CONSTITUTIONAL COURT

JUDGES

THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE ANTHONY ELLUL

Sitting of Monday, 24th August 2020

Number: 2

Application number: 86/20 TA

Elton Gregory Dsane

v.

State Advocate

The Court:

1. On the 19th May 2020 the applicant filed a constitutional case wherein he claimed a breach of his right to a fair trial in the criminal proceedings **The Police vs Elton Gregory Dsane et (189/2019)**, decided by a judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 1st May 2019. The applicant complained that:-

1.1 He was not provided with adequate legal assistance;

1.2 During the police interrogation he was not assisted by a lawyer;

1.3 The lawyers that assisted him at the pre-trials stage and after he was arraigned in Court, gave conflicting advice;

1.4 None of the lawyers that assisted requested full disclosure from the prosecution;

1.5 He was assisted by the same lawyer as the co-accused;

1.6 The charges included crimes which the applicant never committed;

1.7 He did not understand the charges due to failures on the part of the legal aid system;

1.8 The Prosecution failed to disclose all the facts of which they were aware of prior to charging the co-accused. This led the Court to find the accused guilty of ten criminal charges, when he should have been found guilty of two.

2. The Attorney General contested all applicant's claims, amongst which were that:

2.1 The applicant failed to exhaust ordinary remedies, that is to appeal the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature;

2.2 When the complaint concerns a breach of the fundamental right to a fair hearing, the Court has to examine the totality of the proceedings

and not one particular incident during the judicial proceedings. The respondent referred to all the circumstances that contradicted his complaint.

3. By judgement delivered on the 30th July 2020, the Civil Court decided:-

> "***Decision***
>
> "*Now therefore, in view of the above, the Court is deciding on the demands of applicant in the following manner:*
>
> "*It accedes to the demand of applicant insofar, that as a consequence of the infliction of imprisonment for a term of four (4) years in the Decision of the Courts of Magistrates (Malta) as a Court of Criminal Judicature in the names of Police Inspector Kevin Pulis -vs- Elton* "*Gregory Dsane et, of the 1st of May 2019, his fundamental human rights as protected by aricle 39(1) and subarticles (6) and (9) of the same article of the Constitution and article 6(1) and subarticles (a) and (c) of the of the Covention (Chapter 319 of the Laws of Malta), were breached.*
>
> "*Orders the variation of the Court Decision above mentioned as regards the applicant, limitedly to the punishment of imprisonment and consequently orders that the term of imprisonment in that decision be reduced from four (4) years to one (1) year six (6) months".*

4. The Attorney General filed an appeal wherein he complained that:-

4.1 The Civil Court was mistaken not to uphold the preliminary plea that the applicant had failed to exhaust the ordinary remedies that were available. He contends that:-

> "*If applicant felt aggrieved by the judgement delivered by the Court of Magistrates, he should have made use of the ordinary remedy provided by law that is file an appeal before the Court of Criminal Court. There is nothing which can justify the fact that applicant did not make use of*

> *this remedy. Just as Usamah Hajjaj appealed from the judgement even applicant had all the opportunity to do the same*".

4.2 There was no breach of respondent's right to a fair hearing. On examining the file of the criminal proceedings, there is no such proof. Throughout the proceedings the respondent was assisted by a lawyer, the charges were read out in open court, the respondent voluntarily pleaded guilty to all charges, the court explained to him the consequences of registering a guilty plea and also gave him time to reconsider; and both prosecution and defence agreed on the punishment to be inflicted. The Court gave effect to that agreement.

4.3 The remedy given by the first court was inappropriate. A finding that the respondent's trial fell short of the standards of Article 6, does not have the effect of quashing the conviction or overturning the judgement.

5. The respondent filed a reply wherein he gave reasons why this Court should reject appellant's appeal.

Facts

6. The first Court referred to the following facts:-

> *"1. The applicant came to Malta on the 30th April 2019 for a holiday, amongst others to attend to a musical festival by the name of Lost and Found Music Festival. He arrived in Malta by flight number FR3882 along with a number of other passengers. They were coming from UK.*

"2. On landing in Malta he was withheld, along with a number of other passengers, amongst them a certain Usamah Hajjaj. They were withheld under suspicion that they were in possession of drugs or other similar substances. Not having found any drugs or substances on their person, they were taken to Mater Dei by the Police for further inspection. It transpired, that on their way to Mater Dei Hospital, two of them defecated. It turned out to be the applicant and the said Usamah Hajjaj. Applicant had his hands soiled with human faeces. From further medical examination, the presence of illegal substances of MDMA, Cocaine and Katemin were detected. After, they were interrogated and each of them released statement (vide pgs 19 to 24 of Criminal proceedings).

"3. Following the above mentioned string of events, applicant and the said Usamah Hajjaj were eventually arraigned to Court on the 1st of May 2019. Ten accusations were brought against them (see list of accusations a' fol 4 and 46).

"4. After having taken advice from their legal Counsel, who was assigned to both of them according to the legal aid system, they entered a guilty plea on all counts of the accusations. Consequently, by a decision of the Court of Magistrates (Malta) As a Court Of Criminal Judicature dated 1st May 2019 presided by Magistrate Ian Farrugia, they were found guilty as charged and condemned, each of them, to a term of four (4) years imprisonment and each to the payment of a fine of one thousand euros (€1000). The punishment was as a result of a plea bargaining on the condition, that accused register an admission on all counts proferred against them.

"5. Notwithstanding having admitted to all accusations, Usamah Hajjaj entered an appeal before the The Court Of Criminal Appeal on the 16th May 2019 on grounds very similar to those that are being premised by the applicant in these procedures (see a' fol 33 of acts of Criminal Appeal). By judgement of the 27th February of 2020, that Court varied the original judgement for reasons therein contained by reducing the term of imprisonment to eighteen months and the fine to eight hundred euros (€800).

"6. Applicant came to know about the judgement of Appeal after he was transferred to Division 4. He met the said Usamah Hajjaj and who discussed his appeal with him. The Court understands, that this meeting took place after the said Judgement of the Court of Appeal had been delivered on the 27th Febuary 2020, so much so that applicant introduced the present procedures on the 19th May 2020".

7. Other facts which the Court consider to be relevant are:-

i. During the constitutional proceedings, the respondent confirmed that he had imported into Malta the drug ketamine:

> *"I confirm that I had brought with me two capsules of the same drug containing the drug ketamine which I had injected in my body. This was the only drug that I brought with me to Malta"*.

ii. The respondent did not testify in the appeal proceedings filed by the other co-accused.

iii. The duty magistrate appointed Gilbert Mercieca to establish what was the powder found in the four capsules found in the police van. It transpired that one contained cocaine (weight 13.032 grms) with a value of €638.57. Another capsule containe MDMA (weight 20.901 grms) with a value of €948.67. The other two capsules contained ketamine (weight 58.526grms) with a value of €2,324.07.

iv. A DNA analsysis was done with regards to five British nationals, two of whom were the accused, to extract the DNA from the five individuals that were arrested on the 30th April 2019 and from the exhibits (including the four capsules). The tests carried out on the capsules containing ketamine and MDMA did not produce any genetic profile, whereas the capsule containing MDMA provided a partial genetic profile which although has some 'alleles' of Hajjaj, there is not sufficient information to conclude that Hajjaj is the contributor.

v. In this case, Police Inspector Kevin Pulis testified that while the respondent and other co-accused were in the police van:-

> *"..... myself and one of the members of my team, we observed that Elton Dsane had his hand dirty with human excrection and we saw a movement I am showing the movement to your honour so that to explain more what was going on, as soon as we were next to the van we saw the hands of Elton Dsane making a movement behind Usamah Hajjaj and within couple of seconds we heard a sound at the back of the van as if something had fell, something hard fell at the back of the tailgate of the van.....*
>
> *"Because we saw, the first thing that we saw, at that time was a movement of his hand behind Usamah Hajjaj. And then he placed his hand at the back of their seat because they were seated next to each other. And Elton Dsane after he placed his hand behind Usamah Hajjaj, he then put his hands at the back of the van and we heard the sound as if something had just been placed at the back of the van. Upon that I instructed all of them to get out of the van, and immediately we could observe that Usamah Hajja had his shorts from the outside it was visible that he had human excretion. The shorts that he was wearing at the time and the hands of Elton Dsane the appellant, he had his hands covered with human excretion".*

vi. The respondent testified that after judgement was delivered, he was taken to Mount Carmel Hospital. The day after he was trasferred to Corradino Correctional Facility and place in Division 6 for ten days. He was then transferred to Division 12 where he spent twenty days. He managed to obtain credit from another inmate and contacted his mother who visited him in prison on the 17th May 2019. This version of events was not contradicted by the appellant, either through cross-examination or other evidence.

vii. During the sitting of the appeal proceedings (**The Police v. Usamah Sufyaan Hajjaj**, 142/2019) held on the 20th February 2020, the lawyer representing the Attorney General declared that:

"The prosecution fully aware of the evidence presented before this Honourable Court, is not objecting to the position taken by the defence with regard to the first, second and third grievance as found in the defnece's appeal application and agrees with the defnce that after this Honourable Court hears submissions from both parties on the fourth grievance of the defence, it should proceed to review the punishment given by the First Court in order to determine whether it truly reflects the facts of the case concerning Usamah Sufyaan Hajjaj as evidence in the acts of the proceedings".

The minutes of the sitting held on the 1st May 2019 when the respondent filed a guilty plea

8. The minutes read:

"Accused were duly examined.

"At this stage both accused as assisted pleaded guilty to the charges brought against them.

"Since both accused pleaded guilty, the Court is informing the accused of the consequences of said guilty plea, and is giving them time according to law to reconsider such plea.

"….

"The accused are insisting on such guilty plea after being given time according to law to reconsider. Accused declared that they had enough time to think and reconsider such guilty plea, and that they clearly understood the nature of the charges brought against, and that they understood clearly that their guilty plea, as pointed out by this Court, was to lead to serious consequences in terms of punishment.

"Oral submissions were made.

"At this stage prosecution and defence, inform the Court that they had the opportunity, granted in terms of law, to discuss the terms of punishment in case the accused pleaded guilty at this early stage of the proceedings while keeping in mind the nature of the charges proferred and the total amount of the illegal substances (in the region of not more than 100g) involved in the case. In this particular context, prosecution and defence declare that, while final judgement remains the sole prerogative of the court, they reached the objective conclusion that a just punishment would be that of imprisonment for 4 years and a fine of 1,000 euro each.

"Case was decided".

Exhaustion of Ordinary Remedy

1. With regards to respondent's failure to file an appeal from the judgement of the 1st May 2019, the first Court reasoned:-

> *"Furthermore the Court reaffirms the principle, that a Constitutional action is an action in subsidium. The legal raison d'etre behind this principle aims at avoiding to undermine ordinary domestic remedies. It is meant to avert the risk of having the whole legal system that provide for ordinary remedies falling flat on its face due to non-exhaustion of such ordinary remedies. A constitutional action is in its very nature exceptional.*
>
> *"From the above observations one would be led to think, that the natural and logical conclusion that follows is that the demands of the applicant to these procedures should be dismissed. However, although the general rule is that a Constitutional action should only be entertained after exhaustion of ordinary effective remedies, exceptions to this rule do exist, albeit in very limited circumstances.*
>
> *"19. These Courts have had occasion to express themselves on this procedural aspect of constitutional actions. Failure to exhaust an ordinary remedy, even if it is an effective remedy, the cause of which failure is attributable to a third party, should not be good enough reason for the Court to decline to exercise it's powers under the Constitution or Convention. What is more, these Courts also sustain that the discretionary powers of the Court are to be exercised with prudence and caution in such a manner, that were it appears that serious and grave breach of a fundamental human right is at hand, the Court is to decide in favour of using that discretion to protect that right and not of declining to do so.n (vide supra Constitutional Court in the names of Maria sive Marthese Attard pro et -vs- Policy Manager tal-Malta Shipyards).*
>
> *"20. This Court is convinced that this case, presents an exceptional circumstance. The set of circumstances surrounding it, are such, that justice demands that the complaints of the applicant (the allegation that his fundamental rights under article 39 and 6 of the Constitution and the Convention has been breached) deserve to be examined by this Court. What is more, the fact the Attorney General, in the case of Usamah Hajjaj, impliedly recognised, that a miscarriage of justice had been committed as per his declaration during the sitting of the 20th February 2020, this in it's self is an enough good reason for this Court to exercise the power entrusted to it by the proviso to section 46 (2) of the Constitution and section 4(2) of Chapter 319 of the Laws of Malta.*

> *"21. Lastly ECHR decisions are to the effect, that in order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision. (vide Hadjianas Tassiou v. Greece, app: 12945/87 of 16th December 1992). The Magistrate's Court was not put in position, notwithstanding the applicant registered an admission, to consider, amongst others, whether to exercise it's discretion in terms of article 253(2) of the Criminal Court as explained underneath.*
>
> *"22. Furthermore, it is unfortunate that our legal system does not provide for a retrial of Criminal Judgement, as in Civil matters under article 811 of Chapter 12 of the laws of Malta. Not even in the case of miscarriage of justice arising from facts that become known after the term of appeal has elapsed"*.

2. There is no doubt that the respondent had a right to appeal. It is true that judgement was delivered after co-accused and respondent registered a guilty plea and, the prosecution and defence agreed *".... that a just punishment would be that of imprisonment for 4 years and a fine of €1,000 each"*. However, there is no provision of law which excludes the right of appeal in such circumstances.

3. In fact the Court of Criminal Appeal in the judgement **The Police v. Usamah Sufyaan Hajjaj**, the other co-accused, referred to the judgement **il-Pulizija v. Martin J. Camilleri** (20th January 1995) wherein that same court declared:-

> "*Dwar l-effett ta' ammissjoni fuq l-appell tal-persuna misjuba hatja din il-Qorti (jew ahjar, il-Qorti Kriminali li allura kienet tisma' l-appelli mid-decizjonijiet tal-Qorti tal-Magistrati tal-Pulizija Gudizzjarja) diga' kellha l-opportunita' li tippronunzja ruhha fis-sentenza taghha tas-27 ta' Ottubru, 1962 fil-kawza fl-ismijiet* ***Il-Pulizija vs George Cassar Desain*** *(Kollezz. Deciz. XLVI.IV.911). F'dik is-sentenza gie ritenut, mill-kompjant Imhallef William Harding, fuq l-iskorta ta' gurisprudenza kemm Ingliza kif ukoll lokali, li fuq ammissjoni ta' l-imputat, Qorti ma tistax hlief tghaddi ghall- kundanna tieghu ammenoke' ma jirrizultax li l-imputat ma jkunx fehem in-natura ta' l- imputazzjoni jew li ma kienitx l-*

> *intenzjoni tieghu li jammetti li hu hati ta' dik l- imputazzjoni* ***jew li fuq il-fatti minnu ammessi l-Qorti ma setghetx skond il-ligi, tikkundannah, cioe' ssibu hati ta' reat***".

4. Respondent certainly had at his disposal an effective remedy had he appealed the judgement.

5. With regards to his failure to appeal, the respondent said:

> *"From the Court building I was taken to Mount Carmel Hospital as a result of my agitation and the following day I was transferred to Corradino Correctional Facility and put in Division 6 where I spent ten days. During this period my legal aid lawyer did not come to speak to me at the Prison and although I was allowed one telephone call during this period I could not call my parents because I had no money. After this period I was transferred to Divsion 12 where I spent twenty days and managed to obtain credit from a detainee which allowed me to speak to my family in the UK.*
>
> *"During this period I had spoken to someone from the British Consulate and I did tell them that I wanted to appeal the length of the sentence, till that time I had not realised what I had admitted to"*.

6. The respondent complains that his legal aid lawyer did not go to speak to him in prison. However, he does not give any valid reason why Dr Micallef Stafrace should have gone to speak to him. There is absolutely no proof that the respondent, during the first few days in prison, asked the prison authorities to speak to a lawyer or to the legal aid lawyer who had assisted him when he was charged in Court. He also gave no details as to when he contacted the British High Commission in Malta and to whom he spoke. His version is not corroborated.

7. According to Article 46(2) of the Constitution:

> *"... the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".*

8. That provision is reproduced in Article 4(2) of the European Convention Act (Chapter 319).

9. From those provisions it is evident that the words *"if it considers it desirable so to do"*, give the Court wide discretion on whether to decline or not to exercise its powers.

10. This Court in the judgement **Joseph Arena nomine v. Kummissarju tal-Pulizija et** delivered on the 16 ta' Novembru 1998, explained:-

> *"Jekk ir-rimedju tan-non ezawriment tar-rimedji ordinarji jista' jitqies li hu, nehhi eccezzjonalment, wiehed prattikament assolut fir-rigward tar-rimedju taht il-Konvenzjoni Ewropeja, specjalment fil-kuntest tad-dritt ta' rikors quddiem din il-Qorti, mhux l-istess jista' jinghad fir-rigward ta' l-applikazzjoni ta' dak il-principju ghar-rimedju taht il-Kostituzzjoni. Il-Kostituzzjoni imkien ma tesigi, la espressament u lanqas implicitament, li r-rimedji disponibbli taht xi ligi ohra kellhom necessarjament ikunu gew ezawriti biex il-Qorti fil-gurisdizzjoni taghha kostituzzjonali tkun tista' tiehu konjizzjoni tal-mertu. Waqt illi ghandu ikun ovvju illi r-rikors li lill-Qorti Kostituzzjonali in tutela ta' allegat ksur ta' dritt fondamentali jew theddida tieghu, kellu bhala regola ikun l-ahhar tarka ta' protezzjoni gudizzjarja ghal dan id-dritt – u f'dan is-sens hi gustament il-gurisprudenza kostanti – **id-dritt ghar-rimedji kostituzzjonali ma huwa bl-ebda mod soggett ghal din il- kondizzjoni**. Ma taghmilx fil-fehma ta' din il-Qorti sens is- sottomissjoni ta' l-appellanti illi ma jkunx jezisti dritt ta' access skond il-Kostituzzjoni lil din il-Qorti jekk u sakemm ir-rimedji ordinarji ma jkunux gew esegwiti. L-appellanti qeghdin infatti jikkonfondu d-dritt sostantiv tal-ksur tad-dritt fondamentali li jkun jezisti oggettivament una volta l-lezjoni tkun tista' tigi hekk kwalifikata skond l-ilment una volta provata, mar-rimedju procedurali li l-istess*

Kostituzzjoni u l-Konvenzjoni jipprovdu ghall-protezzjoni ta' dak il-jedd u meta u safejn dan seta' jigi ezercitat. Il-fatt li skond il-Kostituzzjoni, il-Prim'Awla tal-Qorti Civili ghandha d-diskrezzjoni li taghzel li ma tiddeklinax li tezercita s-setghat taghha nonostante kienet sodisfatta li mezzi xieraq ta' rimedju ta' l-allegat ksur kienu jew ghadhom disponibbli favur ir-rikorrent taht xi ligi ohra, hu ndikattiv mhux biss li kuntrarjament ghal dak sottomess mill-appellanti, ***il-Kostituzzjoni tqis rilevanti l-ksur tal-jedd fondamentali fih innifsu u mhux ir- rimedju jew rimedji accessibbli ghall-parti leza, imma wkoll li ma tqisx dikjarazzjoni ta' l-ezistenza ta' dak il-ksur jew ta' theddida tieghu dipendenti mill-fatt jekk kienx jezisti jew le rimedju biex jigi rettifikat taht xi ligi ohra****"*.

11. The Court explained:-

*"..... **Pero' mhux esklużż li tagħti wkoll rimedju kostituzzjonali fil-każijiet fejn jirriżultalha illi r-rikorrent kellu wkoll xi rimedju taħt xi liġi oħra.** Stabbilit li l-Prim'Awla tal-Qorti kellha kull jedd li ma tiddeklinax li teżerċita s-setgħat tagħha anke li kieku kienet sodisfatta li l-appellant kellu mezz xieraq ta' rimedju aliunde u li dan setgħet tagħmlu fl-eżerċizzju tal-poteri diskrezzjonali li l-istess Kostituzzjoni ttiha, anke f'dan il-każ għandu jkun evidenti illi l-eżistenza tal-ksur tal-jedd fondamentali ma kienx jiddependi mill-fatt li l-parti leża ma kellhiex dritt ta' ridress għar-rimedju xieraq taħt xi liġi oħra – fil-każ taħt eżami quddiem il-Qorti biex jissindikaw l-operat tat-tribunali amministrattivi (judicial review) kif suġġerit mill-appellanti"*.

12. The extracts are a brief and clear explanation of the above-mentioned provisions of law. The respondent alleged a breach of his fundamental human right to a fair hearing, and the first Court decided to exercise its powers under the Constitution and European Convention Act notwithstanding that the respondent could have filed an appeal from the judgement. A decision which the first Court had every right to make in order to determine whether respondent's right to a fair trial was breached, and in the affirmative to provide a remedy. Evidently the first Court took into account the seriousness of the case since respondent was was

convicted to a long term of imprisonment. This Court approves of the first Court's decision especially when one considers the facts that transpired in evidence during the hearing of the appeal **The Police v. Usamah Sufyaan Hajjaj** (142/2019).

13. Although the appellant referred to the judgement delivered by the Civil Court, **Carmel Hartley v. Kummissarju tal-Pulizija** (9th April 2014), the facts of that case were totally different to the case under review.

Merits

14. The first Court held:

> *"30. After having examined all the evidence adduced, the Court is particularly concerned with the following aspects:*
>
> *"31. The right of the accused to be properly informed with clarity and precision with what he is being accused, free from haste to expedite proceedings accompanied with alluring plea bargaining, particularly were foreigners are involved. Plea bargaining (non contendere plea) only makes sense after a sober examination of the charges.*
>
> *"32. That in a system entrenched in the adversarial and accusatorial tradition (as distinct from the prosecutorial system), the prosecution is at law bound, not only to produce evidence that may exculpate the accused, but more essential, to disclose all relevant salient information pertinent to the charges in every case, independently from the fact that the accused admits to all charges. Better to suffer restrain of liberty pending trial, than be condemned for offences not committed consequent to a hasty admission.*
>
> *"33. Accused should be placed in a clear position to know to what charges he is admitting to. Revelation of all the material facts, will also enable the Magistrate to discover, notwithstanding a blanket admission, whether the accused, admitting to all the offences as charged were in fact reasonably committed by him. This aspect of the matter acquires*

particular importance in the light of what article 392A(3) of Chapter 9 of the Laws of Malta lays down: "Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the court shall, notwithstanding the confession of the accused, order the trial of the cause to be proceeded with as if the accused had not pleaded guilty".

"34. That an accused is entitled from the moment of his arrest, to an adequate and effective legal assistance. This comprises the entitlement to have a lawyer of his own choice, particularly when he has the financial means.

"35. It is clear that applicant was in a similar position of Usamah Hajjaj. Applicant in these proceedings, entered an admission even as regards drugs that Hajjaj possessed, when it seems he had nothing to do with at least two of them (Cocaine and MDMA). Furthermore, in the light of the medical reports (vide page 93 of these proceedings) and particularly that of Mr. Gilbert Mercieca (vide page 113 of these proceedings), both exhibited for the first time before the Court of Appeal, it transpires, that not all of the three substances mentioned in charges were necessarily connected to the applicant. Applicant had outrightly denied all accusations levied against him during interrogation stage albeit on advice of legal aid lawyer per telephone conversation (vide his statement at page 83 of these proceedings).

".....

"38. After weighing the evidence adduced during these proceedings, this Court is convinced that the reasoning of the Court of Criminal Appeal is equally applicable to applicant to these procedures: that reasonable doubt exists as to whether the charge sheet was actually explained to the applicant. This meaning, that when applicant admitted to all charges he was not aware of the nature of the offences he was being charged with.

"39. The plea bargaining that took place during the first and only sitting of the trial on the 16th of July 2019 and which even went as far as to suggest the extent of the punishment, has to pass the test of conforming with the minimum requirements of the law and mainly:

"A) the bargain is to be accepted by the accused in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner;

"and

"B) the content of the bargain and the fairness of the manner in which is reached between the parties is to be subjected to sufficient judicial review (vide Natsvlishvili and Togonidze v. Georgia app: 9043/05 of the

24th April 2014 and Navalny and Ofitserov v. Russia app: 46632/13/28671/14 Court of third session 2312/2016).

"40. The last requirement acquires utmost importance under maltese law in the light of what article 392A(3) of the Criminal sets down (vide supra). It cannot be reasonably said, that the applicant was fully aware of what were the consequences of the charges, particularly those of being in possession of Cocaine and MDMA. The manner by which the whole trail was managed and conducted, one can hardly say with peace of mind, that there was sufficient judicial review, when not all the facts of the investigations were known. This is particularly worrying in the light of the evidence that surfaced for the first time during Appeal proceedings of Hajjaj. It seems that the reports of the experts could not have been available at the time of the trial, though the Inspector Kevin Pulis had caught wind of what were the findings of these experts by permission of the enquiring Magistrate (see further hereunder). This is being said because it transpires that the expert reports were definitely concluded, that of Marisa Cassar on the 10th of December 2019 (vide pg 109 and 110 pg Criminal proceedings) and that of Gilbert Mercieca on the 20th of January 2020 (vide pg 150 and 151 of Criminal procceedings). The Court must remind that the decision of the Magistrates Court was pronounced on the 1st of May 2019, a good seven months from the reports mentioned bearing the above dates.

"43. As regards the manner that admission of the accused consequent to a plea bargaing, this Court conscientiously thinks it pertinent to refer to article 392B(5)(a) and (b) of the Crminal Code which lays down:

> *"5) (a) The accused and the Attorney General may request the Criminal Court to apply a sanction or measure or, where provided for by law, a combination of sanctions or measures, of the kind and quantity agreed between them, and to which the accused can be sentenced.*
>
> *(b) If the court is satisfied that the sanction or the measure, or the combination of sanctions and measures requested, as provided for in paragraph (a), is one which it would been lawful for it to impose upon conviction of the offence for which the accused has pleaded guilty, the court shall proceed to pass the sentence indicated to it by the parties declaring in its judgement that the sentence being awarded is being so awarded at the request of the parties".*

"44. The Police are prosecuting officers and not the Attorney General. From what this Court could gather, the Attorney General was in no way involved in any plea bargaining that had taken place on the 1st of May 2019.

"45. As to effective legal assistance, Inspector Kevin Pulis, during the sitting of 3rd October 2019, declares "....from my end I filed a request ....in the inquiring Magistrate to allow us to speak to the relevant Court

experts nominated was of importance before the arraignment of this Case." (vide pg 61 tergo of Appeal proceedings). Notwithstanding the importance of the information obtained from these experts, no mention of them was made to the Magistrate. During the trial stage, Inspector Kevin Pulis took the witness stand only to state under oath the nature of the charges and explain the circumstances that justified arraignment under arrest of the accused (vide pg 5 of Criminal proceedings). Nothing else was mentioned.

"46. This Court fails to understand the haste and hurry by which the Police arraigned within matters of hours. Applicant was stopped at the airport on the 30th April 2019 at around midnight (vide deposition of Inspector Kevin Pulis at pg 156 tergo). Before midday the next day, judgement was delivered. This Court finds it hard to ignore the fact that applicant was a foreigner. In the early hours of the same day of arraignment, he was taken to Mater Dei for further investigations and afterwards interrogated and spent what remained of the rest of the night under arrest. In the morning, he was taken to court were he admitted to all accusations. Immediately afterwards, applicant was again taken to hospital because he was in a state of agitation.

"47. Applicant states: "I asked to speak to a lawyer, they told me they will be providing me one by Legal Aid although I insisted I had the money to pay for it or my parents could have paid for it." (vide statement of applicant at pg 149 of these proceedings). On the other hand Inspector Kevin Pulis on the witness stand, somewhat nebulously states: "He told me that he wants a lawyer and I told him as already said in my testimony that he can't bring a lawyer from UK because some of them mentioned, I am not sure if it was appellant to be correct and they want a lawyer from Uk but I told him here we are and it is a maltese lawyer, And I told him if you're not going to tell me I have to choose heqq to give you legal aid."(vide pg 172 of these proceedings).

"48. It does not transpire applicant was presented with the list of lawyers from were to choose (Vide dok KP at pg 173 of these proceedings). Article 355AU (4) clearly lays down that "Once a request for legal assistance is made, the suspect or the accused person shall be provided with a list of lawyers drawn up by the Chamber of Advocates and the Chamber of Legal Procurators and submitted on a yearly basis to the Executive Police and to any other law enforcement and judicial authority, from which the suspect or the accused person may select a lawyer of his own choice. Alternatively, the suspect or the accused person may elect to be assisted by the Advocate for Legal Aid in which case the Advocate for Legal Aid shall assign a lawyer for this purpose."

"49. Before the interrogation started and that is early in the morning, applicant along with another four persons, consulted Dr. Christopher Chircop (legal aid) per telephone, and was assigned Dr. Simon Micallef Stafrace (legal aid), for the trial. The latter lawyer was assisting both accused. Had all the facts been clearly explained to their lawyer, in all

> *probabilties he would have been put in a position to make the appropriate considerations, amongst others, whether there existed conflict interest to represent both accused at the same time or whether they should collectively admit to all accusations.*
>
> *"50. Although they were accused together, the individual surrounding facts were not the same, particularly as to who was in possession of which substance at the time of the arrest. It has been frequently said, that the right to have a lawyer is principally to have an effective defence. (Vide Ibrahim and others -vs- Uk ECHR Grand Chamber of 13th September 2016). A lawyer who is oblivious to certain facts renders his assistance possibly ineffective for all purposes of the law. The Court recalls that during the procedures before the Criminal Appeal of Usamah Hajjaj, the Attorney General, by his own declaration, during the sitting of 20th February 2010, impliedly accepted that there was a clear miscarriage of Justice. This meaning, that it would be incongruously unjust, were this Court to retain that the fundamental human rights of the applicant above were not breached in the light of the reasons mentioned in this decision.*
>
> *"51. In view of the above the Court is convinced that applicant's fundamental human rights under article 39(1) and subsections (6) and (9) of the same article of the Constitution and article 6(1) and subsections (a) and (c) of the same article of the Convention have been breached".*

15. There is no doubt that respondent was not coerced to file a guilty plea. He was assisted by a legal aid lawyer who has been working in the legal aid office for the past twelve to fourteen years (vide his testimony in the proceedings held before the Court of Criminal Appeal with regards to the other co-accused), and as a litigation lawyer for many more years.

16. This Court examined the deposition of the legal aid lawyer and highlights that:

i. The fact that he did not communicate with the previous legal aid lawyer who adviced the respondent at the pre-trial stage, was of no consequence.

ii. Although both the co-accused were assisted by the same lawyer, there is no evidence that respondent's rights were prejudiced because of such a fact. Neither did the respondent mention any reasons which could convince the Court that such a fact had been of prejudice to him.

iii. The legal aid lawyer confirmed that he adviced the respondent and the co-accused that they were under no obligation to admit the charges during that particular sitting, and they could meet again to discuss the matter within a few days. This notwithstanding they insisted on pleading guilty.

iv. The legal aid lawyer repeatedly confirmed that he explained the charges to the co-accused, and they understood the contents. He also confirmed that they were *'good listeners'*.

v. The co-accused were given time to reconsider whether or not to file a guilty plea. This is also corroborated by the minutes of the sitting held on the 1st May 2019.

vi. What impressed him is that they were interested in getting the matter settled, so that arrangements could be made to be transferred to a prison in England. He said, *"they insisted on guilty. They insisted of the guilty plea, and again I repeat that they were given the chance to not say that they are guilty"*.

17. Respondent complains that he was assisted by two different legal aid lawyers who within less than twenty four hours gave him different advice, *".... one.... not to answer to any questions and the other counselling the accused to admit to all charges"*. The respondent testified that, *"He told us we could be facing around 10 years in prison and strongly recommended that we admit, which advice being a foreginer, first time in Malta, all alone and with no one else to speak to, I took"*. The legal aid lawyer gave a totally different version. The Court finds no reason why the legal aid lawyer would give such advice at such an early stage of the proceedings.

18. There is also no evidence that during the sitting the respondent and other co-accused declared that they did not understand the charges or asked for further explanation. The witness Marica Mifsud, the deputy registrar assisting the Magistrate during the sitting of the 1st May 2019, said:-

> *"Court: In any moment in time, did the accused say that they were not understanding ?*
>
> *"Witness: No, not at all, they understood English I mean*".

19. The same witness also confirmed that, *"..... **the Magistrate continued to ask them if they were sure.** He told them that this means that they will go to prison"*.

20. In the minutes of the sitting held on the 1st May 2019, it is stated that the prosecuting officer *'read out the charges'* and that the accused declared *"that they clearly understood the nature of the charges"*. This in itself contradicts the version given by the other co-accused.[1] It is true that when Inspector Kevin Pulis testified in these constitutional proceedings, he said that the charges were not read. However, he then went on to say that he was not sure.

21. In the judgement delivered on the 27th February 2020 in the appeal filed by the co-accused, the Court of Criminal Appeal said:

> *"**This is not a case where the appellant did not know what he is charged of** but **did not know that he was charged with the same charges in relation to three drugs** instead of two and thus it is evident that his admission was directed in relation to the drug Cocaine and MDMA"*.

22. Therefore the Court of Criminal Appeal did not believe that Usamah Sufyaan Hajjaj had no knowledge of what the charges were, i.e. conspiracy to deal in drugs, importation and possession of drugs. However, the Court was convinced that he was not aware that he was also charged with importation and possession of ketamine.

23. The Court also notes that in the appeal application the third party stated that:-

[1] Hajjaj said: *"The individual charges was not read out to me cos I would have never pleaded guilty to something I had nothing to do with"*.

> *"**Appellant had immediately raised, both with his legal counsel present in the Court**, who he had never met or spoken to before, **and also with the Police there present that he wanted to plead guilty to some of the charges and not to all**. The possibility was denied to him in the sense that he was never informed that he would only be facing one question, guilty or not guilty"*.

24. Therefore, in his application Hajjaj admitted that he knew what the charges were against him. However, when he testified in front of the Court of Criminal Appeal he gave a different version. This shows a lack of consistency without any explanation to justify the same.

25. Furthermore, during the criminal appeal proceedings the appellant Hajjaj renounced to his first three complaints in the appeal application (vide the *proces verbal* of the sitting held on the 20th February 2020). The third complaint dealt with the claim that he had no connection with respondent and that, *"From a purely legal point of view, the Police needed to charge them together to substantiate the charge of conspiracy to import drugs to Malta"*.[2] The fourth and only remaining complaint was that four years imprisonment were excessive on taking into account the circumstances of the case. In the judgement delivered on the 27th February 2020, the Court of Criminal Appeal declared that Hajjaj was not guilty of conspiracy with another to sell or deal in a drug in Malta.[3] It is established that the Attorney General agreed that the punishment given

[2] Extract from the appeal application.
[3] The conspiracy charges were number 1, 4 and 8 and the Court of Criminal Appeal declared that he was not guilty of those charges.

to Hajjaj by the first court should be diminished to reflect the facts that were discovered during the hearing of that appeal.

26. The Civil Court concluded that taking into account that judgement, it would be *'incongruously unjust'* if it concludes that respondent's fundamental rights were not breached during the trial.

27. Based on the evidence, the Court has no doubt that prior to filing a guilty plea, respondent Dsane knew that he was charged with conspiracy for the purpose of selling or dealing in a drug in Malta; importation; possession; and complicity. The Court does not exclude that respondent might not have been aware that he was charged with regards to three different types of drugs, i.e. cocaine, MDMA and ketamine and that he understood that he was charged with regards to the drug ketamine. This notwithstanding that the minutes of the sitting held on the 1st May 2019 expressly state that charges were read out. The charges although ten in number are not complex. However reading of the the charges on its own is not enough. Each charge must be explained in a manner in which the accused understands it.

28. On the other hand the Court can neither exclude that the respondent decided to plead guilty to all charges irrespective of the fact that he did not personally import into Malta and was not in possession of

cocaine and MDMA, in order to immediately take the benefit of a reduced punishment.

29. From the DNA Analysis report, dated 10th December 2019, no genetic profile of the respondent emerged from the packets examined by Dr Marisa Cassar. In her report she refers to them as *'borożʼ* and confirms that samples were taken from inside and outside *'ta' dawn il-borożʼ*.

30. It was certainly advisable that during the first sitting the respondent and co-accused plead not guilty. There was certainly no urgency to file a guilty plea at such an early stage. There is no convincing evidence that leads the Court to conclude that the appellant had no option but to admit to all charges during the first sitting. If the respondent truly wanted to be assisted by a lawyer of his choice, he could have pleaded not guilty so as to appoint a lawyer of his own choice.

31. The first court said that the prosecution has a legal duty to produce *"32 .....all evidence that may exculpate the accused but more essential, to disclose all relevant salient information pertinent to the charges in every case ....."*. True. Inspector Kevin Pulis testified that he informed Dr Micallef Stafrace:-

> *"..... that we have DNA analysis on the capsules, **that they linked some with the accused** but with regards to the applicant I informed him that he had in his possession all four capsules, because he was the person who had, who was in possession of these four capsules and*

> *who had thrown them at the back side of the van.* ***<u>That information which I gave to him</u>****"*.

32. It is therefore evident that although the court appointed expert (Dr Marisa Cassar) collected the items to be examined on the 30th April 2019 in order to do DNA tests, at some point in time prior to the arraignment the DNA tests were completed and the prosecuting officer was given some form of information that implicated respondent and Hajjaj. In fact the other three British nationals who participated in the DNA tests, were not charged.

33. From what Inspector Pulis said, it does not seem that he informed Dr Micallef Stafrace as to which drug/s were linked to the respondent. However, contrary to what Inspector Pulis testified in these constitutional proceedings, the DNA analysis on the capsules did not link any of the co-accused. Therefore, if he gave the information that he said he gave to Dr Micallef Stafrace, it was incorrect information. The facts stated by Inspector Pulis are certainly not compatible with the findings of the DNA analysis carried out by Dr Marisa Cassar.

34. On the basis of what the Inspector Pulis testified, one might conclude that the legal aid lawyer could have had an oversight in not asking for more information since the charges mentioned three different types of drugs in respect of which both accused were charged with the

same charges. However, Dr Micallef Stafrace said that from the information given to him by the prosecuting officer, he understood that the co-accused were involved in all charges.

35. In any case, a possible oversight by the legal aid lawyer does not mean that respondent's right to a fair trial was breached. In **Kamasinski v. Austria** decided by the EctHR on the 19th December 1989, it was held:-

> *"A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes ... It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6§3(c) to intervene* ***only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way****".*

36. Furthermore, Dr Micallef Stafrace testified during the appeal proceedings that:

> *"Law: So the police did not tell you one had one and the other had another one.....*
> *Wit: No.*
> *Law: That information was not given to you ?*
> *Wit: No"*.

37. From Dr Marisa Cassar's report it transpires that in actual fact the DNA analysis did not produce any genetic profile which matched that of the respondent with regards to the capsules that contained the drugs and

were found at the back of the police van (vide Dr Cassar report dated 10th December 2019). However, a sample from a stain on one of the seats in the van did match the genetic profile of the respondent.

38. There is uncertainty as to what the prosecuting officer actually told Dr Simon Micallef Stafrace. With regards to the DNA tests carried out by Dr Marisa Cassar, it is not clear what exact information the prosecuting officer (Inspector Kevin Pulis) had in his possession prior to arraignment. Evidently the DNA tests had been carried out and it seems that the prosecuting officer either failed to ensure that he receives all the relevant information with regards to the drugs which each co-accused was carrying, or failed to pass on all the relevant information to defence counsel for the co-accused. Information which was evidently available according to what Inspector Pulis testified in this constitutional case.

39. This brought about a situation whereby the respondent admitted to the importation and possession of cocaine and MDMA and found guilty of the same, when the evidence shows that it was Hajjaj not respondent who was guilty of those charges (charges number 2, 3, 9 and 10), as confirmed by the Court of Criminal Appeal in the judgement delivered on the 27th February 2020.

40. In the judgement **Macklin (Appellant) v. Her Majesty's Advocate (Respondent)** of the 16th December 2015, the United Kingdom Supreme Court referred to judgements of the ECtHR:-

> *"As the European Court of Human Rights explained in Edwards v United Kingdom (1992) 15 EHRR 417, the question whether a failure of disclosure has resulted in a breach of article 6(1) has to be considered in the light of the proceedings as a whole, including the decisions of appellate courts. This means that the question has to be approached in two stages.* ***First, it is necessary to decide whether the prosecution authorities failed to disclose to the defence all material evidence for or against the accused****, in circumstances in which a failure to do so would result in a violation of article 6(1).* ***If so, the question which then arises is whether the defect in the trial proceedings was remedied by the subsequent procedure before the appellate court.*** *That was held to have occurred in Edwards, where the Court of Appeal had considered in detail the impact of the new information on the conviction. The European court observed that it was not within its province to substitute its own assessment of the facts for that of the domestic courts, and, as a general rule, that it was for those courts to assess the evidence before them. Those observations were repeated in Mansell v United Kingdom (2003) 36 EHRR CD 221, where the non-disclosure of material evidence in the trial proceedings was again held to have been remedied by the Court of Appeal's examination of the impact of the non-disclosure upon the safety of the conviction"*.

41. Evidently there was forensic evidence that was not disclosed to defence counsel. This evidence was very relevant with regards to some of the charges, and was readily available. Information that should have been disclosed to the legal aid lawyer when consulting with his clients. It is possible that notwithstanding the respondent would have insisted on pleading guilty. However, there is no way of knowing what he would have done.

42. This Court considers that the lack of disclosure of all relevant facts gave rise to a situation where the respondent admitted to charges of which the co-accused Hajjaj has now been found guilty of with respect to the drugs cocaine and MDMA. Article 392(A) of the Criminal Code provides:

> *"Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the court shall, notwithstanding the confession of the accused order the trial of the cause to be proceeded with as if the accused had not pleaded guilty"*.

43. Had the Prosecution provided the Court with all information from the DNA analysis carried out by Dr Marisa Cassar, there was a likelihood that the Court of Magistrates (Malta) would have ordered the cause to proceed as if the respondent had not pleaded guilty.

44. The Civil Court also highlighted that from the moment of his arrest, respondent had a right to adequate and effective legal assistance particularly when he has the finacial means. This is not contested. However, there is no clear evidence that confirms that on arrest and when he was arraigned in court, respondent had the financial means to appoint a lawyer of his choice and pay him. Respondent did however say that he did not have the financial means to contact his parents while in prison. Furthermore, there is no evidence that during the sitting he made a request to the Court to grant him some time so that he could appoint and

consult a lawyer of his own choice. On the other hand Dr Micallef Stafrace confirmed that when he spoke to the co-accused, he told them that there was that option. An option which evidently the co-accused chose not to take. Therefore in this respect, the complaint of the respondent is certainly not justified.

45. It is also true that the Attorney General was not involved in the plea bargaining process that took place on the 1st May 2019. However, there is no evidence that this had an impact on respondent's right to a fair trial.

46. The first Court also commented that it cannot understand the haste and hurry by which the Police charged respondent and the co-accused. However, this had no impact on respondent's plea of guilt. The Magistrate and the legal aid lawyer explained to respondent and the co-accused the consequences if he pleads guilty. The lawyer assisting the co-accused also explained that there was no hurry to file a guilty plea, and that they could also appoint another lawyer who was not a legal aid lawyer. However, respondent and the other co-accused were of a different opinion. It is evident that they wanted to get the case over and done with, plead guilty and benefit from a reduced punishment. The haste was certainly on respondent's part.

47. The Court therefore agrees with the decision of the Civil Court that there was a breach of respondent's right to a fair trial due to lack of disclosure.

The remedy

48. As regards to the remedy, the first Court said:-

> *"52. The Court has pondered and thought about the nature of the measure possibly available as an effective remedy in the circumstances. Articles 46 (2) and 4(2) of the Constitution and Convention respectively entrust the Court with the powers to make any orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of the relative provisions. This power has always been considered as giving the Court a wide discretion and aiming at an effective remedy. This applies also in the instances where there is a lacuna in the law. Apart from what has been said above, the Court considers that in criminal proceedings the law does not unfortunately provide for a retrial.*
>
> *"53. In the Decision per Justice Joseph R. Micallef in the names of Emmanuel Camilleri -vs- Spettur Louise Calleja of 29th September 2016 the Court had this to say:*
>
> > *"Illi l-Qorti tqis li s-setgħat li hija tista' twettaq biex tara li ma jseħħx ksur ta' xi jedd fundamentali jew li twaqqaf qagħda li tkun jew tista' tkun ta' ħsara għat-tgawdija ta' xi jedd bħal dak jestendu wkoll għall-għoti ta' rimedji dwar atti u proċedimenti ġudizzjarji, wkoll dwar sentenzi mogħtijin matulhom. Kemm hu hekk, ingħad (fil-qafas ta' proċedimenti ta' xejra kriminali) li "Kieku ma kienx għaż-żewġ ċirkostanzi u raġunijiet li sejrin jissemmew u li jimmilitaw kontra r-rikorrent, il-Qorti ċertament ma kenitx sejra tillibera għal kollox lir-rikorrent, imma kienet tordna 'new trial' għax il-kamp tar-'redress' mogħti mid-dispożizzjoni ampja tal-art. 47(2) tal-Kostituzzjoni jidher li jippermetti anke direttiva simili, u kif qal il-Privy Council fil-kawża Borg Olivier vs Buttigieg (il-kawża tal-gazzetti fl-isptarijiet) mal-'human rights' m'għandhomx isiru skerzi, lanqas minimi".*
>
> *"54. In view of the above, this Court only finds it just, that the punishment inflicted by the The Court of Magistrates (Malta) As A Court of Criminal Judicature in the names of Il-Pulizija (Spettur Louise Calleja) -vs- Elton Gregory Dsane and Usamah Sufyaan Hajjaj of the 1st of May 2019 be varied in the sense, that the period punishment of*

> *four years imprisonment vis a vis the applicant , be reduced to one year six months"*.

49. This Court does not agree with that part of the judgement of the Civil Court. The Civil Court and Constitutional Court are not a court of criminal jurisdiction. Furthermore, respondent was not a party to the appeal proceedings **The Police v. Usamah Sufyaan Hajjaj** (appeal no. 142/2019). There may also be other relevant facts and circumstances which need to be taken into account prior to such a decision. Thus for example with respect to:-

i. What Inspector Pulis testified that respondent did while he was in the police van sitting close to Hajjaj. Facts that could be relevant with regards to the charge of conspiracy;

ii. The type of drug that respondent imported into Malta, the quantity and value of the drug as compared to the other drugs that were found at the back of the van.

50. Furthermore after taking into account what respondent testified with regards to what happened after judgement was delivered on the 1st May 2019, the Court is of the opinion that the respondent is placed in the same position that he was after the delivery of the judgement. Thereby he will have the opportunity to file an appeal from the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature.

For these reasons the court decides the State Advocate's appeal by:-

1. Rejecting the first two complaints of the application appeal.

2. Upholds the third complaint and alters the judgement delivered by the first Court on the 30th July 2020 by granting the right to the respondent to appeal the judgement delivered on the 1st May 2019 within the time period established by law for filing a judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature.

The judicial costs of the appeal are to be paid by the appellant since this Court has agreed with the conclusion of the Civil Court that respondent's fundamental right to a fair hearing was breached.

Mark Chetcuti Chief Justice	Giannino Caruana Demajo Judge	Anthony Ellul Judge

Deputy Registrar
mb