The Court of Criminal Appeal

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

The Hon. Mr Justice Dr Edwina Grima LL.D.

The Hon. Mr Justice Dr Giovanni Grixti LL.D.

Today the 22nd day of November of the year 2023

Bill of Indictment No : 8/2022

The Republic of Malta

vs.

Kayode Kola Ogunleye

The Court:

1.Having seen the Bill of Indictment bearing number 8 of the year 2022 filed against Kayode Kola Ogunleye, wherein he was charged by the Attorney General in the name of the Republic of Malta:

> **In the First and only Count**, of having, on the seventeenth (17th) day of September of the year two thousand and fourteen (2014) and during the previous days, been

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

2. Having seen the note of preliminary pleas of the accused filed in the registry of the Criminal Court on the 1st of June 2022.

3. Having seen the judgment of the Criminal Court of the 24th of January 2023, wherein the said Court upheld the first preliminary plea brought forward by the accused and declared the accused's statement released on the 17th of September 2014 and any reference made to it, as inadmissible. Consequently, the Court ordered that the statement and any reference made to it be expunged from the acts of the proceedings. Furthermore, the Court rejected the second (2nd), third (3rd) and fourth (4th) preliminary pleas brought forward by the accused.

4. Having seen the appeal application filed by the Attorney General of the 30th of January 2023 wherein the Court was requested to vary the judgment of the First Court by confirming it where the second, third and fourth preliminary pleas put forward by accused were rejected, and revoking it where it upheld the first plea and instead declare the said plea unfounded, thus rejecting all preliminary pleas filed by accused to the bill of indictment.

5. Having seen the appeal application filed by accused Kayode Kolo Ogunleye of the 31st of January 2023 wherein he requested the Court to revoke the judgment delivered by the Criminal Court with respect to the part of the judgment where the third and fourth preliminary pleas were rejected and instead accede to the applicant's third and fourth pleas and confirms the rest of the judgment of the Criminal Court.

6. Having seen the reply filed by the Attorney General of the 17th of February 2023.

7. Having seen all the acts of the case.

Considers:

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

9. It is appellant's firm view, put forward in her one and only grievance, that the pre-trial statements made by the accused were released by him according to the law applicable at the time, wherein he was given the right to legal assistance prior to being interrogated, which right was exercised by him, proceeding to release voluntarily and without any threats or coercion his statement to the investigating officer, and this after having obtained legal advice. Appellant relies, in her appeal, on various judgments delivered by the European Court of Human Rights foremost amongst which that in the case *Farrugia vs Malta* of the 4th of June 2019, and the two-fold test set out in the said decisions, wherein it was decided by the said Court that the fact that a person did not have the right to have a lawyer present during interrogation did not amount to an automatic breach of his right to a fair hearing according to law.

10. In its reasoning the Criminal Court, after making a detailed exposition of jurisprudence, both local and European, regarding the probative value of pre-trial statements where the suspect did not have a lawyer present during his interrogation, thus declared:

> **In the present case, the 'caution' was given to the accused according to the law in vigore at that time. The statement was released on the 17th September, 2014, during a time when the accused did not have a right to be assisted by a lawyer during the interrogation. The accused consulted with his lawyer prior to the interrogation and should he have been given the right to be assisted**

by a lawyer during the interrogation, he might have also exercised that right. Therefore, the accused may still be prejudiced.

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

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

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

11. From this excerpt of the judgment of the Criminal Court it is evident that the Court did not base its judgment on any clear disposition of the law or any alleged violation of accused's rights at law because he was not assisted by a lawyer during interrogation, as argued by accused. It reached its decision on the sole premise that to hold otherwise would result in judicial uncertainty emanating from conflicting judgments on this issue, which would be prejudicial to the course of the administration of justice. Thus, although the Criminal Court, proceeded to declare the said statement as "inadmissible in terms of law", in its reasoning throughout the judgment it repeatedly emphasises that the statement has been released in line with the law prevailing at the time when it was released, accused having been duly cautioned and allowed to consult with a lawyer of his choice prior to the interrogation, although the fact that his lawyer was not present with him during questioning could be prejudicial.

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

of penal law empowering the Court to reject it, but relies solely on the presumption that admitting this piece of evidence would prejudice his right to a fair hearing, having been denied the right to have his lawyer present during interrogation, resulting therefore, in his opinion, to a denial of his right to mount a defence in a situation where incriminating statements were made to the police, alleging that obtaining advice prior to interrogation without having had a right to disclosure of the evidence in hand by the police, made it impossible for him to adequately mount a defence upon questioning. Now the Criminal Court has declared the evidence as inadmissible, as already pointed out, not because of these objections put forward by appellant but solely on the premise, as already pointed out of judicial certainty which demands consistency in the decisions of the courts.

13. Now it is not uncommon that judicial pronouncements evolve over time where there could even result a change in the *ratio decidendi* of the courts. This does not necessarily and automatically lead to any judicial uncertainty. This Court disagrees that judicial uncertainty is still prevalent in the judgments handed out by the ECtHR on this matter. Reference is being made to two recent judgments which, in this Court's opinion, shed a clear light on the correct interpretation of how a statement released by a suspect without legal assistance at interrogation stage should be considered, when assessing the weight to be given to this piece of evidence.

14. "Farrugia vs Malta" (63041/13 decided on the 7th October 2019 and "**Stephens vs Malta"** (35989/14) decided on the 14th January 2020, set out the principle that 'systematic restrictions on the right of access to a lawyer did not lead to an *ab initio* violation of the right to a fair hearing'. These judgments confirmed the position taken by the Grand Chamber in the Beuze (9th November 2018) case that in order to establish whether a statement taken without the assistance of a lawyer is deemed to violate the accused's constitutional right to a fair hearing, one must apply a two stage test, namely whether there are compelling reasons to justify the restriction, together with an examination of the overall fairness of the proceedings.

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

"The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention".

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

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

(a) *whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;*

(b) *the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;*

(c) *whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;*

(d) *the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;*

(e) *where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;*

(f) *in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;*

(g) *the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;*

(h) *whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;*

(i) *the weight of the public interest in the investigation and punishment of the particular offence in issue; and*

(j) *other relevant procedural safeguards afforded by domestic law and practice (ibid., § 150).*

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

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

20. The Court has taken judicial notice of the recent judgments delivered by the Constitutional Court of the 31st of May 2023[1] wherein it was thus decided:

> **10. Il-Qorti tagħraf li kemm fil-ġurisprudenza ta' din il-Qorti u kif ukoll fil-ġurisprudenza tal-Qorti Ewropea, il-fatt waħdu li s-suspettat ma kellux il-possibilità li jkun assistit minn avukat waqt l-interrogazzjoni ma jfissirx awtomatikament li l-użu ta' dik l-istqarrija fil-proċeduri kriminali kontra tiegħu illeda, jew x'aktarx ser jilledi, id-dritt fundamentali tiegħu għal smigħ xieraq. Dan fil-fatt jaċċettah l-attur stess.**
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> **11. Fil-każ odjern m'hemmx dubju li l-liġi kif kienet viġenti fiż-żmien relevanti ma kinitx tippermetti li s-suspettat jiġi assistit minn avukat waqt li jkun qed jiġi interrogat mill-pulizija. Dak iż-żmien però l-liġi kienet tippermetti li s-suspettat jikkonsulta privatament ma' avukat, wiċċ imb'wiċċ jew bit-telefon, għal żmien ta' siegħa, qabel ma jiġi interrogat. Il-Qorti tosserva wkoll li l-attur kellu d-dritt li ma jirrispondix għad-domandi magħmula lilu waqt l-interrogazzjoni. ....**
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> **13. Din il-Qorti reġgħet għarblet sew il-pozizzjoni tagħha fuq din it-tema ta' intempestività tal-ilment kostituzzjonali. Tagħmel riferenza għaż-żewġ sentenzi tal-Qorti Ewropea Għad-Drittijiet tal-Bniedem, Martin Dimech v. Malta tat-2 ta' April 2015 u Tyrone Fenech et v. Malta tal-5 ta' Jannar 2016, dwar ilmenti li jixxiebħu ħafna għal dawk tal-lum dwar it-tehid ta' stqarrija mingħajr konsultazzjoni minn qabel ma' avukat, għalkemm f'dan il-każ il-konsultazzjoni kienet waħda limitata.**
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> **14. F'dawk is-sentenzi l-ilment tas-smigħ xieraq tressaq meta l-proċeduri kriminali kienu għadhom pendenti. Billi l-proċeduri kriminali kienu għadhom mexjin, il-Qorti Ewropea saħqet li kien kmieni biex jiġi deċiż jekk kienx hemm smigħ xieraq jew le. Fi kliem il-Qorti Ewropea: "applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simons v. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant's possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected, pursuant to Article 35 I and 4 of the Convention, for non exhaustion of domestic remedies"**

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

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

16. <u>Naturalment ladarba f'dan il-każ il-proċess kriminali għadu ma ġiex mitmum, għadu mhux magħruf kif u taħt liema ċirkostanzi l-appellant ser jiġi żvantaġġjat. Huwa ċertament barra minn loku illi l-ilment *de quo agitur* jiġu diskussi f'dan l-istadju *in vacuo*. Il-Qorti Kriminali għadha trid tevalwa l-istqarrijiet li saru u jekk saru jkunx hemm vjolazzjoni tad-dritt ta' smigħ xieraq minħabba l-mod kif ittieħdu tenut kont iċ-ċirkostanzi partikolari tal-każ li jvarjaw minn każ għall-ieħor. Hemmx leżjoni tad-dritt għalhekk ser jiddependi mill-mod kif il-Qorti Kriminali tkun trattat l-istqarrijiet u l-piż mogħtija lilhom fl-assjem tal-provi kollha[2].</u> Għal dak li jiswa jista' jkun il-każ li l-Qorti Kriminali fl-aħħar mill-aħħar ma ssibux ħati u għalhekk ħafna mill-preokupazzjonijiet tiegħu dwar l-istqarrijiet jisfaw fix-xejn. Dan biex ma jingħadx ukoll li anke wara s-sentenza tal-Qorti Kriminali hemm il-possibbilità li jsir appell quddiem il-Qorti tal-Appell Kriminali, li għandha s-setgħa li ddawwar l-affarijiet. Jiġi b'hekk, li l-ilment jekk seħħx virtwalment xi ksur ta' drittijiet fundamentali f'dan l-istadju huwa għal kollox prematur.

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

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

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

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

[2] Sottolinjar tal-Qorti

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

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

22. L-għaqal li din il-Qorti tieħu din id-deċiżjoni dwar l-ilqugħ tal-eċċezzjoni tal-intempestività, jinsab imsaħħaħ ukoll minn dak li ġara fl-aħħar sentenza Roderick Castillo v. Avukat Generali et deċiża mill-Qorti Kostituzzjonali fl-20 ta' Lulju 2020. F'din is-sentenza ġara li waqt li kienu mexjin il-proċeduri kostituzzjonali, ġew mitmuma l-proċeduri kriminali u Roderick Castillo gie meħlus mill-akkużi miġjuba kontrih. Minħabba din il-ġrajja, il-Qorti Kostituzzjonali qalet li:
"Bis-sentenza tal-Qorti tal-Appell Kriminali l-appellat ingħata rimedju definittiv u effettiv. B'hekk minkejja dak li ġara fl-istadju meta l-appellat tal-istqarrija, xorta 'on the whole' kellu smigħ xieraq b'dak li ġara flistadju tal-appell"[3]

21. In another recent judgment the Constitutional Court reiterated:

> **10. Il-ġurisprudenza hi ċara li l-fatt li persuna suspettata li kkommettiet reat tagħmel stqarrija mingħajr l-assistenza ta' avukat ma jwassalx bilfors għal ksur fil-jedd fundamentali għal smigħ xieraq fil-proċeduri kriminali li jittieħdu kontra dik il-persuna.[4]**

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

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

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

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

23. Consequently for the above-mentioned reasons the Court declares the grievance put forward by the Attorney General to be well-founded and upholds the same, and orders that the said statement of the 17th of September 2014 be adduced as evidence in the trial by jury with the safeguard that the judge presiding the jury should inform the jurors that the statement was released according to the law prevalent at the time, accused thus being denied the right to have a lawyer present during interrogation.

Considers further,

24. Accused has also filed an appeal from the judgment of the Criminal Court and this with regard to the third and fourth preliminary pleas which attack the probative value of the *proces verbal* exhibited in the acts, and all evidence emanating from the said document, which pleas were rejected. Appellant criticizes the judgment of the Criminal Court where the said Court made ample reference to the judgment of this

Court in the case "*Ir-Repubblika ta' Malta vs George Degiorgio et*" delivered on the 22nd of September 2021 since he insists that his objection to the production of the document bears no similarity to the issue determined in the said judgment.

25. Now, as the Attorney General rightly points out, although in his preliminary pleas accused does not lay out the reason why he is objecting to the validity of this piece of evidence, however, from the submissions made by the Defence it transpires that the probative value of the *proces verbal* is being attacked on the grounds that this was not admitted as evidence according to law, the document being presented only by means of a note filed by the Attorney General in the acts of the proceedings and not confirmed on oath by the person filing the same, such person also not being easily identifiable. Accused alleges that the document found at folio 51 *et.seq.* of the records of the compilation of evidence was never confirmed on oath and the identity of the person exhibiting the document is unknown.

26. The Attorney General rebuts the arguments raised by appellant and insists that the production of the *proces verbal* as evidence in criminal proceedings stands on a different footing to any other document or exhibit since the law itself regulates the manner in which the *proces verbal* is to be inserted in the acts of the compilation of evidence and this in article 569(4) of the Criminal Code, the Attorney General having fully complied with this disposition of the law. Even if the Court were to decide that this document had to be presented on oath by the Deputy Registrar, this does not automatically erase the probative value of this evidence, rendering it inadmissible. Moreover, the *proces verbal* itself exhibited in the acts contains no evidence since the experts appointed in the inquiry had not as yet presented their reports when it was concluded, which reports were presented during the compilation of evidence before the Court of Criminal Inquiry.

27. The Criminal Court decided thus with regard to the third and fourth preliminary pleas:

> **"Even though there is no indication of who the deputy registrar is who presented the process-verbal and there is also no number of the same process-verbal, a brief description was minuted together with the name of**

the Magistrate who had drawn up the proces-verbal. However, there is no doubt that the proces-verbal referred to in the minutes of the 29th October, 2014 is the same one presented in the acts of this case. Furthermore, it needs to be observed that during the sitting dated 29th October, 2014, the accused was duly assisted by his lawyer, the minutes were recorded in open court, and nobody complained about what was being minuted and neither was any irregularity alleged. Moreover, even if the minutes are not detailed and precise, it does not mean that the proces-verbal should be considered as null, inadmissible, and consequently removed from the acts of the proceedings. However, it is then the defence's duty to address the jurors on the probative value and reliability of the same procès-verbal. Having seen the above, this Court is also rejecting this preliminary plea. Moreover, this Court is also rejecting the fourth preliminary plea brought forward by the accused since it concerns the inadmissibility of evidence which emanates from the document referenced in the third preliminary plea."

28. The Court has examined the acts of the compilation of evidence wherein it results that on the 26th of September 2014, the Attorney General by means of a note filed in the Registry of the Court of Magistrates as a Court of Criminal Inquiry exhibited the acts of the inquiry, and this after the Inquiring Magistrate suspended the *in genere* inquiry and compiled the *proces verbal* when she was notified by the Investigating Police that a person had been arraigned in Court to answer to the charges emanating from the facts being investigated. Subsequently, in the sitting of the 29th of October 2014 held before the Court of Criminal Inquiry, the Court's deputy registrar presented the said note with the document thereto attached, the Court then confirming the appointment of the experts nominated in the inquiry as witnesses in the case. From an examination of this document, it results that no expert had as yet presented his/her report before the Magistrate conducting the inquiry.

29. The procedure to be followed by the Inquiring Magistrate upon notification that a person has been arraigned in Court was outlined in a judgment delivered by this Court in the case *Ir-Repubblika ta' Malta vs Jason Calleja* of the 3rd of July 1997 wherein it was stated:

"Il-prattika fost il-Magistrati dejjem kienet - u l-logika legali hekk tirrikjedi - illi meta u appena l-Magistrat Inkwirenti jigi informat mill-pulizija illi persuna kienet ser titressaq jew ga' giet imressqa l-Qorti u akkuzata bid-delitt li l-Magistrati Inkwirenti kien qed jinvestiga, dan isir mhux ghas-semplici formalita', izda biex il-Magistrat Inkwirenti proprju ma jkomplix bl-investigazzjoni tieghu u jghaddi biex jirredigi l-process verbal. Minn dak

il-mument, il-funzjoni tal-magistrat Inkwirenti tigi immedjatament cirkoskritta u kull ma jkun jifdallu jaghmel huwa, mhux li jaghlaq l-inkjesta, izda li jissospendiha u jipprocedi biex jirredigi l-process verbal li fih jindika dak li tirrikjedi l-ligi u xejn aktar. F'cirkostanzi bhal dawn minhabba li persuna partikolari tkun ghaddiet taht il-gurisdizzjoni tal-Qorti b'akkuza specifika, hu impellenti li l-Magistrat Inkwirenti jifhem li l-funzjoni tieghu ta' investigatur ma tistax titkompla u ghalhekk huwa necessarju li l-proces verbal tieghu jkun limitat biss biex jindika xi provi lahaq gabar u ppreserva sa dak il-hin minghajr ma jipprova jistabbilixxi htijiet jew responsabbilitajiet partikolari. Infatti l-formula dejjem kienet li f'dawn ic-cirkostanzi l-Magistrat wara li jindika xi provi lahaq gabar jghaddi ghall-paragrafu konklussiv li dejjem kien jikkonsisti f'dikjarazzjoni li minhabba n-notizja u l-fatt tal-prezentata huwa ssospenda l-inkjesta jew l-access[5], irrediga l-proces verbal li mieghu jghaqqad id-deposizzjonijiet tax-xhieda u d-dokumenti migbura. Imbaghad jiddisponi mill-proces verbal kif trid il-ligi."

30. Now article 646(4) states that the *procès-verbal* may be produced as evidence in terms of article 550 of the Criminal Code, which section of the law in turn provides:

> **(1) The *procès-verbal*, if regularly drawn up, shall be received as evidence in the trial of the cause, and the witnesses, experts or other persons who took part or gave evidence during the Magisterial inquest shall not be produced to give evidence in the inquiry before the Court of Magistrates as court of criminal inquiry during the compilation stage.**

With sub-article 5 of article 500, most importantly, giving probative force to the procès-verbal which **'shall be deemed to have been regularly drawn up if it contains a short summary of the report, information or complaint, a list of the witnesses heard and evidence collected, and a final paragraph containing the findings of the inquiring magistrate.'**

31. Now from the court's examination of this evidence, which is sought to be removed from the acts by appellant, it is evident that all these requisites laid out at law have been adhered to. Moreover, as the Attorney General rightly points out, the Magistrate conducting the inquiry did not receive any evidence or collect any testimonies from witnesses since the inquiry was suspended when appellant was arraigned in court, with the expert evidence and all testimonies being then collected during the

[5] Emphasis made by the Court.

compilation of evidence, such that this Court fails to understand the scope behind appellant's fourth preliminary plea wherein he asks the Court to declare inadmissible all evidence gathered in the inquiry, when no such evidence result from its acts apart from the report by the Investigating Officer and the appointment of the experts.

32. It is clear, therefore, that appellant cannot place on the same footing the filing of the *proces verbal*, an institute regulated by *ad hoc* dispositions of the law in the Criminal Code, and the filing of other documents before the Court, even more so where the law itself expressly exempts the Attorney General from confirming on oath the *proces verbal* sent to her office by the Magistrate leading the inquiry upon its conclusion, or suspension, as requested by the Police. In fact, section 569(4) of the Criminal Code expressly provides that the *proces verbal* shall be returned to the Inquiring Magistrate by means of a note filed in the Court of Magistrates, and, notwithstanding anything contained in this Code, **'the Attorney General shall not be subpoenaed to exhibit such record'.**

33. Thus, the grievance brought forward by appellant is completely unfounded since the *proces verbal* drawn up regularly may be adduced as evidence, which document may be presented in the acts of the compilation of evidence without the necessity of having the Attorney General sub-poenaed to confirm the same on oath. After all the person compiling the *proces verbal* is the Magistrate himself/herself conducting the inquiry so that appellant's argument that the "owner or representative" of the document has to confirm the same on oath is completely unfounded at law. The Court reiterates that Article 646(4) of the Criminal Code clearly and unequivocally establishes that this document may be received as evidence by the Court if regularly drawn up, thus implying that the only objection to the probative force of the *proces verbal* can be entertained when the requisites established by law for its validity as outlined in article 500(5) of the Criminal Code have not been adhered to. Consequently, the grievances put forward by appellant with regard to his third and fourth preliminary pleas are completely unfounded and are being rejected.

Consequently, for the above-mentioned reasons the Court declares the grievance put forward by the Attorney General to be well-founded and upholds the same. Therefore revokes the judgment of the First Court wherein it declared that the statement released by accused is inadmissible according the law, and orders that the said statement of the 17th September 2014 be adduced as evidence in the trial by jury. Rejects the appeal filed by accused Kayode Kola Ogunleye and confirms the judgment of the Criminal Court wherein the third and fourth preliminary pleas were denied. Thus varies the judgment of the Criminal Court of the 24th of January 2023, confirms it wherein it rejected the second, third and fourth preliminary pleas brought forward by accused and revokes it where it upheld the first preliminary plea, and instead rejects the same.

The Chief Justice Mark Chetcuti.

Judge Edwina Grima.

Judge Giovanni Grixti