The Court of Criminal Appeal

His Honour the Chief Justice Mark Chetcuti

The Hon. Judge Edwina Grima

The Hon. Judge Giovanni Grixti

Sitting of the 22nd of May 2024

Bill of Indictment No: 36/2022

The Republic of Malta

Vs

Aleksandar Stojanovic

The Court,

1.Having seen the bill of indictment bearing number 36 of the year 2022 filed against Aleksandar Stojanovic, wherein he was charged by the Attorney General on behalf of the Republic of Malta:

> **<u>In the First Count</u>** - that during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, limits of Għarb, Gozo, maliciously, with intent to kill Walid Salah Abdel Moteleb Mohamed or to put his life in manifest jeopardy, caused the death, of the same Walid Salah Abdel Moteleb Mohamed. Additionally, the accused

Aleksandar Stojanovic, having carried out the wilful homicide of Walid Salah Abdel Moteleb Mohamed, during the night between the fourteenth (14) and the fifteenth (15) January of the year two thousand and eighteen (2018) rendered himself a recidivist, after being found guilty by virtue of judgments delivered by the Court of Magistrates of Malta, which judgements have become res judicata and cannot be changed.

In the Second Count - during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, in the limits of Għarb, Gozo, at the time of committing the crime of wilful homicide against the person of Walid Salah Abdel Moteleb Mohamed, had on his person arms proper or ammunition or an imitation of any arms proper or ammunition. Additionally, the accused Aleksandar Stojanovic, in the light of the facts and circumstances mentioned in this count of this bill of indictment during the night between the fourteenth (14) and the fifteenth (15) January of the year two thousand and eighteen (2018), rendered himself a recidivist, after being found guilty by virtue of the following judgments delivered by the Court of Magistrates of Malta, which judgements have become res judicata and cannot be changed.

In the Third Count - during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, in the limits of Għarb, Gozo, at the time of committing the crime of wilful homicide against the person of Walid Salah Abdel Moteleb Mohamed, had on his person or carried outside any premises or appurtenances a firearm and ammunition without a license issued by the Commissioner of Police. Additionally, the accused Aleksandar Stojanovic, in the light of the facts and circumstances mentioned in this count of this bill of indictment, during the night between the fourteenth (14) and the fifteenth (15) January of the year two thousand and eighteen (2018) rendered himself a recidivist, after being found guilty by virtue of the following judgments delivered by the Court of Magistrates of Malta, which judgements have become res judicata and cannot be changed.

In the Fourth Count - during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, in the limits of Għarb, Gozo and/or in these Islands, as a person acquired or came into possession of a firearm or ammunition otherwise than in virtue of a license and did not immediately notify the Commissioner of Police. Additionally, the accused Aleksandar Stojanovic, in the light of the facts and circumstances mentioned in this count of this bill of indictment, during the night between the fourteenth (14) and the fifteenth (15) January of the year two thousand and eighteen (2018) rendered himself a recidivist, after being found guilty by virtue of the following judgments delivered by the Court of Magistrates of Malta, which judgements have become res judicata and cannot be changed.

In the Fifth Count - during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, in the locality of Għarb, Gozo, driven a grey motor vehicle of the make

BMW bearing United Kingdom registration number RN52GKJ and chassis number WBABV7206OJZ79109 without a license.

In the Sixth Count - during the night between the fourteenth (14) and the fifteenth (15) of January of Page 16 of 57 the year two thousand and eighteen (2018), in the area of San Dimitri, in the limits of the locality of Għarb, Gozo, used a grey motor vehicle of the make BMW bearing United Kingdom registration number RN52GKJ and chassis number WBABV7206OJZ79109 without a policy of insurance in respect of third party risks in force.

In the Seventh Count - during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, in the locality of Għarb, Gozo, had in his possession or charge a grey vehicle of the make BMW bearing United Kingdom registration number RN52GKJ and chassis number WBABV7206OJZ79109, which vehicle was not registered with the Authority for Transport in Malta.

In the Eight Count - during the night between the fourteenth (14) and the fifteenth (15) of January of the year two thousand and eighteen (2018), in the area of San Dimitri, in the limits of the locality of Għarb, Gozo, had in his possession or use a grey vehicle of the make BMW bearing United Kingdom registration number RN52GKJ and chassis number WBABV7206OJZ79109, which vehicle was not issued with a valid circulation license or a valid circulation permit or a valid temporary licence disk by the Authority for Transport in Malta.

2. Having seen the preliminary pleas filed by accused Aleksandar Stojanovic on the 27th of February 2023.

3. Having seen the judgment of the Criminal Court of the 5th of December 2023, wherein the Court rejected the first, second, third, fourth and sixth preliminary pleas, abstained from taking further cognisance of the fifth preliminary plea which plea was withdrawn by the accused on the 25th. July 2023, partially acceded to the seventh preliminary plea on the lines of what was laid down in Ir-Repubblika ta' Malta vs. Carmel Saliba in the sense that there is nothing which precludes Dr. Daniel Calleja from being produced as an ordinary witness in order to ascertain and establish the facts that resulted during the site inspections carried out by him and to confirm the correctness of the declarations made to him as reproduced in his report so that both the Prosecution and the Defence can use these declarations as a means of exercising control over the witnesses who also gave evidence during the compilatory stage of the

proceedings and will also give *viva voce* evidence during the trial by jury. Therefore, and save what is provided in the first *proviso* to sub article (2) of Article 646 of the Criminal Code Dr. Daniel Calleja's report should remain in the acts of the proceedings but shall not be passed on to the jurors (except when requested by either of the parties for the purpose of exercising control over a witness). The Court rejected the eighth, ninth and tenth preliminary pleas, acceded to the eleventh preliminary plea in part in the sense that it declared as inadmissible and consequently ordered the removal from the acts of the documents inserted at folios 1214 to 1219 and also ordered that no reference to such documents and to the past criminal conduct of the accused be made by Inspector Bernard Spiteri during the course of his testimony unless this is rendered necessary by any one of the circumstances required by Articles 459A and 489 of the Criminal Code. Acceded to the twelfth preliminary plea in part in the sense that whilst not declaring the judgements exhibited by Dr. Mary Debono Borg on the 30th. September 2022 and the 21st. October 2022 as inadmissible nor could it order their removal from the acts of these proceedings but ordered instead that these judgements are not shown to the jurors unless the jurors arrive to a verdict of guilt in relation to the accused in which case proof relating to the first, second, third and fourth accusations would have to be produced by the Prosecution unless the accused would exempt them from so doing at that stage. Furthermore, the Court rejected the first and second plea raised by the Attorney General in his note of the 6th of March 2023 and acceded to the third plea made by the Attorney General and declared that statements of a general nature such as that made in point four of the list of witnesses in the note of preliminary pleas of the accused regarding witnesses are not admissible according to law.

4. Having seen the appeal application filed by accused Aleksandar Stojanovic on the 12th of December 2023 wherein this Court was requested to vary the judgment of the Criminal Court by confirming its decision with regard to the second, fourth, fifth, ninth, tenth, eleventh and twelfth preliminary pleas, and where it partially acceded to the seventh preliminary plea, and also confirming its decision with regard to the pleas raised by the Attorney General, while revoking the remainder of the judgment and this whereby the Criminal Court dismissed the first, third, sixth and eighth

preliminary pleas and only acceded partially to the seventh preliminary plea and instead uphold the same.

5. Having seen the reply of the Attorney General filed on the 31st of January 2024 wherein he requested that the Court reject all the grounds of appeal filed by the accused in their entirety.

6. Having seen the appeal filed by the Attorney General on the 14th of December 2023 wherein he requested this Court to vary the judgment of the Criminal Court in the following manner:

> i. By revoking limitedly that part of the judgment wherein the Criminal Court rejected the second preliminary plea raised by the Attorney General in her note in relation to the note of preliminary pleas filed by accused on the date of the 27th of February 2023 in accordance with article 438 of the Criminal Code.
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> ii. By confirming the rest of the judgment in its entirety.

7. Having seen the reply filed by accused Aleksandar Stojanovic on the 7th of February 2024 to the appeal filed by the Attorney General wherein he referred to the appeal filed by himself before this Court and declared that the said appeal is exhaustive and addresses all the issues raised by both parties.

8. Having heard oral submissions by the parties.

9. Having seen all the records of the case.

Considers,

10. Both the accused Aleksandar Stojanovic as well as the Attorney General have put forward an appeal to this Court from the judgment of the Criminal Court of the 5th of December 2023, both parties feeling aggrieved by parts of the said judgment. Whilst appellant Stojanovic is asking this Court to review that part of the appealed judgment which determined the first, third, sixth, seventh and eighth preliminary pleas raised by him to the Bill of Indictment, the Attorney General, whilst considering the judgment as well founded with regards to these pleas, however feels aggrieved by the decision of the Criminal Court wherein it rejected the plea of inadmissibility in relation to the sworn testimony of Inspector Colin Sheldon as indicated in the sixth

bullet point of point number three of the List of Witnesses filed by accused, since it was the Criminal Court's opinion that this was not a question of inadmissibility but of relevance to be determined by the jurors during the trial.

11. The Court will first consider the grievances filed by appellant in the order in which they appear in his appeal application.

> **A. The nullity of the bill of indictment and of the acts of the proceedings due to an absence in the acts of the compilation of evidence of the decree issued by the Criminal Court on the 21st of November 2022 wherein the request of the Attorney General in terms of article 432 of the Criminal Code requesting an extension of the one-month time limit established at law for the filing of the bill of indictment was acceded to.**

12. The Criminal Court rejected this plea on the following grounds:

> **"9. Article 431(1) of te Criminal Code provodes tat the functions of the Attorney General commenced on the day that he received the record of the inquiry from the Court of Magistrates (Gozo) as a Court of Criminal inquiry. Article 432(1) of the Criminal Code granted the Attorney General one month from the date of receipt of the records of the inquiry to file the bill of indictment against the accused and it also grants the Attorney General the right to lodge a request to the Criminal Court for an additional period of fifteen days. In The Republic of Malta vs Daniel Mukai it was established that "*the law did not allow any discretion to the Criminal Court in this case*"' since the law provides that "*the said term shall on the demand of the Attorney General be extended by the Court for an additional period of fiteen days and on the expiration of this other period by the President of Malta to a further additional period of fifteen days and, where the matter is such that the determination of the true nature of the offence necessarily depends upon the lapse of a longer period of time to such longer period. Provided however that where such longer period extends beyond forty days, the accused shall have the right to be released on bail*""**
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> **....**
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> **"11.In this case as already pointed out in paragraph 8 supra there is no contestation that the request for an extension was lodged by the Attorney Genral within the time limit stipulated by law. This Court therefore, as was laid down in the Muka judgement, is entitled to take judicial notice of the demand which if lodged and found in the records of the Criminal Court according to the case law mentioned above is still considered as part of the records of the case hence requiring no further proof. This Court proceeded to verify the records of its own Registry and confirmed that this Court had taken cognisance of the demand lodged by the Attorney Genral on the 21st November 2022 abd acceded to the demand for an extension of the original**

time limit. The Court took judicial notice of the original document of the demand lodged by the Attorney General held in the Registry of the Criminal Court on which document is found the decree of this Court upholding the request indicated by the phrase "Akk.22.xi.22', with the judge's signature attesting the decree. This Court therefore has no doubt that the demand for an extension was lodged on time, that it was acceded to and that therefore the bill of indictment filed on the 24th. November 2022 was filed within the fifteen day extension granted in terms of Article 432(1) of the Criminal Code."

13. Appellant does not agree with this line of reasoning and this for two reasons, the first being that although the Attorney General must file his request within the one-month time frame granted by law, however, this does not automatically lead to an extension of the time limit for the filing of the indictment, since the request has necessarily to be acceded to by the Court. Had the court decree been considered superfluous, in appellant's opinion, the legislator would have granted this extension to the Attorney General by means of a note to be filed in the records and not in the form of a request to the Court, which request must be acceded to for the fifteen-day extension to be granted. This decree is not found in the acts of the case and thus appellant is of the opinion that this is tantamount to the Attorney General's request still pending to date.

14. The Attorney General refutes appellant's stance that no decree exists granting the fifteen-day extension, in that the request of the Attorney General was in fact acceded to by operation of the law, leaving no discretion on the Criminal Court whether to grant or refuse such a request.

15. This Court has already taken cognisance of a similar grievance in the case **the Republic of Malta vs Daniel Muka**[1]**,** which judgment was also cited by the Criminal court in the appealed judgment**,** and refers to the considerations made therein regarding the procedure followed during the compilation of evidence and the powers of the Attorney General before the filing of the Bill of Indictment:

[1] Decided by this Court on the 26/04/2023

> **"12**. In our legal system, when a person is accused by the Executive Police of a crime that exceeds the original competence of the Court of Magistrates as a Court of Criminal Judicature, the Court of Magistrates proceeds with the compilation of evidence. In fact, the Court of Magistrates has two attributes, one as a court of criminal judicature and another as a court of criminal inquiry, the latter being a form of judicial investigation that has two main purposes (a) to collect and preserve the evidence that will eventually be brought before the Criminal Court in the trial by jury and (b) to decide if there are sufficient reasons for the issuance of a bill of indictment against the accused (Art. 401(2), Cap. 9). In any case the inquiry shall be concluded within the term of one month.
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> **13**. The powers of the Attorney General, being the chief prosecutor in such cases, are laid out in Title III, Part I of Book Second of the Criminal Code, wherein his functions commence from the day on which the record of the inquiry is remitted to his office by the Court of Magistrates. From this date the Attorney General has more than one option available to him, in those cases where upon the conclusion of the inquiry the Court of Criminal Inquiry has decided that there is *prima facie* evidence for the accused to be sent to trial, one of them being that envisaged in article 405(1) of the Criminal Code which entitles the Attorney General to demand the Court to collect more evidence. In any case the Attorney General shall be allowed the term of one month for the filing of the indictment, to run from the day when the acts are remitted to him by the Court, which term shall, on the demand of the Attorney General, be extended by the court to an additional period of fifteen days (art.432(1))."

16. It is undisputed that in this case the Attorney General adhered to the time limits imposed at law and requested the Criminal Court for a fifteen-day extension as provided in article 432, however the fact that the Court's decree granting this request is not found in the acts of the inquiry is at the core of appellant's first preliminary plea. Now in this case, contrary to the plea raised in the Muka judgment appellant is raising the nullity of the Bill of Indictment together with the nullity of the acts of the proceedings, the Court presuming that appellant is here referring to the acts of the inquiry. To begin with the Bill of Indictment may be declared null and void only if there is non-adherence to the requisites laid out in article 589 of the Criminal Code[2].

[2] **The indictment shall be made in the name of the Republic of Malta and shall - (a) specify the court before which it is preferred; (b) contain a clear indication of the person accused;(c) state the facts constituting the offence with such particulars as can be given relating to the time and place in which the facts took place and to the person against whom the offence was committed, together with all such circumstances as, according to law and in the opinion of the Attorney General, may increase or diminish the punishment for the offence; and(d) end with a summary in which the accused shall be charged with the offence as specified or described by the law, and with the demand that the accused be proceeded against according to law, and that he be sentenced to the punishment prescribed by law(quoting the article of**

Moreover, the acts of the inquiry may also be found to be defective only for the reasons laid out in article 597(4) of the Criminal Code being "**the total absence of the charges being read or of the examination of the accused or of the order committing the accused for trial, or in the refusal of the court of criminal inquiry, without just cause, to hear the evidence produced by the accused; saving always the right of the accused and the Attorney General to oppose the production, at the trial, of any act tendered in evidence which is not according to law**."

17. Thus, it is evident that the non-extension by the Criminal Court of the one-month time frame for the filing of the indictment by a further fifteen days, upon a request by the Attorney General to that effect, does not lead to the nullity being alleged. After all, had appellant, then accused, shown any doubt as to whether the extension had been granted, thus leading to the failure by the Attorney General to file the Bill of Indictment within the one-month time frame established by law, he could always have had recourse to the only remedy contemplated by the legislator in article 602 of the Criminal Code[3], requesting his discharge, an action which he has failed to take, with the compilation of evidence proceeding according to law.

18. Furthermore, in this case the Criminal Court went a step further and took judicial notice of the decree in its original form retained in the registry of the said court wherein it is evident that the fifteen-day extension was granted to the Attorney General. Consequently, there is no doubt whatsoever that the procedure laid out by the law in article 432 has been adhered to and the fact that the Court decree is not found in the acts of the inquiry is not equivalent to the absence of such a concession since the decree found in the registry of the Criminal Court is evidence to the contrary. The existence of the court order acceding to the request of the Attorney General, which decision, as so rightly pointed out by the Criminal Court is not a discretionary one, is

the law creating the offence) or to any other punishment applicable according to law to the declaration of guilty of the accused

[3] **Where the indictment is not filed within the prescribed time, the court may, at the request of the accused, and after hearing the Attorney General, order the discharge of the accused, and the provisions of article 434 shall, mutatis mutandis, apply: Provided that this provision shall not apply if at the time the request is made the indictment shall have been filed**

proof itself that the extension was granted and that therefore there has been an absolute adherence to the time limits imposed by law. Consequently, for the above-mentioned reasons this grievance is being denied.

> **B. The nullity of the proceedings including the bill of indictment, since Article 432(2) of the Criminal Code (the remittal of 5 days) was not adhered to, and this with reference to the note of remittal found at folio 1745 of the court records which indicated a wrong date referring to the previous year, the correction to the said note by the Court of Criminal Inquiry being contrary to the law.**

19. From the records of the compilation of evidence it transpires that after the sitting of the 26th of November 2021, the acts were remitted to the office of the Attorney General and the hearing of the case adjourned to the 7th of January 2022. The Attorney General then, remitted the acts to the Court of Criminal Inquiry by means of a note of remittal found at folio 1745 of the records which bears the date of the 28th of December 2020. After the filing of the said note, the Attorney General filed an application before the Court of Criminal Inquiry requesting a correction in the date of the note, which date was to read the 28th of December 2021 rather than 2020. This application was filed prior to the note of remittal being read out by the said Court, which authorized the correction in the date, as requested. After the correction was carried out, the Court of Criminal Inquiry proceeded to read out the same note in terms of law. No objection was at the time entered into by the appellant who was duly assisted by his lawyer, Dr. Francesca Zarb, and the compilation of evidence proceeded with the hearing of the witnesses indicated in the note of remittal in terms of article 405 of the Criminal Code. After the hearing of the witnesses, the Court once again sent the acts to the Attorney General, who once again remitted the acts to the Court of Criminal Inquiry by means of a note filed on the 11th of February 2022.

20. The Criminal Court decided in the following manner with reference to this plea:

> **24. This Court considers that the Attorney General was correct in not resorting to the provisions of Article 432(2) of the Criminal Code when reqquesting a rectification of the error in the date in figures which did not reflect the date in words which was on the other hand correct and which error was obviously a lapsus calami or komputeris, and in simply proceeding to**

rectify this lapsus komputeris by requesting a correction in terms of artic;e 175(1) of Chapter 12 of the Laws of Malta which provision of the law was also made applicable to criminal proceedings as per Article 520(1)(c) of the Criminal Code. The record of the inquiry was not defective because of any non-observance of any of the provisions of the Criminal Code or of any other law and therefore Article 432(2) of the Criminal Code was not applicable and the Court of Magistrates (Gozo) as a Court of Criminal inquiry was correct in acceding to the Attorney General's request.

…

25.In this case the correction made can by no stretch of the imagination be deemed to effect the substance of the action or in any way prejudice the accused and the acts of these proceedings and the bill of indictment cnnot be declared null in terms of Article 597(4) of the Criminal Code.

21. Appellant however feels aggrieved by the judgment of the Criminal Court since he asserts that the request made by the Attorney General in his application of the 7th of January 2022, was not filed in terms of article 175 of Chapter 12 of the Laws of Malta, as indicated in the appealed judgment. He criticises the decision of the Criminal Court since it did not consider the part of the plea raised by him regarding the failure by the Court of Criminal Inquiry to carry out the examination without oath anew, in terms of articles 370(4), 390(1) u 392 of the Criminal Code, and this before proceeding to deliver its decree *prima facie* as to whether there were enough grounds to commit the accused to trial. And contrary to what was decided by the Criminal Court, the error in the date indicated in the note of remittal of the Attorney General, in appellant's opinion, falls within the scope of article 432 of the Criminal Code, this error being tantamount to the non-observance of any of the provisions of the Code or of any other law relating to the inquiry.

22. The Attorney General rebuts appellant's grievance by referring to article 597(4) of the Criminal Code which lays down the circumstances in which the inquiry may be impugned, the instance mentioned by appellant in his plea, not being one of them.

23. Now, article 175 of Chapter 12 of the Laws of Malta, applicable to criminal proceedings by means of article 520 of the Criminal Code, has as its scope the possibility to remedy any defect in the judicial process with the aim of avoiding any

unnecessary delay and a waste of resources, doing away with the need for proceedings to be heard afresh. That the parameters laid out in article 175 for the correction of defects in proceedings is very wide and includes the rectification of any type of error that can sometimes emerge not only throughout the proceedings until final judgment is delivered, but also any amendments during appeal proceedings even to the appealed judgment itself, as long as such a correction does not change the merits of the case. Hence, once the legislator gives the power to the court to correct any error not only in judicial acts, but even in the judgments themselves, *multo magis* article 175 finds application in this case wherein the defect referred to the year on the date shown on the note of remittal of the Attorney General, such a rectification having no bearing, as the Criminal Court rightly points out to the substance of the action or the merits of the case. That the only objection which can be made to the application lies in those instances where the change, or amendment requested changes the substance of the action or the pleas on the merits of the cause, something that certainly did not manifest itself in this instance.

24. Moreover, once the Court of Criminal Inquiry acceded to the Attorney General's request for an amendment to the date in the note of remittal, there was no need for the charges to be read out once again, and that the examination of accused in terms of articles 390(1) and 392 of the Criminal Code be carried out afresh, as erroneously suggested by the defense in its grievance.

25. The instances where the inquiry may be impugned are clearly laid out in article 597(4) of the Criminal Code and this '**when such defect consists in the total absence of the charges being read or of the examination of the accused or of the order committing the accused for trial, or in the refusal of the court of criminal inquiry, without just cause, to hear the evidence produced by the accused; saving always the right of the accused and the Attorney General to oppose the production, at the trial, of any act tendered in evidence which is not according to law.'** Thus, the error which occurred, and which was rectified immediately by the Court of Criminal Inquiry upon a request to that effect by the Attorney General is not one of those circumstances which envisages the nullity of the inquiry.

26. Appellant also argues that the correct procedure to have been followed by the Attorney General in this case where the wrong date was indicated on the note of remittal, was the procedure laid out in article 432(2) of the Criminal Code since in his opinion led to a defect in the records of the inquiry due to the non-observance of the provisions of the Criminal Code.

27. The Court cannot agree with this line of reasoning, and this after having examined the acts and noted the timeline followed by the Court of Criminal Inquiry and the Attorney General when the acts were remitted by the Court to the office of the Attorney General and back from this office to the Court. As shown at the outset of the Court's considerations on this grievance, at no point in time were the time limits imposed by law in article 432(1) of the Criminal Code not adhered to either by the Court of Criminal Inquiry or the Attorney General. Although the date indicated on the note of remittal at folio 1745 of the records of the inquiry is shown as having taken place a year previously, however, it is evident that this was a mistake since it was humanly impossible for both the Court and the Attorney General to put back the clock to the year 2020. There is nothing in the acts of the proceedings to indicate otherwise. On the contrary, it is evident that all the timeframes were strictly adhered to, so much so that when the Attorney General filed his request for a correction in the date, which request was acceded to prior to the Court's reading out of the said note, as already stated, the defence entered no objection to such a procedure being followed. Consequently, contrary to what appellant argues in his grievance, there was strict adherence by the provisions of the Criminal Code relating to the inquiry all time limits laid out in article 432(1) of the Criminal Code having been respected.

28. Finally, although the Attorney General in his application did not indicate that his request was being filed in terms of article 175 of the Criminal Code, however it is evident that what is being requested is a correction to the note of remittal, such correction can be entertained by the Court in terms of article 520 of the Criminal Code which renders article 175 of Chapter 12 applicable to criminal proceedings. Having thus premised, however it was also within the power of the Court to affect such a correction in terms of this disposition of the law without the same having to be cited

specifically by the Attorney General in his application, the request being, as already pointed out one of a simple correction. For all the above reasons, this grievance is also being rejected.

C. The nullity of the appointment of court experts PC602 Jonathan Attard, Antoine Fenech, WPC140 Kirsty Cremona and PC422 Neil Godwin Caruana since they form part of the Police Force and thus can never be considered independent and impartial.

29. The Criminal Court decided thus with regards to this plea, and this after referring to the judgment delivered by the ECtHR in the case Nazzareno Zarb vs Malta:

> **……. the fact that an expert is a member of the police force does not mean that he will not be able to carry out the task he has been entrusted with by the Inquiring Magistrate and the Court of Magistrates as a Court of Criminal Inquiry with proper neutrality. As aptly pointed out in the Zarb judgement** ***'to hold otherwise would in many cases place unacceptable limits on the possibility for the courts to obtain expert advice having regard in particular, to the technical skills that members of the police have in taking and comparing fingerprints (see Emmanuello decision quoted above)*** **. Furthermore the applicant did not produce any element showing that the experts complained of performed their duties in a way which was not impartial and objective". Page 38 of 57 As also aptly pointed out by the Attorney General during oral submissions, the experts referred to in the sixth preliminary plea produced detailed and meticulous reports relating to the carrying out of the tasks they were entrusted with and at no point during the compilatory stage of these proceedings did the accused question their impartiality and objectivity in the course of the carrying out of their duties.**

30. In his grievance appellant is objecting to the reports filed by the experts PC602 Jonathan Attard, Antoine Fenech, WPC140 Kirsty Cremona and PC422 Neil Godwin Caruana, and although he indicates that this objection is not limited solely to these experts, however he fails to indicate which other experts he is objecting to. Now from the records of the *in genere* inquiry, it results that the Inquiring Magistrates appointed Antoine Fenech and Kirsty Cremona as photographic experts, Jonathan Attard as ballistics expert and finally Neil Godwin Caruana as telephony expert, all experts being members of the police force. The report filed by expert PS 442 Neil Godwin Caruana consists of data extraction from six mobile phones, three sim cards and an SD card. The report was filed on the 26th of August 2021 marked as Document MC

found at folio 1544 *et seq*. of the compilation of evidence. Jonathan Attard's report was compiled together with another expert, Jesmond Cassar, whose latter appointment was not contested by the defence. The report is filed as Document MCDA and found at folios 1614 *et seq*. of the inquiry, and examines the gunshot wounds suffered by victim and contains an analysis of the cartridges found at the scene of crime and other particles which were taken from the victim during the autopsy carried out by the pathologists. No comparative examinations were carried out by these experts, which analysis was then carried out by court-appointed expert Patrick Farrugia. Finally, Antoine Fenech and Kirsty Cremona filed a joint report together with two other experts PC60 John Grima and PC951 David Xerri. The report is exhibited at folio 1277 *et seq*. of the compilation of evidence. Again, in this case the defence finds no objection to the appointment of PC60 and PC951.

31. Both in his plea, as well as in his grievance, appellant fails to give a reason for his objection to the appointment of these specific police officers when it transpires that several others were appointed by the Inquiring Magistrate. And although both in his plea as well as in his grievance he indicates that the objection is not limited to these four experts, however, he does not indicate if he finds objection to any of the other police officers appointed as experts. Also, during the compilation of evidence at no point in time did the defence register its objection regarding the appointment of these experts or to the reports filed by them.

32. Now, although appellant is insisting that the appointment of these police officers as experts is null and void since they can never be independent and impartial, it has repeatedly been held by the ECtHR that the principles of independence and impartiality apply solely to a court or tribunal and not to court-appointed experts, and what the Court has to investigate in deciding whether the experts' conclusions are admissible as evidence before the court is whether these were neutral in the carrying out of the task entrusted to them, giving the rights to the defence to rebut their conclusions on the basis of a lack of neutrality during the proceedings. It held that to hold otherwise would in many cases place unacceptable limits on the possibility for

courts to obtain expert advice[4]. Now, it is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert, however so long that the principles of equality of arms is safeguarded, a principle inherent in a fair trial, then the appointment of such experts may not be declared null and void *a priori*. What is decisive is whether the doubts raised by appearances can be held objectively justified. Thus, although the said experts may form part of the police force, however this does not automatically eradicate their neutrality in the proceedings, such a matter to be determined from an overview of the proceedings as a whole and the specific tasks entrusted to them, examining in an objective manner whether in the carrying out of their duties they lacked the neutrality required by any court-appointed expert.

33. Finally, the *Longinu Aquilina* judgment and the other judgments cited by appellant in his grievance, all put forward the principle that so long as the assignment carried out by such an expert is only a matter of ascertainment of a state of fact, their report is admissible as evidence, and it is only comparative analysis and conclusions that have no probative value. Now in this case, the experts' task was specifically that of ascertaining facts, being the extraction of data, that of photography and finally the report on ballistics. No comparative analysis was carried out, such comparisons being entrusted to other experts appointed by the Court as already pointed out. What the Court finds perplexing is that appellant singles out these four experts who all carried out their tasks in conjunction with other experts for whom the defence found no objection regarding their appointment. Finally, appellant's plea couched in generic terms wherein he indicates that his objection/grievance could also lie with other expert reports without indicating which evidence he is finding objectionable cannot be entertained by the Court. Consequently, even this grievance is being rejected.

D. The inadmissibility as evidence of the report filed by Dr. Daniel Calleja LL.D. since it is in violation of article 548(1) of the Criminal Code, the said

[4] Vide amongst others – Brandstetter vs Austria 11170/84, 12876/87 and 13468/ 87, 28 August 1991; Bönisch v. Austria, 8658/79, 6 May 1985

<u>expert hearing witness under oath and thus not in conformity with his appointment.</u>

34. This preliminary plea was partially upheld by the Criminal Court when it thus decided:

> **39.The decree at folio 122 of the acts of the proceedings dated 15th. January 2018 provides that 'Dr. Daniel Calleja (espert legali) was being appointed 'bil-fakulta li tamministra/jamministra l-gurament lix-xhieda jekk ikun il-kaz sabiex jezamina/tezamina u jistabilixxi/tistabbilixx ic-cirkostanzi li gabu li gabu din l-inkjesta bil-poter li jaghti l-gurament." Dr. Calleja's report (at folio Page 39 of 57 1118 et sequitur of the acts of these proceedings) specifies that the task wth which Dr. Calleja was entrusted by the Inquiring Magistrate was 'sabiex isir inventarju tal-oggetti li insabu gewwa Dresden Flat 2, Triq it-Tempju tal Imramma, Sannat, Ghawdex u taz-zewg vetturi li kien juzufruwixxi minnhom bin-numru tar-registrazzjoni HAJ-909 u JBP 086 wara l-omicidju ta' Walid Salah Abdel Motaleb Mohammed" and that subsequently the Inquiring Magistrate verbally instructed him to elevate the objects found in the victim's residence and to deposit them in the acts of the inquiry. The only witness heard under oath by Dr. Calleja was Francis Fava, the lessor of the property where the victim resided. The said Fava is indicated as a witness in the list of witnesses attached to the bill of indictment and will therefore give his testimony in the trial by jury.**
>
> **40.The third proviso to Article 548(1) of the Criminal Code lays down that 'without prejudice to the provisions of Article 552(2) no expert shall be appointed solely for the purpose of examining witnesses on oath and taking down their depoistions in writing and establishing the relevant facts, where the offence to be investigated is one which carries a maximum term of impisonment of seven years or more". In this case there is no contestation about the fact that the offence being investigated carried a maximum term of imprisonment exceeding seven years and that therefore no expert could be appointed solely for the purpose of examining witnesses under oath**
>
> **....**
>
> **42. .... this Court is partially acceding to the seventh preliminary plea on the lines of what was laid down in Ir-Repubblika ta' Malta vs. Camrmel Saliba as of quoted above n the sense that there is nothing which precludes Dr. Daniel Calleja being produced as an ordinary witness in order to ascertain and establish the facts that resulted during the site inspections carried out by him and to cinfirm the correctness of the declarations made to him as reproduced in his report so that both the Prosecution and the Defence can use these declarations as a means of exercising control over the witnesses who also gave evidence during the compilatory stage of the proceedings and will also give viva voce evidence during the trial by jury. Therefore and save what is provided in the first proviso to subarticle (2) of Article 646 of the Criminal Code Dr. Daniel Calleja's report should remain in the acts of the**

proceedings but shall not be passed on to the jurors (except when requested by either of the parties for the purpose of exercising control over a witness).

35. Appellant insists that Dr. Daniel Calleja's appointment runs counter to article 548 of the Criminal Code and that he was appointed by the Inquiring Magistrate not for his special skills or knowledge as envisaged in article 650 of the Criminal Code, but simply to facilitate the work of the Inquiring Magistrate.

36. From an overview of the *proces verbal* exhibited in the acts of the compilation of evidence found at folios 107 *et seq* of the court records, and specifically from an undated decree of the Inquiring Magistrate found at folio 122, it results that Dr. Daniel Calleja was appointed as a legal expert '*for the purpose of examining and establishing the circumstances leading to the inquiry*'. The said expert was also authorised to hear witnesses under oath should the need arise. Now, from a report filed by the expert and exhibited during the compilation of evidence in the sitting of the 23rd of July 2021, Dr. Daniel Calleja declares that he was tasked by the Inquiring Magistrate to make an inventory of all the items found in the apartment where the victim lived and also of the items found in the two vehicles he was making use of at the time of the murder. After compiling the said inventory, the expert seized a list of items which were deposited by him in court during the inquiry into the *in genere*. During the on-site inspection of the premises which were rented out to the victim, the witness heard also the testimony of the owner of the apartment a certain Francis Fava, the scope being solely that the witness was to indicate those items found in the apartment which belonged to him. Consequently, this expert's report consisting of the inventories drawn up by him relating to the objects found at victim's residence and his two cars does not in any way fall under the impediment envisaged in article 548(1) of the Criminal Code, contrary to what is being held by the defence. The expert's remit is couched in general terms and consequently although the Inquiring Magistrate did not specify that he was being entrusted with drawing up inventories relating to items belonging to the victim, however, such an exercise, falls within the scope of his appointment, such specific order to be made only whenever it is expedient so to do.

37. In fact, article 650(5) of the Criminal Code clearly provides:

The court shall, <u>whenever it is expedient</u>, give to the experts the necessary directions, and allow them a time within which to make their report.

It has been often held:

> **24. Issa, l-eċċezzjoni ta' inammissibilita` tippresupponi xi disposizzjoni tal-liġi li teskludi dik il-prova milli tinġieb 'il quddiem fil-proċess. Fil-każ odjern in-nomina ta' l-esperti saret mill-Maġistrat Inkwirenti a tenur ta' l-artikolu 548 tal-Kodiċi Kriminali. Imbagħad is-subartikolu (5) ta' l-artikolu 650 – reż applikabbli għall-in genere mill-ewwel proviso ta' l-imsemmi artikolu 548 – jipprovdi li: "Il-qorti, <u>kull meta jkun hemm bżonn</u>, tagħti lill-periti d-direzzjonijiet meħtieġa" (sottolinear ta' din il-Qorti). Naturalment sabiex ma jkunx hemm ekwivoċi hu desiderabbli li jkun hemm deskrizzjoni ta' l-inkarigu mogħti lill-esperti rispettivi fid-digriet tan-nomina. Fil-każ in eżami m'hemm l-ebda ekwivoku, peress illi kull wieħed mill-esperti ndika fir-relazzjoni tiegħu l-inkarigu speċifiku li kellu. Barra minn hekk, id-difiża jibqagħlha dejjem id-dritt li tikkontrolla dak li jiġi konstatat mill-esperti prodotti billi jekk hekk jidhrilha timpunja l-kompetenza, l-kredibilita` u l-affidabilita` tal-istess esperti u tal-konklużjonijiet tagħhom.**[5]

38. In this case, the expert Daniel Calleja, did not present any opinions to the Court, nor did he reach any conclusions regarding the murder, nor did he hear any witnesses testify under oath. In fact, all the witnesses testified before the Inquiring Magistrate himself as may be seen from the records of the *proces verbal* and thus appellant's allegation that the Magistrate appointed Dr. Calleja to facilitate his work is completely unfounded. Hence, although the Criminal Court acceded partially to the plea put forward by appellant, this Court finds that there was nothing irregular in the report filed by the said expert since his task was definitely not that objected to by appellant, the expert not entrusted solely to the hearing of witnesses, as alleged. Consequently, for the above-mentioned reasons this grievance is also being rejected.

> **<u>E. The inadmissibility of the witnesses Christiana Vella, Victor Vella, Derrick Vella and Christian Curmi since the court-appointed interpreters, Dr. Claire Caruana, Dr. Larry Formosa, Dr. Jonathan Mintoff and Mr. Anthony Mizzi were not administered the oath in line with article 391(2) of the Criminal Code.</u>**

[5] Ir-Repubblika ta' Malta v. Martin Dimech decided bt this Court as otherwise composed on the 28th of Februaray 2012.

39. Appellant laments that the article of law which the Criminal Court relied upon when rejecting this plea, being article 3(d)(e) of Chapter 189 of the Laws of Malta is inapplicable to the objection raised by him in his eight preliminary plea, this disposition of the law referring to translators and not interpreters. He insists that once these interpreters were not administered the oath in translating from the Maltese to the English language what the witnesses were testifying, hence their appointment is not valid at law. In appellant's opinion the administration of the oath is not a mere formality, but it is an assurance and the ultimate show of solemnity that the person so appointed would act according to the highest moral standards.

40. The Attorney General in his reply argues that the defence never objected to the validity of the appointment when the witnesses were testifying before the Court of Criminal Inquiry, and never pointed out to the Court that the accused was unable to follow the proceedings, raising this objection only after the wrapping up of the compilation of evidence.

41. The Criminal Court decided this plea as follows:

> **44.Article 391(2) of the Criminal code does in fact provide that at the request of the accused a sworn interpreter shall be employed to translate a deposition of a witness into the language in which the written proceedings are being conducted. In this case the proceedings are being conducted in the English language and the witnesses in question tetified in Mlatese and an interpreter was thus appointed by the Court of Magistrates Gozo as a Court of Criminal Inquiry to translate their depositions into the English language for the benefit of the accused. The minutes of the sittings whereby the said witnesses testified and the relative transcriptions of their testimonies effectively do not indicate that the interpreters were administered the oath. This Court however deems that the fialure to administer the oath to the interpreters does not bring about the nullity of the proceedings or the inadmissability of the depositions of the witnesses whose testimonies the interpreters were tasked to translate into the English language for the benefit of the accused so that he could comprehend what was being said and be able to effectively participate in the proceedings. Article 3(d)(e) of Chapter 189 of the Lawss of Malta, Judicial Proceedings (Useof the English Language) Act provides as follows:**
>
> > **(d) where a court has ordered proceedings to be conducted in the English language, that language shall be used in all subsequent stages of the proceedings, unless the order is revoked by that court or any other court before which the proceedings are pending;**

(e) where the evidence of witnesses is to be taken down, it shall be taken down in Maltese, except where it is given in English, in which case it shall be taken down in English:

Provided that where the evidence is taken down in English in proceedings which are conducted in the Maltese language or in Maltese in proceedings which are conducted in the English language, a translation of such evidence into the language in which the proceedings are being conducted shall be inserted by the registrar in the record of the proceedings as soon as practicable.

45.Additionally all the witnesses referred to were themselves administered the oath and the translations of their depositons from the Mlatese language into the English language were duly ordered by the Court and are inserted in the acts of these proceedings, except for the testimony of Christiana Vella of the 2th.May 2021 where the translation made by the interpreter Dr. Claire Caruana was recorded and transcribed hence eliminating the necessity for a translation to be ordered.

42. That the Court feels it should point out prior to its considerations regarding this grievance, that the witnesses indicated by appellant are all indicated as witnesses by the Prosecution in the List annexed to the Bill of Indictment. It is the testimony heard during the trial that the jurors will take into account in their deliberations regarding the guilt or otherwise of appellant, and not the testimony given during committal proceedings, such depositions usually referred to solely in the eventuality that a conflicting version of the facts is tendered by the witness during the trial.

43. Now the minutes of the proceedings of the compilation of evidence do not indicate that the interpreters appointed by the Court to translate the testimony of the witnesses Christiana Vella, Victor Vella, Derrick Vella and Christian Curmi were administered the oath upon their appointment. However, the scope of their task was to assist accused to understand the proceedings guaranteeing his rights to a fair trial. It appears that at no point in time did the defence point out to the Court that accused was not understanding what the witnesses were testifying. Moreover, in the case of the testimony of Derrick and Victor Vella and Christian Curmi, an official translation of their testimony was carried out by Mr. Anthony Mizzi and is found in the acts at folios. 1228, 1667 and 1826 of the compilation of evidence. As rightly pointed out by the Criminal Court, the testimony of Christiana Vella was translated concurrently by

the interpreter and is at folio 63 of the records wherein there is the following declaration:

"**This is the substance of the evidence of Christiana Vella as dictated by herself on oath in the Maltese language in the presence of the accused, and which testimony has been concurrently interpreted into English by the court appointed expert."**

44. Moreover, there is no disposition at law which renders the testimony of these witnesses as inadmissible, for the sole reason that the interpreters assisting accused were not administered the oath, and although article 516 of the Criminal Code provides that in the cases where any person charged does not understand the language in which the proceedings are conducted or any evidence that is adduced, such proceedings or evidence shall be interpreted to him either by the court or by a sworn interpreter, however non-compliance with the same does not amount to inadmissibility and this more so in this case where the necessary safeguards which the law gives to the accused have been fully complied with and accused provided with an official translation in terms with article 3(e) of Chapter 189 of the Laws of Malta, and article 534AD of the Criminal Code.

45. It has been held:

> **"….. din il-Qorti taghmel referenza ghal dak li jinghad mill-awtur Karen Reid fit-tieni edizzjoni tal-ktieb taghha A Practitioner's Guide to the European Convention on Human Rights:**
>
> ***"The ability to comprehend the proceedings in a criminal trial, guaranteed in Art. 6, para. 3(e), may be seen as another aspect of the importance for an accused to participate effectively in the proceedings. For the right to be effective, the obligation of the authorities is not limited to the provision of an interpreter, but may also extend to a degree of control over the adequacy of the interpretation provided. Issues as to the standard of the interpretation could arise if it could be established as damaging to the accused's effective participation in the proceedings. Although a failure to complain at the time may be fatal to claims before the Court as generally domestic courts must be given an opportunity to remedy any inadequacy, the onus is nontheless on the trial judge to treat an accused's interest with 'scrupulous care' and take steps to ensure his ability to participate where problems are drawn to his attention…The requirement for interpretation must, however, be genuine and necessary to the fair conduct of the proceedings. Where an applicant has sufficient understanding of the language of the proceedings, he cannot claim a cultural or political preference for another. Once it is apparent that the***

applicant requires interpretation assistance, it is unlikely that informal and unprofessional assistance will be sufficient. Article 6, para. 3(e) has been held to cover documentary material and pre-trail matters, but it does not extend to requiring translations of all documents in the proceedings. It is sufficient if the applicant is assisted by interpreters, translations and the help of his lawyers so that he has knowledge of the case which enables him to defend himself, in particular by being able to put forward his version of events. If this standard is reached, a failure to provide all the translations an applicant might have wanted is not a problem. An applicant would presumably have to indicate that the untranslated documents were material to his ability to defend himself and that he was refused or not permitted the necessary facilities[6].”

46. It does not appear that the rights of defence have been violated in this case, with the witnesses, as already pointed out will be testifying afresh during the trial, the failure of administering the oath to the interpreters at compilation stage can in no way be considered as rendering their testimonies inadmissible. And even if this Court were to agree with appellant's objection, the translations carried out serve to validate the admissibility at law of these depositions. Consequently, for the above-mentioned reasons this grievance is also being rejected as unfounded.

Considers further,

47. Having thus disposed of the grievances filed by appellant, the Court will consider the sole grievance put forward by the Attorney General in his appeal application referring to the inadmissibility of the witness Inspector Colin Sheldon indicated by appellant in his List of Witnesses, and this insofar as the said testimony refers to ongoing investigations and other pending cases which are not as yet *res judicata*. The admissibility of this witness therefore in the Attorney General's opinion could invariably prejudice any ongoing criminal proceedings

48. The Criminal Court decided thus with regards to this objection entered into by the Attorney General:

> **69.The Attorney General also raised the plea of inadmissability in relation to the sworn testimony of Inspector Colin Sheldon as indicated in the sixth**

[6] Court of Criminal Appeal (inferior jurisdiction) Il-Pulizija vs Andriy Petrovych Pashkov decided on the 10/09/2009.

bullet point of point number three of the list of witnesses of the note of preliminary pleas filed by the accused because this testimony refers to ongoing investigations and could therefore preudice the said investigations. This Court agrees with the submission made by the Defence in this regard that the issue is not one of admissibility but rather of relevance and must therefore be decided by the Judge presiding the trial by jury when the matter is raised during the hearing of the trial by jury. This plea raised by the Attorney General is also hereby being rejected.

49. The Attorney General's sole objection to the hearing of the testimony of Inspector Colin Sheldon is that this could be prejudicial to ongoing investigations and/or pending criminal proceedings which have not been finally determined. Now, the defence indicates that it requires the testimony of this witness with regard to investigations and pending criminal cases concerning a certain Andre Galea, the said Galea being a witness for the Prosecution.

50. From the acts of the compilation of evidence it transpires that Andre Galea testified both before the Inquiring Magistrate during the *in genere*[7], as well as before the Court of Criminal Inquiry[8]. The witness testified that appellant spent a couple of months residing with him in the same apartment and implicates appellant in the murder, amongst other crimes. During his testimony the defence cross-examined the witness and asked him about criminal charges pending against him. Now, whether mention of these cases is relevant or not to the present proceedings as the Criminal Court rightly pointed out any matter regarding the relevance of evidence is to be left in the hands of the jury.

51. It has been decided by our Courts:

"Kull prova li hija rilevant ghal "facts in issue" hija ammissibbli. X'inhuma "facts in issue" insibuh spjegat fi Cross on Evidence (4th Ed. 1974,p.4) fejn jinghad illi: *'The main facts in issue are all those facts which the.... prosecutor*

[7] Folio 481 et.seq.

[8] Folio 619 et seq.

in criminal proceedings must prove in order to succeed, together with any further facts that the …. Accused must prove in order to establish a defence.'"[9]

52. Also, the defence has the possibility to discredit a witness for the prosecution by referring to his/her criminal past, subject to the rule laid out in article 459A of the Criminal Code which states:

> **(1) The accused who takes the stand to testify shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than the one with which he is accused, or is of bad character, unless:**
>
> **(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or the deceased victim of the alleged crime;**

53. Consequently, there is nothing to prevent the defence from attacking the character of the prosecution witnesses with the aim of discrediting them in the eyes of the jury, or for the purpose of controlling what the witnesses say.

54. Having thus premised, in the event that the testimony of the witness Inspector Colin Sheldon, should, at the moment of his taking the witness stand prejudice any ongoing investigations or criminal proceedings, it is in the discretion of the judge presiding over the trial to order that his testimony be held behind closed doors. The objection, however, raised by the Attorney General cannot render the said testimony inadmissible. For these reasons, the grievance put forward by the Attorney General is also being rejected.

Consequently, for the above-mentioned reasons, the Court rejects both the appeal filed by appellant Aleksandar Stojanovic and that filed by the Attorney General and confirms the judgment of the Criminal Court in its entirety.

[9] Ir-Repubblika ta' Malta vs Louis sive Lewis Bartolo – App.Sup. deciza 02/11/1981

The Court orders that the acts be remitted to the Criminal Court so that the case against accused Aleksandar Stojanovic may proceed according to law.

The Chief Justice Mark Chetcuti

Mrs. Justice Edwina Grima

Mr. Justice Giovanni Grixti