The Court of Criminal Appeal

His Honour the Chief Justice Mark Chetcuti

The Hon. Mr. Justice Joseph Zammit McKeon

The Hon. Madame Justice Edwina Grima

Today the 27th day of January of the year 2021

Bill of Indictment No : 11/2017

The Republic of Malta

vs.

Lamin Samura Seguba

The Court:

Having seen the Bill of Indictment bearing number 11 of the year 2017 filed against appellee Lamin Samura Seguba, wherein he was charged:

> **In the First Count**, of having, on the 7th of December 2014 and during the previous months, rendered himself guilty of producing, selling or otherwise dealing in the whole or any portion of the plant Cannabis (excluding its medicinal preparations) controlled under the provision of Part I, First Schedule, of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), when he

was not in possession of any valid and subsisting production, sale or dealing authorisation granted in pursuance of the said law.

In the Second Count: of having on the 7th of December 2014 and during the previous months, rendered himself guilty of having in his possession (otherwise than in the course of transit through Malta or the territorial waters thereof) the whole or any portion of the plant Cannabis (excluding its medical preparations) in that such possession was not for the exclusive use of the offender.

In the Third Count: of having on the 7th of December 2014 and during the previous months, rendered himself guilty of being in possession of the whole or any portion of the plant Cannabis, being a drug specified and controlled under the provisions of Part 1, First Schedule of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) when not in possession of any valid and subsisting import or possession license or authorisation from the President of Malta granted in pursuance of the said law, and was not authorised by the Internal Control of Dangerous Drugs Regulations (G.N. 292/1939) or by other authority given by the President of Malta, to be in possession of this drug in terms of Regulation 9 of the said Regulations, and was likewise not in possession of a valid prescription in terms of the said Regulations.

2. Having seen the note of preliminary pleas of the accused filed in the registry of this Court on the 20th of November 2017.

3. Having seen the judgment of the Criminal Court of the 11th of June 2020 wherein the said Court upheld the first plea raised by the accused in his note of preliminary pleas and dismissed the second, third and fourth plea. Consequently, ordered that no reference to the statement or statements of the accused or any verbal declaration he may have made to the Police in the pre-trial stage be made of during the trial, that such statement or statements, namely Doc PG3 and PG9 be removed from the records of the case. Furthermore, since the narrative in the Bill of Indictment refers to the statement voluntarily released by the accused, ordered the removal of such narrative from the said Bill of Indictment and this as a consequence of upholding the first plea raised by the accused.

4. Having seen the appeal application filed by the Attorney General of the 17th of June 2020 wherein the Court was requested to reform the judgment of the First Court as following:

a) to confirm that part where the Criminal Court dismissed the second, third and fourth pleas put forward by the accused; and

b) to revoke that part where the Criminal court upheld the first plea put forward by the accused and that part where it ordered that "*no reference to the statement or statements of the accused or any verbal declaration he may have made to the Police in the pre-trial stage be made of during the trial, that such statement or statements, namely Doc PG3 and PG 9 be removed from the records of the case. Furthermore, since the narrative in the Bill of Indictment refers to the statement voluntarily released by the accused, ordered the removal of such narrative from the said Bill of Indictment and this as a consequence of upholding the first plea raised by the accused.*", and subsequently proceeds to deal with the matter in question according to law, and this in the best interests of justice.

5. Having heard oral submissions by the parties.

6. Having seen the minutes of the hearing of the 4th of November 2020 wherein the determination of the appeal filed by Attorney General was put off for judgment for today's hearing.

7. Having seen all the acts of the case.

Considers:

8. That the Attorney General has registered his objection to the judgment delivered by the First Court and this with regard to the determination of the first preliminary plea put forward by the accused to the bill of indictment filed against him, which plea was upheld by the First Court resulting in the expunging from the court records of the pre-trial statements made by accused when he was arrested and interrogated by the police upon his arrest, ordering also that no reference be made to such statements during the trial by jury.

9. It is appellant's firm view, put forward in his one and only grievance, that the pre-trial statements made by the accused were released by him according to the law applicable at the time, wherein he was given the right to legal assistance prior to being interrogated which right was waivered, proceeding to release voluntarily and without any threats or coercion his statement to the investigating officer. Appellant relies, in his appeal, on the judgment delivered by the European Court of Human

Rights in the case *Farrugia vs Malta* of the 4th of June 2019, and the two-fold test set out in the said decision, wherein it was decided that the fact that a person did not have the right to have a lawyer present during interrogation did not amount to an automatic breach of his right to a fair hearing according to law.

10. In its reasoning the First Court laments the lack of legal certainty which the domestic courts have had to face in decisions regarding the probative value of pre-trial statements where the suspect did not have a lawyer present during his interrogation, and this in line with current legislation which saw the transposition into Maltese law of Directive 2013/48/EU of the European Parliament and of the Council dated 22 October 2013, and this by means of Act LI of 2016. This Court concurs with the objections put forward by the First Court to the ever-evolving situation regarding the legal validity of pre-trial statements obtained without a lawyer's assistance. Indeed, both our jurisprudence and that of the European Court present differing and often contradictory *dicta* on the matter. And it is precisely this legal uncertainty that led the First Court to uphold accused's preliminary plea regarding the inadmissibility of his pre-trial statements as evidence in the criminal proceedings brought against him. The Court thus states in its judgment:

> **12. The Farrugia v. Malta case essentially states that not all statements given by suspects in the pre-trial proceedings in the absence of legal assistance should be expunged from the records. The court needs to follow a number of criteria before deciding on such a request among which whether the accused was a vulnerable person, the age of the accused and whether that statement was the only evidence adduced. This Court now finds itself in a situation where it could have acceded to a request or a plea such as the present and must now decide in an opposite manner the next day even where there results "a systematic breach of pre-trial proceedings". Legal uncertainty for an accused may potentially be conducive to a breach of a fair hearing. It is the opinion of this Court that there needs to be a strong degree of certainty in such circumstances and not to hold a trial within a trial to examine whether a statement, for instance, is the only evidence produced by the prosecution.**
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> **13. Indeed the rules as provided in Directive 13/48 cited above should be the yardstick to which all pre-trial proceedings should be subjected without making any difference with regard to the vulnerability or otherwise of the suspects, their age and other criteria. In the case at hand, the accused was offered legal assistance consisting of a maximum one hour colloquial with**

a lawyer or legal procurator and subject to the right of inference if he does take up such offer. This Court is not aware of what made the accused decide to not take up that offer. Perhaps he decided that it would have been useless to talk to a lawyer for one hour over the phone or face to face and not having the lawyer by his side during the interrogation proper and this is precisely another reason why certainty of rules and rights is of utmost importance.

11. This Court however cannot accept the line of reasoning of the First Court, as it is its duty to lay down rules where the law fails to do so to provide that legal certainty which every accused person has a right to. This does not necessarily amount to the removal from the records of the case of all pre-trial statements, all the more where the said statements were released according to law.

12. The regulatory principle as to the admissibility of evidence in criminal proceedings presupposes the existence of an express provision of law which regulates the admission of such evidence in a court of law. Evidence is consequently deemed to be inadmissible only if the law precludes its production. The law of evidence is made up of rules which exclude from the consideration of the court evidence which may or may not have a reasonable bearing on the matter in hand. Consider for example, hearsay evidence, evidence obtained through illegal means, or evidence relating to the character or criminal conduct of the accused. If evidence is obtained in violation of the accused's constitutional rights, this could also result in the exclusion of such evidence from the trial echoing the exclusionary rule adopted by the United States Supreme Court. Similarly section 78 of the United Kingdom Police and Criminal Evidence Act provides that "*in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it*."

13. No similar provision, however, exists under our law regulating the rules of evidence in criminal proceedings thus making accused's objection to the admissibility of his pre-trial statement as evidence during the trial a matter having constitutional ramifications outside the competence of this Court in its criminal

jurisdiction. The accused does not attack the probative value of the statements on any particular rule of penal law empowering the Court to reject it but relies solely on the presumption that admitting this piece of evidence would deny him a right to a fair hearing, having been denied the right to have his lawyer present during interrogation, resulting therefore in a denial of his right to mount a defence in a situation where incriminating statements were made to the police.

14. Now all cases dealing with a violation under article 6 of the European Convention speak of the right to legal assistance. In the present case it cannot be said that accused was totally denied this right. In fact, prior to interrogation accused was given the right existing according to the law in force at the time to speak to a lawyer privately either face to face or by telephone for an hour, such right being waivered by accused. Now it is true, as the First Court pointed out in its judgment, that the rule of inference existed at the time when the statement was released by accused, implying therefore, that had accused obtained this form of legal advice, and subsequently refused to answer questions put to him by the interrogating officer, a court of law could infer an admission of guilt from his silence, when his statement is adduced as evidence at the trial. This rule however has today been removed from our statute book thus leaving intact the right to silence of the accused person in a criminal trial.

15. The First Court, therefore, should have acted with more caution and circumspection, all the more in the light of the decision given by the Grand Chamber of the European Court in the case of *Philippe Beuze v. Belgium* (71409/10) delivered on the 9th of November 2018 which reversed the criteria set out in the decision of *Salduz* and others, although it found that in this case a violation of article 6 of the Convention had occurred. In this decision the European Court re-adopted the criterion of "overall fairness of the proceedings" so as to investigate whether any violation to the right to a fair hearing had occurred, and this after establishing a two-tier test, the first one being the existence or otherwise of compelling reasons to deny the right to legal assistance.

"441. When examining the proceedings as a whole, the following non-exhaustive list of factors should, where appropriate, be taken into account (Ibrahim and Others v. the United Kingdom [GC], § 274; Beuze v. Belgium [GC], § 150; Sitnevskiy and Chaykovskiy v. Ukraine, §§ 78-80):
▪ Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.
▪ 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.
▪ Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.
▪ 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.
▪ 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.
▪ In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.
▪ 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.
▪ Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.
▪ The weight of the public interest in the investigation and punishment of the particular offence in issue.
▪ Other relevant procedural safeguards afforded by domestic law and practice.[1]

16. Therefore, in the light of the above-mentioned guidelines put forward by the European Court, this Court cannot *a priori* expunge a statement of a suspect who has been given the right to consult a lawyer before being interrogated, but where his lawyer was not present at the time, solely on the premise that this could potentially infringe his right to a fair hearing. The Court cannot create a blanket evidentiary rule of criminal law declaring a piece of evidence obtained lawfully, inadmissible in criminal proceedings on the basis that this could violate accused's right to a fair trial, all the more so, as already pointed out, where some sort of legal assistance had been given. As the European Court has guided domestic courts in dealing with pre-trials

[1] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

statements, each case must be dealt with individually thus taking into account, on a case by case basis, whether by the fact that accused person did not have a lawyer present when releasing the statement, although such person had obtained legal advice or at least had been given the right to obtain that advice, this could result at a later stage, during the criminal proceedings instituted against him, as a breach of his right to a fair hearing thus vitiating an otherwise legally obtained piece of evidence. In a similar case it was decided by the European Court that no violation of article 6 had occurred:

> **"In Doyle v. Ireland the applicant was allowed to be represented by a lawyer, but his lawyer was not permitted in the police interview as a result of the relevant police practice applied at the time. The Court found no violation of Article 6 §§ 1 and 3 (c) of the Convention. It considered that, notwithstanding the impugned restriction on the applicant's right of access to a lawyer during the police questioning, the overall fairness of the proceedings had not been irretrievably prejudiced. In particular, it laid emphasis on the following facts: the applicant had been able to consult his lawyer; he was not particularly vulnerable; he had been able to challenge the admissibility of evidence and to oppose its use; the circumstances of the case had been extensively considered by the domestic courts; the applicant's conviction had been supported by significant independent evidence; the trial judge had given proper instructions to the jury; sound public-interest considerations had justified prosecuting the applicant; and there had been important procedural safeguards, namely all police interviews had been recorded on video and made available to the judges and the jury and, while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.**
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> **429. In addition, 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 (Ibid., § 136).[2]"**

17. The Court is also of the firm opinion that at this early stage of the proceedings where the trial by jury has yet to be heard by the competent court it cannot be said

[2] *Ibid*

that the two-tier test established in the *Beuze* judgment can be conducted. Also, since neither the First Court nor this Court has constitutional powers to address the issue and thus establish whether any violation of fundamental rights has occurred or if this could potentially occur. The Court of Criminal Jurisdiction cannot *a priori* expunge evidence from the records which at this stage still has its probative weight for the reason put forward by appellee in his preliminary plea. This is because according to the said court *dicta* the denial of legal assistance during interrogation does not automatically lead to a breach of the accused's right to a fair hearing, when the European Court is now directing domestic courts to investigate whether the proceedings as a whole were fair, an exercise that can be carried out only after all evidence has been brought forward at the trial, accused also having a right to appeal from the verdict and judgment of the Criminal Court establishing his guilt.

18. Having thus premised, from an overwiew of the evidence gathered during committal proceedings before the Court of Magistrates, it transpires that accused was arrested after suspicion that he was dealing in drugs. In fact the police had stopped a certain David Garzia Zabalata exiting a block of appartments where accused resided and found him in possession of the drug cannabis. The police then proceeded to conduct a search at accused's residence in St. Paul's Bay in his presence, and from his bedroom around eight hundred grammes of cannabis, found wrapped up in a plastic bag, were seized. Upon interrogaton accused admitted that the drugs belonged to him, and that there had been occasions where he sold cannabis at a bar in Marsa. During the search the police also seized a number of small self sealable plastic bags which were empty and new. Some of these were found in accused's jacket and shoes. The sum of €300 was also seized from accused's wallet, together with a mobile phone. The statement is exhibited as Document PG3 in the Court records. Prior to releasing the statement accused was given the right to consult with a lawyer which right was waivered by him, as already pointed out. David Garzia Zabalata was never brought to testify by the Prosecution at committal stage since criminal proceedings against the witness were still ongoing leading the Attorney General to issue the bill of indictment against the accused, said witness

however being indicated in the List of Witnesses filed together with the said bill of indictment.

19. In a similar case wherein accused had waivered his right for legal advice prior to interrogation, the Constitutional Court decided that:

> **"Hu fuq l-Istat l-obbligu li jagħti prova li fil-proċess kriminali kien hemm *overall fairness*. F'dan il-każ m'huwiex possibbli li jsir għal kollox l-eżerċizzju li ssemma fil-każ ta' *Beuze* għaliex s'issa l-ġuri għadu ma sarx[3].**
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> **... dwar dan il-każ għad irid isir il-ġuri. Għalhekk huma l-ġurati li ser jiddeċiedu jekk l-appellant huwiex ħati tal-akkużi li hemm kontrih. Madankollu, ser ikun l-imħallef li fl-indirizz li jrid jagħmel lill-ġurati ser jiġbor ix-xiehda tax-xhieda u l-provi li jkunu marbutin magħhom, kif ukoll ifisser ix-xorta u l-elementi tar-reati rilevanti għall-każ. Hu l-imħallef li jagħmel ".... kull osservazzjoni oħra li tiswa biex trieġi u turi lill-ġuri kif għandu jaqdi sewwa d-dmirijiet tiegħu" (Artikolu 465 tal-Kap. 9)[4].**

20. In the light of the above considerations, and since the defense is basing its objection on the inadmissibility of the defendant's statement not on any evidentiary rule which attacks the probative value of such evidence, since the pre-trial statement complied with the criminal law in force at the time, but on the alleged breach of his right to a fair hearing under article 6 of the European Convention were that incriminating statement to be used in court of justice against him, the Court cannot agree with the ruling of the First Court wherein it declared such pre-trial statement as inadmissible as evidence at this stage of the proceedings, since it is only after all evidence, both in favour and against the accused, has been heard would it be possible to conduct the two-tier test as established by the European Court of Human Rights and this in order to determine whether the overall fairness of the proceedings has been compromised if accused's statement were to be used against him as evidence. It will be the duty of the presiding judge during the trial by jury to properly address the jurors as to the probative value of the statement if during the

[3] Kost: Ir-Repubblika ta' Malta vs Martino Aiello – 27 ta' Marzu 2020

[4] *Ibid*

jury it results that this was not released according to law or if it results that the overall fairness of the proceedings has been compromised by the declarations made by accused in his pre-trial statement in terms of the criteria established in the *Beuze* judgment above-cited, accused having a right of appeal from the verdict and judgment of the Criminal Court in the event of a finding of guilt.

21. Consequently for the above-mentioned reasons the Court declares the grievance put forward by the Attorney General to be well-founded and upholds the same. Therefore varies the judgment of the First Court, confirms the same where the second, third and fourth preliminary pleas put forward by accused were rejected, however revokes the judgment of the First Court where it upheld the first plea, and declares the said plea to be unfounded, thus rejecting all preliminary pleas filed by accused to the bill of indictment.

The Chief Justice Mark Chetcuti

Mr. Justice Joseph Zammit McKeon

Mrs. Justice Edwina Grima