CONSTITUTIONAL COURT

JUDGES

THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO (ACTING PRESIDENT)
THE HON. MR JUSTICE ANTHONY ELLUL
THE HON. MR JUSTICE MARK SIMIANA

Sitting of Thursday, 20th February, 2025.

Number: 1

Application number: 391/2022/1 MH

The Republic of Malta

v.

Christoph Doll

1. This is an appeal filed by Christoph Doll ('appellant') from a judgement delivered by the Civil Court, First Hall on the 29th November, 2023. The Court replied to a constitutional reference made by the Criminal Court, and declared that the inclusion of the statement released by Christoph Doll on the 15th April, 2016 as evidence in the trial by jury, as per judgement of the Court of Criminal Appeal of the 22nd September

2021 (**The Republic of Malta vs Christoph Doll**), does not breach the right of fair hearing as protected in article 39 of the Constitution and article 6 of the European Convention.

Facts and Preliminary Considerations

2. The main facts are the following:

2.1. Bill of Indictment number 5/2020 was issued against the appellant, and he was *inter alia* charged with the criminal offence of having participated in sexual activities with a minor and other related offences;

2.2. As a preliminary plea he claimed that the statement he gave during police interrogation, was inadmissible as according to law he had no access to a lawyer during interrogation;

2.3. In a judgement delivered on the 17th November 2020, the Criminal Court upheld the plea and declared that the statement dated 1st October 2015, marked as document PC1 (folio 26 to 33) is inadmissible according to law. Consequently, the Court ordered its removal from the court file and that no reference is to be made during the trial by jury.

2.4. The Attorney General appealed;

2.5. By judgement delivered on the 22nd of September 2021 the Court of Criminal Appeal found:

> *" ... the grievance put forward by the Attorney General to be well-founded and upholds the same. Therefore revokes the judgement of the First Court wherein it declared that the statement released by accused is inadmissible according the law, and orders that the said statement of the 15th April 2016 be adduced as evidence in the trial by jury."*

2.6. By application filed on the 25th November 2021, whilst stating that his statement was actually given on the 15th March 2016[1], the accused complained that:

> *"with all due respect to the Court of Criminal Appeal, ordering the use of the statement is not correct in view of the fact that, whatever the outcome of this disquisition, the use or otherwise of the statement remains the parties' prerogative.*
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> *That although local case-law on the matter, both by the courts of criminal jurisdiction and by the courts of constitutional jurisdiction, abounds, inconsistency in these decisions reigns supreme and applicant is certainly in no position to prepare an adequate defence as a consequence of this.*
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> *That a close to identical situation occurred in the proceedings in the names "Ir-Repubblika ta' Malta vs Rosario Militello". In that case, following a request by the accused, this Honourable Court had referred the matter to the First Hall of the Civil Court in its constitutional jurisdiction. By means of a decision dated 18th November, 2021 the latter Court in fact replied to the Court's reference by stating that the use of his statement could lead to a breach of his fundamental right to a fair trial and its use in the criminal trial was not recommended.*
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> *For these reasons applicant requests this Honourable Court to refer the matter to the First Hall of the Civil Court in its constitutional jurisdiction in order for it to be determined whether the decision of the Court of Criminal Appeal dated 22nd September, 2021 – wherein it was stated that the said statement released by applicant is inadmissible according to law and ordered that the said statement released on the 15th April, 2016[2] be adduced as evidence in the trial by jury – breaches his fundamental right*

[1] Footnote 1
[2] The statement was actually given on the 15th March 2016

to a fair trial in terms of Article 6 of the European Convention and Article 39 of the Constitution of Malta."

2.7. In a decree delivered on the 29th November 2021, the Criminal Court upheld the appellant's request for a constitutional reference, "*in that it believes that legal uncertainty is not a frivolous or vexatious matter and thus an in-depth review of the actual position that the accused is facing is warranted."*

3. On the 28th July 2022 the Attorney General replied that:

"the decision of the Court of Criminal Appeal dated 22nd September 2021 wherein it was stated that the said statement released by applicant is admissible according to law and ordered that the said statement released on the 15th April, 2016 be adduced as evidence in the trial by jury does not breach the accused fundamental right to a fair trial in terms of Article 6 of the European Convention of Human Rights and Article 39 of the Constitution of Malta."

4. On the 29th of November 2023 ["the appealed judgement"] the Civil Court, First Hall delivered judgement, and declared:

"in reply to the question that should have been posed as to whether the decision of the Court of Criminal Appeal dated 22nd September, 2021 wherein it was stated that the statement released by Christoph Doll was admissible according to law and ordered that the said statement released on the 15th April, 2016 be adduced as evidence in the trial by jury, breaches his fundamental human right to a fair trial in terms of article 6 of the European Convention and Article 39 of the Constitution of Malta, from the point of view of inconsistencies of the jurisprudence in this regard making it impossible for the accused to prepare an adequate line of defence, ***answers that the inclusion of the statement as evidence in the trial by jury as decided by the Court of Criminal Appeal judgement of the 22nd of September, 2021 in the names of The Republic of Malta vs Christoph Doll does not breach the right of fair hearing as entrenched and protected in article 39 of the Constitution and article 6 of the Convention, in particular but not***

> ***exclusively were such violation addressed the lack of jurisprudence consistency in this regard."***

5. By application filed on the 11th December 2023 the accused appealed the judgement delivered by the Civil Court, First Hall (Constitutional Jurisdiction) on the 29th of November 2023 and requested this Court to revoke it and declare instead that:

> *"the use of his statement given to the Police on the 15th March, 2016 is in breach of his rights protected by Article 6 of the European Convention and Article 39 of the Constitution of Malta or is likely to breach his rights protected by Article 6 of the European Convention and Article 39 of the Constitution of Malta."*

6. The State Advocate and the Attorney General replied that the appeal is frivolous and vexatious and that the judgement of the Civil Court, First Hall (Constitutional Jurisdiction) of the 29th of November 2023 is just and should be confirmed.

The Appeal

7. In his appeal application the appellant complains that although he had commented about the lack of consistency in case-law which made it impossible for him to prepare an adequate defence, this was not his *'main complaint'*. He contends to have specifically requested the Criminal Court to refer the matter to the Civil Court, First Hall "*in order for it to be determined whether the decision of the Court of Criminal Appeal dated 22nd September, 2021 – wherein it was stated that the said statement*

released by applicant is admissible according to law and ordered that the said statement released on the 15th April, 2016 be adduced as evidence in the trial by jury – breaches his fundamental right to a fair trial in terms of Article 6 of the European Convention and Article 39 of the Constitution of Malta." A question to which no answer was given. He does not contest that there is case-law stating that when one alleges a breach of one's fundamental right to a fair hearing, the overall fairness of the proceedings have to be examined. However, he argued that the Constitution and the Convention also protect individuals from likelihood of breaches of fundamental human rights. It was on this basis that our courts have many times ordered that the statement given without the assistance of a lawyer be removed from the acts of the criminal proceedings notwithstanding not having found an actual breach of the right to a fair hearing. He concludes by saying that in his criminal case the Attorney General is erroneously contending that one of the offences brought against him carries a punishment of life imprisonment, which means he cannot opt to have his trial heard without a panel of jurors. He insists that he had specifically requested to be assisted by a lawyer during his interrogation by the police and even declared so in the course of the interrogation. However, he was only allowed to speak to his lawyer before the interrogation, without being given any disclosure of the facts of the case and of the allegations made against him.

8. The State Advocate and the Attorney General contend that the Court of first instance has indeed replied to the constitutional reference made to it. In relation to where the accused stated that he cannot opt to have his trial heard without panel of jurors, the Attorney General and State Advocate insist that the Court still addresses the jurors and explains the weight and probatory value of the evidence. They continue to argue that statements released without the assistance of a lawyer do not *ipso facto* constitute a breach of the right to a fair hearing and that a statement cannot be considered in isolation without taking into account the rest of the evidence and proceedings. In terms of the factors listed in **Beuze vs. Belgium** they submit that: (i) the accused released the statement in question voluntarily; (ii) he was not a vulnerable person; (iii) he was given the right to consult a lawyer prior to his interrogation, which he exercised; (iv) he was not given the right to have a lawyer present during his interrogation because, at the time, the law did not provide for such right; (v) the statement was made in accordance with the law at the time and exhibited in the acts of the criminal proceedings in terms of article 658 of the Criminal Code; (vi) he was duly cautioned according to law and understood the circumstances he was in; (vii) even though he was informed of his right to remain silent he chose to answer a number of questions during the interrogation by the police; (viii) he never attempted to amend or challenge his statement before the Court of Magistrates as a Court of Criminal Inquiry; (ix) he had every opportunity to cross-

examine the witnesses of the prosecution and still has this opportunity during the trial by jury; (x) the evidence of the prosecution does not consist solely of the statement but also consists of other evidence, including the testimony of the alleged victim and messages allegedly sent by the accused to the minor; (xi) after the conclusion of the case by prosecution and defence, the jury will be addressed by the judge in terms of article 465 of the Criminal Code; (xii) investigations and criminal proceedings against the accused were made / initiated in the interest of society; (xiii) he was assisted by a lawyer during the proceedings; (xiv) he was always informed about his statutory rights which existed at the time; (xv) due regard should also be given to the interest of society in general as well as the interests of the victim. As regards the issue of disclosure, brought up by the accused in the present appeal, the State Advocate and Attorney General contend that this was not the basis of the Constitutional Reference. Without prejudice to this they submit that the accused at no point stated what was allegedly not disclosed to him at that stage. They insist that questions made to him during the taking of the statement confirm that he was given disclosure to the material evidence in terms of article 534AF of the Criminal Code and subsequently all material evidence was disclosed during proceedings.

9. During the sitting held on the 23rd January 2025 the Court heard submissions made by defence counsel and the appeal was adjourned for judgement.

Considerations

10. In his application dated 25th November 2021 the appellant claimed that conflicting caselaw as regards to the admissibility in criminal proceedings of statements made by a suspect without the assistance of a lawyer, made it hard for him to adequately prepare his defence. He referred to the judgement **Ir-Repubblika ta' Malta vs Rosario Militello** delivered by the Civil Court, First Hall. He said that the Court had decided that the use of such a statement could lead to a breach of fair trial of the accused and therefore its use in the criminal trial was not recommended. Therefore, appellant requested the Criminal Court to ask the Civil Court, First Hall to determine:

> *"whether the decision of the Court of Criminal Appeal dated 22nd September, 2021 – wherein it was stated that the said statement released by applicant is inadmissible according to law and ordered that the said statement released on the 15th April, 2016[3] be adduced as evidence in the trial by jury – breaches his fundamental right to a fair trial in terms of Article 6 of the European Convention and Article 39 of the Constitution of Malta."*

[3] The statement was actually given on the 15th March 2016

11. This is precisely the question addressed and answered in the appealed judgement. A conclusion reached, *"in particular but not exclusively where such violation addressed the lack of jurisprudence consistency in this regard"* as it was ultimately satisfied that:

> *"today there is abundant and definite consistency of the Courts in the matter in issue as correctly concluded by the Court of Criminal Appeal in Doll's instance. Clearly our Constitutional Court, for long a supporter of this line of thought, today supported by the developed jurisprudence of the European Courts For Human Rights, has been consistent in its conclusion that no breach can be determined unless the whole process is seen in its totality and that every case is to be examined in its specifics. As said this line of thought is today favoured by the European Court and consistently prevalent in our Courts."*

12. The Court notes that in the appeal application the appellant expressly declared that what he refers to inconsistency in local case-law, *"… was not the reason for appellant's request…"*. However, during final submissions defence counsel referred to inconsistency in case-law.

13. For all intents and purposes the Court highlights that it has now been long established in local case-law that the fact that the suspect was not assisted by a lawyer during police interrogation, on its own is not sufficient to find a breach of the accused's right to a fair hearing. This Court has repeatedly referred to the **Beuze vs Belgium** (71409/10) judgement delivered by the Grand Chamber of the ECHR on the 9th November, 2018. The judicial practice of the Constitutional Court to advise for the removal of a statement from the case file was solely a precautionary measure and nothing more, and certainly did not involve

an interpretation of law. A position which this Court has recently revised, since at that stage there would be no declaration by the Court that the accused's right to a fair hearing had been breached or is likely to be breached.

14. Indeed, both in the case-law of this Court as well as that of the European Court of Human Rights [ECHR] it has now been recognised that the sole fact that a suspect did not have the possibility to be assisted by a lawyer during the interrogation, does not automatically give rise to a breach of the fundamental right to a fair hearing. For such an assessment to be made one ought to consider the overall fairness of the proceedings:

> *"120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see Ibrahim and Others, cited above, § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings ...*
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> *121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 ...*
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> *122. Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole*

(see Ibrahim and Others, cited above, §§ 251 and 262, and Correia de Matos, cited above, § 120)."[4]

15. In **Farrugia v. Malta**[5] the ECHR reiterated that:

"99. ... In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.

(i) Concept of compelling reasons

100. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Beuze, cited above, §§ 142-143).

(ii) The fairness of the proceedings as a whole and the relationship between the two stages of the test.

101. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see Beuze, cited above, § 145).

[4] **Beuze v. Belgium,** application no. 71409/10
[5] Application no. 63041/13

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case law, should, where appropriate, be taken into account:

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

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

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

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

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

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

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

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

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

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

16. In the case **Ir-Repubblika ta' Malta v. Rosario Militello**[6], this Court revoked the decision of the court of first instance which had recommended that no use be made of his statement in the criminal proceedings. The Constitutional Court said:

> *"22. ... din il-Qorti m'għandhiex dubju li l-jedd tar-rikorrent għal smigħ xieraq għadu ntatt u lanqas ma jista' jingħad li l-fatt li l-istqarrija tibqa' fl-atti x'aktarx ser iwassal għall-ksur ta' dak il-jedd fundamentali. Hu biss ladarba jintemmu l-proċeduri kriminali u jiġi kkunsidrat dak kollu li jkun sar waqt il-proċeduri kriminali li qorti tkun f'pożizzjoni li tagħmel konsiderazzjonijiet u tagħmel ġudizzju fuq dak kollu li jkun seħħ waqt il-proċess kriminali.*
>
> *23. Għalhekk is-sentenza li tat il-Qorti tal-Appell Kriminali li ċaħdet l-eċċezzjoni tal-akkużat li l-istqarrija mogħtija fl-assenza ta' avukat hi inammissibbli bħala prova, ma kisritx il-jedd ta' smigħ xieraq tal-akkużat u lanqas jista' jingħad li x'aktarx ser tikser dak il-jedd. Dan iktar u iktar meta tikkunsidra li b'dak li qalet il-Qorti tal-Appell Kriminali tat gwida lill-Qorti Kriminali intiża sabiex jiġi salvagwardat il-jedd ta' smigħ xieraq tal-akkużat waqt il-ġuri."*

17. Similarly, in the case **Romario Barbara v. L-Avukat Ġenerali**[7] this Court once more held that an assessment of *overall fairness*, according to **Beuze v. Belgium** and **Farrugia v. Malta** can only be made once the criminal proceedings have come to an end:

> *"22. Il-Qorti tirreferi hawnhekk l-aktar sentenzi riċenti fuq is-suġġett, viz. **Beuze v. Il-Belġju** deċiża mill-Grand Chamber fid-9 ta' Novembru 2018 u s-sentenza **Carmel Joseph Farrugia v. Malta** deċiża mill-Qorti Ewropea Għad-Drittijiet tal-Bniedem fl-4 ta' Ġunju 2019.*
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> *23. Dawn iż-żewġ sentenzi ħolqu numru ta' kriterji mhux tassattivi li wieħed għandu jqis biex jara jekk in-nuqqas ta' assistenza legali fl-istadju tat-teħid tal-istqarrija jwassalx għall-ksur tal-jedd ta' smigħ xieraq. Dawn il-kriterji jistgħu jiġu determinati biss wara li jintemm il-proċess kriminali.*

[6] Decided on the 22nd June 2023
[7] Decided on the 12th July 2023

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

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

25. L-għaqal li din il-Qorti tieħu din id-deċiżjoni dwar l-ilqugħ tal-eċċezzjoni tal-intempestività, jinsab imsaħħaħ ukoll minn dak li ġara fl-aħħar sentenza ***Roderick Castillo v. Avukat Generali et*** *deċiża mill-Qorti Kostituzzjonali fl-20 ta' Lulju 2020. F'din is-sentenza ġara li waqt li kienu mexjin il-proċeduri kostituzzjonali, ġew mitmuma l-proċeduri kriminali u Roderick Castillo ġie meħlus mill-akkużi miġjuba kontrih. Minħabba din il-ġrajja, il-Qorti Kostituzzjonali qalet li:*

> *"Bis-sentenza tal-Qorti tal-Appell Kriminali l-appellat ingħata rimedju definittiv u effettiv. B'hekk minkejja dak li ġara fl-istadju meta l-appellat tal-istqarrija, xorta 'on the whole' kellu smigħ xieraq b'dak li ġara fl-istadju tal-appell".*

18. Also relevant is the judgement **<u>Nicholas Vella vs L-Avukat Ġenerali</u>** delivered by this Court on the 25th October, 2023 wherein the court made reference to the above-mentioned judgement and concluded that *"20. Il-Qorti ma tara l-ebda raġuni għalfejn għandha tirrevedi din il-fehma, iktar u iktar meta ġie deċiż li l-ilment dwar ksur ta' smigħ xieraq hu intempestiv"*.

19. In the present case, in its judgement of the 22nd September 2021 the Court of Criminal Appeal declared that the statement released by the accused be adduced as evidence in the trial by jury after *inter alia* considering that:

> *"21. Having thus premised, from an overview of the evidence gathered during committal proceedings before the Court of Magistrates, it transpires that accused was arrested after a report filed to the police by a certain AB, regarding alleged sexual abuse perpetrated by accused on her daughter AA, who at the time of this alleged abuse was around 11/12 years of age. In his statement subsequently released to the police, accused denies any wrong doing. Accused not only availed himself of his right to legal advice, but also replied to certain questions while he chose to deny or else not to reply to others. This indicates that he understood the caution which was given to him by the interrogating officer and exercised his rights of defence at this early stage. Also there is no evidence in the acts that accused, at 31 years of age, was a vulnerable, inexperienced, or impressionable person. The Police during the course of their investigations proceeded to seize all mobile phones and computers found both in the possession of the minor and the accused for further forensic examination by the Court appointed experts which reports are also found in the acts of the proceedings, together with other evidence.*
>
> *22. The Court has taken judicial notice of the recent judgements delivered by the Constitutional Court of the 27th January 2021 wherein the said Court has directed the Criminal Court not to bring to the attention and cognisance of the jurors the statement of the accused and this as a precautionary measure, thus avoiding the possibility of placing the proceedings at a risk of being annulled due to a future potential breach of the accused's right to a fair trial, thus invalidating the proceedings. It has also taken judicial notice of other judgements, one being more recent, where the Constitutional Court was of a contrary opinion. Thus this Court having an overall picture, from the acts of the compilation of evidence, of all the evidence which the Prosecution will put forward in the trial by jury, and without delving into the merits of the case, since it does not have the power to do so at this stage of the proceedings, is of the firm opinion that each and every case has to be decided on its own merits and this in order to establish whether there is a risk that the accused may suffer a breach of his fundamental human rights if the statement released by him without having a lawyer present during interrogation is vitiated by a defect which cannot otherwise be remedied, and this when taking into consideration "the overall fairness of the proceedings". The Court observes that the Constitutional Court itself has repeatedly affirmed that at this early stage of the proceedings it cannot*

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

...

24. ... since the defence is basing its objection on the inadmissibility of the defendant's statement not on any evidentiary rule which attacks the probative value of such evidence, since the pre-trial statement complied with the criminal law in force at the time, but on the alleged breach of his right to a fair hearing under article 6 of the European Convention were that incriminating statement to be used in court of justice against him, the Court cannot agree with the ruling of the First Court wherein it declared such pre-trial statement inadmissible as evidence at this stage of the proceedings, since it is only after all evidence, both in favour and against the accused, has been heard that it would be possible to conduct the two-tier test as established by the European Court of Human Rights and this in order to determine whether the overall fairness of the proceedings has been compromised if accused's statement were to be used against him as evidence. It will be the duty of the presiding judge during the trial by jury to properly address the jurors as to the probative value of the statement, if during the jury it results that this was not released according to law or if it results that the overall fairness of the proceedings has been compromised by the declarations made by accused in his pre-trial statement in terms of the criteria established in the Beuze judgement cited above. Above all accused will always have a right of appeal from the verdict and judgement of the Criminal Court in the event of a finding of guilt in his regard. This right eradicates any risk which the Criminal Court has perceived as existing during the trial wherein the accused may suffer an alleged breach of his rights. Although it is true that the juror's verdict is not a motivated one, such that it would not be possible to determine whether accused's statement has had a bearing on the verdict of guilt, however the jurors will be guided by the presiding judge who will direct them as to the probative value of the statement should the said judge deem that such evidence may compromise the overall fairness of the proceedings. Not only, but a review of the verdict will also carried out by this Court should accused decide to exercise his constitutional right of appeal from an eventual finding of guilt in his regard, in which case the two-tier exercise indicated in the Beuze judgement can be carried out by the Court in its appellate jurisdiction."

20. The Court of Criminal Appeal has therefore, whilst ordering that the pre-trial statement of the accused be adduced as evidence in the trail

by jury, made the Criminal Court well aware that, should it result, in the trial by jury, that the statement in question was not released according to law or that said statement could compromise the overall fairness of the proceedings, it is it's duty to properly address the jurors as to the probative value of such statement.

21. That therefore, the judgement of the Court of Criminal Appeal of the 22nd September 2021, which rejected accused's plea as regards the alleged inadmissibility of his statement to the police, did not violate his right to a fair hearing nor is it likely to violate that right. On the contrary, it set out the necessary measures and precautions which ought to be taken, according to caselaw of this Court and of the ECHR, to ensure the overall fairness of the proceedings.

22. As regards the issue of disclosure, this has been raised in the appeal stage and was not the subject matter of the decree delivered by the Criminal Court on the 29th November 2021. Furthermore, the appellant did not declare which material evidence was not disclosed to when he gave the contested statement.

Decision.

For these reasons the Court rejects appellant's appeal with judicial costs at his expense.

The Registrar is to insert a copy of this judgement in the court file of the proceedings **Ir-Repubblika ta' Malta vs Christopher Doll** (bill of indictment no 5/2020).

Giannino Caruana Demajo Acting President	Anthony Ellul Judge	Mark Simiana Judge

Deputy Registrar
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