



**QORTI TAL-MAGISTRATI (MALTA)  
BHALA QORTI TA' ĠUDIKATURA KRIMINALI  
MAGISTRAT DR NATASHA GALEA SCIBERRAS**

**Kawża Numru: 433/2009**

**Il-Pulizija  
(Spettur Jesmond J. Borg)**

**vs**

**Thomas Pace  
(ID 73686(M))**

**Illum, 26 ta' Ġunju 2019**

Il-Qorti,

Wara li rat l-imputazzjonijiet miġjuba fil-konfront tal-imputat **Thomas Pace** ta' 23 sena, iben Louis u Mary Odette nee` Camilleri, imwieled il-Pieta` fit-3 ta' Frar 1986 u residenti 9, Sardinella, Triq San Pawl, Naxxar, detentur tal-karta tal-identita` bin-numru 73686(M);

Akkużat talli f'dawn il-gzejjer, fil-lejl bejn is-7 u t-8 ta' Diċembru 2008, kif ukoll f'dawn l-aħħar sentejn u nofs, f'ħinijiet differenti u fi bnadi oħra f'Malta:

1. Forna jew ipprokura jew offra li jforni jew li jipprokura d-droga kokajina, speċifikata fl-ewwel Skeda ta' l-Ordinanza dwar il-Medicini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta lill-persuna jew persuni, jew għall-użu ta' persuna/i, mingħajr ma kellu licenzja mill-President ta' Malta u mingħajr ma kien

awtorizzat bir-Regoli tal-1939 għall-Kontroll Intern tad-Drogi Perikolużi (G.N.292/1939) jew minn xi awtorita` mogħtija mill-President ta' Malta li jforni d-droga u mingħajr ma kien fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħrug mit-Tabib Principali tal-Gvern skond id-dispożizzjonijiet tas-Sitt Taqsima ta' l-Ordinanza msemmija u mingħajr ma kellu liċenzja jew kien xorta oħra awtorizzat li jimmanifattura jew iforni d-droga msemmija u mingħajr ma kellu liċenzja li jipprokura l-istess droga u dan bi ksur tar-Regolament 4 tar-Regoli tal-1939 għall-Kontroll Intern tad-Drogi Perikolużi (G.N. 292/1939) kif sussegwentement emendati u bi ksur ta' l-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta;

2. Traffika, biegħ, qassam jew offra li jittraffika, jbiegħ jew iqassam mediċina psikotropika u ristretta (*ecstasy*) mingħajr awtorizzazzjoni speċjali u bil-miktub mis-Supritendent tas-Saħħa Pubblika, bi ksur ta' l-Ordinanza Dwar il-Professjoni Medika u l-Professjonijiet li għandhom x'jaqsmu magħha, Kap. 31 tal-Liġijiet ta' Malta, u r-Regolamenti dwar il-Kontroll tal-Mediċini, Avviż Legali 22 tal-1985 kif emendati;
3. Kellu fil-pussess tiegħu d-droga kokajina speċifikata fl-ewwel skeda ta' l-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta meta ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħrug mit-Tabib Principali tal-Gvern skond id-dispożizzjonijiet tar-4 u s-6 Taqsima ta' l-Ordinanza u meta ma kienx bil-liċenzja jew xorta oħra awtorizzat li jimmanifattura jew li jforni d-droga msemmija u meta ma kienx b'xi mod ieħor bil-liċenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tiegħu u naqas li jipprova li d-droga msemmija giet fornuta lilu għall-użu tiegħu skond ir-riċetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-Regoli ta' l-1939 għall-Kontroll Intern tad-Drogi Perikolużi (G.N. 292/1939) kif sussegwentement emendati u bi ksur ta' l-Ordinanza dwar il-Mediċini Perikolużi Kap. 101 tal-Liġijiet ta' Malta, liema mediċina nstabet f'tali ċirkustanzi li juru li ma kintix għall-użu ekklussiv tiegħu;
4. Aktar talli kellu fil-pussess tiegħu mediċina psikotropika u ristretta (*ecstasy*) mingħajr awtorizzazzjoni speċjali bil-miktub mis-Supritendent tas-Saħħa Pubblika, bi ksur tad-dispożizzjonijiet tal-Ordinanza dwar il-Professjoni Medika u l-Professjonijiet li għandhom x'jaqsmu magħha, Kap. 31 tal-Liġijiet ta' Malta u r-Regolamenti dwar il-Kontroll tal-Mediċini, l-Avviż Legali 22

tal-1985 kif emendati, liema medicina nstabet f'tali ċirkustanzi li juru li ma kintix għall-użu ekklussiv tiegħu.

Il-Qorti ġiet mitluba sabiex barra milli tapplika l-piena skont il-liġi, tordna lill-imputat iħallas l-ispejjeż li għandhom x'jaqsmu mal-ħatra tal-esperti skont l-artikolu 533 tal-Kap. 9 tal-Liġijiet ta' Malta.

Rat l-atti kollha tal-kawża u d-dokumenti esebiti, inkluż l-Ordni tal-Avukat Ġenerali ai termini tal-Artikolu 22(2) tal-Kapitolu 101 tal-Liġijiet ta' Malta<sup>1</sup>, kif ukoll l-Ordni tal-istess Avukat Ġenerali ai termini tal-Artikolu 120A(2) tal-Kapitolu 31 tal-Liġijiet ta' Malta<sup>2</sup> sabiex dan il-każ jinstema' minn din il-Qorti bħala Qorti ta' Ġudikatura Kriminali;

Rat illi fis-seduta tal-5 ta' Marzu 2010, l-imputat ammetta l-imputazzjonijiet in kwantu jirrigwardaw il-pussess 'semplici' tad-droga<sup>3</sup>;

Rat ukoll illi fis-seduta tas-17 ta' Jannar 2014<sup>4</sup> il-partijiet eżentaw lill-Qorti kif preseduta, milli terġa tisma' l-provi li kienu ngabru sa dakinhar quddiem il-Qorti kif diversement preseduta;

Rat id-digriet ta' din il-Qorti kif diversament preseduta tal-4 ta' Frar 2013<sup>5</sup> u d-digriet ta' din il-Qorti kif preseduta tal-20 ta' Frar 2017<sup>6</sup>;

Rat in-nota ta' sottomissjonijiet tad-difiża u semgħet it-trattazzjoni finali tal-partijiet.

### **Ikkunsidrat:**

Illi l-fatti fil-qosor li taw lok għal dan il-każ kienu s-segwenti: Fil-lejl ta' bejn is-7 u t-8 ta' Dicembru 2008, ċertu Mark Calleja, li kien ma' persuni oħrajn f'*party* ġewwa *Eden Arena*, ittiegħed l-isptar allegatament isofri minn *overdose*, u dan wara li hu, kif ukoll il-ħbieb tiegħu Maria Victoria Aquilina u Samantha Gili allegatament ikkunsmaw pilloli *ecstasy*. F'din l-istanza, il-Prosekuzzjoni qegħda tixli lill-imputat bit-traffikar ta' dawn il-pilloli.

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<sup>1</sup> A fol. 5 tal-proċess.

<sup>2</sup> A fol. 4 tal-proċess.

<sup>3</sup> A fol. 7 tal-proċess.

<sup>4</sup> A fol. 69 tal-proċess.

<sup>5</sup> A fol. 61 tal-proċess.

<sup>6</sup> A fol. 150 tal-proċess.

Il-Prosekuzzjoni ressqet is-segweni xhieda u provi in sostenn tal-imputazzjonijiet fil-konfront tal-imputat odjern:

1. Ix-xhieda ta' **Oriana Deguara**<sup>7</sup>, Deputat Registratur, li esebiet erba' proċessi verbali u ċioe': (i) proċess verbal bin-numru 1239/2008 dwar xhieda ġuramentata ta' Maria Victoria Aquilina, liema proċess verbal ġie esebit bħala Dok. OD; (ii) proċess verbal bin-numru 342/2009 dwar stqarrija ġuramentata ta' Clayton Muscat, liema proċess verbal ġie esebit bħala Dok. OD1; (iii) proċess verbal bin-numru 1253/2008 dwar xhieda ġuramentata ta' Mark Calleja, liema proċess verbal ġie esebit bħala Dok. OD2; u (iv) proċess verbal bin-numru 1241/2008 dwar stqarrija ġuramentata ta' Samantha Gili, liema proċess verbal ġie esebit bħala Dok. OD3<sup>8</sup>;
2. Ix-xhieda ta' **PS69 Jesmond Cremona**<sup>9</sup> li jgħid illi nhar it-8 ta' Diċembru 2008 għall-ħabta tal-4:00 a.m. huwa kien ġie infurmat li ċertu Mark Calleja kien iddaħħal l-isptar b'*overdose*, u li huwa kien hejja rapport dwar dan;
3. Ix-xhieda ta' **Maria Victoria Aquilina**<sup>10</sup> li tgħid illi hija kienet ftehmet ma' Samantha Gili u ma' Mark Calleja sabiex imorru *party* flimkien fil-lejl in kwistjoni. Tgħid ukoll illi huma kienu lkoll ħadu l-*ecstasy*, u li Calleja dakinhar kien ittieħed l-isptar peress li kien ħassu ħażin ferm. Tgħid illi kellu jkun Calleja li jipprovdi lilha u lil Gili b'dawn il-pilloli sabiex jeħduhom it-tlieta flimkien, iżda hija ma kinitx taf minn fejn kien akkwistahom Calleja;
4. Ix-xhieda ta' **WPC23 Geraldine Buttigieg**<sup>11</sup> li kkonfermat li hija kienet xhud tal-istqarrija rilaxxata minn Maria Victoria Aquilina;
5. Ix-xhieda tal-**Ispettur Malcom Bondin**<sup>12</sup> li esebixxa l-istqarrija rilaxxjata mill-imputat odjern nhar it-2 ta' Marzu 2009 bħala Dok. MB1<sup>13</sup>;

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<sup>7</sup> A fol. 11 sa 13 tal-proċess.

<sup>8</sup> Dawn jinsabu esebiti a fol. 14 tal-proċess.

<sup>9</sup> A fol. 17 u 18 tal-proċess.

<sup>10</sup> A fol. 19 sa 54 tal-proċess.

<sup>11</sup> A fol. 55 sa 57 tal-proċess.

<sup>12</sup> A fol. 80 u 81 tal-proċess.

<sup>13</sup> A fol. 82 sa 84 tal-proċess.

6. Ix-xhieda ta' **WPS 86 Diane Fenech**<sup>14</sup> li kkonfermat li hija kienet xhud ta' l-istqarrija rilaxxjata mill-imputat Thomas Pace;
7. Ix-xhieda tal-**Ispettur** (illum Supretendent) **Jesmond J. Borg**<sup>15</sup> li jgħid illi fit-8 ta' Diċembru 2008, huwa kien ġie infurmat mill-Maġġur Marisa Bartolo li kienet tinsab xogħol l-Isptar Mater Dei, illi ċertu Mark Calleja kien ġie rikoverat ġewwa l-istess sptar b'konsegwenza ta' *overdose* u li kien jinsab fil-periklu tal-mewt. Ftit wara li Calleja iddaħħal l-isptar, hija nmutat żewġ tfajliet li marru l-isptar jistaqsu għalih, li rriżultaw li kienu Maria Victoria Aquilina u Samantha Gili u dawn ġew mitkellma mill-pulizija. Huwa jgħid illi ż-żewġ tfajliet irrilaxxjaw stqarrija li sussegwentement ikkonfermawha quddiem il-Maġistrat Inkwirenti u bażikament jispjega dak li kienu qalu dawn iż-żewġ tfajliet waqt l-investigazzjoni. L-Ispettur jgħid ukoll illi wara li Calleja ħareg mill-Isptar, nhar it-13 ta' Diċembru 2008 huwa wkoll irrilaxxja stqarrija lill-pulizija, liema stqarrija huwa kkonfermaha quddiem il-Maġistrat Inkwirenti nhar il-15 ta' Diċembru 2008. Huwa jirreferi għal dak li kien stqarr Calleja u jgħid illi b'konsegwenza ta' din il-parti tal-investigazzjoni, sussegwentement huwa tkellem ma' Clayton Muscat li wkoll irrilaxxja stqarrija lill-pulizija u kkonfermaha quddiem il-Maġistrat Inkwirenti nhar it-2 ta' Marzu 2009. Fl-aħħar huwa kien investiga lill-imputat odjern li rrilaxxja stqarrija nhar it-2 ta' Marzu 2009 u kien ukoll ipprova informazzjoni dwar terza persuna, li eventwalment tressqet il-Qorti u għaldaqstant, skont ix-xhud, l-imputat għandu jibbenefika mill-Artikolu 29 tal-Kapitolu 101. Ix-xhud jgħid ukoll illi ma kinux instabu pilloli fil-każ odjern, iżda l-pulizija kienet qegħda tistrieħ fuq ix-xhieda ta' Maria Victoria Aquilina, Samantha Gili u Mark Calleja dwar l-involviment tal-imputat fil-fornitura ta' tliet pilloli *ecstasy*.

### **Ikkunsidrat ukoll:**

Illi kif ġia ġie rilevat aktar 'il fuq f'din is-sentenza, l-imputat irreġistra ammissjoni limitatament in kwantu l-pussess 'sempliċi' tad-droga ossia d-droga kokaina u l-*ecstasy*. Għalhekk l-imputat qed jikkontesta kemm l-ewwel u t-tieni imputazzjonijiet ta' traffikar tad-droga kokaina u tal-medicina psikotropika u ristretta *ecstasy*, kif ukoll it-tielet u r-raba' imputazzjoni ta' pussess aggravat tal-istess sustanzi.

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<sup>14</sup> A fol. 77 u 78 tal-proċess.

<sup>15</sup> A fol. 135 sa 143 tal-proċess.

Huwa ċar illi l-provi li ressqet il-Prosekuzzjoni fil-konfront tal-imputat odjern huma l-istqarrija rilaxxjata mill-istess imputat nhar it-2 ta' Marzu 2009 u x-xhieda ta' Maria Victoria Aquilina, Samantha Gili, Mark Calleja u Clayton Muscat quddiem il-Maġistrat Inkwirenti li permezz tagħha huma kkonfermaw l-istqarrijiet rispettivi tagħhom, magħduda wkoll ix-xhieda ta' Maria Victoria Aquilina f'dawn il-proċeduri. Fil-mori tal-investigazzjoni, ma giet elevata ebda sustanza mill-pussess tal-imputat odjern.

### **Ikkunsidrat ukoll:**

Illi fl-ewwel lok, jehtieg illi l-Qorti tiddetermina l-valur probatorju li għandha tingħata l-istqarrija rilaxxjata mill-imputat odjern nhar it-2 ta' Marzu 2009 u dan wara li huwa ngħata s-solita twissija skont il-liġi, iżda mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u l-jedd li jkun assistit minn avukat waqt l-istess interrogatorju. Fiż-żmien in kwistjoni, il-liġi Maltija ma kinitx tippovdi lill-persuna arrestata dawn id-drittijiet u dan stante illi l-ewwel jedd daħal fis-seħħ fl-10 ta' Frar 2010 permezz tal-Avviż Legali 35/2010, fil-waqt illi t-tieni jedd imsemmi daħal fis-seħħ fit-28 ta' Novembru 2016, permezz tal-Avviż Legali 401 tal-2016.

Jirrizulta mill-verbal tas-seduta tad-19 ta' Ottubru 2011, illi d-difiża talbet l-isfilz tal-istqarrija tal-imputat, stante illi din ittiehdet mingħajr il-jedd li huwa jottjeni parir legali qabel l-interrogatorju tiegħu.

Kif jirrizulta wkoll mill-verbal tas-seduta tal-15 ta' Frar 2012, quddiem din il-Qorti kif diversament preseduta, l-avukati difensuri talbu referenza kostituzzjonali sabiex jiġi determinat jekk i) l-istqarrijiet esebiti mill-Uffiċjal Investigattiv (f'dan il-każ l-istqarrija tal-imputat odjern), ii) kif ukoll dawk ġuramentati, ġewx ottjenuti bi ksur tal-Artikolu 6 tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni, fil-waqt illi għamlu referenza għas-sentenzi tal-Qorti Kostituzzjonali fil-każijiet ta' Alvin Privitera, Mark Lombardi, Carmel Muscat u oħrajn u dan stante illi meta ttiehdu l-istqarrijiet kollha in kwistjoni, il-liġi Maltija ma kinitx tippermetti li persuna suspettata jew persuna li tagħmel dikjarazzjoni ġuramentata, ikollha l-assistenza ta' avukat qabel l-interrogatorju tagħha jew qabel tagħmel tali dikjarazzjoni. Dwar dan, permezz ta' digriet tal-4 ta' Frar 2013, fil-waqt illi qieset l-ewwel allegazzjoni tad-difiża li dwarha kienet qegħda titlob referenza kostituzzjonali bħala vessatorja u qieset it-tieni allegazzjoni tad-difiża bħala frivola u vessatorja, għaddiet biex tiċhad it-talba tad-difiża għal referenza kostituzzjonali u ordnat il-prosegwiment tal-kawża. Fid-digriet tagħha madankollu, il-Qorti għamlet referenza għal sentenzi tal-Qorti Kostituzzjonali dwar l-ewwel punt imqajjem mid-difiża fir-rigward tal-istqarrija rilaxxjata mill-imputat mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju

tiegħu fosthom dawk fl-ismijiet **Charles Steven Muscat vs Avukat Ġenerali** tat-8 ta' Ottubru 2012 u **Ir-Repubblika ta' Malta vs Alfred Camilleri** tat-12 ta' Novembru 2012 u ddikjarat illi "*hija ser issegwi skrupolozament dawn id-direzzjonijiet u l-linji gwida tal-Qorti Kostituzzjonali, u konsegwentement ma hemmx il-htiega li ssir riferenza kostituzzjonali fuq materja ga deciza awtorevolment, recentement u bla ekwivoku mill-Qorti Kostituzzjonali.*"<sup>16</sup>

Mid-data ta' dan id-digriet madankollu ngħataw diversi sentenzi oħrajn kemm mill-Qorti Kostituzzjonali, kif ukoll minn qrati oħrajn dwar il-punt imqajjem mid-difiza.

F'dan ir-rigward issir referenza għas-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tat-12 ta' Jannar 2016 fil-każ **Mario Borg v. Malta**, kif ukoll għas-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet **The Republic of Malta vs Chukwudi Onyeabor** tal-1 ta' Dicembru 2016, fejn hemmhekk il-Qorti għamlet referenza għal diversi sentenzi tal-Qorti Kostituzzjonali ossia **Carmel Saliba vs Avukat Ġenerali** tas-16 ta' Mejju 2016, **Stephen Nana Owusu vs Avukat Ġenerali** tat-30 ta' Mejju 2016, **Malcolm Said vs Avukat Ġenerali et** tal-24 ta' Ġunju 2016 u **Aaron Cassar vs Avukat Ġenerali et** tal-11 ta' Lulju 2016 u għaddiet sabiex tiddeċiedi illi "*the denial of the right to legal assistance at the pre-trial stage as a result of a systematic restriction applicable to all accused persons must today be held to be in violation of the conditions for the admissibility of an accused's statement.*"

Il-Qorti tirreferi wkoll għas-sentenza mogħtija mill-Qorti Kostituzzjonali fil-5 ta' Ottubru 2018, fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali et**, f'liema każ fl-istqarrijiet tiegħu, ir-rikorrenti minkejja li qabel irrilaxxja l-ewwel stqarrija, kien ingħata parir mingħand l-avukat tiegħu li f'dak l-istadju ma jgħid xejn lill-pulizija, huwa xorta wahda rrisponda għad-domandi waqt l-interrogatorju li sarlu, bir-riżultat li stqarr fatti li kienu inkriminanti għalih, in kwantu ammetta li kien jixtri d-droga kemm għall-użu personali tiegħu, kif ukoll sabiex ibiegħ minnha lil terzi. Fis-sentenza tagħha, il-Qorti Kostituzzjonali qalet hekk dwar l-istqarrijiet rilaxxjati mill-istess rikorrenti mingħajr il-jedd ta' assistenza legali waqt l-interrogatorji tiegħu:

*"36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil-proceduri kriminali, mhux in kwantu għall-ammissjonijiet, izda in kwantu l-kontenut tagħhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu*

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<sup>16</sup> Ara dan id-digriet a fol. 61 sa 65 tal-proċess.

*konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan ir-rigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jistax f'dan l-istadju jigi determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk ilproceduri, jekk l-istqarrijiet jithallew fil-process tal-proceduri kriminali, dawn wisq probabbilment ser isir uzu minnhom mill-Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil-kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.*

*37. Fid-dawl tal-premess it-tehid tal-istqarrijiet zgur li ser ikollhom impatt fuq l-ezitu tal-process kriminali u, ladarba dan isir, x'aktarx ser isir ksur tad-dritt tal-rikorrent ghal smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mirrikorrent fl-assenza ta' avukat li jassistih. Ghalhekk huwa xieraq li, filwaqt li f'dan l-istadju ma jistax jinghad jekk kienx hemm lezjoni ta' dan id-dritt fundamentali tar-rikorrent peress li l-proceduri kriminali ghadhom pendenti, dawn ma jithallewx jibqghu fl-inkartament tal-process kriminali." [sottolinear tal-Qorti]*

Allura minkejja illi r-rikorrenti f'dak il-każ, kien ingħata l-jedd li jikkonsulta ma' avukat qabel l-ewwel interrogatorju tiegħu u anke eżercita dan il-jedd, il-Qorti ordnat illi l-istqarrijiet tiegħu ma jithallewx fl-inkartament la darba kien ser ikollhom impatt fuq l-eżitu tal-process kriminali u dan stante illi ma ngħatax il-jedd għall-assistenza legali waqt l-interrogatorji tiegħu. Din kienet ukoll il-konkluzjoni tal-Qorti tal-Appell Kriminali fis-sentenza tagħha tal-20 ta' Novembru 2018, fl-ismijiet **Il-Pulizija vs Claire Farrugia**, f'liema każ dik il-Qorti skartat bħala inammissibbli l-istqarrijiet tal-imputata, waħda minnhom ġuramentata, u dan għaliex ghalkemm hija ngħatat id-dritt li tottjeni parir legali qabel l-istqarrijiet tagħha, madankollu hija ma ngħatatx id-dritt li tkun assistita minn avukat waqt l-interrogatorji li sarulha u dan stante li dan id-dritt ma kienx għadu vigenti fiż-żmien in kwistjoni. F'dan is-sens ukoll iddeċidiet l-istess Qorti fis-sentenza tagħha fl-ismijiet **Il-Pulizija vs Emad Masoud** tas-16 ta' Mejju 2019 u iżjed riċentement fis-sentenza tagħha fl-ismijiet **Il-Pulizija vs Sandro Spiteri** tat-18 ta' Ġunju 2019, f'liema każ, l-imputat kien irrilaxxja stqarrija mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u wisq inqas li jkun assistit minn avukat waqt l-istess interrogatorju.

Fis-sentenza fl-ismijiet **Il-Pulizija (Spettur Malcolm Bondin) vs Aldo Pistella** tal-14 ta' Dicembru 2018, f'liema każ l-appellat kien ingħata l-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u anke eżercitah, iżda ma ngħatax il-jedd li jkun assistit minn avukat waqt dan l-interrogatorju, stante illi anke f'dak il-każ, fiż-żmien in kwistjoni, dan il-jedd ma kienx vigenti fil-liġi Maltija, il-Qorti Kostituzzjonali reġgħet irribadjet il-konkluzjonijiet tagħha fis-sentenza preċedenti fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali et:**



“14. *Għalkemm, bħall-ewwel qorti, taqbel mal-appellanti illi f’dan l-istadju għadu ma seħħ l-ebda ksur tal-jedd għal smiġh xieraq, madankollu, kif osservat fil-każ ta’ Malcolm Said, il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jithalla jitkompla bil-produzzjoni tal-istqarrija tal-akkużat Pistella ladarba din, għallinqas f’parti minnha, ittiegħdet mingħajr ma Pistella kellu l-għajjnuna ta’ avukat. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smiġh xieraq, fiċ-ċirkostanzi huwa għaqli illi, kif qalet l-ewwel qorti, ma jsir ebda użu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniġġes b’irregolarità – dik li jkun sar użu minn stqarrija li ttiegħdet mingħajr ma l-interrogat kellu l-għajjnuna ta’ avukat – li tista’ twassal għal konsegwenzi bħal tħassir tal-proċess kollu.”*

Fil-każ ta’ **Philippe Beuze vs Belgium** deċiż mill-Grand Chamber tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fid-9 ta’ Novembru 2018, dik il-Qorti reġgħet adottat il-kriterju tal-*overall fairness of the proceedings* sabiex tistharreġ jekk seħħitx o meno leżjoni tad-dritt għal smieġh xieraq. Għalkemm sabet li f’dan il-każ seħħet vjolazzjoni tal-Artikolu 6 tal-Konvenzjoni, il-Qorti mxiet lil hinn minn dawk id-deċiżjonijiet li fihom instabet vjolazzjoni tal-imsemmi artikolu la darba kien hemm restrizzjoni sistematika fil-liġi domestika tad-dritt ta’ persuna suspettata jew arrestata ta’ aċċess għall-avukat, u ddeċidiet illi l-Qorti għandha dejjem tistharreġ iċ-ċirkostanzi partikolari tal-każ, tenut kont ta’ numru ta’ kriterji, mhux eżawrjenti, elenkati fid-deċiżjoni tagħha. Dik il-Qorti qalet hekk dwar id-dritt ta’ aċċess għall-avukat u dwar l-istħarriġ li għandu jsir f’kull każ:

**“(a) Preliminary comments**

114. *The Court observes, by way of introduction, that the Grand Chamber has already had occasion, in a number of cases, to rule on the right of access to a lawyer under Article 6 §§ 1 and 3 (c) of the Convention (see, as recent examples, Dvorski v. Croatia [GC], no. 25703/11, ECHR 2015; Ibrahim and Others, cited above; and Simeonovi, cited above).*

115. *In the present case, as can be seen from paragraphs 3 and 90 above, the applicant complained first that he had not had access to a lawyer while in police custody and, in addition, that even once he had been able to consult with a lawyer, his lawyer could not assist him during his police interviews or examinations by the investigating judge or attend a reconstruction of events.*

116. *The applicant's complaints concern statutory restrictions on the right of access to a lawyer, the first alleged restriction being of the same nature as that complained of in the Salduz judgment. It should be pointed out that, further to that judgment, the Grand Chamber provided significant clarification on the right of access to a lawyer in its Ibrahim and Others judgment, even though the restriction complained of in the latter case was not one of a general and mandatory nature. The present case thus affords the Court an opportunity to explain whether that clarification is of general application or whether, as claimed by the applicant, the finding of a statutory restriction is, in itself, sufficient for there to have been a breach of the requirements of Article 6 §§ 1 and 3 (c).*

117. *The present case also raises questions concerning the content and scope of the right of access to a lawyer. The Court observes that, since the Salduz judgment, its case-law has evolved gradually and that the contours of that right have been defined in relation to the complaints and circumstances of the cases before it. The present case thus affords an opportunity to restate the reasons why this right constitutes one of the fundamental aspects of the right to a fair trial, to provide explanations as to the type of legal assistance required before the first police interview or the first examination by a judge. It also allows the Court to clarify whether the lawyer's physical presence is required in the course of any questioning or other investigative acts carried out during the period of police custody and that of the pre-trial investigation (as conducted by an investigating judge in the present case).*

118. *Those questions will be examined in the light of the general principles set out below.*

## **(b) General principles**

### *(i) Applicability of Article 6 in its criminal aspect*

119. *The Court reiterates that the protections afforded by Article 6 §§ 1 and 3 (c), which lie at the heart of the present case, apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see Ibrahim and Others, cited above, § 249, and Simeonovi, cited above, §§ 110-11, and the caselaw cited therein).*

*(ii) General approach to Article 6 in its criminal aspect*

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 ...*

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 (see, for example, Salduz, cited above, § 50; Al-Khawaja and Tahery, cited above, § 118; Dvorski, cited above, § 76; Schatschaschwili, cited above, § 100; Blokhin, cited above, § 194; and Ibrahim and Others, cited above, § 251).*

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).*

*(iii) Right of access to a lawyer*

123. *The right of everyone “charged with a criminal offence” to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see Salduz, cited above, § 51, and Ibrahim and Others, cited above, § 255).*

*(a) Starting-point of the right of access to a lawyer*

124. *Where a person has been taken into custody, the starting-point for the right of access to a lawyer is not in doubt. The right becomes applicable as soon as there is a “criminal charge” within the meaning given to that concept by the Court’s case-*

law (see paragraph 119 above) and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see *Simeonovi*, cited above, §§ 111, 114 and 121).

*(β) Aims pursued by the right of access to a lawyer*

125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54; *Blokhin*, cited above, § 198; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

126. The Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and ill-treatment of suspects by the police (see *Salduz*, cited above, § 54; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

127. The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (see *Salduz*, cited above, § 54, and *Ibrahim and Others*, cited above, § 253).

128. Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see *Salduz*, cited above, § 54; *Dvorski*, cited above, § 77; and *Blokhin*, cited above, § 198) and for his right to remain silent.

129. In this connection, the Court has considered it to be inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence", within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed would not be practical and effective (see *Ibrahim and Others*, cited above, § 272, and *Simeonovi*, cited above, § 119; the complementarity of these rights had already been emphasised in *John Murray v. the United Kingdom*, 8 February 1996, § 66, Reports of Judgments and Decisions 1996-I; *Brusco v. France*, no. 1466/07, § 54, 14 October 2010; and *Navone and Others*, cited above, §§ 73-74). Consequently, Article 6 § 3 (c) of the Convention must be interpreted as

*safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see Simeonovi, cited above, § 119).*

*130. In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see Ibrahim and Others, cited above, § 273, and case-law cited therein).*

*(γ) Content of the right of access to a lawyer*

*131. Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see Öcalan v. Turkey [GC], no. 46221/99, § 135, ECHR 2005-IV; Salduz, cited above, § 51; Dvorski, cited above, § 80; and Ibrahim and Others, cited above, § 272).*

*132. Assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see Öcalan, cited above, § 135; Sakhnovskiy v. Russia [GC], no. 21272/03, § 95, 2 November 2010; and M v. the Netherlands, no. 2156/10, § 82, 25 July 2017), and to that end, the following minimum requirements must be met.*

*133. First, as the Court has already stated above (see paragraph 124), suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview (see Brusco, cited above, § 54, and A.T. v. Luxembourg, cited above, §§ 86-87), or even where there is no interview (see Simeonovi, cited above, §§ 111 and 121). The lawyer must be able to confer with his or her client in private*

and receive confidential instructions (see *Lanz v. Austria*, no. 24430/94, § 50, 31 January 2002; *Öcalan*, cited above, § 135; *Rybacki v. Poland*, no. 52479/99, § 56, 13 January 2009; *Sakhnovskiy*, cited above, § 97; and *M v. the Netherlands*, cited above, § 85).

134. Secondly, the Court has found in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (see *Adamkiewicz v. Poland*, no. 54729/00, § 87, 2 March 2010; *Brusco*, cited above, § 54; *Mader v. Croatia*, no.56185/07, §§ 151 and 153, 21 June 2011; *Šebalj v. Croatia*, no. 4429/09, §§ 256-57, 28 June 2011; and *Erkapić v. Croatia*, no. 51198/08, § 80, 25 April 2013). Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract (see *A.T. v. Luxembourg*, cited above, § 87), and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see *John Murray*, cited above, § 66, and *Öcalan*, cited above, § 131).

135. The Court has found, for example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may undermine the fairness of the proceedings: (a) a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation (see *Moiseyev v. Russia*, no. 62936/00, §§ 217-18, 9 October 2008; *Sapan v. Turkey*, no. 17252/09, § 21, 20 September 2011; and contrast *A.T. v. Luxembourg*, cited above, §§ 79-84); (b) the non-participation of a lawyer in investigative measures such as identity parades (see *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 67, 20 April 2010) or reconstructions (see *Savaş v. Turkey*, no. 9762/03, § 67, 8 December 2009; *Karadağ v. Turkey*, no. 12976/05, § 47, 29 June 2010; and *Galip Doğru v. Turkey*, no. 36001/06, § 84, 28 April 2015).

136. In addition to the above-mentioned aspects, which play a crucial role in determining whether access to a lawyer during the pre-trial phase has been practical and effective, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see *Hovanesian v. Bulgaria*, no. 31814/03, § 34, 21 December 2010; *Simons*, cited above, § 30; *A.T. v. Luxembourg*, cited above, § 64; *Adamkiewicz*, cited above, § 84; and *Dvorski*, cited above, §§ 78 and 108).

*(iv) Relationship between the justification for a restriction on the right of access to a lawyer and the overall fairness of the proceedings*

*137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the Salduz judgment (cited above, § 55) as follows: “... in order for the right to a fair trial to remain sufficiently ‘practical and effective’ ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”*

*138. The Salduz judgment also demonstrated that the application on a “systematic basis”, in other words on a statutory basis, of a restriction on the right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 5758).*

*139. The stages of the analysis as set out in the Salduz judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.*

*140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular, Dayanan, cited above, § 33, and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the*

*proceedings, sometimes in summary form (see, among other authorities, Çarkçı v. Turkey (no. 2), no. 28451/08, §§ 43-46, 14 October 2014), and sometimes in greater detail (see, among other authorities, A.T. v. Luxembourg, cited above, §§ 72-75).*

*141. Being confronted with a certain divergence in the approach to be followed, in Ibrahim and Others the Court consolidated the principle established by the Salduz judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them (see Ibrahim and Others, cited above, §§ 257 and 258-62).*

*(α) Concept of compelling reasons*

*142. 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 (see Salduz, cited above, §§ 54 in fine and 55, and Ibrahim and Others, cited above, § 258). 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.*

*143. The Court has also explained that 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 Ibrahim and Others, cited above, § 259, and Simeonovi, cited above, § 117).*

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

*144. In Ibrahim and Others the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see Ibrahim and Others, cited above, § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court’s case-law on the right of access to a lawyer (see*



paragraph 97 above) to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the *Ibrahim and Others* judgment, followed by the *Simeonovi* judgment, the Court rejected the argument of the applicants in those cases that *Salduz* had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the *Dayanan* case and other judgments against Turkey (see paragraph 140 above).

145. 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 *Ibrahim and Others*, cited above, § 265).

146. 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.*, § 273 *in fine*).

147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention (see the case-law on Article 6 § 1 cited in paragraph 120 above).

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

149. 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.

*(γ) Relevant factors for the overall fairness assessment*

*150. 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 (see Ibrahim and Others, cited above, § 274, and Simeonovi, cited above, § 120):*

*(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.”*

F’dak il-każ, meta l-Qorti Ewropea giet biex teżamina dawn il-kriterji fil-kuntest ta’ ċirkostanzi li kellha quddiemha, fil-waqt illi saħqet illi kienet qed issib vjolazzjoni tal-Artikolu 6 fid-dawl ta’ diversi fatturi meħudha lkoll flimkien u mhux kull fattur meqjus separatament, ikkunsidrat *inter alia* illi fl-istess każ, ir-restrizzjonijiet fuq id-dritt tal-aċċess għall-avukat kienu estensivi u dan fis-sens illi l-akkużat gie interrogat waqt li kien fil-kustodja tal-pulizija mingħajr ma qabel ingħata l-opportunita’ li jottjeni parir legali jew li jkollu avukat preżenti u fil-kors tal-investigazzjoni ġudizzjarja li seħhet wara, ma ngħatax il-possibilita’ li jkun assistit minn avukat, kif lanqas ma ngħata dan id-dritt f’atti investigattivi oħrajn sussegwenti. F’dawk iċ-ċirkostanzi, mingħajr ma ngħata informazzjoni ċara dwar id-dritt tiegħu għas-silenzju, huwa rrilaxxa stqarrijiet dettaljati u sussegwentement ta wkoll verżjonijiet differenti dwar il-fatti, bir-riżultat illi għamel stqarrijiet, li għalkemm ma kinux inkriminanti fis-sens restrittiv ta’ din il-kelma, effettwaw sostanzjalment il-posizzjoni tiegħu, speċjalment fir-rigward ta’ akkuża partikolari. Dawn l-stqarrijiet ġew il-koll ikkunsidrati bħala ammissibbli fil-proċeduri kontra tiegħu. In oltre tali stqarrijiet kellhom rwol importanti fil-proċeduri u fir-rigward ta’ akkuża minnhom, kienu jiffurmaw parti integrali mill-provi li a bażi tagħhom huwa nstab ħati.

Fil-każ deċiż mill-Qorti Kostituzzjonali fl-ismijiet **Paul Anthony Caruana vs Avukat Ġenerali et** nhar il-31 ta’ Mejju 2019, l-attur ilmenta minn ksur tal-jedd tiegħu għal smiegħ xieraq fid-dawl tal-fatt illi ma ngħatax id-dritt tal-aċċess għall-avukat kemm qabel irrilaxxa l-istqarrija tiegħu lill-pulizija kif ukoll waqt l-interrogatorju tiegħu, u għaldaqstant talab lill-Qorti kemm sabiex tiddikjara illi ġew leżi d-drittijiet fundamentali tiegħu kif sanciti fl-Artikolu 39 tal-Kostituzzjoni, kif ukoll fl-Artikolu 6 tal-Konvenzjoni Ewropea, kif ukoll sabiex takkorda daww ir-rimedji effettivi inkluż li tannulla, tħassar u tirrevoka s-sentenza mogħtija fil-konfront tiegħu mill-Qorti tal-Maġistrati (Malta) bħala Qorti ta’ Ġudikatura Kriminali, li permezz tagħha kien instab ħati tal-imputazzjonijiet miġjuba kontra tiegħu u gie kkundannat għal terminu effettiv ta’ prigunerija.

F’dan il-każ, wara li rreferiet għall-każ ta’ **Ibrahim and Others v. United Kingdom** deċiż mill-Qorti Ewropea fit-13 ta’ Settembru 2016 u kompliet illi allura l-fatt waħdu li persuna ma tkunx thalliet tingħata l-għajjuna ta’ avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, ma huwiex biżżejjed biex, *ipso facto*, jinsab ksur tal-jedd għal smiegħ xieraq, iżda wiehed irid

iqis il-proċess fit-totalità tiegħu, il-Qorti Kostituzzjonali għamlet referenza wkoll għad-deċiżjoni f'**Beuze v. Belgium** u għall-kriterji hemmhekk indikati (u fuq citati minn din il-Qorti) li a bażi tagħhom wieħed għandu jeżamina l-proċeduri fl-intier tagħhom fid-dawl tal-impatt tan-nuqqasijiet proċedurali fl-istadju ta' qabel il-proċeduri. Il-Qorti kompliet hekk dwar l-ilment tal-attur:

*“20. Fid-dawl ta' dawn il-konsiderazzjoniet, l-aggravju tal-attur – safejn iġid illi “l-fatt waħdu illi persuna li tkun instabet hatja ma tkunx thalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minhabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smiġħ xieraq ta' dik l-istess persuna taht l-artikolu 6 tal-Konvenzjoni Ewropea” – huwa hażin u huwa miċhud.*

*21. Fil-każ tallum kien hemm raġuni tajba għala l-attur ma thalliex ikellem avukat qabel jew waqt l-ewwel interrogazzjoni. Ir-raġuni hi li kien hemm il-ħsieb li ssir controlled delivery lil terza persuna li kienet tipprovdi lill-attur bid-droga, u biex din l-operazzjoni tirnexxi kien meħtieġ li l-attur ma jithalla jikkomunika ma' hadd biex ma titwassalx il-kelma lil dan it-terz.*

...

*23. L-attur ingħata t-twissija li trid il-liġi qabel ma ta l-istqarrija, u ma saret ebda allegazzjoni li l-istqarrija saret fiċ-ċirkostanzi msemmija fl-art. 658 tal-Kodiċi Kriminali. ... Hlief għall-fatt li ma kellux avukat dak il-ħin, l-attur ma ressaq ebda argument serju kontra l-validità u l-veraċità tal-istqarrija.*

*24. Għandu jingħad ukoll illi l-attur ma nżammx aktar milli kien meħtieġ biex tirnexxi l-operazzjoni tal-controlled delivery; dakinhar stess kien meħlus u seta' liberament ikellem avukat.*

*25. Barra minn hekk, l-istqarrija magħmula lill-pulizija ma kinitx ir-raġuni li wasslet għall-kundanna tal-attur: l-attur instab hati mill-qorti ta' ġurisdizzjoni kriminali għax ammetta l-ħtija għal dawk l-akkużi li ma ġewx ritirati. Dan għamlu fil-preżenza tal-avukat wara li ikkonsulta miegħu u quddiem maġistrat li wissih bil-konsegwenzi tal-ammissjoni u tah l-opportunità li jehodha lura.*

*26. Tassew illi l-attur iġid illi kien kondizzjonat bil-fatt li kien għa ta stqarrija lill-pulizija qabel ma ammetta quddiem il-qorti...*

27. *Dan jista' f' ċerti ċirkostanzi jkun fattur relevanti, iżda fil-każ tal-lum l-attur seta' jiċċhad dak li stqarr fl-istqarrija u wkoll, jekk tassew kif qal hu kien fis-sakra meta għamilha u għalhekk l-istqarrija ma għamilhiex "volontarjament", jikkontestaha taht l-art. 658 tal-Kodiċi Kriminali – seta' saħansitra jirtira l-ammissjoni li għamel quddiem il-qorti – għax il-qorti ta' ġurisdizzjoni kriminali, presjeduta minn ġudikant togat, kienet taf biżżejjed, fid-dawl tas-sentenza ta' Salduz, li kienet ingħatat qabel, li ma kellhiex toqgħod fuq l-istqarrija wehedha, aktar u aktar jekk tkun giet irtirata, jekk ma jkunx hemm xieħda oħra li ma tħallix dubju dwar il-ħtija. Bilkemm għalfajn ngħidu wkoll illi l-attur kien inqabad in flagrante, bi kwantità ta' droga fuq il-persuna tiegħu u fid-dar fejn kien joqgħod.*

28. *Il-qorti aktar temmen illi l-attur ammetta quddiem il-qorti mhux għax kondizzjonat bl-istqarrija li kien ta iżda għax kien jaf bix-xieħda l-oħra kontrieh u biex jieħu l-benefiċċju, li fil-fatt ingħata, taht l-art. 29 tal-Ordinanza dwar il-Mediċini Perikolużi [Kap. 101].*" [sottolinear ta' din il-Qorti]

Fil-każ li għandha l-Qorti quddiemha llum, kif ingħad, il-Prosekuzzjoni qed tistrieħ *inter alia* fuq l-istqarrija rilaxxjata mill-imputat, mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u mingħajr il-jedd li jkun assistit waqt tali interrogatorju. Huwa evidenti illi jeħtieġ li din il-Qorti teżamina ċ-ċirkostanzi li għandha quddiemha mhux mill-ottika ta' ksur tal-jedd għal smieġħ xieraq stante li m'għandhiex kompetenza li tagħmel dan, iżda sempliciment mil-lat tal-valur probatorju li għandha tingħata l-istess stqarrija, tenut kont madankollu tal-ġurisprudenza fuq indikata. Mis-suespost, il-Qorti jidhrilha illi fil-każ ta' Beuze, sabiex sabet vjolazzjoni tal-jedd tal-akkużat għal smieġħ xieraq, il-Qorti Ewropea fil-valutazzjoni tagħha tal-*overall fairness of the proceedings* straħet hafna fuq il-fatt illi l-akkużat ma ngħatax aċċess għall-avukat qabel u/jew waqt l-interrogatorji diversi li sarulu, illi fl-istqarrijiet tiegħu għamel dikjarazzjonijiet inkriminanti u illi fir-rigward ta' akkuża partikolari, l-istqarrijiet tiegħu kellhom impatt tali illi wasslu għal sejbien ta' ħtija. Fil-każ ta' Paul Anthony Caruana, imbagħad, fil-waqt illi ma sabitx ksur tad-dritt tal-attur għal smieġħ xieraq, il-Qorti Kostituzzjonali qieset bħala fattur determinanti l-fatt illi huwa nstab ħati mill-Qorti tal-Maġistrati mhux fid-dawl tal-istqarrija rilaxxjata minnu lill-pulizija, iżda a bażi tal-ammissjoni tiegħu fil-proċeduri. Effettivament din il-Qorti tinnota illi dejjem tibqa' kunsiderazzjoni determinanti kemm l-istqarrija rilaxxjata mingħajr il-jedd ta' aċċess għall-avukat, ikollha impatt fuq l-eżitu tal-proċeduri, jew fi kliem ieħor fuq is-sejbien ta' ħtija tal-imputat. Fil-każ odjern, l-imputat għamel dikjarazzjonijiet inkriminanti fl-istqarrija minnu rilaxxjata u għalhekk ċertament li kemm il-darba din il-Qorti tieħu tali stqarrija in konsiderazzjoni, din ser ikollha impatt fuq l-eżitu ta' dawn il-proċeduri.

Fid-dawl ta' dawn is-sentenzi u anke tal-ġurisprudenza tal-Qrati tagħna u tal-Qorti Ewropea hemmhekk citati, il-Qorti jidhrilha illi m'għandhiex tistrieħ fuq l-istqarrija tal-imputat u għalhekk qegħda tiskartaha, kif qegħda tiskarta wkoll dik il-parti tax-xhieda tal-Ispettur Jesmond J. Borg li tagħmel referenza għal tali stqarrija.

### **Ikkunsidrat ukoll:**

Illi kunsiderazzjoni oħra li trid tagħmel din il-Qorti hija dwar is-siwi probatorju tal-istqarrijiet ġuramentati ta' Mark Calleja u Clayton Muscat quddiem il-Maġistrat Inkwirenti li jiffurmaw parti mill-atti proċesswali. F'dan ir-rigward, il-Qorti tagħmel referenza għas-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet **II-Pulizija vs Pierre Gravina** tas-26 ta' Mejju 2003, permezz ta' liema ingħad is-segwent:

*“Issa huwa principju generali li “...ix-xhieda għandhom dejjem jiġu eżaminati fil-Qorti u viva voce” (Artikolu 646(1), Kap. 9). Għal din ir-regola, pero`, hemm ċerti eċċezzjonijiet li jipprovdi għalihom l-istess Artikolu 646 fis-subartikoli li jiġu wara s-subartikolu (1). Hemm ukoll l-eċċezzjoni tad-deposizzjoni meħuda in segwitu għall-ħrug ta' ittri rogatorjali bil-proċedura traċċjata fl-Artikolu 399 tal-Kodiċi Kriminali, proċedura li giet ritenuta applikabbli anke għal kawżi sommarji (ara **II-Pulizija v. Angelo Grima App. Krim. 18 ta' Ottubru, 1952**), u li fil-prattika giet ukoll applikata mill-Qorti Kriminali f'xi każijiet wara l-ħruġ tal-att ta' akkuża. U hemm l-eċċezzjoni ta' meta xhud jinstema' f'daru minhabba mard jew xjuħija (Art. 647, Kap. 9). Jiġi osservat li anke fil-każ ta' xiehda permezz ta' rogatorji u ta' xhieda li jinstemgħu f'darhom, l-imputat jew akkużat għandu dejjem il-jedd li jkun presenti waqt is-smiġħ tax-xhud jew li jahtar rappresentant tiegħu għal waqt tali smiġħ – Art. 647(3) u 399(2). L-ewwel sentenza tal-Artikolu 30A tal-Kap. 101 tagħmilha ċara li dak l-Artikolu qed jipprovdi ukoll eċċezzjoni, pero` mhux eċċezzjoni għar-regola kontenuta fl-Artikolu 646(1) tal-Kodiċi Kriminali iżda għar-regola kontenuta fl-Artikolu 661<sup>17</sup> ta' l-istess Kodiċi. Minn dan isegwi, li anke meta l-prosekuzzjoni tkun trid tagħmel użu minn dikjarazzjoni ġuramentata meħuda skond l-imsemmi Artikolu 30A, ir-regola għandha tkun li minn ikun għamel dik l-istqarrija għandu jingieb fil-qorti biex l-imputat jew akkużat ikun jista' jikkontroeżaminah dwarha. S'intendi, dan ma jfissirx li jekk ix-xhud, meta jiġi eżaminat jew kontro-eżaminat, ibiddel jew jirritratta minn dak li jkun qal fid-dikjarazzjoni ġuramentata, allura dik id-dikjarazzjoni (jew il-parti mibdula jew ritrattata) ma tkunx aktar tista' tittiehed bħala prova kontra l-akkużat; il-gudikant*

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<sup>17</sup> L-Artikolu 661 tal-Kap. 9 jgħid hekk: “Konfessjoni ma tagħmilx prova ħlif kontra min jagħmilha, u mhix ta' preġudizzju għal ebda persuna oħra.”

*jista' xorta waħda, wara li jkun sema' lix-xhud, jasal għall-konkluzzjoni li il-verita` hija dik kontenuta fl-istqarrija ġuramentata u mhux dak li jkun iddepona fil-qorti x-xhud. Ifisser biss li, bħala regola, min ikun għamel tali stqarrija ġuramentata għandu jingiebb il-qorti għall-fini ta' kontroll da parti tal-akkużat jew imputat. F'dan is-sens ukoll esprimiet ruhha l-Qorti Ewropea fil-kawza **Kostovski v. Netherlands** (20 ta' Novembru, 1989) meta qalet li d-dritt ta' akkużat li jikkonfronta xhud miġjub kontra tiegħu*

*does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage in the proceedings<sup>18</sup>.*"

*Fil-każ in diżamina Mentosa la ġie prodott mill-prosekuzzjoni fil-qorti peress li kien telaq minn Malta definittivament, u anqas ittiehdet id-deposizzjoni tiegħu permezz tal-proċedura tar-roġatorji. L-ewwel qorti, għalhekk, kellha tiskarta l-istqarrija ġuramentata tiegħu u mhux, kif effettivament għamlet, tistrieħ in parti fuqha...".*

F'dik is-sentenza, il-Qorti tal-Appell Kriminali rriteniet ukoll illi:

*"Għal kull buon fini l-Qorti tosserva li l-ġurisprudenza tal-Qorti Ewropea ma teskludix l-ammissibilita` ta' stqarrijiet magħmula minn persuni li in segwitu qatt ma jingiebu bħala xhieda fil-proċess. Dak li dik il-Qorti tara biex tiddetermina jekk kienx hemm jew le smiegħ xieraq hu jekk dawk l-istqarrijiet kienux l-unika prova kontra l-akkużat, jew kinux altrimenti prova determinanti biex huwa jinstab ħati."*  
[sottolinear ta' din il-Qorti]

Fl-istess sens hija wkoll is-sentenza tal-Qorti Kriminali tat-8 ta' April 2010, fl-ismijiet **Ir-Repubblika ta' Malta vs Matthew-John Migneco**, fejn ingħad illi:

*"S'intendi, dana l-Artikolu 30A tal-Kap. 101 irid dejjem jinqara fid-dawl tad-disposizzjonijiet ġenerali tal-Kodiċi Kriminali (eċċetwat l-Artikolu 661 tal-istess Kodiċi, li għalih l-Artikolu 30A jagħmel deroga espressa). Issa, l-Artikolu 549(4)*

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<sup>18</sup> (1990) 12 E.H.R.R.434, para. 41.

*(u ma jistax ikun hemm dubju li l-intervent ta' Magistrat taht is-subartikoli (12) u (13) tal-Art. 24A tal-Kap. 101 hija forma ta' inkjesta dwar l-in genere b'modalitajiet kemm xejn differenti mehtiega għall-finijiet tal-istess Kap. 101) u 646(2) tal-Kap. 9 huma çari fil-portata tagħhom: id-deposizzjoni regolarment mogħtija fl-inkjesta dwar l-in genere ... tista' tingieb bhala prova, u mhux sempliciment għall-finijiet ta' kontroll, basta, pero`, li x-xhud jingieb ukoll fil-qorti biex jiġi eżaminat viva voce ... ħlief jekk ix-xhud ikun mejjet, ikun barra minn Malta jew ma jkunx jista' jinstab... (ara l-proviso tas-subartikolu (2) tal-imsemmi Artikolu 646)."*

Fis-sentenza tal-Qorti Kriminali tas-6 ta' Lulju 2016, fl-ismijiet **Ir-Repubblika ta' Malta vs Charles Paul Muscat**, wara li dik il-Qorti għamlet referenza għall-Artikolu 30A tal-Kap. 101, kif ukoll għall-Artikolu 661 tal-Kap. 9, li għalih l-imsemmi Artikolu 30A jagħmel eċċezzjoni, ingħad hekk:

*"Issa allura dan ifisser illi ai termini tal-artikolu 30A tal-Kapitolu 101 Marlon Apap u Brian Godfrey Bartolo għandhom jitqiesu illi huma 'a competent witness' fil-konfront tal-akkuzat għalkemm fiz-zmien meta huma offrew id-depozizzjoni tagħhom kienu għandhom jitqiesu bhala ko-akkuzati billi l-proceduri kriminali fil-konfront tagħhom dwar l-istess fatti addebitati lill-akkuzat odjern kienu għandhom ma gewx konkluzi. Li hu cert huwa illi sakemm il-kaz tagħhom jiġi deciz dawn iz-zewg xhieda ma humiex 'a compellable witness' u cioe' ma jistghux jigu imgieghla jagħtu id-depozizzjoni tagħhom billi għandhom id-dritt sancit mill-Kostituzzjoni u l-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem illi ma jwiegbu għall-ebda mistoqsija li tista' b'xi mod tinkriminathom. Fil-fatt meta huma offrew id-depozizzjoni tagħhom matul il-kumpilazzjoni għazlu li juzufruwixxu minn dan il-jedd u ma xehdux. Issa id-difiza targumenta illi għaladarba l-akkuzat ma nghanax il-jedd li jikkontrolla dak mistqarr minn dawn it-tnejn min-nies fl-istqarrija guramentata tagħhom li tinsab esebita in atti, din il-prova f'dan l-istadju hija inammissibbli u għandha tigi skartata u dan fid-dawl ta' dak deciz superjorment fid-decizzjoni ta' 'Gravina' supra citata. Dan għaliex l-artikolu 30A ma huwiex eccezzjoni għal dak dispost fl-artikolu 646 tal-Kodici Kriminali fejn hemm espressament stipulat illi "ix-xhieda għandhom dejjem jiġu eżaminati fil-Qorti u viva voce."*

*Illi l-akkuzat kien ikollu ragun fl-argumenti minnu imressqa li kieku dawn iz-zewg xhieda għazlu li ma jixhdux matul is-smigh tal-guri. Illi allura il-Qorti u cioe' l-Imhalled togat ikun irid necessarjament jagħti direzzjoni lill-imhallfin tal-fatti u cioe' lill-gurati meta jigu biex jiznu din il-prova mressqa mill-Prosekuzzjoni. Izda dan jista' isir biss fl-istadju meta allura ikun qed jinstema' il-process penali fil-konfront tal-akkuzat. Illi għalhekk għalkemm gustament l-akkuzat talab id-direzzjoni tal-Qorti f'din l-ewwel eccezzjoni sollevata minnu għar-rigward tal-validita'*



probatorja tal-istqarrijiet guramentati li jinsabu fl-atti bhala prova li giet kumpilata fl-istadju li jipprevedi l-guri mill-Qorti Istrutturja, madanakollu huwa prematur ghall-Qorti li tiddikjara tali prova bhala wahda inammissibbli meta z-zewg xhieda Marlon Apap u Brian Godfrey Bartolo it-tnejn indikati bhala xhieda tal-Prosekuzzjoni ghad iridu joffru id-depozizzjoni taghhom fil-guri. Izda jekk f'dak l-istadju huma jiddikjaraw li ser jaghzlu li ma jixhdux biex ma jinkrimnawx irwiehom fil-process penali li jkun ghadu pendent fil-konfront taghhom, imbaghad f'dak l-istadju il-gurati ghandhom jigu ggwidati meta jigu biex jiznu il-valur probatorju tal-istqarrijiet guramentati u dan ghaliex ***"The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency."***

Dan ghaliex kif gie deciz fil-kaz Luca v Italy [(2003) 36 EHRR 46], inghad mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem:-

***"As the court has stated on a number of occasions . . . it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular where the witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3(d). The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that had been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."***

Dan ifisser allura illi hemm erba' kriterji li jridu jigu ikkunsidrati:

1. Illi x-xhieda bhala regola trid tinghata viva voce fil-Qorti fejn l-akkuzat ikollu kull opportunita' li jikkontrolla dak li jghid ix-xhud.
2. Il-fatt illi x-xhieda ma jixhdux madanakollu ma ghandux iwassal ghall-inammissibilita` tal-istqarrija minnhom rilaxxata fl-istadju tal-investigazzjonijiet jew fil-pre-trial stage u dan ghaliex irid jittiehed in konsiderazzjoni l-fatturi kollha tal-kaz, bhal perezempju fil-kaz meta xhud ma jistax jingieb jixhed ghax ikun miet.
3. L-affidabbilita ta' dik l-istqarrija u tax-xhud li jkun irrilaxxjaha.

4. *Finalment jekk dik ix-xhieda ġuramentata wahedha hijiex l-unika prova inkriminanti u deciziva fil-konfront tal-persuna akkuzata.*”

Stabbiliti dawn il-principji legali, il-Qorti tqis illi għandha tistabilixxi x'valur probatorju għandha tingħata x-xhieda ta' Mark Calleja u Clayton Muscat quddiem il-Maġistrat Inkwirenti, la darba dawn baqgħu ma xehdux f'dawn il-proċeduri.

Ix-xhud Maria Victoria Aquilina ikkonfermat l-istqarrija tagħha quddiem il-Maġistrat Inkwirenti nhar it-8 ta' Diċembru 2008 u sussegwentement xehdet f'dawn il-proċeduri kemm in eżami, kif ukoll in kontro-eżami. Minkejja x-xhieda pjuttost twila tagħha, li in suċċint il-Qorti rreferiet għaliha iżjed 'il fuq, isem l-imputat qatt ma ssemma mill-istess xhud u ma ssir l-ebda referenza għall-istess imputat fix-xhieda tagħha, u dan fil-waqt illi hija tispjega x'kien wassal sabiex hija takkwista pillola u nofs *ecstasy* fil-lejl in kwistjoni. Ix-xhieda ta' Aquilina għalhekk ċertament li ma tistax twassal għal sejbien ta' htija fl-imputat odjern.

Fir-rigward tal-istqarrija ġuramentata ta' Samantha Gili, ukoll tat-8 ta' Diċembru 2008, apparti li l-istess Gili baqgħet ma xehditx f'dawn il-proċeduri u allura japplika fir-rigward ta' din ix-xhieda dak li ser tgħid il-Qorti iżjed 'l isfel dwar l-istqarrijiet ġuramentati ta' Mark Calleja u Clayton Muscat, anke hawn irid jingħad illi Gili lanqas ma ssemmi jew tirreferi għall-imputat odjern. Bħal Aquilina, hija tgħid x'wassal sabiex hija takkwista tliet pilloli *ecstasy*, f'liema verzjoni, bħal dik ta' Aquilina, l-imputat ma jinkwadra mkien.

L-uniċi stqarrijiet ġuramentati li fihom jissemma l-imputat odjern u li għalhekk jincidu fuq il-mertu ta' dawn il-proċeduri huma daww ta' Mark Calleja u Clayton Muscat tal-15 ta' Diċembru 2008 u tat-2 ta' Marzu 2009 rispettivament. Mark Calleja u Clayton Muscat baqgħu ma ttellgħux bħala xhieda mill-Prosekuzzjoni f'dawn il-proċeduri, x'aktarx għaliex kif jirriżulta mill-verbal tas-seduta tad-19 ta' Ottubru 2011, kien hemm kawżi pendenti fil-konfront tagħhom ukoll (u anke fil-konfront ta' Gili), liema kawżi kienu qegħdin jinstemgħu kontestwalment ma' din il-kawża. Mill-atti ma jirriżultax li kien hemm xi mpediment ieħor għal dan bħal dak spjegat fl-aħħar sentenza fuq ċitata. La darba skartata l-istqarrija tal-imputat għar-raġunijiet fuq indikati, l-unika prova determinanti li tibqa' fl-atti fil-konfront tal-istess imputat hija proprju l-istqarrijiet ġuramentati ta' Calleja u Muscat. Altrimenti fl-atti ma jibqa' xejn, għajr l-ammissjoni tal-imputat dwar il-pussess tad-droga u huwa f'dan is-sens illi dawn l-istqarrijiet ġuramentati huma prova determinanti għas-sejbien ta' htija tal-imputat. Fi kliem ieħor, mingħajr din ix-xhieda ta' Calleja u Muscat, ma jibqa' assolutament xejn fl-atti li jista' jsostni s-sejbien ta' htija fl-imputat odjern dwar l-imputazzjonijiet kif dedotti fil-konfront tiegħu.

F'dawn iċ-ċirkostanzi, la darba d-difiża giet prekluża milli tikkonfronta u tikkontrolla x-xhieda Mark Calleja u Clayton Muscat billi tagħmel il-kontro-eżami tagħhom, il-Qorti tqis illi m'għandhiex triq oħra hlief illi tiskarta l-istqarrijiet ġuramentati ta' Calleja u Muscat quddiem il-Maġistrat Inkwirenti.

### **Ikkunsidrat ukoll:**

Fid-dawl tal-kunsiderazzjonijiet magħmula iżjed 'il fuq għalhekk, la darba skartati l-istqarrija tal-imputat odjern u l-istqarrijiet ġuramentati ta' Mark Calleja u Clayton Muscat, ma jibqa' xejn fl-atti li jsostni l-ewwel, it-tieni, it-tielet u r-raba' imputazzjonijiet kif dedotti fil-konfront tal-imputat. Fuq ammissjoni tiegħu stess, madankollu, l-imputat qed jinstab ħati tal-pussess 'sempliċi' tad-droga kokaina u tal-medicina psikotropika u ristretta *ecstasy*, liema reati huma kompriżi u nvoluti fir-reati mertu tat-tielet u r-raba' imputazzjonijiet.

### **Kunsiderazzjonijiet dwar il-Piena**

Għal dak li jirrigwarda l-piena, il-Qorti qegħda tieġu in kunsiderazzjoni fl-ewwel lok, l-ammissjoni bikrija ta' l-imputat dwar ir-reati li tagħhom huwa qed jinstab ħati, kif ukoll il-fedina penali tal-imputat, kif aġġornata sa Lulju 2015, mil-liema jirriżulta li huwa nstab ħati ta' pussess ta' medicina psikotropika u ristretta *ecstasy* f'Ġunju 2006 u fix-xhur ta' qabel din id-data, dwar liema l-imputat ingħata liberazzjoni kundizzjonata għal żmien sena.

Qieset ukoll id-dikjarazzjoni tal-Prosekuzzjoni illi l-imputat għandu jibbenefika mid-disposizzjonijiet tal-Artikolu 29 tal-Kap. 101 tal-Liġijiet ta' Malta, kif ukoll is-*Social Inquiry Report* redatt mill-Uffiċjal tal-*Probation* Saviour Lia fil-konfront tal-imputat u x-xhieda ta' missier l-imputat, mil-liema jirriżulta illi l-istess imputat daħal fi programm residenzjali sabiex jirrijabilita ruħu mill-vizzju tad-droga u sa Frar 2016, kien qed jissottometti ruħu regolarment għal testijiet tal-kampjuni tal-urina li kienu qegħdin jirriżultaw fin-negattiv għal sustanzi lleċiti. Minn ittra esebita mid-difiża, datata 9 ta' Frar 2016, u ffirmatha minn Stephanie Grech fi ħdan l-Aġenzija Caritas, jirriżulta illi għalkemm wara sitt xhur l-imputat telaq mill-programm, huwa baqa' jattendi sessjonijiet individwali darba fil-ġimgħa u jħalli kampjuni tal-urina. Jirriżulta wkoll li sejjer tajjeb ħafna u l-intenzjoni kienet li huwa jiġi riferut għall-*Evening Programme* f'April 2016, sabiex jibqa' jattendi sessjonijiet fi grupp darbtejn fil-ġimgħa u eventwalment jiggradwa. Missier l-imputat ukoll xehed b'mod positiv ferm dwar il-bidla li huwa kien ra f'ibnu minn meta daħal fil-programm. Jirriżulta wkoll mix-xhieda ta' Noel Cutajar, in rappreżentanza tal-Aġenzija Caritas illi l-imputat baqa' jattendi għal sessjonijiet mal-istess Aġenzija u

jissottometti kampjuni tal-urina sa Awwissu 2016, iżda mbaġhad waqaf jagħmel dan minhabba pressjonijiet ta' xogħol.

In vista tal-fatt illi l-imputat kellu vizzju serju tad-droga u minkejja li jidher li għamel sforz kbir sabiex jirrijabilita ruħu minn dan il-vizzju u bħala konsegwenza għamel progress sostanzjali anke f'aspetti oħrajn ta' ħajtu, il-Qorti jidhrilha li jkun għaqli li tqiegħed lill-istess imputat taħt Ordni ta' *Probation* sabiex jiġi assikurat li jibqa' miexi fit-triq li huwa qabad u jibqa' l-bogħod mid-droga.

### **Konkluzjoni**

Għal dawn il-motivi, il-Qorti, wara li rat it-Taqsimiet IV u VI, l-Artikoli 22(1)(a), 22(2)(b)(ii) u 29 tal-Kap. 101 tal-Liġijiet ta' Malta, ir-Regolament 9 tal-Legislazzjoni Sussidjarja 101.02, l-Artikoli 40A, 120A(1)(a) u 120A(2)(b)(ii) tal-Kap. 31 tal-Liġijiet ta' Malta u r-Regolament 3(1) tal-Avviż Legali 22/1985, fil-waqt li qed issib lill-imputat mhux ħati tal-ewwel u t-tieni imputazzjonijiet u tat-tielet u r-raba' imputazzjonijiet kif dedotti kontra tiegħu u qegħda tilliberah minnhom, fuq ammissjoni, qed issibu ħati ta' pussess 'semplici' tad-droga kokaina u tal-medicina psikotropika u ristretta *ecstasy*, iżda fid-dawl tal-kunsiderazzjonijiet fuq magħmula u b'applikazzjoni tal-Artikolu 7 tal-Kap. 446, qed tqiegħdu taħt Ordni ta' *Probation* għal żmien sentejn mil-lum, bil-kundizzjonijiet elenkati fl-istess Ordni hawn anness, liema Ordni għandu jiffirma parti integrali minn din is-sentenza.

Il-Qorti wissiet lill-ħati bil-konsegwenzi skont il-liġi kemm il-darba huwa jikkommetti reat ieħor waqt il-perjodu operattiv tal-Ordni tal-*Probation* jew kemm il-darba huwa jonqos milli jħares il-kundizzjonijiet tal-istess Ordni.

Stante li ma ġewx maħtura esperti f'dawn il-proċeduri, tastjeni milli tiegħu konjizzjoni tat-talba tal-Prosekuzzjoni ai termini tal-Artikolu 533 tal-Kap. 9.

Natasha Galea Sciberras  
Maġistrat