QORTI CIVILI - PRIM'AWLA
(SEDE KOSTITUZZJONALI)

IMHALLEF

ONOR. DR JOANNE VELLA CUSCHIERI
B.A., MAG. JUR. (EUR. LAW.), LL.D.

Illum il-Hamis , 30 ta' Novembru, 2023

Kawza Numru: 1

Rikors Guramentat Numru:- 312/2023 JVC

Aleksander Stojanovic

vs

L-Avukat Generali

u

L-Avukat ta' l-Istat

Il-Qorti,

Rat ir-rikors ta' Aleksander Stojanovic fejn ir-rikorrent premetta u talab kif isegwi:

'Illi nharget fil-konfront tal-esponent att t'akkuza nru. 36/2022, akkuzat inter alia b'umicidju voluntarju.

Illi, pendenti dawn il-proceduri, r-rikorrent ipprezenta talba ghall-liberta provizorja li, wara li giet ttratat quddiem dil-Qorti Kriminali, l-Imhallef sedenti rrikuza ruhu.

Illi, wara li ghaddew numru ta' gimghat din il-kawza ma gietx riassenjata lil Imhallef alternattiv.

Illi, minhabba dan, ir-rikorrent rega' pprezenta rikors iehor gimghat ilu, pero' r-rikors baqa' ma giex riassenjat.

Illi, l-appellant hass illi ma kellux forum sabiex jiddetermina l-legittima tal-arrest kontinwat tieghu u illi l-arrest tieghu f'dak l-istadju kien wiehed illegittimu. Konsegwentement huwa ppresenta rikors ta' *habeas corpus* quddiem il-Qorti Kriminali a bazi ta' l-artikolu 412B tal-Kap.9.

Illi dan ir-rikors gie appuntat quddiem il-Qorti Kriminali ghal nhar it-2 ta' Gunju 2023 u permezz ta' digriet tal-5 ta' Gunju 2023 dik il-Qorti taghat digriet fejn astjeniet milli tiehu konjizzjoni ta' dan ir-rikors. Fid-digriet taghha dik il-Qorti kkonkludiet illi rikors simili ta' *habeas corpus* jista' jsir biss waqt illi proceduri kriminali jkunu pendenti quddiem il-Qorti tal-Magistrati (Malta) meta l-atti

jkunu quddiem dik il-Qorti fejn allura r-rikors isir quddiem dik il-Qorti, jew meta l-proceduri jkunu pendenti quddiem dik il-Qorti meta l-atti jkun rinvjati fejn allura r-rikors isir quddiem il-Qorti Kriminali. Pero' hemm lakuna fil-ligi f'kaz illi tali talba tkun trid issir wara li tinhareg l-atti ta' l-akkuza, kif inhu l-kazodjern. Il-Qorti kriminali fil-fatt fid-digriet taghha pregudikat kwalunkwe dritt li l-esponent jista' jkollu biex jindirizza din il-lakuna quddiem Qorti ta' kompetenza kostituzzjonali.

Illi minhabba f'dan kollu l-esponent spicca f'pozizzjoni fejn m'ghandu l-ebda forum fejn jista' jikkontesta l-lokalita' tal-arrest tieghu.

Illi in effetti l-artikolu 39 tal-Kostituzzjoni jghid hekk:

"39.(1) Kull meta xi hadd ikun akkuzat b'reat kriminali huwa ghandu, kemm-il darba l-akkuza ma tigix irtirata, jigi moghti smigh xieraq gheluq zmien ragonevoli minn qorti indipendenti u imparzjali mwaqqfa b'ligi.,"

Illi in oltre l-artikolu 6(1) tal-Konvenzjoni Ewropea jghid:

" Fid-determinazzjoni tad-drittijiet civili u tal-obbligi tieghu jew ta' xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u publiku fi zmien ragonevoli minn tribunal

indipendenti u imparzjali mwaqqaf b'ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jistghu jigu eskluzi mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, tal-ordni pubbliku jew tas- sigurta' nazzjonali f'socjeta' demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieg, jew safejn ikun rigorozament mehtieg fil-fehma tal-qorti f'cirkostanzi specjali meta l-pubblicita' tista' tippregudika l-interessi tal-gustizzja."

Illi fil-Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb) insibu hekk:

"51. The "right to a court" is no more absolute in criminal than in civil matters. It is subject to implied limitations (Deweer v. Belgium, § 49; Karl v Turkey [GC], § 67).

52. However, these limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (Gue´rin v. France [GC], §37; Omar v. France [GC], § 34, citing references to cilvil cases)."

Illi wahda mis-sentenzi ewlenija tal-Qorti Ewropeja f'dan ir-rigward kienet dik fl-ismijiet ***Golder vs united Kingdom*** [1]. Dik il-qorti kienet qalet hekk (estratt mill-paragrafi 34 u 35):

"In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts [...] It would be inconceivable, in the opinion of the Court, that Article 6 par. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings".

Illi ssir referenza wkoll ghas-sentenza tal-Qorti Ewropea fl-ismijiet ***Case of Yilmaz Aydemir V. Türkiye***[2] fejn insibu hekk:

"36. The Court reiterates that by virtue of Article 5 § 4 of the Convention, are arrested or detained person is entitled to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the "lawfulness", within the meaning of Article 5 § 1, of his or her deprivation of liberty (see Idalov v. Russia [GC], no. 5826/03, § 161, 22 May 2012). Article 5 § 4 of the Convention does not normally come into play as regards detention governed by Article 5 § 1 (a) of the Convention, save where the grounds justifying the person's

deprivation of liberty are susceptible to change with the passage of time (see Kafkaris, cited above) of where fresh issues affecting the lawfulness of such detention arise (see Gavril Yosifov v. Bulgaria, no. 74012/01, § 57, 6 November 2008). However, where the Contracting States provide for procedures which go beyond the requirements of article 5 § 4 of the Convention, the guarantees of that provision nevertheless have to be observed in those procedures (see Stollenwek v. Germany, no 8844/12, § 36, 7 September 2017)."

Illi l-artikolu 5 tal-Konvenzjoni Ewropea jghid:

"Kulhadd ghandu d-dritt ghal-liberta' u ghas-sigurta' tal-persuna. Hadd ma ghandu jigi pprivat mil-liberta' tieghu hlief fil-kazijiet li gejjin skont il-procedura preskritta bil-ligi..."

Illi l-Guide on article 5 of the European Convention on Human Rights- rights to liberty and security[3] insibu hekk:

"34. Article 5 § 1 thus does not merely refer back to domestic law, it also relates to the "quality of the law" which implies that where a national law authories deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its applicaton. Factors relevant to this assessment of the "quality of law " – which are referred to in some cases as "safeguards" against

arbitratiness"- will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention (J.N. v. The United Kingdom, 2016, § 77)."

Illi ssir referenza ghall-artikolu 34 tal-Kostituzzjoni li jghid hekk:

"Hadd ma ghandu jigi pprivat mill-liberta' personali tieghu hlief kif jista' jkun awtorizzat b'ligi fil-kazijiet li gejjin, jigifieri-"

Illi fis-sentenza ***Case of J.N.V. The United Kingdom***[4] il-Qorti qalet hekk:

"77. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the "quality of the law". "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see Nasrulloyev v. Russia, no. 656/06, § 71, 11 October 2007; Khudoyorov v. Russia, no.

6847/02, § 125, ECHR 2005-... (extracts); Ječius v. Lithuania, no. 34578/97, § 56, ECHR 2000-IX; Baranowski v. Poland, no. 28358/95, §§ 50-52, ECHR 2000-III; and Amuur, cited above). Factors relevant to this assessment of the quality of law"- which are referred to in some cases as "safeguards against arbitrariness"- will include the existence of clear legal provisions for ordering detention; for extending detention, and for setting time-limits for detention (Abdolkhani and Karimnia, cited above, § 135 and Garayev v. Azerbaijan, no. 53688/08, § 99, 10 June 2010); and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention (Louled Massoud v. Malta, no. 24340/08, § 71, 27 July 2010)."

Ghaldaqstant l-esponenti jitolbu umilment li din l-Onorabbli Qorti joghgobha:

1. Tiddikjara illi l-fatt illi l-esponent m'ghandux forum skont il-Kap 9 fejn jista' iressaq talba ghal *habeas corpus* una volta illi inharget fil-konfront tieghu att ta' l-akkuza jilledi d-drittijiet ta' smiegh xieraq kif sanciti fl-artikolu 39 tal-Kostituzzjoni u l-artikolu 6(1) tal-Konvenzjoni ghad-Drittijiet tal-Bniedem u l-artikolu 34 tal-Kostituzzjoni u l-artikolu 5 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

2. Taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa, sabiex twettaq, jew tizgura t-twettiq tad-drittijiet fundamentali tar-rikorrent, inkluz li tehles lill-esponent mill-arrest.

Bl-ispejjez.'

Rat ir-risposta tal-Avukat Generali u tal-Avukat tal-Istat li taqra kif isegwi:

1. 'L-esponenti Avukat Generali ma hiex il-legittimu kontradittur f'din l-azzjoni u konsegwentement ghandha tigi liberata mill-osservanza tal-gudizzju.

2. Minghajr pregudizzju ghas-suespost, u fil-mertu, l-ilment tar-rikorrent huwa li ma ghandux forma ta' *habeas corpus* kif kontemplat fl-Artikolu 412B tal-Kap. 9 tal-Ligijiet ta' Malta wara li tkun inharget att ta' akkuza. Filwaqt li huwa minnu li ma hemmx ligi ossia dispozizzjoni ekwivalenti, dan il-fatt wahdu ma jfissirx li r-rikorrent sofra minn lezjoni tal-jedd tieghu ghalsmigh xieraq u tal-jedd tieghu ghal-liberta' u ghalhekk qieghed jigi eccepit li t-talbiet u l- pretensjonijiet tar-rikorrent huma infondati fil-fatt u fid-dritt, u dan ghar-ragunijiet segwenti li qed jinghataw minghajr pregudizzju ghal xulxin. Kif ser jintwera aktar 'l isfel f'din ir-risposta, ir-

rikorrent ghandu rimedji ohra li tipprovdi l-ligi ordinarja penali abbazi ta' liema il-legalita' tal-arrest tieghu tigi analizzata minn Qorti.

3. In kwantu ghall-**jedd ghal-liberta'**, dan huwa mhares mill-Artikolu 5 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem u l-Artikolu 34 tal-Kostituzzjoni ta' Malta. Ir-rikorrent prezentement jinsab mixli quddiem il-Qorti Kriminali b'omicidju voluntarja. Isegwi ghalhekk li d-detenzjoni tieghu, kemm meta l-kaz kien ghadu fi stadju ta' kumpilazzjoni u issa quddiem il-Qorti Kriminali, hi bbazata fuq l-Artikolu 5(1)(c) tal-Konvenzjoni u l-Artikolu 34(1) (f) tal- Kostituzzjoni. Ma hemm ebda dubju li l-arrest tar-rikorrent kien u huwa wiehed legali; kien ikkonvalidat meta tressaq quddiem il-Qorti tal-Magistrati bhala Qorti Istruttorja, l-arrest tieghu baqa' jigi kkonfermat bhala wiehed legali kull meta talab ghall-helsien mill-arrest (u t-talbiet tieghu s'issa dejjem gew michuda kemm meta dawn gew ipprezentati quddiem il-Qorti tal- Magistrati kif ukoll meta gew ipprezentati quddiem il-Qorti Kriminali) u, fuq kollox, l-arrest tar-rikorrent ghadu fil-parametri tat-termini kontemplati fl-Artikolu 575 tal-Kap 9 tal-Ligijiet ta' Malta.

Ghalhekk, qatt ma kien hemm kwistjoni fuq il-validita' u legalita' tal-arrest tar-rikorrent, u konsegwentement, din l-

Onorabbli Qorti ghandha tichad it-talbiet tar-rikorrent sa fejn dawn jirrigwardaw il-jedd ghal-liberta'.

4. In kwantu ghall-**jedd ghal smigh xieraq** kif sancit mill-Artikolu 6 tal-Konvenzjoni u l-Artikolu 39 tal-Kostituzzjoni, l-esponenti ma jaqblux li r-rikorrent sofra min-nuqqas ta' access ghal qorti bi ksur ta' dan il-jedd fundamentali. Kif diga' nghad, huwa minnu li ma hemmx habeas corpus ai termini tal-Artikolu 412B tal-Kap. 9 wara li tkun inharget att ta' akkuza, izda dan il- fatt ma jfissirx li r-rikorrent ma ghandux modalita' ta' kif jistharreg l-arrest tieghu. L-artikolu 575 tal-Kap. 9 tal-Ligijiet ta' Malta kjarament jipprovdi dan ir-rimedju – rimedju li l-istess rikorrent utilizza numru ta' drabi. F'dan il-kaz, gara li minhabba dewmien fl-assenjazzjonijiet bejn imhallef u iehor, ma nghatax digriet definittiv ghar-rikorsi ghall-helsien mill-arrest li kien ghamel ir-rikorrent.

Madankollu izda, fil-mument li qed tigi mfassla din ir-risposta, talba ohra ghall-helsien mill-arrest min-naha tar-rikorrent tinsab imhollija ghas-smigh ghal nhar l-20 ta' Gunju, 2023. Lil hinn mill-kwistjoni ta' kif dik it-talba ser tizvolgi, il-fatt jibqa' li bis-sahha tal-Artikolu 575 tal-Kap.9, l-istharrig tal-arrest li r-rikorrent irid jaghmel ser ikun qieghed isir. Ghalhekk, il-fatt li l-Artikolu 412B tal-Kap. 9 ma

jipprovdix *habeas corpus* fic-cirkostanzi specifici tar-rikorrent, ma jfissirx li r-rikorrent huwa sprovvist minn rimedju xierqa u adegwat ghac-cirkostanzi tieghu.

Ghalhekk, din l-Onorabbli Qorti ghandha tichad it-talbiet tar-rikorrent sa fejn dawn jirrigwardaw il-jedd tieghu ghal smigh xieraq.

5. Minghajr pregudizzju ghas-suespost, unikament fl-eventwalita′ li din l-Onorabbli Qorti tqis li sehh xi ksur ta′ wiehed jew aktar mil-jeddijiet fundamentali tar-rikorrent, is-sejbien ta′ tali ksur ghandu jkun rimedju sufficcjenti. Fi kwalunkwe kaz, l-esponenti jissottomettu li din l-Onorabbli Qorti ma ghandiex tehles lir-rikorrent mill-arrest kif mitlub fit-tieni talba tieghu. L-ghoti tal-helsien mill-arrest ghandu jibqa′ fdat f′idejn il-Qorti Kriminali, mhux biss ghaliex prezentament ghandha rikors ghall-helsien mill-arrest quddiemha, izda ghaliex hi l-istess Qorti Kriminali li ghandha quddiemha l-atti tal-process kriminali kollha quddiemha u li hi fl-ahjar pozizzjoni sabiex tiddetermina, in vista ta′ dak kontemplat mill-Artikolu 575 tal-Kap. 9, jekk ir-rikorrent ghandux jinghata l-helsien mil-arrest u, jekk iva, taht liema kundizzjonijiet tali helsien ghandu jkun regolat.

6. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant, l-esponenti umilment jissottomettu li din l-Onorabbli Qorti ghandha **tichad** it-talbiet rikorrenti.

Bl-ispejjez.'

Rat il-provi fl-atti li principarjament jikkonsistu f'kopja estensiva ta' dokumentazzjoni mill-atti tal-kumpilazzjoni fil-konfront tar-rikorrent;

Semghet it-trattazzjoni tal-partijiet fis-seduta tal-5 ta' Ottubru, 2023 liema trattazzjoni giet traskritta u tinsab fl-atti.

Rat illi fil-verbal datat 5 ta' Ottubru, 2023 ir-rikors gie differit ghal-lum ghad-decizjoni.

Rat l-atti kollha.

Ikkunsidrat:

Illi l-kaz odjern jikkonsisti f'rikors ta' indoli kostituzzjonali fejn ir-rikorrent Aleksander Stojanovic, li jinsab akkuzat b'omicidju volontarju apparti akkuzi ohra u ghadu sal-lum mizmum taht arrest preventiv, isostni li l-fatt li l-ligi nostrana ma tippermettix li

jsir rikors *habeas corpus* wara li akkuzat tkun inharget l-att ta' akkuza fil-konfront tieghu, huwa leziv tad-dritt ghal smiegh xieraq fit-termini tal-artikolu 39 tal-Kostituzzjoni ta' Malta u l-artikolu 6 (1) tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem kif ukoll tad-dritt fundamentali ta' protezzjoni minn arrest jew detenzjoni arbitrarja fit-termini tal-artikolu 34 tal-Kostituzzjoni ta' Malta u l-artikolu 5 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem li jitratta d-dritt ghal-liberta u s-sigurta'.

Illi l-fatti li r-rikorrent isostni li wassluh quddiem din il-Qorti Kostituzzjonali huma li ghal perjodu ta' oltre xahar, rikors sottomess minnu sabiex jinghata l-liberta' provisorja baqa' mhux mismugh u dekretat ghar-raguni li fil-frattemp irrikuzaw erba' mhallfin. Ir-rikorrent isostni li tul dak iz-zmien huwa gie mcahhad mill-possibilita' li jirrikorri ghall-protezzjoni ta' Qorti sabiex ma jibqax jigi deprivat mil-liberta' tieghu u dan ghaliex irrizulta li l-artikolu 412B tal-Kodici Kriminali ma japplikax wara li tkun inharget l-att ta' akkuza, kif deciz ukoll f'digriet tal-Imhallef Edwina Grima fl-atti tal-akkuzi kriminali kontra r-rikorrent. Isostni ghalhekk li din il-Qorti ghandha ttih rimedju effettiv fosthom li tkun din il-Qorti stess li ttih il-liberta' provizorja.

L-intimati Avukat Generali u Avukat tal-Istat fl-ewwel lok jeccepixxu li l-Avukat Generali mhux il-legittimu kontradittur f'dawn il-proceduri. Isostnu li l-jedd ghal-liberta tar-rikorrenti fil-

proceduri kriminali fil-konfront tieghu kif sancit mill-artikolu 5 tal-Konvenzjoni u l-artikolu 34 tal-Kostituzzjoni huma mharsa u li d-detenzjoni tar-rikorrent hija wahda legali fit-termini tal-istess artikoli stante li huwa jinsab taht arrest ghar-raguni li huwa jinsab akkuzat b'omicidju volontarju, liema arrest gie konvalidat mill-Qorti tal-Magistrati bhala Qorti Istruttorja, li ghalkemm huwa prezenta diversi rikorsi sabiex jinghata l-liberta' provizorja dawn gew kollha michuda u li l-arrest tieghu ghadu validu fil-parametri tal-artikolu 575 tal-Kap. 9 tal-Ligijiet ta' Malta. L-intimati wkoll ma jaqblux li sehh ksur ghal jedd ghal smiegh xieraq stante li, ghalkemm jaqblu li r-rikorrent ma setax jirrikorri ghal rikors *habeas corpus*, skont l-intimati l-artikolu 575 tal-Kap. 9 jipprovdi rimedju billi r-rikorrenti jista' dejjem jiprezenta rikors ghal-liberta provizorja fit-termini tal-artikolu 575 tal-Kap. 9, rimedju li l-intimati jsostnu li r-rikorrenti ghamel uzu minnu diversi drabi. Izidu li tant hu hekk li meta kienet qed tigi abbozzata r-risposta tal-intimati r-rikorrent kellu rikors fit-termini tal-artikolu 575 tal-Kap. 9 pendenti quddiem il-Qorti Kriminali. Jeccepixxu ulterjorment li fi kwalunkwe kaz, anki li kieku din il-Qorti kellha ssib il-ksur allegat, is-sejbien ta' tali ksur ghandu jkun rimedju sufficjenti ghar-rikorrenti u li fi kwalunkwe kaz mhux idoneu fil-ligi li tkun din il-Qorti li taghti hi l-helsien mill-arrest stante li hija l-Qorti Kriminali li ghandha quddiemha l-atti tal-process kriminali li hija fl-ahjar posizzjoni li tiddetermina jekk ir-rikorrent akkuzat ghandux jinghata l-helsien mill-arrest jew le.

Ecezzjoni li l-Avukat Generali mhux legittimu kontradittur:

Illi fil-kaz odjern jirrizulta li primarjament ir-rikorrent qed jattakka bhala leziv tad-drittijiet fundamentali tieghu in-nuqqas ta' provvediment fil-ligi li jippermettilu li jiprezenta talba *habeas corpus* pendenti l-proceduri kriminali fil-konfront tieghu fl-istadju li gia nharget l-att ta' akkuza fil-konfront tieghu. Illi sakemm ir-rikors odjern jitratta dan il-punt il-Qorti tqis li l-eccezzjoni tal-intimati ghandha mis-sew stante li mhux l-Avukat Generali li huwa l-legittimu kontradittur meta jigi allegat li l-ligi jew omissjoni fl-istess huma lezivi tad-drittijiet fundamentali. Il-Qorti izda tirrileva li bhala rimedju ghal tali lezjoni allegata r-rikorrent qed jitlob ukoll li tkun din il-Qorti li taghtih il-liberta' provizorja u dan fi proceduri fejn huwa l-Avukat Generali li qed imexxi l-prosekuzzjoni fil-konfront tar-rikorrent akkuzat. Il-Qorti tqis li dwar dan il-punt certament l-Avukat Generali ghandu kull interess li jkun parti mill-kawza odjerna anki sabiex ikun jista' jirribatti ghal din it-talba da parti tar-rikorrent li taffettwa dirett il-proceduri li l-Avukat Generali qed imexxi fil-konfront tar-rikorrent akkuzat quddiem il-Qorti Kriminali. Il-Qorti ghalhekk ghal din ir-raguni tqis li l-ewwel eccezzjoni tal-intimati mihiex gustifikata u ser tghaddi sabiex tichad l-istess.

Mertu:

Illi fil-mertu l-Qorti rat id-dokumentazzjoni esebita mill-atti tal-kumpilazzjoni fil-konfront tar-rikorrent fosthom:

(1) l-att ta' akkuza a fol. 19 et seq fejn fost ohrajn huwa jinsab akkuzat b'omicidju volontarju b'dana li tressaq taht arrest nhar l-20 ta' Mejju, 2021;

(2) Rat illi tul il-kumpilazzjoni r-rikorrent issottometta diversi drabi talbiet sabiex jigi rilaxxat bil-liberta' provizorja izda dawn it-talbiet gew dejjem rifjutati principalment ghar-raguni li l-Qorti tal-Magistrati u l-Qorti Kriminali dejjem irritenew li ma jqisux li r-rikorrent huwa persuna ta' min jafdah, stante li gia huwa mahrub minn pajjiz iehor cioe' is-Serbja fejn fil-konfront tieghu inhareg mandat ta' arrest sabiex iservi piena ta' prigunerija ta' tlett snin u nofs, w'ghalhekk ma jqisux li jista' jigi fdat li ma jahrabx minn Malta, aktar u aktar la darba fil-kaz odjern jinsab akkuzat b'omicidju;

(3) L-att ta' akkuza fil-konfront tar-rikorrent li jgib id-data tal-24 ta' Novembru, 2022 esebit a fol. 188 et seq tal-process;

(4) Id-digriet ta' rikuza tal-Imhallef Aaron Bugeja datat 19 ta' April, 2023 esebit a fol. 265 tal-process u iehor datat 21 ta' April, 2023 a fol. 267 tal-process;

(5) Id-digriet ta' rikuza tal-Imhallef Consuelo Scerri Herrera datat 16 ta' Mejju, 2023 esebit a fol. 98 tal-process;

(6) In-nomina tal-Imhallef Audrey Demicoli sabiex tisma l-kawza kriminali tar-rikorrent liema nomina ggib id-data tas-17 ta' Mejju, 2023 esebita a fol. 274 tal-process;

(7) In-nomina tal-Imhallef Edwina Grima flok l-Imhallef Audrey Demicoli datata 1 ta Gunju, 2023 a fol. 276 tal-process;

(8) Ir-rikors tar-rikorrent *habeas corpus* intavolat a tenur tal-artikolu 412B tal-Kodici Kriminali datat l-1 ta' Gunju, 2023 a fol. 279 et seq tal-process. F'dan ir-rikors huwa jilmenta li ntavola talba ghall-liberta' provizorja fejn wara li dan gie trattat l-Imhallef sedenti rrikuza ruhu. Jzid li ghaddew numru ta' gimghat u l-kawza ma gietx riassenjata lill-Imhallef alternattiv. Izid kif isegwi:

'Illi, l-atti m'humiex iktar quddiem il-Qorti tal-Magistrati u ilhom rinvijati u inharget att ta' l-akkuza fil-konfront ta' l-esponenti u ghalhekk dan ir-rikors jista' jsir biss quddiem il-Qorti Kriminali. L-artikolu 412B (1) japplika biss meta l-atti jkunu quddiem il-Qorti

tal-Magistrati u l-artikolu 409A japplika meta ma jkunx hemm proceduri pendenti.

Illi, l-esponent jikkontendi li l-arrest tieghu huwa llegali ghaliex huwa ma jistax isib forum sabiex jiddetermina jekk l-arrest kontinwat tieghu huwiex gustifikat.

Ghaldaqstant ir-rikorrenti jitlob bir-rispett li dina l-Onorabbli Qorti joghgobha, previa li jingieb l-esponent quddiem din il-Qorti terminu previst u li jinstema' r-Registratur tal-Qrati Kriminali, tordna r-rilaxx tal-esponent mill-arrest.'

(8) Id-Digriet tal-Qorti Kriminali preseduta mill-Imhallef Edwina Grima datat 5 ta' Gunju 2023 (fol. 285 et seq) fl-atti tar-rikors *habeas corpus* fejn fil-parti disposittiva tieghu jaqra kif isegwi:

'Accused declares that he is filing his request for release from arrest in terms of article 412B of the Criminal Code. Now this article of the law states as follows:

(1) Any person in custody for an offence for which he is charged or accused before the Court of Magistrates and who, at any stage other than that to which article 574A applies, alleges that his continued detention is not in accordance with the law may at any time apply to the court demanding his release from custody

Any such application shall be appointed for hearing with urgency and together with the date of hearing shall be served on the same day of the application on the Commissioner of Police or, as the case may be, on the Commissioner of Police and the Attorney General, who may file a reply therefor by not later than the day of the hearing.

(2) The provisions of article 574A (2) and (3) shall *mutatis mutandis* apply to an application under this article.

(3) Where the application is filed in connection with proceedings pending before the Court of Magistrates as a court of criminal inquiry before a bill of indictment has been filed or if the term referred in sub-article (3A) of article 401 is still running, the application shall be filed in the Criminal Court and 4901 is still running, the application shall be filed in the Criminal Court and the foregoing provisions of this article shall mutatis mutandis apply thereto.

(4) The provisions of article 409A(4) shall apply to a decision of the Court of Magistrates under this article.

It is thus clear that this provision of the law applies solely in those instances where the case is pending before the Court of Magistrates either as a Court of Criminal Judicature, in which instance such application shall be heard before that Court, or

before the Court of Magistrates as a Court of Criminal Inquiry prior to the filing of the bill of indictment by the Attorney General, or if the term referred in sub-article (3A) of article 401 is still running, in which case the application is to be filed before this Court.

The Bill of Indictment in this case has been issued by the Attorney General and this on the 24th of November 2022. Accused himself, in fact, in his application is asking this Court to consider his request in terms of this disposition of the law, although it is evident from its wording that this procedure does not apply when the case is no longer being heard before the Court of Magistrates either as a Court of Criminal Judicature or as a Court of Criminal Inquiry.

Now this court cannot assume a competence which is not conferred to it by Law. The Court concurs with accused that the only disposition of the Criminal Code which addresses the institute of *Habeas Corpus* in cases which are pending before the courts of justice is article 412B. He puts forward the argument that this disposition applies also in proceedings pending before this Court on the premise that to argue otherwise would be tantamount to denying an accused person an effective remedy should he wish to seek redress before this Court for his continued detention in cases where he deems that the same is contrary to law,

however, article 412B clearly and unequivocally applies only with regards to all cases pending before the Court of Magistrates, and not also to those cases pending before this Court. The fact that the acts are no longer before the Court of Criminal Inquiry does not automatically grant competence to this Court to hear accused's application filed within the parameters of article 412B(3), since the law clearly states that this procedure is applicable only in those instances where the bill of indictment has not as yet been filed and where the acts are remitted to the Attorney General in terms of article 401(3A) of the Criminal Code. In fact, this article of the law is found in Title II of the Book Second, Part I of the Cirminal Code netitle "**Of the Court of Magistrates".** It has been decided:

"l-ordinament tal-procedimenti legali jemana biss u esklussivament mil-ligi kif mdawwla bl-interpretazzjoni taghha mill-qrati li ghandhom il-funzjoni li jaghtu t-tifsira awtentika tal-ligijiet tal-pajjiz. Hija wkoll il-ligi li tippreskrivi l-parametri tal-kompetenza ta' kull qorti u ebda qorti ma tista' tohrog 'il barra minn dawk il-parametri ghaliex anki l-qrati huma soggetti ghall-ligi."

Thus, the hands of this Court are tied in that it cannot provide the remedy being sought by accused since the procedure for *habeas corpus* filed in terms of article 412B of the Criminal code applies solely to the Court of Magistrates.

Having thus premised, this does not mean, and should in no way imply, that accused has no redress at law with regards to a potential violation of his rights on his being denied an effective and timely hearing to his applications of bail filed on the 13th of April 2023 and on the 16th May 2023. Moreover, the Court is of the firm opinion that the law itself should provide such a remedy before this Court similar to that granted before the Court of Magistrates. This being said, today, accused's bail applications have been set for hearing thus granting him a right of review as to the "lawfulness" of his deprivation of liberty, albeit somewhat late in day. This Court in its criminal jurisdiction however can only address his grievance within the powers granted to it by law, leaving however unprejudiced any rights which accused may have to address his grievances before the competent court being the Constitutional Court.

Consequently, for the above-mentioned reasons, since the Court does not have the competence according to law to address accused's request, abstains from taking further cognisance of the same.'

(5) Rat id-diversi atti li jevidenzjaw li l-Imhallef Audrey Demicoli ma astjenietx formalment mis-smiegh tal-kawza qabel ma din giet

assenjata lill-Imhallef Edwina Grima b'dana li dan wassal ghal talba mid-difiza ghall-astensjoni tal-Imhallef Edwina Grima.

(6) Id-digriet tal-Prim Imhallef tar-revoka tal-assenjazzjoni tal-Imhallef Edwina Grima datat 13 ta' Gunju, 2023 u konferma tal-assenjazzjoni tal-Imhallef Audrey Demicoli a fol. 311 tal-process;

(7) Rat illi finalment l-Imhallef assenjata harget digriet datat 14 ta' Gunju, 2023 li permezz tieghu ordnat in-notifika tar-rikors ghal-liberta provizorja datat 16 ta' Mejju, 2023 bi zmien 24 siegha lill-Avukat Generali ghar-risposta u rat id-digriet datat 16 ta' Gunju, 2023 li permezz tieghu ir-rikors gie appuntat ghas-smiegh ghal nhar l-20 ta' Gunju, 2023 (fol. 322). Dan is-smiegh gie segwit minn digriet datat il-21 ta' Gunju, 2023 li permezz tieghu, ghar-ragunijiet moghtija fl-istess (ara fol. 325 et seq tal-process), dik il-Qorti Kriminali wkoll cahdet it-talba ghal-liberta' provizorja liema ragunijiet isegwu u huma simili ghal dawk fid-digrieti ta' cahda precedenti.

Illi mis-suespost jirrizulta lil din il-Qorti li effettivament wiehed minn zewg rikorsi ghall-helsien mill-arrest sottomess mir-rikorrent odjern gie finalment deciz erba' u tletin gurnata (34) wara li gie ntavolat cioe' fil-21 ta' Gunju, 2023. Mis-suespost ukoll irrizulta wkoll li tul dawn l-erba' u tletin gurnata (34) l-Qorti Kriminali stess iddikjarat li r-rikorrent ma setax jusufruwixxi ruhu

mill-artikolu 412B tal-Kap. 9 tal-Ligijiet ta' Malta u jipprezenta rikors *habeas corpus* ghas-semplici raguni li l-ligi stess teskludi l-applikazzjoni ta' dan l-artikolu lill-akkuzati li fil-konfront taghhom tkun gia harget l-att ta' akkuza kif sehh fil-kaz odjern.

Illi fit-trattazzjoni taghhom l-intimati sostnew li l-arrest tar-rikorrent gie fil-fatt konvalidat u huwa kellu diversi drabi l-okkazzjoni li jintavola rikorsi ghall-helsien mill-arrest fit-termini tal-artikolu 575 tal-Kap. 9 tal-Ligijiet ta' Malta izda jzidu:

''Issa, il-kwistjoni kollha hawnhekk, hija li, verament kaz pjuttost ecezzjonali, l-Imhallfin kollha tal-Kriminal spiccaw b'xi mod jew iehor ma setghux jisimghuh dan il-kaz. It is unfortunately a statistical anomaly tista' tghidilha ghax jien qatt ma naf b'kaz iehor in recent memory fekn erbgha Imhallfin kollha b'xi mod jew iehor gew rikuzati . . .sfortunatament, vera, ma nistax immerieha, hawnhekk kien hawn din l-anomalija, kien hawn l-izball amministrattiv nista' nghid forsi min-naha tar-registratur, li kien hemm perjodu, relattivament qasir, imma kien hemm perjodu fejn is-Sinjur ma kellux imhallef assenjat ghal kawza tieghu u sfortunatament huwa minnu, it-talbiet tieghu ghal helsien mill-arrest, baqghu imdendlin. . .''

B'referenza ghad-digriet tal-Imhallef Edwina Grima dwar il-jedd o meno tar-rikorrenti li jiprezenta rikors *habeas corpus* id-difensur tal-intimati sostna:

'Il-Qorti Kriminali tat id-digriet taghha. Jien nahseb li huwa konformi mal-ligi . . *habeas corpus* fil-kuntest wara att ta' akkuza ma jezistix. . . Imma ma jezistix ghaliex il-ligi tindirizza din is-sitwazzjoni ordinarja fejn jekk inti trid tistharreg l-arrest tieghek, taghmel ir-rikors tal-bail.'

Ikkunsidrat ulterjorment:

Illi l-fatti odjerni ghalkemm forsi *prima facie* jistghu jidhru kumplikati fil-fatt huma pjuttost semplici. Ir-rikorrent isostni li l-fatt li persuna akkuzata qabel ma nhargilha l-att tal-akkuza tista' tintavola kemm rikors ghal-liberta' provizorja kif ukoll rikors *habeas corpus* jekk ikun jehtieg, filwaqt li persuna akkuzata wara li nhargitilha l-atti tal-akkuza tista' biss tintavola rikors ghal-liberta provizorja izda mhux rikors *habeas corpus,* jirrendi tali nuqqas fil-ligi bi ksur tad-dritt fundamentali tieghu ghal smiegh xieraq u kontra detenzjoni illegali. Il-Qorti rat li fil-kaz odjern ir-rikorrent spicca ghal mill-anqas tletin gurnata (30) f'limbu legali filwaqt li kien taht arrest preventiv minghajr ma kellu l-

possibilita′ fil-ligi li jressaq ilment tul dan il-perijodu quddiem Qorti kompetenti fil-ligi adita bil-poter li taghmel dan.

Illi l-intimati jsostnu li dan kien kaz eccezzjonali rizultat tad-diversi rikuzi tal-imhallfin izda l-fatt li dan kien kaz eccezzjonali xejn ma jnaqqas mill-importanza li d-dritt ghall-liberta ta′ persuna ghandu dejjem jibqa mhares w′anki siegha jew jum ta′ arrest mhux legali huma zejda u huma protetti taht l-artikolu 34 tal-Kostituzzjoni u l-artikolu 5 tal-Konvenzjoni, b′dana li jirrizulta ksur tad-dritt fundmentali tar-rikorrent fit-terminita′ dawn l-artikoli.

Illi ir-rikorrent sab ruhu taht arrest preventiv ghal perjodu ta′ madwar erba′ u tletin (34) gurnata minghajr ma kellu rimedju, f′dan il-perjodu, sabiex jikkontesta tali detenzjoni. Il-Qorti tqis li dan iwassal ukoll ghal ksur tal-jedd ghal smiegh xieraq tar-rikorrent fit-termini tal-artikolu 6 tal-Konvenzjoni u tal-artikolu 39 tal-Kostituzzjoni stante li sahansitra l-Qorti li quddiemha fittex rimedju kkonfermatlu permezz ta′ digriet li ma kinitx adita bil-poter li tisma′ u titratta r-rikors tieghu *habeas corpus* ghar-raguni li l-ligi nostrana ma tiprovdilux tali rimedju.

Il-Qorti ghaldaqstant in vista tal-konsiderazzjonijiet suesposti ser tghaddi sabiex tilqa′ l-ewwel talba tar-rikorrent.

Rimedju:

Illi permezz tat-tieni talba tieghu ir-rikorrent jitlob li din il-Qorti taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa, sabiex twettaq, jew tizgura t-twettiq tad-drittijiet fundamentali tar-rikorrent, inkluz li tehles lill-esponent mill-arrest.

Da parti taghhom l-intimati jsostnu li f'kaz li din il-Qorti ssib il-lezjoni, allura d-dikjarazzjoni tal-lezjoni ghandha tkun rimedju bizzejjed fic-cirkustanzi tal-kaz odjern. Izidu li din il-Qorti mihiex l-ahjar Qorti adita bl-informazzjoni dwar il-kaz kriminali w'ghalhekk m'ghandhiex tkun hi li tiddeciedi dwar jekk ir-rikorrent odjern ghandux jinghata l-liberta' provizorja jew le.

Illi din il-Qorti rat li ghalkemm effettivament ir-rikorrent spicca ghal numru ta' gimghat, oltre tletin gurnata, f'limbu legali fejn nonostante li ntavola rikors ghal-liberta provizorja dan baqa' ma nstemghax ghar-raguni li erba' mhallfin kollha rrikuzaw, finalment jirrizulta li dan ir-rikors instema' u gie deciz nhar il-21 ta' Gunju, 2023 fejn it-talba' ghal-liberta provizorja giet michuda. Dan ifisser lil din il-Qorti li anki li kieku dak ir-rikors instema' qabel minghajr problemi, r-rizultat xorta kien ser ikun l-istess u cioe' li r-rikorrent jibqa' jinzamm taht arrest. Ghalhekk minn dan

l-aspett il-Qorti tqis li verament sa dan l-istadju d-dikjarazzjoi tal-lezjoni hija bizzejjed.

Il-Qorti izda mihiex tal-istess fehma dwar dik il-parti tal-ilment tar-rikorrent li l-ligi ma tiprovdilux il-jedd li jintavola rikors *habeas corpus* f'dan l-istadju tal-proceduri fil-konfront tieghu. Il-kaz odjern, ghalkemm verament wiehed eccezzjonali, huwa ezempju car li ghandu juri lill-legislatur li dan ir-rimedju ghandu jkun applikabbli wkoll ghal persuni li fil-konfront taghhom tkun gia harget l-att ta' akkuza u mhux biss ghal dawk li fil-konnfront taghhom ghadha ma hargitx. Din il-Qorti ma tistax tifhem x'jaghmel anqas importanti u anqas fundamentali l-liberta' ta' persuna wara li tkun harget l-att tal-akkuza meta komparata ma qabel! Ghalhekk il-legislatur ghandu jaghmel l-emendi legislattivi neccessarji sabiex il-jedd fit-termini tal-artikolu 412B tal-Kap. 9 tal-Ligijiet ta' Malta jkun car li japplika f'kull kaz tul il-procedura kollha kriminali u mhux biss tul parti minnha. Huwa minn dan l-aspett tal-lezjoni fil-konfront tar-rikorrent li l-Qorti tqis li s-semplici dikjarazzjoni tal-lezjoni mihiex bizzejjed u ser tghaddi sabiex taghti kumpens lir-rikorrent ghal-lezjoni fis-somma ta' hames mitt Euro (€500).

Decizjoni

Ghaldaqstant, ghar-ragunijiet kollha suesposti il-Qorti tghaddi sabiex taqta' u tiddeciedi din il-vertenza ta' indoli kostituzzjonali kif isegwi:

1. Tichad l-ewwel eccezzjoni tal-intimati filwaqt li ssib li l-Avukat Generali huwa wkoll legittimu kontradittur fil-proceduri odjerni;

2. Tichad il-bqija tar-risposta tal-intimati sakemm din hija nkompatibbli ma' dak hawn deciz;

3. Tilqa' l-ewwel talba tar-rikorrent u tiddikjara li l-fatt illi r-rikorrent m'ghandux forum skont il-Kap 9 fejn jista' iressaq talba ghal *habeas corpus* una volta illi inharget fil-konfront tieghu att ta' l-akkuza jilledi d-drittijiet ta' smiegh xieraq tieghu kif sanciti fl-artikolu 39 tal-Kostituzzjoni u l-artikolu 6(1) tal-Konvenzjoni ghad-Drittijiet tal-Bniedem u l-artikolu 34 tal-Kostituzzjoni u l-artikolu 5 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

4. Tilqa' t-tieni talba limitatament billi tordna lill-intimat Avukat tal-Istat ihallas kumpens ghal-lezjoni sofferta lir-rikorrent fis-somma ta' hames mitt Euro (€500) filwaqt li tichadha fil-bqija.

5. Il-Qorti tordna lir-Registratur Qrati Civili u Tribunali sabiex fil-mument li din is-sentenza tghaddi in gudikat, jibghat kopja ta' din is-sentenza lill-Ispeaker tal-Kamra tad-Deputati kif jesigi l-

Artikolu 242 tal-Kodici ta' Organizazzjoni u Procedura Civili Kap. 12 tal-Ligijiet ta' Malta.

Bl-ispejjez kontra l-intimat Avukat tal-Istat.

Moqrija.

Onor. Imhallef Dr. Joanne Vella Cuschieri
B.A., Mag. Jur. (EUR.LAW), LL.D.
30 ta' Novembru 2023

Cora Catania
Deputat Registratur
30 ta' Novembu 2023