragjonevolment ghallkonkluzzjoni li persuna partikolari tkun hatja tar-reat ta' serq tal-oggetti misjuba ghandha jew, skond ic-cirkostanzi, tar-reat ta' ricettazzjoni ta' dawk l-oggetti.

F' dik is-sentenza din il-Qorti ccitat mill-Archbold : Criminal Pleading, Evidence and Practice, 1997, paras. 21-125, 21-126):-

"In R. v. Smythe, 72 Cr. App. R. & C.A., the court stressed that it is a misconception to think that recent possession is a material consideration only in cases of handling: it adopted the following passage from Cross on Evidence , 5 th. ed., p.49 (now 8th. ed.., p.35): "if someone is found in possession of goods soon after they have been missed, and he fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to have been stolen….The absence of an explanation is equally significant whether the case is being considered as one of theft or handling, but it has come into particular prominence in connection with the latter because persons found in possession of stolen goods are apt to say that they acquired them innocently from someone else. Where the only evidence is that the defendant on a charge of handling was in possession of stolen goods, a jury may infer guilty knowledge or belief (a) if he offers no explanation to account for his possession, or (b) if the jury is satisfied that the explanation, he does offer is untrue."

"Every case depends on its own facts. ….It would be impossible to compile a definitive list of circumstances which might be relevant. They will include, however, the time and place of the theft, the type of property stolen, the likelihood of it being sold on quickly, the circumstances of the defendant, whether he has any connection with the victim or with the place where the

theft occurred, anything said by the defendant and how that fits in or does not fit in with the other available evidence." (ara ukoll f' dan is-sens :"Il-Pulizija vs. Carmel Debono" [1.11.1996], "Il-Pulizija vs.Richard Spiteri " [31.8.2006] u ohrajn).

120. Once again it must be stressed that this Court does not determine itself whether from the records of the proceedings there is enough evidence proving beyond a reasonable doubt the integration of the offence in question. This does not form part of the remit of this Court. What this Court must do at this stage is see if the narrative part of this count and the accusatory part of the bill of indictment can be read together and reflect each other. And whether the wording used by the Attorney General in the narrative to this Fourth Count to identify whether the facts therein recounted reflect in substance the elements of the offence as explored in the above quoted jurisprudence.

i) On page 13 : 'it became manifestly clear during the investigation that the accused Jesper Gejl KRISTIANSEN had **knowingly** taken part in **the use and disposal of a property which has been stolen** or obtained by means of any offence, specifically the white Volkswagen Tiguan that was used by the perpetrators to reach Locker Street in Sliema where the targeted residence was situated';
ii) On page 13: 'it is an irrefutable fact that the concerned Volkswagen Tiguan was the same one as that which had been reported stolen by Malcolm Fava'.
iii) On page 14: 'it has also resulted during the investigation that the accused Jesper Gejl KRISTIANSEN helped the other perpetrators to 'disguise' the getaway vehicle…prior to abandoning (which is a form of disposal) said vehicle in Pieta' ..'
iv) On page 14: 'it resulted that the accused Jesper Gejl KRISTIANSEN has knowingly taken part in any manner whatsoever, in the disposal of the vehicle Volkswagen Tiguan and this by helping one of the co-perpetrators to change the vehicle registration number plate as part of a disguise before abandoning the vehicle, hence before disposing of such vehicle. This vehicle in question, the Volkswagen Tiguan which was being used by the perpetrators in this case, had been stolen, and this as reported by its legitimate owner Malcolm Fava.'

121. However, the Court notes that in the accusatory part, the Attorney General stated that the accused should be found guilty of the crime mentioned in article 334 of the Criminal Code. Indeed, the

crime of receiving stolen property is regulated by this specific article. This article provides three hypotheses as to how this offence can be committed, subjecting the convict to the punishment established by Law for that particular mode. In this case the Attorney General's narrative is based on the fact that the vehicle that the accused made use of **was stolen** as reported by its rightful owner. Therefore, the accused knew from the outset what the offence he was being charged with and under what hypothesis. There is no reason for the bill of indictment therefore not to specify this by reference to the particular mode in which this offence was allegedly committed. This means that the Attorney General should have specified that this offence is being contemplated under **article 334(a) of the Criminal Code**. This way the accusation is more in tune with the narrative part and renders more clarity to the eventual punishment that may be meted out against the accused should he be found guilty of this offence by the jury.

122. Furthermore, if the accused is found guilty of this offence under article 334(a) of the Criminal Code, the punishment that is to be meted out against him would be that of the crime of theft according to the value of the property. Now in the bill of indictment the Attorney General states that if found guilty, the accused should be sentenced to a term of imprisonment from thirteen months to ten years. But according to article 279(b) of the Criminal Code, also quoted by the Attorney General, provides for a minimum of thirteen months imprisonment and a maximum of seven years imprisonment. Therefore the bill of indictment must be corrected to reflect the proper parameters of punishment that may be awarded against the accused should he be found guilty by the jury of this criminal offence.

**Consequently, the Court declares that the Attorney General's narrative in the Third and Fourth Count are in line with the provisions of the Law and therefore this sixth preliminary plea is hereby being rejected.**

**However after having seen article 597(1) of the Criminal Code, the Court orders the correction of the bill of indictment such that in the accusatory part of the bill of indictment any reference to article 334 of the Criminal Code be specified as being a reference to article 334(a) of the Criminal Code; whereas in that part of the accusatory part of the fourth count bill of indictment which deals with the parameters of the punishment to be meted out in case of a finding of**

**guilt of the accused by the jury for this same count, the Court orders that the phrase "sentenced to a term of imprisonment from thirteen (13) months to ten (10) years" be substituted by "sentenced to a term of imprisonment from thirteen (13) months to seven (7) years" instead.**

**Considers further:**

**The Seventh Preliminary Plea – Nullity of the Fifth Count**

123. That in this seventh preliminary plea the accused pleads the nullity of the Fifth Count of the Bill of Indictment on the grounds of it containing references to facts based on the statements of the co-accused as referred to in the First Count of the Bill of Indictment. The accused maintains that these references are inadmissible evidence and have to be expunged from the Bill of Indictment.

**Consequently, this Court refers to its reasons mentioned by reference to preliminary plea 1(a) and therefore aligns this preliminary plea with those reasons and findings. Consequently, in this sense this seventh preliminary plea is being rejected.**

**Considers further:**

**The Eighth Preliminary Plea – The Nullity of the Fifth Count of the Bill of Indictment**

124. In this **eighth preliminary plea** the accused attacks the validity of the Fifth Count of the Bill of Indictment for want of facts or evidence in support of the charge of illegal arrest and detention after that references made to the statements of the other co-accused are expunged. The legal point of contention here, as in preliminary pleas 2(a), 3(a), 4(a) and 6(a), is therefore that the narrative as expounded by the Attorney General in this Fifth Count does not contain facts in support of the accusation.

125. The offence proffered in the Fifth Count of the Bill of Indictment is based on the provisions of Article 86 and 87 of the Criminal Code. Article 86 of the Criminal Code, reads as follows:

> Whosoever, without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend

offenders, arrests, detains or confines any person against the will of the same, or provides a place for carrying out such arrest, detention or confinement, shall, on conviction…

126. Article 86 of the Criminal Code contemplates three different forms of how this offence against personal liberty can be committed, namely through:
   i) arrest;
   ii) detention or
   iii) confinement.

127. Professor Mamo[30] comments:

> The words 'arrest', 'detention' and 'confinement' are not synonymous: each indicates a special manner in which an attempt can be made on personal liberty: ''Il reato (our Section 85) esiste sia quando alcuno si fermi nel mentre che agisce o cammina; sia quando si faccia rimanere suo malgrado in quel luogo ove si trova; sia quando finalmente si trasporti da un luogo ad un altro (Roberti – ibid, para. 323). It was held in France that these three expressions denote three varieties of the same crime which although closely analagous to one another may exist separately. In fact the illegal arrest may subsist as an offence although it is not followed by detention or confinement. Thus a person may be arrested without being detained in his own house without having been previously arrested or may be confined in a lonely place or may, by a fresh act of violence, be confined in a place where he is (Cheveu et Helie – para 2945).

128. The authors Smith and Hogan[31] state that at English Law, as for the material element of the offence of illegal arrest, or rather "false imprisonment" is as follows:

> The imprisonment may consist in confining V in a prison (Cobbett vs. Grey 1849), a house (Warner vs. Riddiford 1858), even V's own house (Termes de la Ley 1920), a mine (Herd vs. Weardale Steel, Coal and Coke Co. Ltd) or a vehicle (Mc Daniel vs. State (1942) Burton vs. Davies (1953)) or simply detaining V in a public street (Ludlow vs. Burgess (1971) or any other place. It is not necessary that he be physically detained. There may be an arrest by words alone, but only if V submits. If V is not physically detained and does not realise he is under constraint he is not imprisoned (Alderson vs. Booth (1969).

129. The Court of Criminal Appeal in the case **Il-Pulizija vs. Josmar Pace** decided on the 12th March 2019, held that:

> Illi l-interpretazzjoni li dejjem ingħatat mill-ġurisprudenza nostrana f'din il-materja hija wahda pjuttost wiesgħa fis-sens illi mhux neċessarjament irid jirriżulta li persuna nżammet imsakkra ġo post jew marbuta ma' xi siġġu

[30] Notes on Criminal Law, Vol II.

[31] in **Smith and Hogan Criminal Law,** 11th edition, page 568.

biex is-sekwestru jirriżulta. Fil-fatt jekk jirriżulta li l-vittma tas-sekwestru kienet anke **jekk għall-mument qasir ħafna**[32] inkapaċi li tagħmel dak li trid u dan kontra r-rieda tagħha, hemmhekk jirriżulta r-reat kontemplat taħt l-Artikolu 86 tal-Kapitolu 9 tal-Liġijiet ta' Malta. Illi dan jista' jseħħ anke fid-dar tal-istess vittma u anke bil-bieb miftuħ.

130. Unlike Italian law where violence is a requisite of the offence of illegal arrest and detention, Maltese law allows illegal arrest, detention or confinement even without any physical violence exercised by the offender. However the use of violence is contemplated as an aggravating circumstance to the main fact as per Article 87 of the Criminal Code. In this regard Maltese law is similar to its English counterpart as was maintained in the decision **Grainger vs Hill** (1838) and **Warner vs. Riddiford** (1858):

> Though some of the older authorities speak of false imprisonment as a species of assault it is quite clear that no assault need be proved.

131. In page 15 of the Bill of Indictment, the Attorney General uses the phrase 'unlawful and unauthorised detention and confinement, even if instantaneous,'. This phrase falls within the parameters of the definition of illegal arrest, detention or confinement mentioned in Article 86 of the Criminal Code. In page 16, the Attorney General also mentions how Pandolfino, after coming into close proximity with his alleged aggressors in the hallway of his residence, was detained against his will before he was killed:

> In order to have successfully executed this, Jesper Gejl KRISTIANSEN, alongside with the other perpetrator present with him in the targeted residence during the confrontation, detained and/or confined the abovementioned victims.
>
> Whereas it became abundantly clear from all the circumstances and evidence that the investigators encountered in this case, that such detention and confinement of the abovementioned victims Christian PANDOLFINO and Ivor Piotr MACIEJOWSKI was made by Jesper Gejl KRISTIANSEN principally for the purpose of extorting money or effects and also, during such detention and/or confinement these victims were mercilessly subjected to bodily harm of deadly proportions.

132. While this narrative does not elaborate in more detail how the illegal arrest, detention or confinement of the victims took place, but rested on the more parsimonious 'unlawful and unauthorised detention and confinement', the facts narrated still refer to the substance of the offence as is described at law, including in its

[32] Emphasis of this Court.

aggravating circumstances. The narrative in this Fifth Count also contains references to the particulars of the time, place and location where the offence took place as well as particulars relating to the victim and a description of the aggravating circumstances accompanying the fact - mirroring the wording used in Article 87 of the Criminal Code.

133. The accused argues that the Attorney General's reference to illegal confinement being 'instantaneous' was legally incorrect. Indeed, the Attorney General could have been more accurate in the choice and use of the legal terms making this offence. While confinement refers to one mode of this offence, it is still the same offence that the Attorney General is making reference to. And indeed, Maltese jurisprudence maintained the material element of this offence consists in the inability of the victim to be free to move away from his aggressor even if for a short while only. Hence the use of the terminology 'instantaneous' although superfluous, does not operate as to bring about the nullity of this Fifth Count of the Bill of Indictment because the narrative thereto still contains facts which in substance amount to the offence contemplated in Article 86 of the Criminal Code, together with a description of those circumstances at law that may increase the punishment for the offence.

134. The legal issue is whether a person who is held at gun point can also be subject to illegal arrest. Indeed, he can be as being held at gunpoint could lead to the victim not being or feeling free to move or act freely due to the imminent danger being posed by the aggressor's use of a weapon. But whether the evidence in this case proves this beyond a reasonable doubt or otherwise is a matter that it remitted to the jury that must eventually base itself on the evidence that will be produced to them during the trial.

**Consequently, the Court is here rejecting the eighth preliminary plea.**

**Considers further:**

**<u>The Ninth Preliminary Plea – a defective Sixth Count</u>**

135. That in this ninth preliminary plea the accused laments a defective Sixth Count of the Bill of Indictment on the grounds of it containing references to facts based on the statements of the co-accused as referred to in the First Count of the Bill of Indictment.

The accused maintains that these references are inadmissible evidence and must be expunged from the Bill of Indictment.

**Consequently, this Court refers to its reasons mentioned by reference to preliminary plea 1(a) and therefore aligns this preliminary plea with those reasons and findings and in this sense this ninth preliminary plea is being rejected.**

**Considers further:**

**The Tenth Preliminary Plea – the Nullity of the Sixth Count of the Bill of Indictment**

136. That in this **tenth preliminary plea** the accused KRISTIANSEN pleads the nullity of the Sixth Count of the Bill of Indictment for want of facts or evidence in support of the charge of possession of a firearm during the commission of an offence as proffered in this Sixth Count of the Bill of Indictment particularly after the expunging from the same of those references made to the statements of the other co-accused. The legal point of contention here, as in preliminary pleas 2(a), 3(a), 4(a), 6(a) and 8 is therefore that the narrative as expounded by the Attorney General in this Sixth Count does not contain facts in support of the accusation.

137. In part 10(b) of this same preliminary plea the accused then laments how the charge as contemplated in this Sixth Count of the Bill of Indictment relates to the physical possession of a firearm and does not therefore subsist where the possession thereof is in the hands of a third party. In the third limb to this tenth preliminary plea the accused then pleads the nullity of the Bill of Indictment for failure to indicate whether in this Sixth Count he is being charged as co-accused or as an accomplice to the fact.

138. In relation to preliminary plea 10(a), this Court refers to the considerations here above made in relation to preliminary plea 1(a).

139. The offence contemplated in the Sixth and final Count of the Bill of Indictment is based on Article 55 of the Arms Act which reads as follows:

> Saving any other provisions of the Criminal Code applicable to the keeping, carrying, use, acquisition or possession of firearms, any person who –

(a) at the time of committing a crime against the safety of the government or against the person (other than involuntary homicide or involuntary bodily harm) or of theft or injury to property (other than involuntary injury to property); or
(b) at the time of being arrested for a crime,
has on his person any arm proper or ammunition or any imitation thereof, shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding four years, unless she otherwise proves that he was carrying the firearm or arm proper for a lawful purpose

140. Now, Article 55 of Chapter 480 of the Laws of Malta is clear in prescribing how the offence arises where – in the case of sub-article a) thereof – at the time of the commission of the offence of theft or of a crime against the person (among others), the offender has on his person any arm proper or ammunition or imitation thereof. It follows that the elements of the offence contemplated in Article 55(a) of Chapter 480 of the Laws of Malta are three-fold:

i) There must be an offence -among others – against the person and/or of theft;
ii) The subject-matter thereof must have been in possession of an arms proper or ammunition or imitation thereof;
iii) And that this possession must be had at the time of the commission of the offence.

141. On page 17 of the bill of indictment, the Attorney General recounts how the accused KRISTIANSEN 'had in his effective possession (within the concerned vehicle *Volkswagen Tiguan*), replicas of two particular firearms (*Thompson* submachine gun and AK-47 *Kalashnikov* assault rifle). From such circumstances, it appeared clearly that these items were intended by the perpetrators to provide some form of backup or serve as extra equipment specifically for the purpose of executing the armed robbery that resulted in the double homicide'. On page 18 the Attorney General then mentions that 'from the circumstances and evidence available' it results that the accused 'was responsible of possessing a firearm imitation at the time when he was committing a crime against the person and of theft, that is the concerned homicidal armed robbery in Sliema.'

142. In the narrative to this Sixth Count the Attorney General has included facts that in substance constitute the offence as described in Article 55 of Chapter 480 of the Laws of Malta. This particular issue raised by the accused touches a point of fact which relies on

an analysis of the evidence that must be left to the jurors at trial stage who after hearing the evidence brought before them must decide whether it was true that, at the time of the commission of the offence the accused was in possession of a firearm or whether he was an accomplice to that fact. As has already been explored hereabove in relation to preliminary plea 2(b) and in particular preliminary plea 4(b), the accused was charged with being the principal in the commission of this offence. But even if the evidence points towards him being an accomplice, the provisions of Article 467(2) of the Criminal Code allow for the jury to reach a verdict of guilt as an accomplice to the fact where there is no proof that the accused was not in possession of a firearm during the commission of the offence against Pandolfino and Maciejowksi.

**Consequently, this Court is hereby rejecting this tenth preliminary plea.**

**Further considers:**

**<u>The Eleventh Preliminary Plea – the inadmissibility of those parts of Inspectors' testimony where the Inspectors expressed opinions.</u>**

143. The accused has failed to indicate which parts of the depositions of which inspectors he is referring to when he laments the inadmissibility thereof due to expressions of opinion. This Court will not embark on a fishing expedition to identify which parts of these depositions he was referring to.

144. It is a fundamental rule of Maltese criminal procedure that only expert witnesses are allowed to express opinions and whose opinions may be received as admissible evidence before the Criminal Court. Also, these expert witnesses will only be allowed to express their opinions within the parameters of the task with which they would have been entrusted. Any other evidence based on opinions which do not fall within the remit of their task will be considered as bearing the same evidentiary value as those opinions given by ordinary witnesses. Police officers fall within the category of ordinary witnesses whose opinions cannot be accepted as admissible evidence before the Criminal Court.

145. Moreover, the presiding judge will direct the jurors accordingly and explain those basic rules of evidence including this distinction.

**Consequently, the eleventh preliminary plea is therefore being rejected.**

**Further considers:**

**<u>Twelfth and Final Preliminary Plea – erroneous references to articles at law.</u>**

146. That from the records of the submissions made by the Attorney General dated 10th November 2022, it appears that the Attorney General requested a correction in this regard.

147. That this Court also notes how the Defence to the accused had no objection in this regard.

148. That, the issue raised in this preliminary plea is therefore being treated as having been adequately addressed by the parties.

**Consequently, the Court orders the correction of the accusatory part of the First Count of the bill of indictment such that the reference to article "279(a)" of the Criminal Code should be substituted by "279(b)" whereas the reference to article "280" of the Criminal Code and to article "280(a)(b)" of the Criminal Code are deleted and substituted by "article 280(1)(2)".**

**The case is being adjourned "sine die" until the outcome of any appeal lodged or/and until such time as it is appointed for the trial by jury to take place before this Court, depending if an appeal is lodged therefrom or not.**

**In the meantime the status of the accused shall remain unchanged.**

**Aaron M. Bugeja,**
**Judge**