CIVIL COURT - FIRST HALL

(CONSTITUTIONAL JURISDICTION)

ONOR.MADAME JUSTICE MIRIAM HAYMAN LL.D.

Today Wednesday 29th of November, 2023

Constitutional Reference: 391/2022 MH

Number: 3

The Republic of Malta

Vs

Christoph Doll

The Court,

Having seen the reference referred to it by the Criminal Court which upheld that *"...asked for by the defence in that it believes that legal uncertainty is not a frivolous or vexatious matter and thus an in-depth review of the actual position the accused is facing is warranted".*

This reference was induced by a judgement handed down by the Court of Criminal Appeal dated 22/09/2021 in the names of The Republic of Malta vs Christoph Doll which in its part revoked the decision of the Criminal Court wherein it was at the first instance decided to uphold the preliminary plea of inadmissibility of the statement released by accused Doll on the 15th of March, 2016.

In its judgement the Criminal Court of Appeal noted;-

"Maltese Law did not extend, then, the right of legal assistance to include the right to have a lawyer present together with the accused in the interrogation room. This was a development that came into effect by Act LI of 2016 in November 2016. Therefore, what the accused is demanding from a court of criminal jurisdiction is to apply procedural safeguards to specific procedural scenarios when those same specific procedural safeguards did not apply, since they did not form part of the legislative framework existing at the time. The right to legal existence envisaged by law was observed and exercised according to the letter of the law prevailing when accused was interrogated.

17. *Today in the light of the decision delivered on the 9th of November 2018 by the Grand Chamber of the European Court in the case of Philippe Beuze v. Belgium (71409/10), (which the Criminal Court makes reference to in its judgment) the criteria set out in the decision of Salduz and others have been reversed, although it found that in this case a violation of article 6 of the Convention had occurred. In this decision the European Court re-adopted the criterion of "overall fairness of the proeedings" so as to investigate whether any violation to the right to a fair hearing had occurred, and this after establishing a two-tier test, the first one being the existence or otherwise of ocompelling reasons to deny the right to legal assistance.*

"441. When examining the proceedings as a whole, the following nonexhaustive list of factors should, where appropriate, be taken into account (Ibrahim and Others v. the United Kingdom [GC], § 274; Beuze v. Belgium [GC], § 150; Sitnevskiy and Chaykovskiy v. Ukraine, §§ 78-80):

- ***Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.***
- ***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.***
- ***Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.***
- ***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.***

▪ 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.
▪ In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.
▪ 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.
▪ Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions. ▪ The weight of the public interest in the investigation and punishment of the particular offence in issue.
▪ Other relevant procedural safeguards afforded by domestic law and practice.[1]

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

[1] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

against him, as a breach of his right to a fair hearing thus vitiating an otherwise legally obtained piece of evidence. In a similar case it was decided by the European Court that no violation of article 6 had occurred:

> ***"In Doyle v. Ireland the applicant was allowed to be represented by a lawyer, but his lawyer was not permitted in the police interview as a result of the relevant police practice applied at the time. The Court found no violation of Article 6 §§ 1 and 3 (c) of the Convention. It considered that, notwithstanding the impugned restriction on the applicant's right of access to a lawyer during the police questioning, the overall fairness of the proceedings had not been irretrievably prejudiced. In particular, it laid emphasis on the following facts: the applicant had been able to consult his lawyer; he was not particularly vulnerable; he had been able to challenge the admissibility of evidence and to oppose its use; the circumstances of the case had been extensively considered by the domestic courts; the applicant's conviction had been supported by significant independent evidence; the trial judge had given proper instructions to the jury; sound public-interest considerations had justified prosecuting the applicant; and there had been important procedural safeguards, namely all police interviews had been recorded on video and made available to the judges and the jury and, while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.***
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> ***429. In addition, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (Ibid., § 136).[2]"***

20. *The Court is also of the firm opinion that at this early stage of the proceedings where the trial by jury has yet to be heard by the competent court it cannot be said that the two-tier test established in the Beuze judgment can be conducted. Also, since neither the First Court nor this*

[2] *Ibid*

Court has constitutional powers to address the issue and thus establish whether any violation of fundamental rights has occurred or if this could potentially occur. The Court of Criminal Jurisdiction cannot a priori expunge evidence from the records which at this stage still has its probative weight for the reason put forward by appellee in his preliminary plea. This is because according to the said court dicta the denial of legal assistance during interrogation does not automatically lead to a breach of the accused's right to a fair hearing, when the European Court is now directing domestic courts to investigate whether the proceedings as a whole were fair, an exercise that can be carried out only after all evidence has been brought forward at the trial, accused also having a right to appeal from the verdict and judgment of the Criminal Court establishing his guilt.

21. *Having thus premised, from an overwiew of the evidence gathered during committal proceedings before the Court of Magistrates, it transpires that accused was arrested after a report filed to the police by a certain AB, regarding alleged sexual abuse perpetrated by accused on her daughter AA, who at the time of this alleged abuse was around 11/12 years of age. In his statement subsequently released to the police, accused denies any wrong doing. Accused not only availed himself of his right to legal advice, but also replied to certain questions while he chose to deny or else not to reply to others. This indicates that he understood the caution which was given to him by the interrogating officer and exercised his rights of defence at this early stage. Also there is no evidence in the acts that accused, at 31 years of age, was a vulnerable, inexperienced, or impressionable person. The Police during the course of their investigations proceeded to seize all mobile phones and computers found both in the possession of the minor and the accused for*

further forensic examination by the Court appointed experts which reports are also found in the acts of the proceedings, together with other evidence.

22. *The Court has taken judicial notice of the recent judgments delivered by the Constitutional Court of the 27th January 2021 wherein the said Court has directed the Criminal Court not to bring to the attention and cognisance of the jurors the statement of the accused and this as a precautionary measure, thus avoiding the possibility of placing the proceedings at a risk of being annulled due to a future potential breach of the accused's right to a fair trial, thus invalidating the proceedings*[3]*. It has also taken judicial notice of other judgments, one being more recent*[4]*, where the Constitutional Court was of a contrary opinion*[5]**.** *Thus this Court having an overall picture, from the acts of the compilation of evidence, of all the evidence which the Prosecution will put forward in the trial by jury, and without delving into the merits of the case, since it does not have the power to do so at this stage of the proceedings, is of the firm opinion that each and every case has to be decided on its own merits and this in order to establish whether there is a risk that the accused may suffer a breach of his fundamental human rights if the statement released by him without having a lawyer present during interrogation is vitiated by a defect which cannot otherwise be remedied, and this when taking into consideration "the overall fairness of the proceedings". The Court observes that the Constitutional Court itself has repeatedly affirmed that at this early stage of the proceedings it cannot be*

[3] Clive Dimech vs Avukat Generali, The Police vs Alexander Hickey, Morgan Onuorah vs l-Avukat ta'l-Istat

[4] Micallef Briegel vs Avukat Ġenerali Const. Court 30/06/2021

[5] Constitutional Court: Ir-Repubblika ta' Malta vs Martino Aiello – 27 ta' Marzu 2020

determined whether accused person has suffered a breach of his fundamental human rights or whether potentially this can occur, and this before the proceedings have been terminated, (although in some cases it has directed the Criminal Court not to adduce the statement as a piece of evidence at the trial and this as a precaution). However, this Court, in its criminal competence cannot expunge from the acts evidence which carries probative value and which has been legally obtained.

23. *As was decided by the Constitutional Court itself:*

24.

> ***"Hu fuq l-Istat l-obbligu li jagħti prova li fil-proċess kriminali kien hemm overall fairness. F'dan il-każ m'huwiex possibbli li jsir għal kollox l-eżerċizzju li ssemma fil-każ ta' Beuze għaliex s'issa l-ġuri għadu ma sarx[6].***
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> ***... dwar dan il-każ għad irid isir il-ġuri. Għalhekk huma l-ġurati li ser jiddeċiedu jekk l-appellant huwiex ħati tal-akkużi li hemm kontrih. Madankollu, ser ikun l-imħallef li fl-indirizz li jrid jagħmel lill-ġurati ser jiġbor ix-xiehda tax-xhieda u l-provi li jkunu marbutin magħhom, kif ukoll ifisser ix-xorta u l-elementi tar-reati rilevanti għall-każ. Hu l-imħallef li jagħmel ".... kull osservazzjoni oħra li tiswa biex trieġi u turi lill-ġuri kif għandu jaqdi sewwa d-dmirijiet tiegħu" (Artikolu 465 tal-Kap. 9)[7].***

25. *In the light of the above considerations, and since the defence is basing its objection on the inadmissibility of the defendant's statement not on any evidentiary rule which attacks the probative value of such evidence, since the pre-trial statement complied with the criminal law in force at the time, but on the alleged breach of his right to a fair hearing under article 6 of the European Convention were that incriminating statement*

[6] Kost: Ir-Repubblika ta' Malta vs Martino Aiello – 27 ta' Marzu 2020

[7] *Ibid*

to be used in court of justice against him, the Court cannot agree with the ruling of the First Court wherein it declared such pre-trial statement inadmissible as evidence at this stage of the proceedings, since it is only after all evidence, both in favour and against the accused, has been heard that it would be possible to conduct the two-tier test as established by the European Court of Human Rights and this in order to determine whether the overall fairness of the proceedings has been compromised if accused's statement were to be used against him as evidence. It will be the duty of the presiding judge during the trial by jury to properly address the jurors as to the probative value of the statement, if during the jury it results that this was not released according to law or if it results that the overall fairness of the proceedings has been compromised by the declarations made by accused in his pretrial statement in terms of the criteria established in the Beuze judgment cited above. ***Above all accused will always have a right of appeal from the verdict and judgment of the Criminal Court in the event of a finding of guilt in his regard. This right eradicates any risk which the Criminal Court has perceived as existing during the trial wherein the accused may suffer an alleged breach of his rights. Although it is true that the juror's verdict is not a motivated one, such that it would not be possible to determine whether accused's statement has had a bearing on the verdict of guilt, however the jurors will be guided by the presiding judge who will direct them as to the probative value of the statement should the said judge deem that such evidence may compromise the overall fairness of the proceedings. Not only, but a review of the verdict will also carried out by this Court should accused decide to exercise his constitutional right of appeal from an eventual finding of guilt in his regard, in which case the two-tier exercise indicated in the Beuze judgment can be carried out by the Court in its appellate jurisdiction.***

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 15th April 2016 be adduced as evidence in the trial by jury."

Following the afore cited judgement, on his part Doll as applicant, addressed the Criminal Court with the Constitutional and Conventional grievance on three premises which ultimately led to this reference;

-That whatever the outcome of this disquisition, concerning the use of the statement, the use or otherwise of the statement remains the parties' prerogative,

-that although local case-law on the matter of the use and admissibility of the statement, abounds, inconsistency in the decisions both of the Crimimal Courts and the Constitutional Courts reign supreme thus putting the applicant in no position to adequately prepare for his defence;

- reference was also made to a decision handed down by the First Court of The Civil Court in its Constitutional Jurisdiction in the names of Repubblika ta' Malta vs Rosario Militello wherein it answered a similar reference by stating that the use of the statement, released in situation similar to those of accused Doll, could lead to a breach of fundamental right to a fair trial and its use in the criminal trial was not recommended.

Seen the note of submissions entered by both parties.

Considers

First and foremost it is incumbent on this Court to once again remark on the manner in which this reference has been drawn up. This was well elucidated in the case pronounced by the Constitutional court in the names **Il-Pulizija (L-Ispettur George Cremona) vs Pauline Vella[8]:-**

"Konsiderazzjonijiet tal-Qorti

13. *Ghal darb'ohra din il-Qorti ssib ruhha f'pozizzjoni li jkollha tir-rimarka dwar l-mod xejn preciz, u b'nuqqas ta' osservanza tar-rekwizit formali bazici stabbiliti mir-regolamenti, ta' kif qeghdin isiru r-riferenzi ta' kwistjonijiet kostituzzjonali li jigu sollevati fil-kors ta' proceduri li ma jkunux quddiem il-Prim' Awla tal-Qorti Civili. Il-Qrati, inkluza din il-Qorti, gja` rrimarkaw dwar dan f'aktar minn okkazzjoni wahda[9], [10] izda jidher li l-Qrati riferenti jissoktaw filli jippekkaw serjament f'din il-materja bhal fil-kaz tar-riferenza odjerna. Wara kollox hemm regolamenti precizi li jistabbilixxu r-rekwiziti minimi ta' kull riferenza ta' kwistjoni kostituzzjonali u dawn ir-rekwiziti, li ma huma xejn esigenti, ghandhom jigu dejjem segwiti. Hekk, issubinciz (1) tar-regola 5 tar-Regoli dwar il-Prattika u lProcedura tal-Qrati u l-Bon Ordni[11] jipprovdi kif gej:*

"Fil-kazijiet imsemmija fl-artikolu 46(3) tal-Kostituzzjoni ta' Malta, f'l-artikolu 4(3) tal-Att dwar il-Konvenzjoni Ewropea u fl-artikolu 95(2)(b) tal-Kostituzzjoni ta' Malta, l-ordni li bih kwistjoni tigi mibghuta ghandu jkun fih b'mod konciz u car il-fatti u c-cirkostanzi li minnhom il-kwistjoni tinholoq, it-termini ta' dik il-kwistjoni, u jindika liema hi d-dispozizzjoni jew liema huma d-dispozizzjonijiet tal-Kostituzzjoni ta' Malta jew tal-Konvenzjoni Ewropea ghall-Protezzjoni tadDrittijiet tal-Bniedem u tal-Libertajiet Fondamentali, kif ikun il-kaz, li jkunu allegatament gew miksura."

[8] Qorti Kost. Appell Ċiv nru. 42/2007/1 deċiża 30/9/2011
[9] Ara, fost ohrajn, Il-Pulizija v Belin sive Benigno Saliba, Qorti Kostituzzjonali,
[10] /04/1991; Il-Pulizija v Lawrence Cuschieri, Qorti Kostituzzjonali, 8/01/1992; Il-Pulizija v Longinu Aquilina, Qorti Kostituzzjonali, 23/01/1992
[11] AL 279/2008

14. *Filwaqt li l-fatti li taw lok ghar-riferenza huma delineati adegwatament fl-ordni ta' riferenza, it-termini tal-kwistjoni riferita lill-Prim' Awla tal-Qorti Civili huma inezistenti u l-ordni ma fih ebda indikazzjoni tad-dispozizzjoni jew dispozizzonijiet tal-Kostituzzjoni ta' Malta jew tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet talBniedem u tal-Libertajiet Fondamentali li allegatament gew miksura. Ghalhekk l-ewwel Qorti, in vista tannuqqasijiet serji li fih l-ordni tar-riferenza, kienet tkun pjenament gustifikata li tibghat lura l-ordni ta' riferenza lillQorti riferenti sabiex tintegraha bir-rekwiziti skont kif previst fir-regola 5(1) tar-Regoli dwar il-Prattika u lProcedura tal-Qrati u l-Bon Ordni.*

15. *B'danakollu**,** f'dan l-istadju inoltrat tal-proceduri, filwaqt li ghal darb'ohra tishaq fuq in-necessita` li l-Qorti riferenti tottempera ruhha ma' dak dispost fir-regoli fuq imsemmija, din il-Qorti ma hix ser thalli n-nuqqasijiet rilevati fl-ordni ta' riferenza jxekkluha milli tiddetermina lmertu tal-kwistjoni li temergi mill-fatti delineati sakemm ilQorti tkun tista' xort'ohra tidentifika t-termini tal-kwistjoni riferita, u dan sabiex jigi evitat kull dewmien bla bzonn fiddeterminazzjoni ta' kwistjonijiet li jinvolvu d-drittijiet fondamentali tal-bniedem."*

Ukoll in tematika sentenza oħra ta' l-istess Qorti fl-ismijiet ***Police vs Nelson Arias***[12]

"This Court's assessment

18. *It is with considerable consternation that this Court notes once again that, as correctly pointed out by the Attorney General in his reply to the reference before the first Court, the referring Court in this case failed to comply with the requirements of rule 5(1) of the Court Practice and Procedure and Good Order Rules*[13] *when drawing up the reference to the First Hall Civil Court in its constitutional competence. The reference made is totally vague, unclear as to the nature of the constitutional questions to which the referring Court required answers, completely deficient in the nature of the actual or potential violations of the Constitution and/or of the Convention, with not the slightest indication of the article or articles, to say nothing of the relevant paragraphs, of the Constitution or of the Convention which are alleged to have been or are likely to be breached. This Court repeats*

[12] 67/2011/1 deċiża 28/9/2012
[13] L.N. 279/2008

that this is unacceptable as it has pointed out on several occasions[14] *but apparently to no avail."*

Aktar riċenti din il-Qorti kif diversament preseduta kellha dan xi tgħid fir-rigward fid-deċiżjoni fl-ismijiet ***Il-Puliżija (Spettur Oriana Spiteri) vs Miloud ELforjani***[15]***-:***

"Konsiderazzjonijiet

15. *L-**artikolu 46(2) tal-Kostituzzjoni ta' Malta** u l-**artikolu 4(2) tal-Att dwar il-Konvenzjoni Ewropea (Kap 319 tal-Liġijiet ta' Malta)** jgħidu li l-Prim'Awla tal-Qorti Ċivili għandu jkollha ġurisdizzjoni oriġinali li tisma' u tiddeċiedi kull talba magħmula minn xi persuna dwar ksur jew potenzjali ksur ta' xi wieħed jew aktar mill-jeddijiet li jissemmew: (i) fl-**artikoli 33** sa **45** tal-**Kostituzzjoni ta' Malta**; (ii) fl-**artikoli 2** sa **18** tal-**Konvenzjoni għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali**; (iii) fl**artikoli 1** sa **3 tal-Ewwel Protokoll tal-Konvenzjoni**; (iv) fl-**artikoli 1** sa **4 tar-Raba' Protokoll tal-Konvenzjoni**; (v) fl-**artikoli 1** u **2 tas-Sitt Protokoll tal-Konvenzjoni**; u (vi) fl-**artikoli 1** sa **5 tas-Seba' Protokoll tal-Konvenzjoni**;*

16. *Mill-banda l-oħra, l-**artikolu 46(3) tal-Kostituzzjoni ta' Malta** u l-**artikolu 4(3) tal-Kap 319 tal-Liġijiet ta' Malta** jgħidu li jekk tqum kwistjoni dwar wieħed mill-jeddijiet fuq imsemmija quddiem qorti li ma tkunx il-Prim'Awla tal-Qorti Ċivili, dik il-qorti għandha tibgħat il-kwistjoni quddiem il-Prim' Awla tal-Qorti Ċivili kemm-il darba fil-fehma tagħha ttqanqil ta' dik il-kwistjoni ma tkunx waħda sempliċement frivola jew vessatorja. Bil-kelma 'frivola' wieħed jifhem li t-talba għar-referenza kostituzzjonali tkun żejda, bla ħtieġa, fiergħa jew vojta; filwaqt li bil-kelma 'vessatorja' wieħed jifhem li t-*

[14] See among others **Pulizija v. Belin sive Benigno Saliba**, 10/4/1991; **Pulizija v. Lawrence Cuschieri**, 8/1/1992; **Pulizija v. Longinu Aquilina**, 23/1/1992; **Pulizija v. Pauline Vella**, 30/9/2011.
[15] 115/2022 deċiża 16 ta' Mejju, 2022.

talba għar-referenza kostituzzjonali tkun saret biex iddejjaq jew tinki lil dak li jkun;

17. *Minn kliem il-liġi hija qorti biss li tista' tibgħat kwistjoni quddiem il-Prim'Awla tal-Qorti Ċivili.*

Din għalhekk teskludi bordijiet bħall-Bord ta' Arbitraġġ Dwar Artijiet (ara ***Kummissarju tal-Artijiet v. Ignatius Licari nomine*** *deċiża mill-Qorti Kostituzzjonali fit-30 ta' Ġunju, 2004), kif ukoll tribunali bħat-Tribunal Għal Talbiet Żgħar (ara* ***Anthony Grech v. Claire Calleja et*** *deċiża mill-Qorti Kostituzzjonali fid-29 ta' Frar, 2008);*

18. *Issa kif ingħad fis-sentenza* ***Il-Pulizija v. Lawrence Attard*** *deċiża mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) nhar l-1 ta' Lulju, 2004, hemm differenza mhux traskurabbli bejn is-setgħat ta' din il-qorti meta tkun imsejħa tiddeċiedi kwistjoni kostituzzjonali jew konvenzjonali direttament fuq talba ta' parti u meta, bħal f'dan il-każ, tkun saritilha referenza minn qorti oħra dwar kwistjoni kostituzzjonali jew konvenzjonali li tkun tqanqlet quddiemha. Huwa meqjus li ż-żewġ għamliet ta' proċeduri huma paralleli għal xulxin (ara* ***Anthony Coreschi v. Kummissarju tal-Pulizija et*** *deċiża mill-Qorti Kostituzzjonali fil-21 ta' Lulju, 1989) u għalhekk dan ifisser li dawn m'humiex l-istess għaliex dak li huwa parallel għal xi ħaġa ma jsir qatt biċċa minnha;*

19. *Illi l-akbar differenza hija fil-fatt li l-proċedura mibdija b'kawża ad hoc hija dritt u għażla tal-persuna li tkun qiegħda tilmenta minn ksur ta' xi dritt fondamentali tagħha; filwaqt li rreferenza mhijiex tal-partijiet li qed jissieltu fil-kawża iżda tal-qorti riferenti biss (ara inter alia* ***Glenn Bedingfield v. Kummissarju tal-Pulizija et*** *deċiża mill-Qorti Kostituzzjonali fil-31 ta' Lulju 2000 u* ***Nazzareno Galea et v.***

Giuseppe Briffa et *deċiża mill-Qorti Kostituzzjonali fit-30 ta' Novembru, 2001). Kemm hu hekk, intqal li l-proċedura marbuta mal-ordni ta' referenza hija waħda ta' ordni pubbliku, b'dana li qorti għandha tiddeċiedi hi mill-ewwel jekk il-kwistjoni mqanqla quddiemha tixraqx li tiġi mibgħuta lill-Prim'Awla tal-Qorti Ċivili u mhux toqgħod tistenna li xi parti tiftaħ kawża kostituzzjonali għal rasha dwar dik il-kwistjoni (ara* ***Avukat Dr. Lawrence Pullicino v. Kap Kmandant tal-Forzi Armati et*** *deċiża mill-Qorti Kostituzzjonali fit-12 ta' April, 1989);*

20. *Naturalment dan ma jfissirx li kull meta tinqala' kwistjoni li tista' tmiss ma' jedd fundamentali, il-qorti għandha tagħlaq għajnejha u taqbad u tibgħat kwistjoni lill-Prim'Awla tal-Qorti Ċivili bl-addoċċ jew kif ġieb u laħaq. Jekk il-kwistjoni tkun dwar xi ħaġa li taqa' fl-obbligi ta' dik il-qorti, ir-referenza m'għandhiex issir. Hekk pereżempju Qorti tal-Maġistrati m'għandhiex tibgħat referenza kostituzzjonali jekk f'talba dwar ħelsien mill-arrest titqajjem mill-akkużat kwistjoni dwar il-jedd tiegħu mill-ħarsien ta' arrest arbitrarju - dan għaliex huwa xogħol il-Qorti tal-Maġistrati li tiddeċiedi kwistjonijiet bħal dawn fid-dawl mhux biss tad-dispożizzjonijiet tal-* ***Kodiċi Kriminali*** *iżda anke fid-dawl tal-jeddijiet li jinsabu fil-* ***Kostituzzjoni ta' Malta*** *u l-* ***Kap 319 tal-Liġijiet ta' Malta****. Wara kollox il-Qorti tal-Maġistrati mhijiex marbuta li timxi biss mal-liġijiet kriminali iżda hija marbuta li timxi mal-liġijiet kollha ta' Malta, magħdud magħhom għalhekk il-liġijiet li joħorġu mill-* ***Kostituzzjoni ta' Malta*** *u mill-* ***Kap 319 tal-Liġijiet ta' Malta****;*

21. *Eżempju ieħor huwa li l-Qorti tal-Appell m'għandhiex għalfejn tibgħat referenza kostituzzjonali jekk ikollha aggravju quddiemha dwar it-tħassir tas-sentenza appellata minħabba li din tkun ingħatat mingħajr ma semgħet x'kellha xi tgħid waħda mill-partijiet - dan għaliex huwa xogħol il-Qorti tal-Appell li tiddeċiedi kwistjonijiet dwar jekk is-sentenza appellata ngħatatx b'ħarsien tal-prinċipji tal-ġustizzja naturali. Hekk ukoll, il-Qorti tal-Maġistrati li tkun qed tisma' proċeduri ċivili ta' libell m'għandhiex għalfejn tagħmel referenza kostituzzjonali jekk il-konvenut iġib bħala difiża f'dik il-kawża l-fatt li huwa kien qiegħed jesprimi l-opinjoni ħielsa tiegħu - dan għaliex huwa mistenni li f'kawżi ta' libell ilQorti tal-Maġistrati twieżen bejn il-jedd ta' reputazzjoni tal-parti li tkun qiegħda tallega li kienet vittma ta' libell u l-jedd tal-parti l-oħra li tiddefendi ruħha billi tgħid li hija kienet qiegħda tesprimi l-ħsibijiet u l-fehmiet tagħha fil-pubbliku;*

22. *Bl-istess mod, qorti għandha toqgħod kemm jista' jkun lura milli tagħmel referenza kostituzzjonali jekk quddiemha titqajjem kwistjoni ta' xejra kostituzzjonali jew konvenzjonali li bħalha tkun tqajmet qabel, u fejn dik il-kwistjoni tkun diġà tqieset mill-ogħla qorti kompetenti u tat il-provvedimenti tagħha dwarha (ara* ***J.G. Systems Ltd. v. Kummissarju tat-Taxxa fuq il-Valur Miżjud*** *deċiża mill-Qorti tal-Appell fis-6 ta' Ottubru, 2010 u* ***Il-Pulizija v. Jean Piere Borġ*** *deċiża mill-Prim'Awla tal-Qorti (Sede Kostituzzjonali) fil-25 ta' Ottubru, 2016). Tassew ma jidhirx li jkun hemm għalfejn li qorti oħra għandha tirreferi l-każ mill-ġdid lill-Prim'Awla tal-Qorti Ċivili kull darba li tqum quddiemha kwistjoni bħal dik, sakemm il-kwistjoni ma tkunx tqanqal xi punt ġdid. Ikun xieraq li l-qorti li quddiemha titqanqal il-*

kwistjoni tieħu qies tad-direzzjoni murija mill-qorti ta' kompetenza kostituzzjonali dwar kwistjoni bħal dik u timxi ma' dik id-direzzjoni indikata fil-każ li jkollha quddiemha. B'daqshekk, ma jfissirx li dik il-qorti tkun qiegħda żżomm għaliha kompetenza li mhijiex tagħha, iżda biss li tkun qiegħda tapplika u tħaddem il-liġi fl-għarfien ta' punti li jkunu ġew stabbiliti mill-qorti kompetenti (ara ***Il-Pulizija v. Pawlu Grech*** *deċiża mill-Prim'Awla tal-Qorti (Sede Kostituzzjonali) fit-3 ta' Novembru, 2011);*

23. *Sfiq ma' dan, huwa importanti li tingħibed l-attenzjoni wkoll li referenzi kostituzzjonali mhumiex maħsuba biex isiru għall-għanijiet akkademiċi iżda biex jiġu solvuti intoppi li jinqalgħu f'kawżi ordinarji. Wieħed ma jridx jinsa hawnhekk li jekk issir ir-referenza, ilproċeduri quddiem il-qorti riferenti għandhom jieqfu skont l-****artikolu 46 tal-Kostituzzjoni ta' Malta*** *u l-****artikolu 4 tal-Kap 319 tal-Liġijiet ta' Malta*** *sakemm ikun hemm tweġiba finali għal dik ir-referenza mill-qorti (ara inter alia,* ***Onorevoli Imħallef Dottor Anton Depasquale v. Avukat Ġenerali*** *deċiża mill-Qorti Kostituzzjonali fl-1 ta' Ġunju, 2001 u* ***Avukat Ġenerali et v. Nicolai (Nicolai Christian) Magrin et*** *deċiża mill-Qorti tal-Appell fl-24 ta' Novembru, 2017);*

24. *Minħabba f'hekk, il-qorti riferenti għandha tkun għaqlija u prudenti biżżejjed meta tiġi biex tiddeċiedi jekk għandhiex tibgħat kwistjoni lill-Prim'Awla tal-Qorti Ċivili jew le. Il-qorti riferenti trid tkun ċerta li dik ir-referenza hija tabilħaqq meħtieġa sabiex hija tkun tista' tkompli twettaq ħidmietha. Referenza kostituzzjonali/konvenzjonali li ma tkunx ħa tħalli lfrott fl-eżitu tal-proċeduri quddiem il-qorti riferenti*

m'għandhiex issir mill-ewwel (ara ***Director of Public Registry v. Ahmad Aziz*** *deċiża mill-Qorti tal-Appell fis-26 ta' Jannar, 2022);*

25. *Biex wieħed forsi jagħti eżempju, mhuwiex indikattiv li ssir referenza kostituzzjonali biex il-Prim'Awla tal-Qorti Ċivili twieġeb biss jekk fil-proċeduri quddiem il-qorti riferenti qiegħedx ikun hemm dewmien irraġonevoli jew le. Referenza bħal din mhijiex utli għall-proċeduri quddiem il-qorti riferenti, anzi l-qorti riferenti tkun qiegħda ttawwal iżjed dawk ilproċeduri għalxejn b'xejn jekk tagħmel referenza bħal dik. Wara kollox, il-qorti riferenti m'għandhiex bżonn il-gwida talqrati kostituzzjonali biex tkun taf jekk hemmx dewmien bla bżonn fil-proċeduri; dan tista' tarah waħidha billi tqalleb il-karti tal-atti;*

26. *Dan l-eżerċizzju ta' rilevanza u ta' ħtieġa huwa importanti li jsir mill-qorti riferenti għaliex jekk il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali jsibu li dik ir-referenza kienet irrilevanti għall-għanijiet tal-kawża li tkun qiegħda tinstema' mill-qorti riferenti, l-ordni ta' referenza tista' tintbagħat lura mingħajr tweġiba (ara inter alia* ***Karkanja Limited v. Carmel Galea et*** *deċiża mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fit-30 ta' Mejju, 2019);*

27. *lli kif tajjeb ġie mpoġġi mill-Qorti Kostituzzjonali fis-sentenza* ***Edgar Blundell et v. Direttur tas-Sigurtà Soċjali*** *deċiża fl-20 ta' Marzu, 2000, qorti b'setgħat kostituzzjonali hija,*

> *«prekluża milli tikkonsidra l-kwistjoni dwar ksur ta' xi waħda minn dawk id-disposizzjonijiet lilha riferita, jekk din ma tkunx rilevanti u tkun għal kollox estraneja għallmertu tal-proċeduri li fihom il-kwistjoni tkun ġiet imqanqla, u li allura deċiżjoni dwarha ma tkunx tenħtieġ biex il-qorti li tkun għamlet irreferenza tkun tista' tiddisponi mill-mertu»;*

28. *Dan iġibna għall-punt ieħor dwar kemm huwa importanti l-mod ta' kif għandha ssir l-ordni ta' referenza, jekk kemm-il darba il-qorti riferenti tagħżel li tagħmilha. Ma ninsewx li billi l-kwistjoni tkun inqalgħet quddiem qorti li mhix il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali, u billi l-proċediment ma jkunx tressaq quddiem din il-qorti direttament minn min jallega l-ksur tal-jedd fondamentali partikolari, din il-qorti trid tqis fedelment il-kwistjoni fil-mod u t-termini mgħoddijin lilha mill-qorti li tkun għamlet ir-referenza. Jekk il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali tonqos li tagħmel dan jew titbiegħed milli tqis dak lilha riferut, hija tkun qiegħda tiddeċiedi extra petita (ara* ***Il-Pulizija v. John Aquilina et*** *maqtugħa mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fit-23 ta' Lulju, 2008 u* ***The Police v. Nelson Arias*** *deċiża mill-Qorti Kostituzzjonali fit-28 ta' Settembru, 2012);*

29. *Xogħol il-qorti li tirċievi r-referenza huwa illi twieġeb għall-mistoqsijiet magħmula lilha mill-qorti riferenti. Tassew mhuwiex mogħti lill-Prim'Awla tal-Qorti Ċivili jew lill-Qorti Kostituzzjonali l-jedd li tiddeċiedi hi l-mertu tal-kawża li minnha tnisslet ir-referenza kostituzzjonali jew li toqgħod tagħti xi rimedju fl-eventwalità li ssib xi vjolazzjonijiet tal-jeddijiet fundamentali tal-bniedem (ara* ***Il-Pulizija v. Vincent Etienne Vella*** *deċiża millQorti Kostituzzjonali fis-6 ta' Ottubru, 2020 u* ***The Police v. Austine Eze et*** *deċiża millQorti Kostituzzjonali fil-25 ta' Ottubru, 2013). Għalkemm irid jingħad ukoll li l-aħħar ġurisprudenza tgħid ukoll li ma hemm xejn xi jżomm lill-qorti b'setgħat kostituzzjonali li tagħmel kull osservazzjoni oħra li jidhrilha rilevanti għal risposta sħiħa għad-domanda magħmula anke billi*

tqajjem hi kwistjonijiet ex officio (ara ***Il-Pulizija (Spettur Kevin Pulis) v. Robert Agius*** *deċiża mill-Qorti Kostituzzjonali fid-29 ta' Marzu, 2019 u* ***The Police (Inspector Keith Arnaud) v. Kristjan Zekic also kwown as Adhamjon Niyazov*** *deċiża mill-Qorti Kostituzzjonali fil-31 ta' Mejju, 2019);*

30. *Illi l-mod ta' kif għandha ssir ordni ta' referenza tinsab imfissra fl-***artikolu 5** *tar-***Regoli dwar il-Prattika u l-Proċedura tal-Qrati u l-Bon-Ordni (Leġislazzjoni Sussidjarja 12.09)**. *Dan l-artikolu jagħmilha ċara li l-ordni ta' referenza għandu jkun fiha b'mod konċiż u ċar:*

i. ***il-fatti u ċ-ċirkostanzi li minnhom il-kwistjoni tinħoloq;***
ii. ***it-termini ta' dik il-kwistjoni; u***
iii. ***id-dispożizzjoni jew dispożizzjonijiet tal-Kostituzzjoni ta' Malta jew talKonvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u talLibertajiet Fondamentali li jkunu involuti (ara f'dan is-sens Il-Pulizija v. Dr. Melvyn Mifsud deċiża mill-Qorti Kostituzzjonali fis-26 ta' April, 2013 u The Police v. Nelson Arias deċiża mill-Qorti Kostituzzjonali fit-28 ta' Settembru, 2012); (enfasi ta' din il-Qorti).***

31. *Huwa meħtieġ u mistenni li l-qorti riferenti timxi mal-***artikolu 5** *tar-***Regoli dwar il-Prattika u l-Proċedura tal-Qrati u l-Bon-Ordni (Leġislazzjoni Sussidjarja 12.09)** *sabiex il-qorti b'setgħat kostituzzjonali jkollha parametri ċari u preċiżi li fuqhom tagħmel l-istħarriġ tagħha tal-kwistjoni mqanqla u mibgħuta lilha mill-qorti riferenti (ara* ***Il-Pulizija v. Anthony Seychell*** *deċiża mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali fil-5 ta' Mejju, 2005);*

32. *Illi din il-qorti ħasset il-bżonn li tagħmel dawn il-konsiderazzjonijiet kollha dwar dan issuġġett għaliex jidhrilha li l-ordni ta' referenza mibgħuta lilha mill-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali setgħet u kellha ssir ħafna aħjar mill-mod ta' kif saret;*

33. *Ibda biex, huwa ċar li l-ordni ta' referenza ma saritx skont kif jitlob l-**artikolu 5(1)** tar**Regoli dwar il-Prattika u l-Proċedura tal-Qrati u l-Bon-Ordni**. Biżżejjed jingħad li flordni ta' referenza la jissemmew l-artikoli tal-**Kostituzzjoni ta' Malta** u/jew tal**Konvenzjoni Ewropea** li għandhom jiġu mistħarrġa minn din il-qorti u lanqas ma jissemmew il-mistoqsijiet li għandhom jiġu mwieġba minn din il-qorti. Daqskemm hemm bżonn li f'rikors maħluf ir-rikorrent iniżżel b'mod ċar u li jinftiehmu t-talbiet li huwa jrid li qorti tiddeċiedi; daqstant ieħor hemm bżonn li l-qorti riferenti tniżżel b'mod ċar u li jinftiehem il-mistoqsijiet fuq l-artikoli tal-**Kostituzzjoni ta' Malta** u/jew tal-**Konvenzjoni Ewropea** li hija tixtieq tweġiba dwarhom min-naħa tal-Prim'Awla tal-Qorti Ċivili jew talQorti Kostituzzjonali;"*

The above premised, the Court finds that lacking a precise question addressed for its attention it can deduce from all submissions and the relative Criminal Court's decree[16], that the reference being asked is whether the statement released by Christoph Doll on the 15th, of March 2016 breaches article 6 of the Convention and article 39 of the Constitution in so far that there is an inconsistency of its admissablity

[16] Wherein it declared that the issue raised was not frivilous orvexatious.

in local case law putting the accused in a prejudiced position concerning his line of defence and this in light also to that decided by the Court of Criminal Appeal.

Before tackling the matter in issue, this Court must as rightly pointed out by the State Advovate comment on an issue raised by Doll in his application that led to this reference, wherein it was stated that the use of the statement pertains to the parties and not to the Criminal Court. Without any doubt it is the Attorney General as the State Prosecutor who usually resorts to this evidence, being the *a tempo vergine* declaration released by the accused at the pre-trial proceedings. The judgement of the Criminal Court of Appeal, did not, as seems to be indicated by Doll, purport to order the use of the statement by the Prosecution, but only considered that it was premature to decide how its admissibilty impacted on the accused's rights. How and whether the parties resort to this evidence in the trial by jury is left to their total discretion.

Further considers.

The main complaint of Doll centres around the inconsistency of local judgements concerning the admissibility of the statement released without the assistance of a lawyer's presence during the whole police interrogation.

First and foremost the Court refers to the remarks made by the Court of Criminal Appeal and echoed by the State Advocate concerning the review of the proceedings to the determine the raised plea.

The Criminal Court of Appeal as cited premised;-"*Having thus premised, from an overwiew of the evidence gathered during committal proceedings before the Court of Magistrates, it transpires that accused was arrested after a report filed to the police by a certain AB, regarding alleged sexual abuse perpetrated by accused on her daughter AA, who at the time of this alleged abuse was around 11/12 years of age. In his statement subsequently released to the police, accused denies any wrong doing. Accused not only availed himself of his right to legal advice, but also replied to certain questions while he chose to deny or else not to reply to others. This indicates that he understood the caution which was given to him by the interrogating officer and exercised his rights of defence at this early stage. Also there is no evidence in the acts that accused, at 31 years of age, was a vulnerable, inexperienced, or impressionable person. The Police during the course of their investigations proceeded to seize all mobile phones and computers found both in the possession of the minor and the accused for further forensic examination by the Court appointed experts which reports are also found in the acts of the proceedings, together with other evidence."*

This as said were duly noted by the State Advocate and the Attorney General in their combined note of submissions.

Thus, already at first glance the Criminal Court of Appeal was duly following the directions of the **Beuze** Judgement as outlined by the

European Court Of Fundamental Human Rights to consider the manner in which the statement was taken and its impact, **in the future**, of the proceedings. Albeit the Court was not examining any breach addressed to this Court.

This Court also agrees with that outlined by respondents that the very fact that use is made of the statement released by Doll under the regime applicable at that time does not of itself contravene or violate article 6 of the Convention as also of article 39 of the Constitution. Already in the much referred to notes issued by The European Court aforementioned **A Guide on Article 6 of the European Convention on Human Rights; Right to a fair trial (Criminal Limb)**[17] it is stated that:-

"A. The fundamental principles

1. *The key principle governing the application of Article 6 is fairness (Gregačević v. Croatia, 2012, § 49). However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (Ibrahim and Others v. the United Kingdom [GC], 2016, § 250).*

2. *In each case, the Court's primary concern is to evaluate the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a wsubject to the hole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (ibid., § 250). Thus, for instance, in the context of its assessment of the pre-trial judge proceedings confirming the indictment, the Court has stressed that it must have regard to the proceedings as a whole, assessing the handling of the case by the pre-trial judge in light of the subsequent trial, when determining whether the rights of the applicant were prejudiced. As part of that determination, it needs to be assessed whether any measures taken during the proceedings before the pre-trial*

[17] Council of Europe 31st August, 2022

judge weakened the applicant's position to such an extent that all subsequent stages of the proceedings were unfair (Alexandru-Radu Luca v. Romania, § 63).*

3. *Where a procedural defect has been identified, it falls to the domestic courts in the first place to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being prima facie incompatible with the requirements of a fair trial according to Article 6 of the Convention (Mehmet Zeki Çelebi v. Turkey, 2020, 51). Moreover, the cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken alone, would not have convinced the Court that the proceedings were unfair (Mirilashvili v. Russia, 2008, 165).*

4. *The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue (see, for instance, Negulescu v. Romania, 2021, §§ 39-42, and Buliga v. Romania, 2021, §§ 41-44, concerning minor offences proceedings). Nevertheless, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration. Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights (Ibrahim and Others v. the United Kingdom [GC], 2016, § 252)."*

Clearly great emphasis is laid on a whole, holistic examination of all the concerned proceedings in their totality, and the solution in examining the impact on article 6 is not that of extrpolating one isolated element or occurance of the proceedings.

Nothing in the Criminal Court Of Appeal's judgement goes contrary to these thoughts and teachings. On the contrary the Criminal Court of Appeal, as seen, considered all the factors outlined, even the decisiveness of the statement desired to be expungned and found that till

that stage in time of the proceedings, it was premature to expunge evidence properly acquired according to the prevalent law at the time, and that the trial judge would better instruct the jury panel as to the weight and probatory value of all evidence deduced. Note must also be made of the fact that in the attacked statement Doll denied any involvement.

Another point stressed by applicant Doll in his reference refers to the lack of consistency of our Courts revolving around the admissibility of the statement released prior to the more recent legal regime established in 2016. Truth be said, our Courts, both of Constitutional and Criminal competence, were not always in alignment in this regard, and before the developements of the like of Beuze decision, the ECtHR addressed considerable criticism towards the Maltese Courts who were not initially in line with the Salduz decision.

But the development of caselaw, even if at times inconsistent, does not itself translate to a breach of fair hearing as contemplated by applicant/accused Doll. Court decisions are by their nature a result of study and research reflecting legislation, its interpretation, thoughts developed by jurists and learned authors in the field. Different ideas yes do abound, but all serve to further develop legal notions that ultimately in a civil, domestic, eclectic and continously developing society are triggered for the protection of the citizen and more so for upholding the rule of law, the fundament of guarantees to upholding human rights. This being said, it does not there-

fore follow that our lack of rule of precedence undermines the proper administration of justice in its narrow scope as addressed to the protection of the individual, as seems to be suggested by Doll's defence counsel.

Lack of the rule of precedence does not translate in our Courts not following determined interpretations to determined issues. Thus treating the concept of the ***Stare Decisis*** our Courts stated:-

> "30. Huwa prinċipju sagrosant fid-duttrina u fil-ġurisprudenza li *argumentum simili valet in lege*. Tassew il-ġustizzja, il-koerenza u ċċertezza legali jeżiġu li kwistjonijiet analogi għandhom kemm jista' jkun jiġu trattati u deċiżi blistess mod. Kif elokwentement ġie mtenni mill-Qorti tal-Appell fis-sentenza ***Emanuel Portelli pro et noe v. Estelle Azzopardi*** mogħtija fil-31 ta' Ottubru, 2014,
>
> *"għalkemm is-sentenzi ma għandhomx seħħ erga omnes, u l-qrati ma humiex marbutin bir-regola stare decisis, dan ma jfissirx illi lauctoritas rerum similiter iudicatarum għandha tintesa. Għalkemm il-konflitti fil-ġurisprudenza huma inevitabbli – u xi drabi huma wkoll ta' ġid għax jipprovokaw djalogu u xi drabi jkun ukoll meħtieġ illi jkunu eżaminati ex novo posizzjonijiet stabiliti li tkun intesiet ir-ratio warajhom – madankollu dawn il-konflitti jkunu evitati u ċ-ċertezza tad-dritt tkun imħarsa jekk ikun hemm konsistenza fis-sentenzi. F'sitwazzjonijiet fejn il-fatturi determinanti jixxiebħu jew huma identiċi, id-deċiżjoni għandha tkun l-istess, mhux għax qorti hija marbuta b'dak li tgħid qorti oħra iżda għax lill-istess mistoqsija għandha tingħata l-istess tweġiba";*
>
> 31.Dan kollu jirrifletti dak li kienet qalet il-Qorti tal-Appell (Kompetenza Inferjuri) fis-sentenza tagħha tas-7 ta' Lulju, 2010, flismijiet ***Noel Sultana v. Tony Xerri***, li,
>
> *"Hu b'mod ġenerali rikonoxxut illi għalkemm il-prinċipju "stare decisis" ma hux assolut fis-sistema legali Malti fis-sens li l-qorti tista'*

> *tiddiskosta ruħha mill-ġurisprudenza jekk tħoss motiv ġust biex tagħmel dan, eppure meta fil-każijiet in ispeċje fejn ilġurisprudenza hi waħda konkordi għall-perijodu hekk twil, l-istabilità tal-ġurisprudenza tesiġi fl-interess ġenerali illi l-qorti jew it-tribunal ma jiddipartix minn dik l-interpretazzjoni, ormaj oltre sekolari";*

Clearly therefore though our Courts are not bound by rule of precedence and a decision binds only the parties thereto, the proper administration of justice necessitates certainty governing the interpretation of legal notions effecting a determined legislation, thus ensuring to those so effected a determined and adequate line of action and defence in its application. This foreseeability allows and is an integral part of the right to a fair hearing.

This being said although the situation regarding statements released prior to 2016 was one that was not always consonant between the local courts themselves and the ECtHR, today the situation with regards to pretrial statements is one that follows as the Criminal Court of Appeal said the dicta of **Beuze** and the likes of. This is easily deductible from a simple search on the Court internet system in relation to recent judgements delivered in this regard.

- Thus in the case of **Charles Kenneth Stephens v Malta**, of the 14th Jannar 2020 it was stated that :

> '*72. Particularly relevant to the present case, the Court observes that in the recent Beuze judgment, the Grand Chamber departed from the approach taken in previous cases that systematic restrictions on the right of access to a lawyer led, ab initio, to a violation of the Convention (see, in particular, Dayanan v. Turkey, no. 7377/03, § 33, 13 October 2009, Boz v. Turkey, no. 2039/04, § 35, 9 February 2010, and Borg, cited above, § 62). In Beuze, the Grand*

> *Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them."*

It can safely be stated that the two tiered test has became prevalent and consistent in issues concerning pre-trial statements released before the transposition of the European Parliament Directive 2013/48 giving the right of access to a lawyer in criminal proceedings. Thus, our Courts have been consistent in reiterating that an alleged breach of article 6 of the Convention and 39 of the Constitution can only be reviewed once all the criminal proceedings were concluded and considered the issue of the admissibility of a so called effected statement as premature before the conclusions of all criminal procedures.

This was aptly stated in the case in the name of **Emmanuele Spagnol vs Attorney General et.**[18]

"Konsiderazzjonijiet ta' din il-Qorti

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-inter-rogazzjoni ma jfissirx awtomatikament li l-użu ta' dik l-istqarrija fil-proċeduri kriminali kontra tiegħu illeda, jew x'aktarx ser jilledi, id-*

[18] Constitutional Court: 31/05/2013 Application 16/2018/1

dritt fundamentali tiegħu għal smigħ xieraq. Dan fil-fatt jaċċettah l-attur stess.

11. *Fil-każ odjern m'hemmx dubju li l-liġi kif kienet viġenti fiż-żmien relevanti ma kinitx tippermetti li s-suspettat jiġi assistit minn avukat waqt li jkun qed jiġi interrogat mill-pulizija. Dak iż-żmien però l-liġi kienet tippermetti li s-suspettat jikkonsulta privatament ma' avukat, wiċċ imb'wiċċ jew bit-telefon, għal żmien ta' siegħa, qabel ma jiġi interrogat. Il-Qorti tosserva wkoll li l-attur kellu d-dritt li ma jirrispondix għad-domandi magħmula lilu waqt l-interrogazzjoni. Inoltre, waqt il-proċeduri kriminali lattur kellu d-dritt li jikkontesta l-ammissibilità tal-istqarrija, oltre li seta' jikkontesta l-kontenut tagħha permezz ta' kull prova li kien iħoss li kienet relevanti, u fil-fatt jirriżulta li l-proċeduri kriminali ilhom fi stadju ta' provi tad-difiża għal żmien sostanzjali. Apparti minn hekk, l-appellant kellu kull dritt li jixhed u jagħti verżjoni differenti quddiem il-Qorti, dritt li jirriżulta li għamel użu estensiv minnu, tant illi d-depożizzjoni tiegħu ġiet maqsuma fuq żewġ seduti.*

12. *Dwar il-vulnerabbilità o meno tal-attur, il-Qorti tosserva li minkejja li l-appellant xehed quddiem l-Ewwel Qorti li ma kienx jiftakar jekk*

qattx kien għadda minn xi proċeduri kriminali oħrajn barra dawk mertu ta' dawn il-proċeduri, mis-sistema elettronika tal-Qorti jirriżulta li l-appellant kien involut f'diversi proċeduri kriminali, inkluż proċeduri li bdew kontra tiegħu fl-1996 u li fihom kien instab ħati u ġie kkundannat għal piena ta' sentejn priġunerija sospiżi għal erba' snin flimkien ma' interdizzjoni ġenerali u interdizzjoni milli jservi bħala xhud ħlief quddiem il-Qrati tal-Ġustizzja għal żmien ta' ħames snin. Għalhekk l-Ewwel Qorti kienet korretta meta sabet li din ma kinitx l-ewwel darba li l-appellant xellef difrejh mal-ġustizzja. Inoltre, għalkemm l-appellant isemmi li huwa kien jieħu ċertu medikazzjoni biex jikkontrolla z-zokkor, u li mingħajr din il-medikazzjoni u ikel kien iħossu dgħajjef, il-Qorti tosserva li mill-atti li ġew preżentati ma jirriżultax li l-appellant kien informa lill-Pulizija li huwa kellu bżonn jieħu xi medikazzjoni u fil-fatt fil-formola li timtela mill-uffiċjal ta' detenzjoni ġie mmarkat li l-appellant ma kien taħt l-ebda kura. F'dan ir-rigward relevanti wkoll li mix-xhieda jirriżulta illi li kieku l-appellant ma kellux il-medikazzjoni meħtieġa miegħu u lanqas il-preskrizzjoni għaliha, il-prassi kienet illi jittieħed il-poliklinika sabiex tkun tista' tinħareġ preskrizzjoni minn tabib biex b'hekk is-suspettat ikun jista' jingħata l-medikazzjoni li jkun jeħtieġ. Għalhekk jidher li jekk l-appellant baqa' nieqes minn xi

medikazzjoni dan kien biss għaliex naqas milli jinforma lill-pulizija meta ġie mistoqsi. Meħud in konsiderazzjoni dan kollu, flimkien mal-fatt li fiż-żmien relevanti l-attur kellu aktar minn ħamsin sena u li kien effettivament ikkonsulta ma' avukat tal-fiduċja tiegħu qabel ma ġie interrogat, il-Qorti tqis li ma jirriżulta l-ebda element ta' vulner-abbilità.

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

14. *F'dawk is-sentenzi I-ilment tas-smigħ xieraq tressaq meta I-proċe-duri kriminali kienu għadhom pendenti. Billi I-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 nonexhaustion of domestic remedies"*

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

16. *Naturalment ladarba f'dan il-każ il-proċess kriminali għadu ma ġiex mitmum, għadu mhux magħruf kif u taħt liema ċirkostanzi I-appellant ser jiġi żvantaġġjat. Huwa ċertament barra minn loku illi I-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 listqarrijiet u l-piż mogħtija lilhom fl-assjem tal-provi kollha. Għal dak li jiswa jista' jkun il-każ li l-Qorti Kriminali fl-aħħar mill-aħħar ma ssibux ħati u għalhekk ħafna mill-preokupazzjonijiet tiegħu dwar l-istqarrijiet jisfaw fix-xejn. Dan biex ma jingħadx ukoll li anke wara s-sentenza tal-Qorti Kriminali hemm il-possibbilità li jsir appell quddiem il-Qorti tal-Appell Kriminali, li ghandha s-setgħa li ddawwar l-affarijiet. Jiġi b'hekk, li l-ilment jekk seħħx virtwalment xi ksur ta' drittijiet fundamentali f'dan l-istadju huwa għal kollox prematur.

17. *L-appellant ma jistax jagħmilha bħala fatta li huwa mhuwiex sejjer ikollu smigħ xieraq minħabba l-mod ta' kif ittieħdet l-istqarrija tiegħu. Ladarba l-proċeduri kriminali għadhom mexjin, allura huwa jgawdi millprežunzjoni tal-innoċenza. Tassew il-prosekuzzjoni għad trid tipprova lakkuzi 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 talkwistjoni minnu sollevata, b'dana li l-ilment huwa għal kollox intempestiv u prematur.*

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

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

21. *Hija għalhekk il-fehma meqjusa ta' din il-Qorti meta jittieħed kont ta' kif il-Qorti Ewropea issa qed tindirizza l-kwistjoni mhuwiex floku li l-Qrati Kostituzzjonali joqogħdu jindaħlu f'temi li jmissu mas-siwi talevidenza. 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 flaħħar sentenza* ***Roderick Castillo v. Avukat Generali*** *et deċiża millQorti Kostituzzjonali fl-20 ta' Lulju 2020. F'din is-sentenza ġara li waqt li kienu mexjin il-proċeduri kostituzzjonali, ġew mit-muma 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"

Għalhekk l-aggravju qed jiġi miċħud."

- Again in the case **Romario Barbara vs Attorney General**[19]**,** the Constitutional Court reversed a decision of this Court differently presided wherein a breach of article 6 of the Convention and 39 of the Constitution was declared. The First Court found that because of the breach declared the involved statement was to be removed, expunged from the records of the case and that no use of it was to be made as evidence. The Constitutional Court's decision on the other hand reiterated that:-

"13. 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. Dan huwa fattur relevanti għall-finijiet tad-determinazzjoni dwar l-"overall fairness of the proceedings" peress li "although there is no doubt that the applicant's right was restricted, the extent of that restriction was relative."[20]

Il-Qorti tosserva wkoll li l-attur kellu d-dritt li ma jirrispondix għad-domandi magħmula lilu, u kellu d-dritt ukoll li jimpunja l-validita tal-istqarrija tiegħu

[19] 12/07/2023 application 491/2021/TA
[20] Idem.

quddiem il-Qorti Kriminali qabel ma jiġi appuntat il-ġuri, oltre li jikkontesta l-valur probatorju tagħha waqt il-ġuri nnifsu.

14.Dawn il-vulnerabbilità o meno tal-attur, il-Qorti tqis li għalkemm kellu dsatax-il sena ma jistax jingħad li saret xi prova li l-attur kien persuna vulnerabbli jew kien fi stat li ma kienx f'pożizzjoni li jieħu deċiżjoni volontarja. Għalkemm jirriżulta li qabel ġie arrestat kellu xi jgħid ma' ħutu u qala' xi daqqa fuq imnieħru, ma jidhirx li dan l-episodju kellu xi effett negattiv fuq il-kapaċitajiet metali u fakoltattivi tiegħu. Għalkemm sar verbal meta deher l-ewwel darba quddiem il-Qorti Struttorja fl-24 ta' Settembru 2015 u sar dan il-verbal

> *"Id-difiza f'dan l-istadju mhux qed taghmel talba ghal ghoti tal-helsien mill-arrest ghalkemm talbet lil Qorti sabiex minhabba ragunijiet ta' natura psikoaffettiva ta' l-imputat, joghgobha taghmel rakkomandazzjoni lid-Direttur tal-Facilita Korrettiva ta' Kordin sabiex waqt il-permanenza tieghu fl-istess facilita l-imputat jigi riferit fittaqsima forensi.*
>
> *L-Ufficjal Prosekutur, fil-waqt li jirrikonoxxi wkoll dak mistqarr mill-avukati difensuri jiddikjara li ma jopponix."* ma jissemma xejn aktar fl-atti sussegwenti.

15.Din il-Qorti reġgħet għarblet sew il-pożizzjoni tagħha fuq din ittema ta' intempestivita tal-ilment kostituzzjonali. Tagħmel riferenza għażżewġ 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 itteħid ta' stqarrija mingħajr konsultazzjoni minn qabel ma' avukat, għalkemm f'dan il-każ il-konsultazzjoni kienet waħda limitata.

16.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 nonexhaustion of domestic remedies".*

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

18.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 jiġi diskuss f'dan l-istadju in vacuo. Il-Qorti Kriminali għadha trid tevalwa l-istqarrijiet li saru u jekk saru ikunx 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 listqarrijiet u l-piż mogħtija lilhom fl-assjem tal-provi kollha. 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.

*19.Huwa rilevanti dak li qalet il-Qorti tal-Appell Kriminali fil-każ ta' **Ir-Repubblika ta' Malta v. Rosario Militello** deċiż fis-27 ta' Jannar 2021 dwar kif għandha timxi l-Qorti Kriminali meta qalet hekk:*

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

20.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 millpreżunzjoni tal-innocenza. Tassew il-prosekuzzjoni għad trid tipprova lakkuzi tagħha kontra tiegħu u l-istess akkużat għad għandu kull opportunità li jiddefendi lilu nnifsu.

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

22.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.*

23.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.

24Hija 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)"*

25 L-għaqal li din il-Qorti tieħu din id-deċiżjoni dwar l-ilqugħ tal-eċċezzjoni tal-intempestività, jinsab imsaħħaħ ukoll minn dak li ġara flaħħar sentenza ***Roderick Castillo v. Avukat Generali et*** *deċiża millQorti 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 ġie 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"*

Għaldaqstant l-appell tal-Avukat tal-Istat qiegħed jiġi milqugħ."

- Yet in another more recent decision in the names of **Nicholas Vella vs Attorney General**[21] the Constitutional Court decided:_

"16 Permezz ta' rikors preżentat fit-13 ta' April 2023 l-Avukat Ġenerali appella mis-sentenza tal-Ewwel Qorti fir-rigward ta' dik il-parti li ordnat li l-istqarrija tal-konvenut ".... m'għandhiex tagħmel parti iżjed mill-atti kriminali". L-Avukat Ġenerali argumenta li meta saret l-istqarrija:

i. *Il-konvenut kellu 30 sena u għalhekk ta' ċerta maturità u esperjenza;*

ii. *M'hemmx prova li kien persuna vulnerabbli;*

[21] 155/19/1MH decided 25/10/2023

iii. *M'hemmx provi li l-istqarrija ittieħdet bi vjolenza, theddid jew wegħda ta' favur jekk iwieġeb b'ċertu mod;*

iv. *Irrifjuta li jitkellem ma' avukat qabel ta l-istqarrija;*

v. *Il-fedina penali tar-rikorrent turi li ma kinitx l-ewwel darba li kienet saritlu interrogazzjoni mill-pulizija;*

11. *17. Kompla li waqt il-ġuri, l-Imħallef jagħti direzzjoni lill-ġurati dwar ilvalur probatorju tal-istqarrija li ta l-akkużat jekk mill-provi jirriżulta li ma ttieħditx skont il-liġi, jew jekk avveraw iċ-ċirkostanzi li jissemmew fissentenza ta' Beuze. F'kull każ dejjem jibqa' d-dritt tiegħu li jappella missentenza tal-Qorti Kriminali. Għalhekk m'għandhiex tkun il-Qorti Kostituzzjonali li tiddeċiedi minn qabel jekk l-istqarrija hijiex ammissibbli jew jekk għandhiex valur probatorju.*

12. *18. Ir-rikorrent ma weġibx.*

13. *19. Riċentement din il-Qorti fis-sentenza <u>Romario Barbara v. L-Avukat Ġenerali</u> tat-12 ta' Lulju 2023 ikkunsidrat aggravju identiku, u ħadet ilposizzjoni li l-istqarrija m'għandhiex titneħħa mill-proċess tal-kawża kriminali u għandha tkun il-Qorti Kriminali li waqt il-ġuri tagħti d-direzzjoni li hemm bżonn lill-ġurati dwar il-valur probatorju tal-istqarrija u jekk jirriżultawx ċ-ċirkostanzi li*

jissemmew fil-linja gwida li tat il-QEDB fissentenza Beuze v Belġju tal-2018 (ara paġna 46 ta' dik is-sentenza).[22] *F'dik is-sentenza ngħad inter alia:*

14.

> *"18. Naturalment ladarba f'dan il-każ il-proċess kriminali għadu ma ġiex mitmum, għadu mhux magħruf kif u taħt liema ċirkostanzi Iappellant ser jiġi żvantaġġjat. Huwa ċertament barra minn loku illi Iilment de quo agitur jiġi diskuss f'dan l-istadju in vacuo. Il-Qorti Kriminali għadha trid tevalwa l-istqarrijiet li saru u jekk saru ikunx hemm vjolazzjoni tad-dritt ta' smigħ xieraq minħabba l-mod kif ittieħdu tenut kont iċ-ċirkostanzi partikolari tal-każ li jvarjaw minn każ għallieħor. Hemmx leżjoni tad-dritt għalhekk ser jiddependi mill-mod kif ilQorti Kriminali tkun trattat l-istqarrijiet u l-piż mogħtija lilhom fl-assjem tal-provi kollha. Għal dak li jiswa jista' jkun il-każ li l-Qorti Kriminali flaħħar 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 ilpossibbilità 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.*
>
> .....

[22] Ara sentenza tal-Qorti tal-Appell Kriminali, Ir-Repubblika ta' Malta v. Rosario Militello tas-27 ta' Jannar 2021.

15. *20. 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-innocenza. Tassew il-prosekuzzjoni għad trid tipprova l-akkuzi tagħha kontra tiegħu u l-istess akkużat għad għandu kull opportunità li jiddefendi lilu nnifsu.*

16. *21. 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 salivate, b'dana li l-ilment huwa għal kollox intempestiv u prematur".*

22.Il-Qorti ma tara l-ebda raġuni għalfejn għandha tirrevedi din ilfehma, iktar u iktar meta ġie delis li l-ilment dwar ksur ta' smigħ xieraq hu intempestiv.

23Għaldaqstant, tilqa' l-aggravju tal-Avukat Ġenerali."

For better instruction of Mr Doll and completion of the examination of the reference in issue the Court inevitably refers to the decision in the names of **Republic of Malta vs Rosario Militello** [23], also a recent one and now a res judicata, wherein once again the Constitutional Court reversed the order of the removal of the statement from the records of the case, upholding the holistic review of all the Criminal procedure once completed, to determine if a breach to the right of fair

[23] Decided 22/6/2023 no. 404/21/1

hearing had infact occurred by the use of statements released without complete legal assistance as transposed after the aforementioned directive. It held:-

"13. Fit-tieni aggravju l-Avukat tal-Istat jilmenta illi dak deċiż mill-Qorti tal-Appell Kriminali fis-sentenza tas-27 ta' Jannar, 2021, ma jiksirx il-jedd għal smigħ xieraq. Jisħaq li din il-Qorti stess f'diversi sentenzi rrikonoxxiet li n-nuqqas ta' assistenza legali ma jwassalx awtomatikament għal tali ksur iżda għandhom jiġu applikati żewġ testijiet: (i) jekk kienx hemm compelling reasons; u (ii) jekk il-proċeduri kienux overall fair skont il-kiterji enunċjati f' Beuze v. Belgium u Farrugia v. Malta. Jgħid li f'dan il-każ l-appellat ikkomunika mal-avukat ta' fiduċja tiegħu qabel ma rrilaxxja l-istqarrija in kwistjoni, u għalhekk, il-fatt li f' dik l-istqarrija inkrimina ruħu juri li ngħatat volontarjament. B'referenza għas-sentenzi ta' Briegel Micallef v. Avukat Ġenerali u r-Repubblika ta' Malta v. Martin Aiello iżid li kull każ għandu l-fattispeċe tiegħu. Jaqbel għalhekk mad-deċiżjoni tal-Qorti tal-Appell Kriminali (Sede Superjuri) tas-27 ta' Jannar, 2021.

14..Il-motivazzjoni fis-sentenza li tat il-Qorti tal-Appell Kriminali fis-27 ta' Jannar, 2021, kien dan:

> *"9. ... huwa fatt inkontestat illi l-akkużat Rosario Militiello rrilaxxa stqarrija lill-pulizija investigattiva nhar il-4 ta' Awwissu 2014 u dan wara illi tħalla jikkomunika permezz tat-telefon mal-avukat tal-fiduċja tiegħu Dr.Giannella Demarco. Waqt it-teħid ta' l-istqarrija imbagħad kien hemm l-interpretu Imelda Fede preżenti miegħu li kienet qed tassistieh fit-traduzzjoni mill-lingwa Maltija għal dik Taljana sabiex b'hekk l-akkużat kien qed jifhem dak li kien qed jiġi mistoqsi. L-akkużat xorta waħda, madanakollu, jqies illi din l-istqarrija hekk rilaxxata mingħajr il-garanziji kollha li llum il-ġurnata tipprovdi l-liġi ma għandha ikollha ebda valur probatorju u dan għaliex jista' jiġi mittiefes il-jedd tiegħu għal smigħ xieraq.*
>
> *...*
>
> *12.Illi l-Qorti tistqarr minnufih u mingħajr tlaqliq illi l-Avukat Ġenerali għandu raġun fil-lanjanza minnu miġjuba 'il quddiem. Illi jibda biex jingħad, kif diversi drabi affermat mill-qrati fir-rigward tal-principju regolatur dwar l-ammissibilita' ta' prova fil-proċess penali, illi hija prassi adottata mill-ġurisprudenza illi prova ma titqiesx li hija*

inammissibbli sakemm ma jkunx hemm xi dispożizzjoni espressa tal-liġi li tipprekludi l-ammissjoni ta' dik il-prova. ...

13... Din ir-regola hija mfassla, kif tajjeb jindika l-Avukat Ġenerali fl-artikolu 658 tal-Kodiċi Kriminali[24]*.*

14.. Illi fiż-żmien meta ġiet rilaxxata l-istqarrija mill-appellat kien hemm dritt, għalkemm wieħed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiduċja tagħha fil-ħin preċedenti linterrogatorju mill-pulizija. Dan id-dritt ġie lilu konċess biex b'hekk listqarrija sussegwentement rilaxxata, hija in konformita' mal-liġi viġenti f'dak iż-żmien ... Illum fid-dawl tal-iżviluppi legali u ġurisprudenzjali, madanakollu, ma jistax jiġi ritenut li dwar dawn listqarrijiet tapplika xi regola esklużjonarja ta' dritt penali proċedurali li tirrendi dawk l-istqarrijiet inammissibbli, għaliex dawn kienu konformi mal-liġi penali viġenti fiż-żmien relevanti.

...

19.. Illi minn eżami li għamlet din il-Qorti tal-atti kumpilatorji jemerġi illi l-appellat qiegħed jiġi mixli li ttraffika d-droga f'żewġ okkażjonijiet separati. Jiġi interrogat u jammetti l-involviment tiegħu. Ma kienx persuna vulnerabbli (jew għall-inqas prova f'dan is-sens sa issa ma hemmx) u seta' jifhem in-natura tal-akkużi li kienu qed jiġu lilu addebitati b'interpretu tassistieh tul-interrogazzjoni. Il-Prosekuzzjoni mbagħad tressaq diversi xhieda kemm diretti kif ukoll ċirkostanzjali sabiex tissostanzja dawn l-akkużi ta' traffikar u pussess aggravat ta' droga, b'mod ewlieni x-xiehda ġuramentata ta' ċertu Aaron Sciortino li allegatament xtara id-droga minn għand l-appellat, liema xhud imbagħad iddepona viva voce quddiem il-qorti istruttorja fil-15 ta' Marzu 2016. Mhux biss iżda l-appellat jiġi interċettat mill-pulizija wara li dawn jibdew jagħmlu l-għassa fuqu u josservaw il-movimenti tiegħu. Mill-pussess ta' l-appellat inoltre ġew elevati ammont ta' flus kontanti, diversi telefowns ċellulari u apparat elettroniku ieħor li kollha ġew eżaminati mill-esperti tal-Qorti Dr. Martin Bajada u Dr. Stephen Farrugia Sacco. Dan ifisser allura illi l-istqarrija ta' l-appellat mhijiex luniku prova li l-prosekuzzjoni bi ħsiebha tressaq biex tissostanzja lakkużi miġjuba kontra l-appellat.

[24] Kull ħaġa li imputat jew akkużat jistqarr, kemm bil-miktub,b'mezzi awdjoviżwali jew b'mezzi oħra, tista' tittieħed bi prova kontra jew favur min, skont kif ikun il-każ, ikun stqarrha, kemm-il darba jinsab li din il-konfessjoni ġiet magħmula minnu volontarjament u ma ġietx imġiegħla jew meħuda b'theddid jew b'biża', jew b'wegħdiet jew bi twebbil ta' vantaġġi.

...

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

15.Huwa fatt li fl-istess ġurnata li ngħatat is-sentenza tal-Qorti tal-Appell Kriminali fil-konfront ta' Militello, din il-Qorti tat is-sentenza <u>Morgan Onuorah v. L-Avukat tal-Istat</u> (176/2019 FDP). F'dak il-każ, bħal dak odjern:

i. *il-kwistjoni kienet jekk l-istqarrijiet li ttieħdu mingħajr il-preżenza talavukat għandhomx jintużaw fil-kawża kriminali kontra Onuorah;*

ii. *il-liġi kienet biss tagħti l-jedd lis-suspettat li jitkellem ma' avukat <u>qabel</u> l-interrogazzjoni (emenda li saret bl-Att III tal-2002 u daħlet fis-seħħ fl-10 ta' Frar, 2010);*

iii. *fil-bidu tal-istqarrija kien hemm miktub li s-suspettat ma kien obbligat igħid xejn u li dak li jgħid jista' jinġieb bi prova (fil-każ ta' Onuorah tniżżel ukoll li seta' jsir inferenza mis-silenzju tiegħu);*

iv. *l-istqarrija ta' Onuorah kien fiha ammissjonijiet għal xi wħud mirreati li kien akkużat li wettaq fl-att tal-akkuża;*

v. *Onuorah kellu jgħaddi ġuri;*

vi. *Onuorah ressaq eċċezzjoni speċifika dwar l-allegata inammissibilità tal-istqarrija tiegħu (għalkemm tressqet tard);*

vii. *il-ġuri kien għad irid isir u għalhekk ma kienx possibbli li jsir ġudizzju dwar jekk il-proċeduri kriminali kinux xierqa meta tikkunsidrahom fittotalità tagħhom; u*

viii. *l-apprezzament tal-provi kellu jsir minn ġurati u l-verdett ma kienx se jkun fih motivazzjoni bil-periklu li l-ġurati jibbażaw id-deċiżjoni tagħhom fuq l-isqarrija tiegħu.*

17. *F'dik is-sentenza din il-Qorti qalet hekk: "26. Kif diġa` issemma, il-fatt waħdu li saret l-interrogazzjoni mhux fil-presenza ta' avukat ta' fiduċja tal-attur m'huwiex biżżejjed sabiex jagħti lok għall-ksur tad-dritt fundamentali ta' smigħ xieraq.*

> *Madankollu l-użu ta' dik l-istqarrija fil-proċeduri kriminali, li fiha l-attur ammetta għal uħud mir-reati li akkużat biha, taf twassal sabiex iseħħ dak il-ksur tal-jedd fundamentali. Dan iktar u iktar meta tikkunsidra l-ġurisprudenza ampja tal-Qorti Ewropea tad-Drittijiet tal-Bniedem li issa ilha s-snin tirrepeti l-istess insenjament.*
>
> *27. Li s-suspettat jitkellem ma' avukat qabel l-interrogazzjoni, l-assistenza ta' avukat wara li tkun saret l-interrogazzjoni u n-natura adversarial tal-kawża kriminali sussegwenti, m'humiex garanzija*

adegwata li jirrimedjaw għad-difett li s-suspett ma kienx assistit minn avukat waqt l-interrogazzjoni li saret meta kien taħt arrest. Fissentenza riċenti Mehmet Zeki Celebi v. Turkey (App. 27583/07) ilQEDB kompliet tisħaq:

> *"57. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The Court also reiterates that it is only in very exceptional circumstances that it can conclude that a given trial has not been prejudiced by the restriction of an applicant's right of access to a lawyer (see Dimitar Mitev v. Bulgaria, no. 34779/08, 71, 8 March 2018)".*

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

29. Fl-aħħar mill-aħħar il-qrati domestiċi ma jistgħux jippermettu li f'proċeduri kriminali li għadhom pendenti jitħallew stqarrijiet li jkunu saru fl-assenza ta' avukat u li l-QEDB ilha tiddeskrivih bħala difett proċedurali bil-periklu manifest li dak il-fatt jikkontamina l-proċess kriminali kollu. Illum il-ġurnata hi l-istess Qorti Kriminali li qiegħda taddotta din il-posizzjoni f'deċiżjonijiet preliminari li qegħdin jingħataw (hekk per eżempju ***r-Repubblika ta' Malta v. Rosario Sultana*** *deċiżjoni tat-23 ta' Settembru 2020 u* ***r-Repubblika ta' Malta v. Rosario Militello*** *tat-3 ta' Diċembru 2019).*

30. Kien id-dmir tal-Gvernijiet differenti matul is-snin li jaġġornaw ruħhom mas-sentenzi tal-Qorti Ewropea u ma jistennewx sal-2016 sabiex jintroduċu disposizzjoni fil-Kodiċi Kriminali li s-suspettat għandu jedd għall-assistenza ta' avukat waqt l-interrogazzjoni li ssir meta jkun fil-kustodja tal-pulizija. Emenda li saret sabiex tittrasponi ddisposizzjoni tad-Direttiva 2013/48/UE tal-Parlament Ewropew (ara

Art. 355AT talKodiċi Kriminali), li fost miżuri oħra assigurat id-dritt tassuspettat għall-assistenza ta' avukat waqt l-interrogazzjoni mill-pulizija.

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

Spejjeż tal-appell jinqasmu nofs bin-nofs bejn il-partijiet, filwaqt li l-ispejjeż tal-ewwel Qorti jibqgħu l-istess."

18. *L-istess kienet id-deċiżjoni ta' din il-Qorti fi-każ ta' Clive Dimech v. Avukat Ġenerali mogħtija ukoll fis-27 ta' Jannar, 2021 (175/2019 GM). Għalkemm f'dak il-każ l-istqarrija ta' Dimech lill-pulizija ma kinitx inkriminanti billi għal kull domanda li saritlu qal 'ma nweġibx', in linea ma' dak deċiż fis-sentenzi fl-ismijiet Christoph Bartolo v. Avukat Ġenerali et tal-5 ta' Ottubru, 2018 u Il-Pulizija (Spettur Malcolm Bondin) v. Aldo Pistella tal-14 ta' Diċembru, 2018, din il-Qorti xorta dderiġiet lill-Qorti Kriminali sabiex fil-kawża kriminali Ir-Repubblika ta' Malta v. Clive Dimech (att ta' akkuża numru 12/2017) ma jsirx użu mill-istqarrija bħala prova.*

19. *Ftit xhur wara din il-Qorti tat ukoll is-sentenza fl-ismijiet Briegel Micallef v. L-Avukat Ġenerali (101/19/1 AF) tat-30 ta' Ġunju, 2021. Dak iżda kien każ fejn l-istqarrija lill-pulizija ngħatat qabel id-dħul fis-seħħ tal-emendi li saru bl-Att III tal-2002 u fejn diġa' kien hemm sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali li sabet lil Micallef ħati tal-akkużi u kkundannatu għal erba' snin u nofs priġunerija u multa ta' ħamest elef ewro (€5,000). Pendenti appell lill-Qorti tal-Appell Kriminali, saru proċeduri kostituzzjonali u din il-Qorti qalet hekk:*

"7. ... l-użu f'proċeduri Kriminali ta' stqarrija minn suspettat mingħajr ma jkun assistit minn avukat, dak il-fatt waħdu ma jwassalx għall-ksur tal-jedd fundamentali għal smigħ xieraq. Kull każ għandu ċ-ċirkostanzi partikolari tiegħu. Kif sewwa qalet l-ewwel Qorti jrid jiġi kkunsidrat ilproċess fit-totalita' tiegħu ...

8. F'dan il-każ m'hemmx dubju li fl-istqarrija li l-attur ta lill-pulizija fis-6 ta' Ġunju, 2006, qal fatti li jinkriminawh ...
9. Diġa' hemm sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali, iżda għad hemm appell pendenti. Minn dik is-sentenza hu evidenti li s-sejbien ta' ħtija kien ibbażat fuq provi oħrajn ... Dan apparti li mill-istqarrija stess jirriżulta li l-attur kien ingħata ttwissija li għandu jedd li ma jitkellimx u li dak li jgħid jista' jinġieb bi prova.

10. Dan ma kienx każ fejn id-deċiżjoni ta' kundanna fl-ewwel stadju kienet determinata fuq l-istqarrija li l-akkużat ta lill-pulizija mhux filpreżenza ta' avukat, fi stadju ta' investigazzjoni. Lanqas mhu każ fejn hemm prova li l-istqarrija inġabret b'mod illegali u kontra r-rieda tal-attur.

11. Il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali presjeduta minn Maġistrat, iddeċidiet il-kawża Kriminali wara li semgħet il-provi kollha u għalhekk kienet fl-aħjar pożizzjoni sabiex tiddeċiedi l-kawża fil-meritu. Dan lanqas mhu każ fejn il-meritu talkawża Kriminali ser jiġi determinat minn ġurati. F'dan il-każ hemm sentenza ta' Qorti u fiha hemm ir-raġunijiet ta' x'wassalha sabiex issib lill-attur ħati. Każ fejn l-attur u x-xhud Ayling, ix-xhud prinċipali talprosekuzzjoni, xehedu viva voce quddiem dik il-Qorti għal iktar minn darba. Għalhekk il-Qorti kienet f'pożizzjoni sabiex tqis liema verżjoni li ngħatat quddiemha kienet l-iktar kredibbli, irrispettivament ta' x'setgħu qalu lill-pulizija fl-istadju talinvestigazzjoni. Dan wara li quddiem il-Qorti tal-Maġistrati l-appellant ingħata kull opportunita` li jressaq il-provi li ried u jagħmel kontro-eżamijiet ta' xhieda talprosekuzzjoni.

12. Rilevanti wkoll hu li l-Qorti tal-Maġistrati fis-sentenza kkunsidrat jekk l-istqarrija kinitx ittieħdet bi pressjoni jew theddid. Eżerċizzju li faċilment jista' jerġa' jsir quddiem il-Qorti tal-Appell Kriminali."

20. *Ġie mbagħad iċċarat illi:*

> *"13. Hu minnu li din l-istess Qorti f'sentenzi oħrajn qalet li jkun floku li stqarrija li jkun ta imputat titneħħa mill-proċess tal-proċeduri Kriminali sabiex jiġi żgurat li ma jkunx hemm periklu li eventwalment isiru proċeduri Kostituzzjonali li jistgħu jwasslu biex jiġi annullat proċess sħiħ. Madankollu, filwaqt li hemm ukoll sentenzi fejn din il-Qorti għamlet sempliċement rakkomandazzjoni, wieħed irid jiftakar li kull każ għandu ċ-ċirkostanzi partikolari tiegħu. F'dan il-każ partikolari diġa' hemm sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali. Ċirkostanza li ma kinitx teżisti f'każijiet oħra li ddeċidiet dwarhom din il-Qorti. Ovvjament dak l-apprezzament ser jiġi mistħarreġ mill-Qorti tal-Appell Kriminali.*
>
> *14. Wara li qieset iċ-ċirkostanzi tal-każ in eżami l-Qorti m'għandhiex dubju li bil-fatt li l-istqarrija tal-attur tibqa' fl-atti, mhijiex ser taffetwa l-overall fairness tal-proċeduri Kriminali li llum hemm pendenti fil-Qorti tal-Appell Kriminali. Kif rajna dik l-istqarrija mhijiex l-unika prova kontra l-attur, apparti l-fatt li l-Qorti tal-Appell Kriminali ser tqis ukoll għandhiex mis-sewwa l-verżjoni li ta l-attur ..."*

21. *Għalhekk dik is-sentenza ma tgħinx l-appell tal-Avukat tal-Istat.*

22. *B'referenza għall-każ tar-rikorrent il-Qorti tosserva:-*

i. *Ir-rikorrent tkellem ma' avukat ta' fiduċja tiegħu qabel interrogawh il-pulizija u waqt l-interrogazzjoni kellu l-assistenza ta' interpretu. Inoltre qabel bdiet l-interrogazzjoni kien imwissi li m'għandux obbligu jitkellem, u dak li jgħid jista' jinġieb bi prova. Fl-aħħar tal-istqarrija jingħad ukoll li għamel l-istqarrija volontarjament, mingħajr theddid jew biża, wegħdiet jew twebbil ta' xi vantaġġi. Jingħad ukoll li nqrat lilu mill-interpretu Imelda Fede u li ma ried jibdel xejn minnha u ffirmaha.*

ii. *F'dan il-każ hemm involut l-interess pubbliku meta tqis li jitratta dwar każ ta' allegat traffikar ta'* droga.

iii. *Fil-proċedurali kriminali r-rikorrent għandu dritt li jikkontesta l-veraċità u l-awtentiċità tal-*istqarrija li ta lill-pulizija.

iv. *Il-każ tal-prosekuzzjoni mhuwiex bażat biss fuq l-*istqarrija tar-rikorrent. *Hemm provi oħra;*

v. *Waqt* il-*ġuri ser jinstemgħu viva voce dawk kollha li setgħu xehdu waqt il-kumpilazzjoni, salv xi impediment leġittimu;*

vi. *F'każ ta' sejbien ta' ħtija r-rikorrent għandu l-jedd li jappella missentenza;*

vii. *M'hemm l-ebda prova li tagħti wieħed x'jifhem li r-*rikorrent kien persuna *vulnerabbli meta ta stqarrija lill-pulizija;*

viii. *Ovvjament għadu mhux magħruf x'ser jingħad fl-*indirizz tal-*Imħallef li ser tkun qiegħda tippresjedi l-*Qorti Kriminali. *Fis-sentenza tas-27 ta' Jannar, 2021, il-*Qorti tal-*Appell Kriminali għamlitha ċara li* lkwistjoni tal-istqarrija *ma*

kellhiex tieqaf ma' dik is-sentenza, u anzi lġudikant fl-indirizz lill-ġurati kellu jidħol fil-kwistjoni dwar il-valur probatorju tal-istqarrija f'każ li ma ttieħditx skont il-liġi, u kif ukoll jagħti direzzjoni lill-ġurati jekk jirriżultaw iċ-ċirkostanzi li jissemmew fil-linji gwida li ngħataw fis-sentenza tal-Grand Chamber tal-QEDB li ngħatat fil-każ Beuze v. Belgium tal-2018 (ara paġna 46 ta' dik is-sentenza).

22. *Meta tqis dawk iċ-ċirkostanzi kollha, din il-Qorti m'għandhiex dubju li l-jedd tar-rikorrent għal smigħ xieraq għadu ntatt u lanqas ma jista' jingħad li l-fatt li l-istqarrija tibqa' fl-atti x'aktarx ser iwassal għall-ksur ta' dak il-jedd fundamentali. Hu biss ladarba jintemmu l-proċeduri kriminali u jiġi kkunsidrat dak kollu li jkun sar waqt il-proċeduri kriminali li qorti tkun f'pożizzjoni li tagħmel konsiderazzjonijiet u tagħmel ġudizzju fuq dak kollu li jkun seħħ waqt il-proċess kriminali.*

23. *Għalhekk is-sentenza li tat il-Qorti tal-Appell Kriminali li ċaħdet l-eċċezzjoni tal-akkużat li l-istqarrija mogħtija fl-assenza ta' avukat hi inammissibbli bħala prova, ma kisritx il-jedd ta' smigħ xieraq tal-akkużat u lanqas jista' jingħad li x'aktarx ser tikser dak il-jedd. Dan iktar u iktar meta tikkunsidra li b'dak li qalet il-Qorti tal-Appell Kriminali tat gwida*

lill-Qorti Kriminali intiża sabiex jiġi salvagwardat il-jedd ta' smigħ xieraq talakkużat waqt il-ġuri.

24. ***Hu minnu li hemm sentenzi fejn din il-Qorti rrakkomandat jew ordnat li titneħħa l-istqarrija li jkun ta l-akkużat fl-istadju qabel ikun tressaq il-Qorti. Rimedju jingħata fejn qorti tkun sabet ksur ta' jedd fundamentali jew x'aktarx ksur tiegħu. Però dik ir-rakkomandazzjoni jew ordni ssir biss biex kemm jista' jkun tkun evitata l-possibbiltà li b'xi mod ikun imptappan il-proċess kriminali, u għalhekk ex abundanti cautela. Rakkomandazzjoni jew ordni li mhumiex rimedju per se ġialadarba m'hemmx dikjarazzjoni li seħħ ksur jew x'aktarx iseħħ ksur tal-jedd għal smigħ xieraq. Għalhekk l-argument tar-rikorrent li b'dak li ddeċidiet il-Qorti tal-Appell Kriminali fis-27 ta' Jannar, 2021, qiegħed joħloq inċertezza legali minħabba dak li ddeċidiet din il-Qorti fl-istess jum fl-appell <u>Morgan Onuorah v. L-Avukat tal-Istat</u> (176/2019) hu skorrett. Fiċ-ċirkostanzi l-fatt li tkun saret rakkomandazzjoni jew ingħatat ordni simili ma jfissirx li hekk għandu jibqa' jsir u li jekk ma jsirx hekk ikun ifisser li m'hemmx ċertezza legali. <u>(Emphasis of this Court)</u>***

Hu x'inhu kull każ għandu jiġi eżaminat skont iċ-ċirkostanzi partikolari tiegħu. M'hemmx dubju li meta tqis iċ-ċirkostanzi kollha s-sentenza tal-Qorti tal-Appell Kriminali tas-27 ta' Jannar, 2021, ma kisritx il-jedd fundamentali ta' Militello għal smigħ xieraq u lanqas ma jista' jingħad li x'aktarx ser tikser dak l-istess jedd. Dan apparti li l-Qorti tal-Appell Kriminali tat gwida lill-Qorti Kriminali dwar kif għandha tipproċedi sabiex anzi jiġi aċċertat li ma jkun hemm l-ebda periklu ta' ksur tal-jedd għal smigħ xieraq għal dak li jikkonċerna l-istqarrija li ta l-akkużat.

<u>Konklużjoni</u>.

Għal dawn il-motivi thassar is-sentenza tal-Ewwel Qorti tat-18 ta' Novembru, 2021 u għad-domanda jekk id-deċiżjoni tal-Qorti tal-Appell Kriminali tas-27 ta' Jannar, 2021, tiksirx il-jedd fundamentali tas-smigħ xieraq tal-akkużat kif garantit fl-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni ta' Malta, twieġeb fin-negattiv."

Considers Further

The Court did not go through this lengthy citing of judgements for a futile purpose or to elongate the issue and the judgement in hand, because truly these judgements are all are easily available on line for any interested. The reason for these references is to elucidate that today there is abundant and definite consistency of the Courts in the matter in issue as correctly concluded by the Court of Criminal Appeal in Doll's instance. Clearly our Constitutional Court, for long a supporter of this line of thought, today supported by the developed jurisprudence of the European Courts For Human Rights, has been consistent in its conclusion that no breach can be determined unless the whole process is seen in its totality and that every case is to be examined in its specifics. **As said this line of thought is today favoured by the European Court and consistently prevalent in our Courts.**

Therefore this Court, in reply to the question that should have been posed as to whether the decision of the Court of Criminal Appeal dated 22nd September, 2021 wherein it was stated that the statement released by Christoph Doll was admissible according to law and ordered that the said statement released on the 15th April, 2016 be adduced as evidence in the trial by jury, breaches his

fundamental human right to a fair trial in terms of article 6 of the European Convention and Article 39 of the Constitution of Malta, from the point of view of inconsistencies of the jurisprudence in this regard making it impossible for the accused to prepare an adequate line of defence**, answers that the inclusion of the statement as evidence in the trial by jury as decided by the Court of Criminal Appeal judgement of the 22nd of September, 2021 in the names of The Republic of Malta vs Christoph Doll does not breach the right of fair hearing as entrenched and protected in article 39 of the Constitution and article 6 of the Convention, in particular but not exclusively were such violation addressed the lack of jurisprudence consistency in this regard.**

Costs of this instance are to be borne by Christoph Doll.

Court orders that a copy of this judgement be immediately transmitted to The Criminal Court to be included in the relative records of the case the Republic of Malta vs Christoph Doll.

Hon. Madame Justice Miriam Hayman

Dep. Reg.
Rita Falzon