MALTA

CONSTITUTIONAL COURT

THE HON. MR. JUSTICE -- ACTING PRESIDENT
GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE
NOEL CUSCHIERI

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 12 th November, 2012

Civil Appeal Number. 50/2011/1

Jovica Kolakovic

versus

Attorney General

1. This case concerns two appeals filed by both parties from a judgment delivered by the First Hall of the Civil Court ["The First Court"] on the 16th January 2012, which decided that:

"… … … all applicant's claims are to rejected except the second claim but only limited to the violation of the right to be assisted by counsel in the pre-trial stage in accordance

with article 6(1) of the European Convention in accordance with that decided above, but the Court feels that in the circumstances this judicial declaration constitutes sufficient remedy to address this violation.

"The Court also finds that there was no violation of Mr Kolakovic's rights with regard to the conditions of bail as imposed by the Magistrates Court taking into account the information available at the time of the decrees. … … …

"Each party shall bear its own costs."

2. By virtue of his appeal applicant is requesting that this Court:

"… … … in so far as is necessary confirms the upholding of the second claim limited to the violation of the right to be assisted by counsel in the pre-trial stage in accordance with article 6(1) of the Convention, and revokes it as to the remainder including the decision that the judicial declaration in light of the breach found in terms of article 6(1) of the Convention constitutes sufficient remedy to address that violation, and by allowing this appeal, decides to uphold the complaints of the appellant with costs of both instances."

3. On his part, respondent is requesting this Court:

"… … … to reform the judgment appealed from given by the First Hall Civil Court in its Constitutional Jurisdiction in the names *Jovica Kolakovic vs Attorney General* (App No 50/11), in the sense that whilst it should revoke the part where it declared a violation of Jovica Kolakovic's right to be assisted by counsel when interrogated by the police in accordance with Article 6 (1) of the European Convention and provide instead by declaring that there is no such breach, it should confirm the remaining part of the judgment with expenses of both instances against appellate party."

4. The First Court gave its judgment after having made the following considerations:

“Applicant is alleging five violations to his fundamental human rights which shall be addressed separately. The case concerns the arrest of applicant by the Police on the 8th September 2009 outside a hotel in Bugibba. He was arrested together with another person who is also undergoing criminal procedures filed against him.

“**First violation**

“Applicant claims that during the proceedings before the Court of Magistrates as a Court of Criminal Inquiry, no Police officer claimed or declared that applicant was arrested or that during applicant’s apprehension he was informed of the reason for this apprehension or was cautioned or informed in detail of the nature of the charges to be brought against him. He claims that this is in breach of article 355AC of the Criminal Code and articles 3 and 5(2) of the Convention.

“Article 355AC of the Criminal Code states that:

“355AC. (1) When a person is arrested, the arrest is not lawful unless the person arrested is informed that he is under arrest, even though the arrest may be obvious.

“(2) The arrest is not lawful unless the person arrested is informed at the time of his arrest or detention, in a language that he understands, of the reasons for his arrest or detention:

“Article 3 states that no one shall be subjected to inhuman or degrading treatment or punishment.

“Article 5(2) states that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

“Applicant alleges in his evidence that he was in a car with a friend (a certain Mikalauskas who is also a co-accused) after having a drink in a bar of a hotel from where they

had emerged. They were about to drive off when they were apprehended by the Police.

“They were taken inside the hotel. He was put in a bathroom on an upper floor of the hotel opposite a hotel room which he knew his friend had rented. He heard them speaking to his friend on the room but he could not hear what was said because the bathroom door was closed.

“He was then taken to the Police station and interviewed by Police Inspector Pierre Grech twenty four hours later. He had not been informed he was under arrest but on apprehension he had been searched and divested of his passport and phones. Applicant goes so far as to say that he only saw the written charges brought against him a month prior to testifying before this Court (applicant testified on the 20th September 2011). On being questioned by the Court applicant stated the Police officers who apprehended them (there were at least six according to the applicant) were in plain clothes. They showed him a Police badge and a gun. He understood they were police officers. They searched him and took him inside the hotel. He could not remember if he said anything to the Police about what was happening. Whilst he was in the bathroom he was under the supervision of two policemen who did not address him. An hour later he was taken to the Police station in a Police vehicle, and put in a cell without being spoken to, where he remained for twenty four hours. Even when he was interrogated no reason was given to him for his arrest. Asked whether the circumstances leading to his arrest could have led him to understand he was being apprehended on suspicion of an offence, applicant claimed he realised he was being detained but not arrested and presumed the detention would be clarified by the Police Inspector or the Court. Applicant presumed he was being detained because of something in connection with his friend.

“The Court notes that this evidence runs counter to the deposition of PS1174 Adrian Sciberras who testified during the Criminal Inquiry procedures and said that he had informed applicant he was under arrest but had not

cautioned him. PS579 Antoine Micallef, who was the other officer assisting PS579 Antoine Micallef in relation to applicant, stated he had searched applicant outside the hotel and had taken him in the hotel but had not cautioned him nor asked him any questions. The prosecuting officer Inspector Pierre Grech testified before this Court and stated that he had gone to the hotel less than an hour after applicant had been apprehended and he spoke to him in the hotel in a small room opposite a hotel room where suspicious items had been found. He had cautioned applicant but had made no charges at that preliminary stage. He had accompanied applicant to Police headquarters in the same Police car. This evidence had not been given during the preliminary inquiry but the witness stated that he had not been asked to state the details of applicant's apprehension and arrest. He interviewed applicant the following day.

"Case law on the issue has established that a person arrested should be informed promptly in a language which he understands of the reasons for his arrest and any charges brought against him. This article of the European Convention of Human Rights is intended to safeguard that any person arrested should know why he is deprived of his liberty and to enable him to deny and obtain release without the necessity of Court procedures (**Van der leer vs Netherlands, 1990**). An arrestee must be told in simple non technical language in a language which he understands of the essential legal and factual grounds of arrest so that he may attack the lawfulness by challenging it in Court. This does not necessarily have to be made in writing or through a warrant, nor does this information guarantee a right of access to a lawyer (**V vs Netherlands, 2621/65**) and (**X vs Netherlands, 1211/61**) and (**Schiesser vs Switzerland, 1979**).

"Aspects to consider when dealing with the requirement of 'promptness' are firstly whether the content of the information given to the detainee is sufficient and secondly the issue of the 'promptness' of that information. The information should relate to facts which 'raise a suspicion' and not necessarily such as to justify a

conviction or even the bringing of a charge (**Murray vs UK, 1994)**. The Courts have indicated that this information should be given to the detainee 'within a few hours of his arrest' and it is assumed that the time frame has been fulfilled if applicant has been interviewed soon after his arrest (**Kerr vs UK, 1999**). This information does not necessarily have to be given in its entirety by the arresting officer at the time of the arrest provided he is informed of the factual and legal grounds of the arrest within a sufficient period following the arrest. Whether this has been achieved has to be seen with reference to the facts of the particular case (**X vs Denmark, 1982**). European case law shows that Courts are flexible in the application of article 5(2) regarding the reasons for initial detention. Arrest on suspicion of committing a crime does not require that information be given in a particular form nor that it consist of a complete list of charges held against the accused person. A bare indication of the legal basis for an arrest does not suffice but a fairly precise indication of the suspicions against applicant such that he could promptly gain some idea of what he was suspected of would be deemed enough (**X vs Germany, 1978** and **Fox, Campbell and Martley vs UK, 1990**). In fact a person need not be expressly informed of the reasons for his arrest in so far as they are apparent from the surrounding circumstances. However such an argument should be considered with caution so as not to dilute the real effects of article 5(2).

"Applying the principles to the present case, it has been proven that late morning or early afternoon on the 8th September 2009 applicant was apprehended and detained by the Police in front of a hotel together with another person who was with applicant. He was searched on the spot and PS1174 states that he cautioned applicant. Police Inspector Pierre Grech further stated that he had spoken briefly to applicant whilst in the hotel.

"It is therefore likely that applicant understood that he was being detained in connection with an offence which he or/and his friend were suspected of having committed and which in some way was connected with the hotel. This is

further confirmed when applicant adds during his evidence before this Court that when he was taken to the Police station from the hotel he was shown a box which was opened in front of him and which contained packets of cannabis. He was asked to sign that he had seen this box being opened in front of him. At this stage the Court is of the firm opinion that applicant should and was in a clear position to know that he was being detained in connection with an offence concerning drugs.

"Applicant was interviewed the next day at 12.33pm, that is to say twenty four hours later. He was not informed of any particular charge being raised against him but was asked about his movements since he arrived in Malta on the 6th September and with particular relevance he was asked a direct question regarding his involvement with drugs. He signed a statement in connection with this interview.

"At 10.04am the next morning he made a second statement, this time at his request, to clarify certain points of the first statement.

"He was arraigned and charged with drug related offences on the same day.

"This Court finds no reason to uphold applicant's allegation that he was not cautioned on being detained nor given a reason for his arrest. He might not have been quoted chapter and verse regarding the charges to be brought against him but he surely understood or was in a position to understand on arrest and on arrival at the Police station that his detention was in connection with drug related offences. This constitutes in the Court's opinion a fairly precise indication of the legal basis for his arrest and detention till arraignment. Nor can it be said that applicant was subjected to degrading and inhuman treatment. There was no allegation that applicant was ill treated from the time of apprehension till his arraignment in Court. His detention till arraignment lasted for approximately forty eight hours wherein it was clear that he was being detained on drug related offences. He was

interviewed twice, once on his initiative wherein he states before this Court that the content of these two interviews were not prejudicial to him. He only alleges as an aggravation that he was not spoken to. But being given the silent treatment before being taken to Police Headquarters is not, in the Court's opinion, tantamount to inhuman and degrading treatment unless this silence is used as a means to illicit [*sic*] undue influence on the accused which is not the case. Nor can it be said that his physical treatment or otherwise on arrest was in any way degrading. Applicant alleges no ill-treatment but emphasises only his segregation from his friend which in the Court's opinion is understandable on the part of the Police to avoid communication between the suspects. As stated in **A and others vs UK**, (19 February 2009):

"Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 95, ECHR 2008). The Court has considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.

"The Court also notes that on arraignment as can be evidenced from the records of the criminal proceedings (fol. 519 of the records of this reference) the charges were

read out in English, that is a language which applicant could understand, and he answered not guilty to the charges. Moreover, the defence submitted that it was not contesting the validity of the arrest. This Court deems therefore the allegation of unlawful arrest at this juncture of the case as highly dubious in face of such a declaration made by the Court appointed lawyer, who was substituted a few days later by another lawyer and later a third lawyer and no withdrawal of such a declaration was made at that stage or any stage except in the present proceedings.

“For these reasons the first allegation is being denied.

“**Second violation**

“Applicant is alleging that he was denied access to a lawyer before being arraigned and this was in breach of article 6(3)(c) of the European Convention which guarantees the right of a person charged with a criminal offence to ”defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it free when the interests of justice so requires”. This violation puts him at a disadvantage vis-à-vis the prosecution, precious time was lost in collecting evidence for the defence which was irretrievably lost and this deprived applicant of a fair hearing.

“Applicant alleges that even on arraignment he was not informed of the charges brought against him and that the Court appointed lawyer to assist had only a few minutes to discuss the case with applicant. Applicant in his note of submissions states that there was no time for the Court appointed lawyer to discuss the case with applicant and that the Court appointed lawyer did not contest the validity of the arrest. The Court appointed lawyer is the State’s responsibility which should ensure that the accused’s rights are preserved and failure to do so makes the State liable if the accused suffers any violation of his human rights.

“The Court notes that applicant makes no reference to this allegation in his application. He only alleged as a violation the lack of legal counsel prior to arraignment. This court can therefore simply disregard any allegation made in a note of submissions when no allegation of such violation was made in the application or during proceedings themselves.

“However, even on the merits of this issue, although the Court agrees in principle that an accused should be aware of the exact charges brought against him on arraignment, and access to a lawyer, Court appointed or not, should be effective and not merely perfunctory, applicant has failed to prove that this was not the case. In his note of submissions allegations of a factual nature were made by applicant but these allegations, particularly in regard to the awareness of the charges brought against him and the effective legal aid afforded to him in his arraignment, were in no way proven or result from the records of the case at any stage, even after applicant engaged his own legal counsel four days after arraignment and therefore at a very early stage of proceedings wherein these allegations could have been put forward and not two years later in this second constitutional case brought forward by applicant.

“The records of the criminal case (fol. 519) furthermore the evidence [*sic*] show that the charges were read in English and amendments were made, and the applicant pleaded not guilty to the charges. Even on the merits applicant’s allegation cannot be upheld. It cannot be argued at this stage as applicant has tried to submit that his alleged ignorance of the charges brought against him violated his rights to have adequate time to prepare his defence and consequently call witnesses. The records of the criminal proceedings show otherwise and during these past two years it is highly unlikely that applicant and his lawyer did not discuss the charges brought against him.

“Applicant complains about the length of time involved in the letters rogatory which lead to a loss of information

crucial to his defense because of the lapse of time involved.

“This Court notes that the records of the case show that as early as December 2009 the Court appointed expert Martin Bajada filed a report regarding the extraction of information from mobile phones. Notwithstanding applicant only filed a request for letters rogatory in July 2010 and as will be seen later on in this judgment this issue of delays was due to circumstances over which the prosecution had no control. Moreover it cannot be said that at a very early stage applicant was not assisted by adequate and able counsel who had every legal means at their disposal to ensure compliance with any request they might have made according to law and procedure.

“Applicant also makes a distinction with regard to the criminal proceedings being decided by a magistrate and one, as in this particular case, where the proceedings are directed in front of a panel of jurors. In the latter case it is being submitted, jurors might not appreciate the issue that evidence which in applicant’s opinion was crucial to his case, cannot be brought forward because of circumstances beyond his control and wherein he alleges that this did not arise through his fault.

“The Court does not agree. There is no evidence to support applicant’s claim. Criminal cases before jurors are in no way less solemn or less fair or just than cases decided by a magistrate sitting in the Criminal Court without an empanelled jury. Moreover even in the jury system, the address and recommendations of the presiding judge to the jurors before deliberations are made by jurors give adequate and sufficient factual legal direction to the jurors to ensure a fair and just appraisal by the empanelled jury of all circumstances to enable them to reach a valid verdict albeit one with which prosecution or defense might not agree.

“The Court however relying on established European case law which was extensively and exhaustively examined in a recent Maltese Constitutional law suit **Police vs Alvin**

Privitera (11/04/2011), is of the opinion that lack of legal representation at pre-trial stage constitutes a breach of the fundamental right enshrined in article 6(3)(c). The facts of this case are similar to the **Privitera** case even though in this case the applicant was not a minor when he was arrested. In all other respects however the iter of events was similar to the present one and to avoid undue and unnecessary repetition, this Court upholds the reasoning of the Constitutional Court in the **Privitera** case as to the right of access to a lawyer, whether or not such right was enshrined and enforced in the local laws at the time the breach was committed. This is one of the main aims of a fair trail ensuring 'equality of arms' between the parties, that is the prosecution and defense, at all stages from detention till final and absolute judgment.

"This Court does not hesitate therefore in declaring that applicant's right to be assisted by a lawyer from his arrest to his arraignment constituted a breach of his fundamental human right, whether or not he requested, as he asserts, to be assisted by legal counsel at the pre-trail stage. This does not however mean that the criminal proceedings have been tainted in such a way that applicant has been deprived of a fair hearing. Applicant is not requesting that the statements made by him be removed from the records. In fact he goes so far as to say in his evidence before this Court that no prejudice resulted from the statements given by him and therefore this Court leaves the issue as to the weight to be given to these statements entirely in the discretion of the Criminal Court. Applicant ties this breach namely that the fact that he was not allowed access to a lawyer during the pre trail stage led to delays within the first forty eight hours that cannot be righted and irretrievably prejudice his defence. He refers specifically to the use of his mobile phone and information to be retrieved from call date records made from such phone between 5th and 8th May 2009. He alleges that this could be done through a request by letters rogatory to England so that the alleged calls emanating from an English service provider could be retrieved. Applicant alleges this was only acceded to in March 2011 and the reply forthcoming from the Home Office by letter dated

27th September 2011 (Dok. A6UK1 fol. 972 of the Criminal Inquiry records) states that call data is not retained by a service provider for more than twelve months.

“Applicant states that he asked the prosecution on several occasions for this information but the implication from his evidence is that the prosecution dragged its feet and, due to this, the data has been lost. The importance of the data to his defence and the severity of the charges have gravely prejudiced his defence.

“This Court notes that on this particular aspect of the case applicant only refers to article 6 as his allegation of a violation of his human rights. However he does not tie this violation with a specific sub-article or paragraph in the said article 6.

“The Court is presuming that applicant is alleging that the general rights under article 6(1) pertaining to the right of a fair trial and therefore compliance with the principle of equality of arms was not adhered to. This requires that each party is granted equal and reasonable opportunity to present his case in such a way and under such conditions that do not place him under a substantial disadvantage vis-à-vis his opponent (**Marus O’Boyle and Warbrick Second Edition pg 251 et seq.)**. This right overlaps those requirements in article 6(3)(b) and (d) to ’adequate facilities’ which includes the calling and examining of witnesses and having access to all relevant information. These are basic rights in an adversial system such as ours.

“The European Courts have dealt in principle with this issue by examining whether the proceedings taken as a whole were ’fair’.

“Applicant alleges that the calls which he wished retrieved were ’necessary’ for his defence and puts the blame for their lack of retrieval on the inertia of the prosecution. The records of the criminal case show that the formal request by applicant for the retrieval of this information was only completed and submitted on 12 October 2010 more than

a year after his arraignment. The prosecution could not obtain this information from Malta since the service provider was English and according to law a request to the foreign entity through the legal channels of letters rogatory had to be made by the Attorney General's office in Malta and this according to article 399 of the Criminal Code. The first request by applicant was made on the 6 July 2010 but although by the 14 July 2010 defence was already informed by counsel for the prosecution that the current procedures could only be undertaken by adhering to article 399 of the Criminal Code and not a simple request for police forces from different jurisdictions to liaise with each other, it was only on the 12 October that the documents were finalised to be forwarded to the UK authorities.

"There is no allegation that the prosecution refused to cooperate with defence but rather that it dragged its feet, and consequently this evidence which defence states was 'necessary' was lost due to circumstances beyond the control of any of the parties concerned. This Court cannot at this stage decide the issue on whether such evidence was in fact 'necessary' for the defence. This is not the point at issue. What is at issue is whether this evidence was not brought forward through any fault of the prosecution as required by article 346(1) of the Criminal Code and whether this fault could be regarded as a violation of applicant's right to a fair hearing.

"The records of the Criminal Inquiry proceedings show that on the 16th December 2009, Martin Bajada appointed by the Court on 22nd September 2009, filed the report pertaining to extraction of information of call profiles from mobile phones, starter packs and sim cards which had been seized from accused's possession. At this stage no requests were made by defense counsel. On the 2nd July 2010 defense counsel examined Martin Bajada relative to the examination of sim cards from abroad. Defence counsel did not make any requests but reserved further questioning.

"Following the decree of the 12 October 2010, it seems that there were further problems with the letters rogatory since there was still information to be included therein and on 3 March 2011 defence filed fresh letter rogatory to be forwarded to the UK corresponding authorities. Following this decree there were ten adjournments and corresponding decrees requesting the Attorney General to file a note regarding progress on the letters rogatory with the final decree of the 13 October 2011 which contained the reply from the UK authorities stating that all data had been lost since more than one year had elapsed. It follows from this chronological order of events that by the time defence filed its complete letters rogatory on 3 March 2011, the information was already irretrievable through no fault of the prosecution and therefore applicant cannot claim a violation of a right which he was not protected [*sic*] in any way from pursuing.

"Therefore the Court only upholds that there was a violation of applicant's right to be assisted by counsel when interrogated by the Police, wherein however in applicant's own words, the statements made by him did not prejudice his defense.

"**Fourth violation**

"The fourth violation relates to the conditions of bail granted to applicant following his successful application to the Constitutional Court wherein he claimed that his continued detention was in violation of articles 5(3) and 5(4) of the Convention. On the 18th January 2011 applicant had been granted bail against a deposit of €50,000 and a personal guarantee of €15,000. Further to this decree applicant had requested a review of these conditions owing to his financial status. The Court by decree dated 22nd February 2011 reduced the deposit to €40,000 and increased the guarantee to €60,000. Applicant asked for a further reduction and by means of a further decree dated 4th May 2011 reduced the deposit to €15,000 but left unaltered the personal guarantee of €60,000 and added a third party surety for the amount of €30,000.

"Applicant claims that the guarantees demanded for his release impose a heavy burden more than is required for obtaining a reasonable degree of security. Other alleged accomplices, both Maltese and foreign, have been granted bail with bail bonds much lighter than applicant. Applicant also claims that he had brought forward evidence that he could not meet the bail bonds on account of family difficulties since his wife can no longer work because of health related issues, the business had to be closed down and his family's savings are being utilised to pay the family home mortgage and family costs including the maintenance of four children and rent being paid for an apartment where applicant can reside if released from preventive custody at Corradino Corrective Facility. Moreover he adds that all evidence in his case had been collected by the Court of Criminal Inquiry and there are no sufficient and relevant reasons for his detention.

"Applicant alleges that the bail conditions imposed by the Court have rendered ineffective the Constitutional judgment of the 14 February 2011 wherein it had been decided that his continued detention constituted a violation of his fundamental human right to liberty.

"This Court notes that in the interval between the Court decrees on bail conditions, the records of the Magistrates Court show that applicant's wife had testified on the 3rd November 2009 wherein she stated the couple were married in 1984 and had four children all being educated, with ages ranging from 15 to 22. They had a shop in London since 2006 wherein they sold shoes which they themselves imported. Prior to that they ran a restaurant.

"Following the Court decrees on bail, applicant's wife testified again before the Magistrates Court on the 19th July 2011 wherein she testified in detail on her degenerative spine condition necessitating treatment including surgical intervention. She also confirmed that three of her four children are still students although the eldest now has graduated from university and is working

but does not contribute to the family upkeep as he is repaying his student loan. She also stated that the shop in London was closed due to her health problems wherein commuting from home to the shop and taking care of four children on her own has become difficult to cope with. She informed the Court that the family home was worth sterling 700,000 on which there was a mortgage of sterling 385,000. She claims that although they could provide security in equity but there was no money available for a bail deposit since what money they had was necessary for their livelihood and paying her husband's expenses including dental care in Malta. Applicant further alleges that in the Court's last decree on bail, it mistook the closing down of the business with a sale of the business which was not the case.

"When she testified before this Court on the 20 September 2011 applicant's wife stated that the shop which was rented premises had been closed since February 2011 since commuting to and from her home to London to take care of the shop in her husband's absence was impossible due to the long hours, her health and taking care of her children. She also filed medical reports confirming her health problems. The stock was sold off at rock bottom prices. Regarding the family home, the witness stated that the bank had foreclosed because of difficulties in repaying the mortgage. The family is living in rented premises. The house has not been sold but she was told that once the house is sold and all fees and expenses are paid, there will not be any capital left over. The family is living on a partial disability allowance, and children's benefits. All their savings have been spent and all the household effects and car were sold off to enable her to have some extra income.

"She also stated that her family are helping out financially. She also adds that she sends approximately €100 a month so that here husband can buy necessities. She also paid €350 for six months rent from January 2011 believing her husband would be granted bail and he would have a place where to live. She could not continue paying

this rent whilst her husband was still in prison but she confirms that the premises are still available for rent.

“The Court is faced with the issue regarding the conditions being levied against applicant for him to be granted freedom from preventive custody pending Court proceedings against him. He claims that these conditions namely the amounts of deposit and guarantee are still denying him the right to freedom from preventive custody because of their severity taking into account mainly his financial status.

“The Court notes that article 5(3) states inter alia that ’release (pending trial) may be conditioned by guarantees to appear for trial’, whilst article 5(4) gives the right to a person detained to question the lawfulness of detention and his release if detention is not lawful.

“In applicant’s first Constitutional case decided on the 14th February 2011 the Court decided that applicant’s detention ran counter to article 5(3) but did not pronounce itself on article 5(4) since pending judgment the Court of Criminal Inquiry by decree dated 18 January 2011 had granted bail to applicant on certain conditions. What is being requested at this point in time is that the conditions imposed, namely pecuniary ones taking into account his financial situation, are such as render his release on bail ineffectual and therefore his detention has once again become illegal.

“The Court notes that the Magistrates Court had changed bail conditions on two further occasions following its first decree of the 18th January 2011, namely on the 22nd February 2011 and 4th May 2011. In these decrees, it is easily noticeable that the deposit requested by the Court was decreased from €50,000 to €15,000 whereas the guarantee was increased from €15,000 to €60,000 and a third party surety of €30,000.

“From the records of the criminal proceedings exhibited in this case, up to the last decree namely that of the 22 July 2011, the only evidence put forward by applicant in

respect of his financial and personal situation was that as appeared from the testimony of his wife on 3rd November 2009. Following this testimony she again testified in more detail before the Magistrates Court on the 19th July 2011 wherein only details as the value of the house owned by her and her husband emerged as well as the mortgage due burdening the property but no other documents were filed to show the financial position of the Kolakovic family and further testified in front of the Court on 20th September 2011, wherein more facts emerged. These were in turn substantiated by some bank documents relating to the business filed by applicant on 2 November 2011 (fol. 353 et seq.).

"As stated in **Neumeister vs Austria, 1968** the release on bail pending criminal procedures can be conditioned by guarantees so as to ensure accused's presence at the trial. These guarantees are intended to justify accused's presence at trial and not to compensate for the damage allegedly caused. This means however that the Court can impose monetary guarantees, which guarantees should be examined and imposed with reference to the accused's assets and any relatives or third parties capable of acting as sureties. These guarantees, as authors **Harris, O'Boyle Bates and Buckley (2nd Ed.)** state, should act as a 'sufficient deterrent to dispel any wish on the accused's part to abscond'.

"The overriding criterion in establishing these guarantees is that they should be reasonable and not excessive taking into account all the personal circumstances of the accused including his financial position, his character, his social status and his past history. Also the seriousness of the offence as well as the probability that the accused might abscond pending trial are to be taken into account. This means that bail conditions may differ from case to case since the circumstances are usually different with every individual.

"In fixing the bail conditions, especially monetary ones, great care should be taken by the Court in ensuring that these conditions are not exaggerated, leading to a

violation of the right to freedom. Equal importance should be taken in fixing the conditions of bail as in deciding whether an accused should be granted bail pending proceedings (**Iwanezuk vs Poland, 2001**). However there is a serious obligation on the part of the accused to give all sufficient and clear information in good faith regarding his assets and personal situation to enable the Court to adequately balance the right to liberty pending proceedings against reasonable and sufficient bail conditions.

"The Magistrates Court based its decrees on bail conditions on information supplied by applicant. Up to the date of its last decree there were insufficient financial and personal details available to the Court with which to evaluate the 'reasonableness' of the conditions being imposed. More information has been made available at this stage and applicant cannot criticise the Magistrates Court's decisions when he himself brought no clear evidence of his financial and presence situation, till late 2011.

"The Court finds that there is no justification in applicant's allegation that the conditions posed by the Magistrates Court up to its latest decree in any way were unreasonable since the Court had no yardstick to measure the reasonableness of the conditions. At this present state of affairs however, applicant's personal and financial situation are more apparent and more detailed even though not exhaustive. This Court invites the Magistrates Court to re-evaluate the conditions of bail following an eventual application by applicant to revisit these conditions. This Court does not find it expedient or prudent to revisit these conditions itself but would leave it to the Magistrates Court to re-evaluate these new circumstances in the light with that already decided and decreed by the same Court on three separate prior occasions.

"In view of the fact that there is no violation of article 5(3), there cannot be any justification for determining whether the detention is justified according to article 5(4). This

might and would only arise following a decree of the Magistrates Court on bail conditions taking into account these new facts brought at this stage.

"**Fifth violation**

"Applicant claims he has suffered inhuman and degrading treatment according to article 3 of the Convention because of lack of access to proper medical care and inadequate medical services offered by government. He claims that as a result of the denial to dental care applicant's porcelain bridge became loose and broke, with applicant having serious difficulty in eating for twelve months. The numerous decrees issued by the Court of Magistrates instructing the authorities to grant applicant recourse to dental care expeditiously were to no avail.

"The Court affirms that European and local jurisprudence have reiterated that requisite medical assistance should be given to protect the physical well being of persons deprived of liberty (**Kudla vs Poland, 2000**) and where a lack of medical assistance gives rise to a medical emergency or exposes one to 'severe and prolonged pain', this would be considered as a form of inhuman treatment. Where it does not, a breach may still be found if the humiliation caused to applicant through stress and anxiety he suffers because of the absence of medical assistance may reach the threshold of degrading treatment in the sense of article 3. If the required regime of medical assistance is inadequate or delayed this may in particular circumstances be tantamount to degrading treatment with the ambit of article 3. However article 3 does not contain a general obligation to release a detainee on health issues unless there are humanitarian measures involved.

"Applying these principles to the facts in hand, it appears that applicant had an upper dental bridge held in place by some of his natural teeth. Applicant states that this bridge became detached whilst he was in prison. He states that he went to see the prison dentist at the end of November 2009. It was imperative that this condition was seen to

because damage would be caused to the denture if it remained loose and infection could be caused to his natural teeth which were holding the denture. Even though the prison dentist said he could arrange the denture, nothing happened until a Court order was given so that applicant be taken to Mater Dei hospital. Even though applicant claims that he was taken to hospital in February 2010, the records of the Criminal Inquiry (fol. 350) show that a complaint was registered by counsel for applicant on 2nd February 2010 with the Criminal Court whereby it was stated that although applicant attempted to have his situation remedied at Mater Dei hospital, it was stated that the treatment requested was not applicable free of charge at State run Mater Dei hospital but had to be done privately and although the Director of Prisons had been informed of a Court decree to that effect nothing had still been done. This extract shows that prior to February 2010, applicant had been seen at Mater Dei.

"On 25th March 2010 Dr. Alexander Azzopardi, Head of Dental Department at Mater Dei hospital, stated that applicant had been examined by one of the staff dentists and the notes showed that the upper dental bridge of applicant was detached and the three natural teeth holding it were 'broken down'. This meant the bridge could not be put back in place. Applicant was offered a denture replacement but applicant did not accept and wanted the bridge to be fixed to the roots.

"Applicant states he went privately to a Dr Pullicino who only temporarily fixed his bridge but by the end of July 2010 he needed to see the dentist again but she refused to treat him claiming he had not paid the previous bill. Applicant states his wife had sent her the money which were withheld by the prison authorities.

"Following further Court applications and decrees applicant stated that in November 2010 he was sent to see a dentist who suggested implants costing €2,500. He spoke to the Director of Prisons, the Deputy Director and made Court applications but nothing happened till June 2011. Meanwhile he could not eat or speak properly. The

money was sent in June 2011 and he had eight implants but the result was not satisfactory, even though after more than two years he could start to eat normally.

"The records of the Court of Criminal case show that on the 18th February 2011 counsel to applicant making submissions on bail stated that the little money applicant had was to be used for dental care. On 22nd February 2011 PS Stephen Zammit of the Corradino Correctional Facility testified that prison records showed that applicant had a dental appointment at Mater Dei and three at a Zebbug clinic. The only recorded dates were those of the private clinic namely 28th January 2011, 2nd February 2011 and 7th February 2011. On the same date the acts of the criminal case record the testimony of an unidentifiable witness (vide fol. 776 et seq.) who from the evidence appears to be a dentist or has dental knowledge. He states that the bridge could not be reaffixed because the teeth that were holding it were rotten. An appointment had been fixed for an operation for the 15th February 2011 but was postponed because he was informed that applicant could not pay the bill. He also stated that the teeth became rotten with the passage of time and because of poor dental hygiene. He also reiterated that fixed dentures were not available free of charge at Mater Dei hospital. Lack of payment was the reason why the implant was not and could not be carried out.

"The Court feels that the issue at stake was one of the remedial procedure which applicant wanted to be carried out on his teeth and the cost of such procedures. There is no doubt that this issue dragged on for too long a period in which applicant's dental health degenerated. This is a factual conclusion from the fragmentary evidence available. However, the Court finds it hard to accept that the delays were the responsibility of the prison authorities. No such direct connection was made by applicant. What transpired from the evidence is that as early as March 2010 when applicant had already been referred to Mater Dei State hospital, there was the possibility that a denture replacement could be effected 'free of charge'. However, applicant wanted implants which procedure was not

carried out at Mater Dei Hospital since this procedure was not state funded. There is then a significant gap of time namely till July 2011 till applicant had implants made in a private clinic which he described as still unsatisfactory. The main reason for this undue delay seems to be lack of funds. Although it has been argued by applicant that funds sent to the prison authorities were not channeled to the proper sources namely for dental treatment no hard evidence was produced to this effect. Evidence shows that before the implants some remedial dental procedures were done privately by applicant but this was stopped because of non payment of bills. Here again no direct link established, at least from the records before this Court, that this was due to the fault of the prison authorities, even though the Court concedes bureaucratic procedures on the part of the prison authorities might not have helped the situation in being resolved at an earlier time. However, this fact alone does not attribute fault for applicant's exacerbated dental problems directly to the prison authorities, nor can it be said that there was contributory responsibility on their part. The records show, as evidenced by the sworn statement of the Director of Prisons, that between February 2010 and November 2011 applicant was granted innumerable visits to see a private dentist and therefore it cannot be said that applicant's dental condition evolved in consequence of a violation of his fundamental human rights.

"Therefore the Court concludes that this alleged violation cannot be upheld."

The Facts

5. Briefly, the following are the facts relevant to this appeal. On the 8th September 2009, after police surveillance, applicant, together with another person ["the co-accused"], was stopped by policemen in plain clothes, when both men were in a car in the vicinity of a hotel. They were taken to the hotel room which was registered in the name of the co-accused, where the police found a number of packets containing cannabis.

6. Subsequently, applicant was put in a room together with two policemen, whilst the co-accused was spoken to by other policemen. Shortly afterwards, Police Inspector Pierre Grech, who was informed of the arrest, arrived on the scene, and both persons were taken to the police depôt for questioning. Applicant released a statement on the 9th September 2009 after being questioned by Police Inspector Pierre Grech, and the next day he released another statement on his request. In both instances, prior to releasing the statements, applicant was duly cautioned according to law.

The First Grievance

7. Applicant holds that his arrest was unlawful in terms of Article 5 subsections (2) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ["the Convention"] since at the time of his arrest [1] he was not informed that he was under arrest, and also was not given a reason for his arrest; [2] the fact that he was segregated in a bathroom whilst the other person was being questioned by the police constituted inhuman and degrading treatment in terms of Article 3 of the Convention; [3] the arraignment proceedings were vitiated because the charges were not read out to him according to law; and [4] the time to consult adequately with his state-appointed lawyer, prior to the arraignment, was very limited.

8. On his part, respondent, quoting various judgments of the European Court of Justice, rebuts these claims pointing out: [1] that various elements of proof result from the evidence, showing that the arrest was lawful in the sense that applicant was informed of his arrest immediately, and duly cautioned, and that, within a short time, he was also informed of the reasons for his arrest by Inspector Pierre Grech, and the circumstances surrounding the arrest of applicant were such as to fall within the ambit of the said Article 5(2) of the Convention; [2] also, that during the arraignment, applicant, who was legally assisted, declared that he was not contesting the validity of his arrest.

9. Respondent also rebuts the claim that applicant was treated inhumanely and in a degrading manner when he was put in a small room, whilst the co-accused was being questioned by the police. Also, the allegation that he was "dragged out of a car at gunpoint, dragged into a hotel and placed in a bathroom and left there" as stated by applicant in his note of submissions is untrue. Moreover, the fact that applicant was placed in a cell to be questioned next morning was quite understandable since when the police arrived at the police depôt it was late in the evening.

Considerations by the Court

10. The legal considerations emanating from Article 5(2) of the Convention, and the principles affirmed by the European Court of Justice on the matter, have been sufficiently outlined in the judgment of the First Court.

11. In essence the principles governing this issue are the following:

11.1 "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."[1]

11.2 "Two aspects to the application of Art. 5(2) have been at the heart of the Court's jurisprudence: firstly whether the *content* of the information conveyed to a detainee is sufficient, and, secondly, the issue of the *promptness* of that information provision. Both are assessed case by case according to the special features of the application before the Court."[2]

11.3 Also, an arrestee must be told in simple non-technical language which he understands of the essential legal and factual grounds of his arrest so that he may attack the lawfulness by challenging it in Court. This does

[1] Art. 5[2] of the Convention
[2] Harris O' Boyle & Warbrick: Law of the European Convention on Human Rights [1995] pg.165

not necessarily have to be made in writing or through a warrant, nor does this information guarantee a right of access to a lawyer[3]. In fact a person need not be expressly informed of the reasons for his arrest in so far as they are apparent from the surrounding circumstances[4]. Also, Art. 5(2) does not require that the reasons for an arrest be given in any particular way[5] and the information given need not be related in its entirety by the arresting officer at the very moment of the arrest[6]; provided he is so informed within a sufficient period following the arrest.[7]

11.4 An arrest on suspicion of committing a crime does not require that information be given in a particular form, nor that it consists of a complete list of charges held against the accused person *[App.no.4949/99* ***Bordovsky v. Russia*** *– 8th February 2003].* A bare indication of the legal basis for an arrest does not suffice, but a 'fairly precise indication' of the suspicions against applicant such that he could promptly gain some idea of what he was suspected of would be deemed enough *[**X v. Germany**1978; **Fox, Campbell and Hartley v. UK** 1990 para. 41]*.

12. *Factual Considerations*

12.1 Applicant's first contention is that his arrest was not lawful in terms of Article 5(2) of the Convention, as, on his arrest, the police did not inform him promptly that he was under arrest, and of the reasons for his arrest.

12.2 In this respect, the First Court came to the conclusion, from the evidence produced before it, that:-

"This Court finds no reason to uphold applicant's allegation that he was not cautioned on being detained

[3] Appl.12244/66, 12245/66, 12383/86 -**Fox, Campbell and Hartley v. UK** [1990]
[4] Appl. 1936/63 – **Neumeister v. Austria** [1968]; Appl.8916/80 **Freda v. Italy** [1980]; and Appl.10179/82 **B v. France**
[5] Appl. 2621/65 **X v. Netherlands**
[6] Appl.110/36 **Ladent v. Poland** – 18th March 2008
[7] Appl. 8828/79 - **X v. Denmark** 1982 – 5th October 1982

nor given a reason for his arrest. He might not have been quoted chapter and verse regarding the charges to be brought against him, but he surely understood or was in a position to understand on arrest and on arrival at the Police station that his detention was in connection with drug related offences. This constitutes in the Court's opinion a fairly precise indication of the legal basis for the arrest and detention till arraignment."[8]

12.3 In a decree dated 23rd April 2012, that is, after the judgment of the First Court, the Magistrates' Court, after having heard PS1174 Adrian Sciberras at the request of the defence, on the mode of arrest of applicant, observed that:-

"Saliently in his original evidence, and the second one, now tendered at this stage of the proceedings, he [PS1174] admitted not having informed Jovica Kolakovic of the reasons of his arrest [emphasis of the [Magistrates Court]"

12.4 Applicant contests the First Court's conclusion that his arrest was lawful, mainly on two grounds: [1] that, that court did not make a correct appreciation of the facts of the case, since, according to him, the court did not take into consideration the fact that PS 1147 Adrian Sciberras, who was the police officer who effected his arrest, gave two different versions, in his testimony before the Magistrates' Court on the one hand, and his affidavit and his testimony in cross-examination on the other; also [2] that he was not cautioned; and even if, *dato non concesso*, he was cautioned, this was not done according to law, since he was not informed of the reasons for his arrest.

13. In this regard the Court considers opportune the following considerations:

13.1 As a rule this Court, as an appellate court does not disturb the appreciation of facts made by the first court,

[8] Pg.14 – fol.643 tergo.

unless it appears manifestly clear that that court had made a wrong appreciation of the facts.

13.2 From the evidence given by the said PS 1147 Adrian Sciberras, and by Inspector Pierre Grech it results that applicant was informed on the spot that he was under arrest and duly cautioned. *"A few minutes later, let's say within the hour"*[9]*,* he was informed that he was being arrested in connection with drugs by Inspector Pierre Grech.

13.3 In this respect it is not amiss to point out that the fact that, during his testimony of the 22nd September 2009 before the Magistrates' Court, PS 1147 had failed to mention that he had cautioned applicant does not necessarily amount to a "different version" from that given by him in his affidavit presented in these proceedings and in his cross-examination before this court, as claimed by applicant, as one has to bear in mind the fact that, on arraignment, applicant, who was assisted by a state-appointed lawyer, declared that *"The defence is not contesting the validity of the arrest"*[10] and at no stage of the proceedings before the Magistrates' Court did applicant, who was always legally assisted, raise the issue regarding the legality or otherwise of his arrest. It was only on the initiation of these proceedings on the 21st August 2011, that is, more than two years from the arraignment, that applicant first raised this issue. Therefore it is quite understandable that the police evidence before the Magistrates' Court on this issue was scarce since, at that time, this was not an issue.

13.4 Moreover, it is to be noted that at no stage did PS1174 Adrian Sciberras state that he had informed applicant of the reasons for his arrest. He only stated that he had informed him that he was under arrest, which fact was also clearly evident from the mode of arrest and the fact that he was handcuffed, and that he had been cautioned according to law.

[9] Vol.2 – fols.452 – 458 Inspector Pierre Grech
[10] Vol.2 – fol.519

13.5 Furthermore, apart from the fact that evidence had been produced showing that applicant was informed of his arrest, the circumstances surrounding his arrest were such as to give applicant "a fairly precise indication" of the grounds for his arrest. In his evidence in cross-examination PS 1174 Adrian Sciberras[11], stated that, when a search of the hotel-room was being carried out, applicant and the co-accused, *"were always present with us"*[12], and that as soon as the drugs were found in the room Police Inspector Grech was informed. At that stage, applicant was still restrained with handcuffs.

13.6 Also in his affidavit he states in more detail that:

"Upon his [applicant] arrest he was handcuffed and I identified myself as a police sergeant and showed him my identification police tag, I informed him that he is under arrest and informed him of his rights … …. When we finished searching the car, which search proved to be in the negative, we all proceeded to room number 9 in Green Grove Guest house … … on searching the said room a carton box with 14 blocks of cannabis grass was found and another separate block wrapped in a newspaper. Upon finding that amount, Inspector Pierre Grech was informed and made arrangements for a magisterial inquiry."[13]

13.7 From the above, it clearly emerges that a few moments after applicant's arrest in the car he was taken to the hotel-room, where he was present during the search effected by the police officers, and so was also present when the packets containing cannabis were found. Therefore, though at that moment no reasons were given for his arrest, it was quite clear that the arrest was in relation to the possession of a substantial amount of cannabis. This was *"apparent from the surrounding*

[11] Fol.588
[12] Fol.588 – PS 1174
[13] Aff. PS1174 Adrian Sciberras

circumstances" which were such as to enable applicant to *"promptly gain some idea of what he was suspected".*[14]

13.8 Finally, as stated by respondent in his reply, from the records of the proceedings before the Magistrates' Court it results that on arraignment the prosecuting officer had read out and confirmed the charges on oath in the English language, and applicant was examined in terms of law and answered not guilty to the charges brought against him. This implies that applicant had understood the charges that were being leveled against him, and, after having consulted with his lawyer, he answered that he was not guilty.

Legal Considerations regarding Art. 3

14. In this respect the Court refers to the case-law of the European Court of Human Rights [ECtHR] as indicated in the case ***A and others v. UK***[15] cited by the First Court. However, in the case at issue it is relevant to reiterate the following principles governing the matter.

14.1 that in the court's assessment of the minimum level of severity account must be taken of all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and in some cases the sex, age and state of health of the victim;

14.2 that treatment qualifies as "inhuman" if, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering;

14.3 that treatment qualifies as "degrading" if it was such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing him; also, regard is had as to whether the object was to humiliate and debase the person concerned, as to adversely effect his/her personality in a manner incompatible with Art. 3;

[14] Supra
[15] App. No 3455/05 - Decided on 19th February 2009

14.4 that "in order for a punishment or treatment associated with it be 'inhuman' or 'degrading' the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment … … *[Ramirez Sanchez Case para.118-119]".*

15. The factual basis on which appellant is basing a violation of this article of the Convention is, in essence, the following:-

i. "The bone of contention is intimately linked with the first breach referred to above [unlawfulness of the arrest] … ... is it not degrading … to have a citizen being dragged out of a car at gunpoint, dragged into a hotel and placed in a bathroom and left there for a considerable period of time without being spoken to? … … it is the firm belief of Jovica Kolakovic that respondent has dealt with him in an inhuman and degrading treatment since … ... as a result of such illegal arrest, he was segregated without being informed as to why, such a segregation took place in a small bathroom, he was manhandled into an awaiting police vehicle and placed in a cell and left there for 24 hours … … in reality this tactic is used solely to 'break' the suspect."[16]

ii. That the records of the proceedings before the Court of Magistrates [Malta] as a Court of Criminal Inquiry "really and truly state that the charges were read … … [however] as a result of misfortune, the testimony of Inspector Pierre Grech for reasons which appellant hopes is the result of transcription errors do not reflect what this prosecuting officer said before the First Court of the Civil Court … … Inspector Pierre Grech stated on oath that probably in this case, what happened in the arraignment was, as happens in nearly all other cases, that the charges were taken as read, and not that they were read out in reality… …. All who practise at Court know that it is the defence counsel who answers this question [whether

[16] Fol.24 - 25

the accused declares himself guilty as charged] before the Court of Magistrates."

iii. That the time allowed to appellant and the co-accused to discuss the case with their legal-aid lawyer, prior to the arraignment, was very short. He states "that the time allotted for introductions and to discuss the way forward, including, but not limited to … any possible contestation of the validity of arrest only lasted a couple of minutes ... ... that the legal-aid lawyer had to comprehend the circumstances pertinent to both co-accused in a very limited amount of time … …. How can the validity of an arrest be contested if the means, the time, the place are not permissible?"

16. On this grievance the First Court observed:

"… that on arraignment as can be evidenced from the records of the criminal proceedings … the charges were read out in English, that is a language which applicant could understand, and he answered not guilty to the charges. Moreover, the defence submitted that it was not contesting the validity of the arrest. This Court deems therefore the allegation of unlawful arrest at this juncture of the case as highly dubious in view of such a declaration made by the court-appointed lawyer, who was substituted a few days later by another lawyer and later a third lawyer and no withdrawal of such a declaration was made at that stage or any stage except in the present proceedings."

16.1 Regarding the first issue based on applicant's allegation that he was dragged out of the car at gunpoint into a hotel and that he was placed in a bathroom and left there for a considerable period of time without being spoken to, this Court observes that the first part of the allegation is not supported by other evidence except the accused's version, and it also runs counter to other evidence produced by the prosecution.

16.2 Also, the second part of the allegation is partly unfounded. The evidence reveals that, during the time police officers were talking to the other co-accused in the

hotel bedroom where the drug substance was found, applicant was put in the bathroom, an adjacent room, under the surveillance of two policemen who did not speak to him. In this regard, the Court observes, firstly, that applicant was under arrest and he had already been informed of his rights, and, secondly, the fact of his segregation was a natural process of the investigation being carried out on the spot at the initial stage, and evidence strongly shows that the purpose of the segregation was in no way meant to "break" applicant, as suggested by him, or to degrade him or to humiliate him in any manner. Moreover, it does not result that he was "manhandled" or that he was left there for "a considerable period of time", and no evidence was brought to show that such events caused him "actual bodily injury or intense physical or mental suffering."[17]

16.3 Regarding the second and third issues, based on applicant's allegation that he did not have proper legal assistance on his arraignment since he did not have enough time to consult with the legal aid lawyer appointed by the Magistrates' Court to represent him, and also that the charges were not read out to him according to law, this Court observes that:-

16.4 Firstly, there is no evidence in support of the first part of the allegation that the time afforded to him to consult with his lawyer was inadequate. Had this been truly the case, his lawyer, or even the accused personally, could have requested the Magistrates' Court to grant a brief postponement of the case to give his counsel more time to consult adequately with applicant and his colleague. However, there is no evidence that such a request was made; on the contrary, the accused through his lawyer declared in the records of the proceedings that he was not contesting the validity of the arrest;

16.5 Secondly, the records of the proceedings show that the charges were read out to the accused in a language which he could understand, he was examined according

[17] Supra.

to law and had replied to these charges by filing a plea of ‘not guilty’. Also no evidence to the contrary was produced; and the fact that the Police Inspector when giving evidence after two years could not recall whether the charges were actually read or taken as read does not weaken the documentary evidence drawn on the date and time of the arraignment in the form of a *verbale* by the Magistrates’ Court; the more so, considering the fact that at no ulterior stage of the criminal proceedings did applicant raise this issue, even though he was assisted by different lawyers of his choice.

In his final note of submissions applicant states that, during the arraignment, it:

“… … emerges from the actual note [verbal] wherein upon raising the conflict of interest issue, the legal aid layer did not as yet know which of the co-accused he was representing! Let alone being able to consider the arrest issues and contesting same!”

The Court observes that from a reading of the said note describing what took place during the arraignment sitting, it results clearly that when the court-appointed lawyer declared that the defence was not contesting the validity of the arrest, it was already made clear by the Magistrates’ Court that he was assisting applicant, whilst another lawyer was appointed by that same court to assist the other co-accused. The relative part of the note [verbal] reads as follows:

“… … …

“Dr Anthony Cutajar explained to the court that there may be a conflict of interest should he assist both the defendants. In the circumstances the court is ordering that Dr Anthony Cutajar assists Jovica Kolakovic in these proceedings, and the court is therefore nominating Dr Renzo Porsella Flores to assist Thomas Mikalauskas after today.

“The defence is not contesting the validity of the arrest.

"The prosecuting officer read and confirmed the charges on oath in the English language … … …."[18]

From the above, it should result clearly that Dr Anthony Cutajar had spoken to both accused before the arraignment, and at the initial stage of the arraignment he informed the court that there "may be" a conflict of interest if he were to represent applicant and the other co-accused. At that stage, the court in very clear terms limited his representation to applicant, after which stage, the declaration that the defense was not contesting the validity of the arrest was made.

16.6 Finally, and without prejudice to the above considerations, the ECtHR has affirmed the principle that the State cannot normally be held responsible for the actions or decisions of an accused person's lawyer because the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal-aid scheme or privately financed.[19]

16.7 In view of the above, applicant's first grievance is unfounded.

The Second Grievance of applicant and The Appeal of the respondent

17. *Applicant's Appeal*

17.1 Applicant indicates Article 6(3)(a), (b), (c) and (d) of the Convention as the legal basis of this part of his appeal. However, from the contents, it appears clearly that this grievance is mainly based on Article 6(1) and (3)(c), in the sense that his fundamental right to a fair trial has been violated since he was not legally assisted at the pre-trial stage during which he released two statements to the police. Also, that this fact led to applicant's inability to

[18] Vol.3 – fol.519

[19] App. No. 38830/97 – para 60 **Czekalla v. Portugal** decided 10/10/2002; App. No. 35228/03 – para 46; and **Bogmil v. Portugal** decided 07/10/2008.

produce in evidence telephonic data from abroad, due the expiry of the one year retention period.

17.2 For the sake of clarity the Court observes that from the records of the proceedings it results abundantly clear that, on arraignment, applicant was assisted by a state-appointed lawyer, the charges were read out to him in a language which he could understand and therefore the nature and cause of the charges leveled against him were clear to him at that initial stage of the judicial proceedings. Also, there is no evidence showing that before the Magistrates' Court he had been denied the possibility of bringing evidence or that a request was made to that effect.

17.3 In this part of his appeal, applicant feels aggrieved by the fact that the judicial declaration made by the First Court that there was a breach of Article 6(1) of the Convention, as he was not assisted by a lawyer in the pre-trial stage, is not by itself a sufficient remedy for the breach. He argues that, as a result of this breach, telephonic data from abroad which was necessary for his defence had been lost; that the police had limited their investigation only to the extraction of telephonic data from the mobile phones found on the applicant and the co-accused, and did not investigate further to obtain all possible evidence in this regard as they are bound to do by law. In the light of this legal obligation on the part of the police, he argues:-

"… … wasn't appellant's previous defence counsel correct in insisting that the prosecution could preserve the evidence prior to the defence's official request by means of letters rogatory? Now, therefore, in the light of the fact that respondent had at its behest tools with which to preserve evidence that the <u>defence desperately needs</u>[20] to defend its position during the consequential trial by jury, does not this Court agree that a serious imbalance is to be suffered by appellant as a result of respondent's actions?"

[20] Underlining by the Court

17.4 Respondent rebuts these allegations using the following arguments. Firstly, the Magistrates' Court was in a better position to grant a remedy than the First Court, since the whole evidence of the case was produced before that court, which therefore would be in the best position to evaluate all the circumstances of the case in the light of the entirety of proceedings pending in front of it before giving the most appropriate remedy; secondly, at no stage did applicant request the removal of the statements released by him; thirdly, the fact that applicant's case may end up in a trial by jury should not prejudicial to him, since jurors are directed by the presiding judge; fourthly, that the evidence shows that at the pre-trial stage, though he was not legally assisted, applicant gave no information to the police and kept claiming that he was not involved with the activities conducted by the other co-accused; and finally, no request was made by him for the preservation of telephonic data from abroad. In fact, even though since his arraignment in September 2009 applicant was always assisted by a lawyer, he did not even bother to make at least a generic request with a view to preserving and obtaining telephonic data until ten months later in July 2010. On this issue respondent argues:-

"If applicant was so convinced that such data could be used to his advantage, as he claims, why did he remain passive for so long? So how can he now blame the State for "loss of precious time"?

17.5 Regarding this breach, the First Court reached the conclusion that the fact that applicant was not assisted by a lawyer in the pre-trial stage was in violation of Article 6(1). However there was no violation of subsection (3) of the said Article, considering that, on arraignment, applicant was assisted by a lawyer, that the charges were read out to him in a language which he could understand, and that there is no evidence in support of applicant's allegation that the services of the state-appointed lawyer were perfunctory. The First Court observed that no

requests were made by applicant before the Magistrates' Court :-

"… … even after applicant engaged his own legal counsel four days after arraignment, and therefore at a very early stage of proceedings wherein these allegations could have been put forward and not two years later in this second constitutional case brought forward by applicant."[21]

18. *Respondent's Appeal*

18.1 Respondent is appealing from that part of the First Court's judgment whereby that court found a breach of applicant's fundamental right as contained under Article 6(1) of the Convention, in so far as during the pre-trial stage he was not assisted by a lawyer.

18.2 Respondent states that according to the jurisprudence of the European Court there is no universal principle in the sense that there is an automatic breach of Article 6(1) if a detained person is not assisted by a lawyer at the pre-trial stage; and that in the determination as to whether the right of fair hearing has been breached, an analysis of the particular and individual circumstances of each case have to be made. Consequently, no valid comparison can be drawn from the case **The Police *v*. Alvin Privitera**[22] cited by the First Court since the circumstances in that case are remarkably different from the present case, chiefly in that in that case defendant, though not a minor, was eighteen years and four months old, whilst in the present case applicant is a mature adult, married with children and runs a business abroad.

18.3 Also, in the present case, it was applicant himself who, without undue pressure, decided to waive his right to stay silent and release a statement to the police, and subsequently, on his request, release a second statement, in both cases denying his involvement in any

[21] Judgment – pg.16 – fol.644 tergo
[22] App. Civili 20/2009/1 – decided on 11th April 2011.

illegal activity. Moreover, in his evidence before this Court, applicant, on being asked whether he felt prejudiced by his second statement, whereby he also confirmed the contents of his previous statement, replied in the negative.

18.4 Respondent also states that, whilst in the *Alvin Privitera case* and in the case **Salduz *v.* Turkey** the statement was the only element of proof against the accused, in the present case, the statements, whilst not being prejudicial to applicant, are the not only evidence against him.

19. *Legal Assistance during pre-trial stage*

In this regard this Court make reference to its judgment of the 8th October 2012, in the names **Charles Steven Muscat *v.* Avukat Ġenerali**, and to the caselaw mentioned therein.

20. In essence the following principles govern this issue:

20.1 Article 6(1)(3)(c) granting the right of legal assistance to a person charged with a criminal offence has been considered by the jurisprudence of the European Court of Human Rights to extend to the pre-trial stage[23];

20.2 This legal provision does not grant an absolute or an automatic right to legal assistance, and, as stated in **Imbrioscia *v*. Switzerland**[24] "Other requirements of Article 6 – especially of paragraph 3 – may also be relevant before a case is sent for trial <u>if and in so far as the fairness of the trial is likely to be seriously prejudiced</u> by an initial failure to comply with them";[25]

20.3 The alleged violation has to be examined in the light of the entirety of the proceedings[26], though even if during

[23] ECHR **Panovits v. Cyprus** – 11th December 2008; Appl. 46221/99 **Ocalan v. Turkey** - 12th May 2005; Appl. 13972/88 **Imbroscia v. Switzerland** – 24th November 1993 : cited in the Alvin Privitera Case.
[24] Imbroscia Supra
[25] Underlining by this court
[26] ECHR Appl.77649/2001 **Ahmet Mete v. Turkey** – 25th April 2006

the proceedings it manifestly appears that the right to a fair hearing has been prejudiced, the accused may validly institute constitutional proceedings to obtain a remedy at that stage[27];

20.4 "In order for the right of fair trial to remain sufficiently practical and effective Art. 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. Moreover, even when compelling reasons may exceptionally justify denial of access to a lawyer – whatever its justification – these must not unduly prejudice the rights of the accused under Article 6. The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[28]

20.5 "National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defense in any subsequent criminal proceedings."[29] As indicated in **Charles *sive* Steven Muscat *v*. Avukat Ġenerali** afore-mentioned, the reference in this paragraph is to the concept of adverse inference against the suspect who chooses not to answer the questions put to him during the interrogation.

20.6 "This right [to assistance by a lawyer] indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."[30]

21. In the case at issue, the following considerations are relevant:

---

[27] Q.Kos. Alvin Privitera case – pg.23 – para.3
[28] ECHR Appl.36391/02 **Sarduz v. Turkey** - 27th November 2008
[29] Ibid – para. 52
[30] Sarduz – para 54

21.1 The arrest was effected in September 2009, that is prior to the introduction on the 10th February 2010[31] of Article 355AT, and Article 355AU of the Maltese Criminal Code which latter article introduced the concept of inferences from failure by the suspect to mention facts. Therefore, in the present case, applicant, who is a mature adult, could have availed himself of the right to remain silent and not answer any of the questions put to him during the interrogation, and he could do so without burdening himself with any consequences at law, since at that time the concept of adverse influence did not form part of the Maltese Criminal Code.

21.2 Applicant however opted to answer the questions put to him, thereby releasing the first statement. The next day, on his request, he released a second statement. In both cases he had been duly cautioned, but he chose voluntarily to release the statements which are not incriminatory, and in which he denied any involvement in anything wrong. Therefore, it can safely be said that the statements were not prejudicial to him, a fact which he himself confirmed in his evidence of the 20th September 2011. Also, though legally assisted throughout the criminal proceedings, he did not retract his statements, which is quite logical since he had stated that he did not consider them prejudicial to his case.

21.3 Also, from the evidence produced, it appears clear that the statements released by applicant are not the only elements of proof brought by the police.

21.4 Applicant claims that:

"Had the State allowed for the right to a lawyer at the time of appellant's arrest, had such a lawyer assisted appellant, had the state introduced the doctrine of disclosure, the police would have been in a better position to abide by the overriding duties in terms of article 346 of the Criminal Code. Had such systems been in place as of the 8th September 2009, no loss of telephonic data would have occurred in this case."

[31] Legal Notice 35/2010

21.5 In short, applicant attributes the loss of telephonic data, which according to him was necessary for his defence, to the fact that at the time of the arrest he was not legally assisted.

22. The Court observes that this conclusion is not borne out in any way by the evidence produced. Evidence shows that applicant was arrested on the 8th September 2009, on the 9th he released the first statement, and on the 10th September he released his second statement and was arraigned on this same date. From the moment of his arraignment onwards applicant was legally assisted. During his arraignment he was assisted by a state-appointed lawyer, and after four days he was assisted by a lawyer of his choice. On the 6th July 2010 applicant, through his counsel, made a generic request for telephonic data from the United Kingdom for the period. On the 19th July, the Criminal Court ordered applicant to adhere by the procedure laid down by law, as requested by the Attorney General. On the 27th September 2010 applicant filed a request for Letters Rogatory, in terms of Article 399 of the Maltese Criminal Code, to be sent to the United Kingdom. Since this application was filed incorrectly, applicant filed another application on the 1st October 2010 requesting telephonic data for a specified period. On the 10th December 2010 Letters of Request were forwarded to the UK Central Authority, but these could not be processed for lack of proper documentation. On the 3rd March 2011 applicant filed fresh letters of request, which were forwarded to the United Kingdom authorities on the 17th March 2011.

23. By the time applicant filed correct Letters of Request covering a specific period, the year for the data retention period in the UK had already elapsed, with the result that that data could not be produced as evidence in the criminal proceedings.

24. As respondent rightly points out, had this telephonic data been so vital for applicant's defence, why did applicant let so much time pass before he made the first

request, which request was not even in conformity with the law? Respondent rightly argues: “If applicant was so convinced that such data could be used to his advantage, as he claims, why did he remain passive about it for so long? So how can he now blame the State for ‘loss of precious time’?”

25. For the above reasons, the Court observes that although, during the pre-trial stage, applicant was not legally assisted, it cannot validly be said that this fact has seriously prejudiced the fairness of his trial. Therefore there is no violation of Article 6 of the Convention. Consequently respondent’ s appeal is justified and is being upheld, whilst applicant’s appeal in this regard is unfounded and is being rejected.

The Third Grievance

26. In essence, applicant’s third grievance is that the First Court had made a wrong appreciation of fact, by discarding the evidence of applicant’s wife and the documents exhibited. Also, that the Magistrates’ Court’s refusal to reduce the bail deposit was in violation of his rights under Article 5 sub-sections (3) and (4) of the Convention.

27. On his part respondent rebuts applicant’s claim stating that the First Court’s appreciation of the facts was correct, and that the refusal by the Magistrates’ Court to reduce the bail deposit was justified by the seriousness of the charges brought against applicant, and the lack presentation of proper supportive documentary evidence regarding his financial position. In fact, as the first court observed, it was during these proceedings that further documentation in this regard was exhibited.

28. This grievance is based on Article 5(3)[32] and (4) of the Convention. Sub-article 4 reads as follows:-

[32] Supra

"(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

29. Regarding the legal principles governing the issue of the reasonableness of the bail conditions and the unlawfulness of applicant's detention, this Court, to avoid unnecessary repetition, refers to the legal observations made by the First Court. However, suffice it to reiterate at this stage that, though the bail conditions, particularly the monetary ones, must be reasonable and not exaggerated, having regard also to the financial position of the accused and the seriousness of the offence, there is a serious obligation on the part of the accused to give sufficient and clear information in good faith regarding his financial position.

30. The following are the facts relevant to this grievance:-

31. On the 18th January 2011 applicant had been granted bail by the Magistrates' Court against a deposit of €50,000 and a personal guarantee of €15,000.

32. In the meantime, this Court in a judgment given on the 14th February 2011 in the names **Jovica Kolakovic *v*. Avukat Ġenerali**[33] found that applicant's continued detention was in violation of Article 5 subarticles (3) and (4) of the Convention.

33. On the 22nd February 2011 the Magistrates' Court reduced the deposit to €40,000, and increased the personal guarantee to €60,000.

34. On the 4th May 2011 the said court reduced further the deposit to €15,000, and reduced also the guarantee to €30,000.

[33] Appl. No.26/10

35. On the 22nd July 2011 that same court gave the following decree:-

"[The Court] after hearing Mrs Kolakovic's evidence, considered that the matrimonial home, although burdened with a substantial mortgage – as evidenced from the documents presented – is still owned by applicant and his wife and is a substantial property nature – this also resulting from other documents presented. It also resulted from Mrs. Kolakovic's evidence that she had to sell the family shoe business, implying the intake of a substantial amount of money with the family.

"It is also noted that the photographs of the residential home presented show that the Kolakovics are not a standard family.

"The Court also makes reference to Attorney General's reply and the various court decrees already handed down, and considers that applicant's request should be denied, also [having] regard to the fact that the bail deposit of €15,000 is very much commensurate with the charges proffered against him, the fact that the accused has no family ties with this Island, or, if it comes to that, any other ties of any nature whatsoever. Therefore the Court sustains that the deposit being asked is just and equitable in the circumstances of the case."[34]

36. On the 14th March 2010, subsequent to the judgment of the First Court, the Magistrates' Court reduced the bail deposit even further to €7,000 and increased the personal guarantee to €60,000. Also on the 23rd April 2012, the Magistrates' Court again reduced the bail deposit to €5,000, and increased the personal guarantee to €70,000, and on this same date applicant was released on bail under the conditions laid down in the last decree.

37. On this issue the First Court, whilst observing that applicant's wife gave evidence on two occasions before

[34] Fol.19 - 20

the Magistrates' Court and on one occasion before this Court, and after having given a brief summary of her evidence, and examined the documents produced, came to the conclusion that the supporting documents were insufficient to corroborate applicant's wife's version of his financial situation.

38. The following extract from the First Court's judgment is relevant:-

"The Magistrates Court based its decrees on bail conditions on information supplied by applicant. Up to the date of its last decree there were insufficient financial and personal details available to the Court with which to evaluate the 'reasonableness' of the conditions being imposed. More information has been made available at this stage, and applicant cannot [validly] criticise the Magistrate's Court decisions when he himself brought no clear evidence of his financial and present situation, till late 2011.

"The Court finds that there is no justification in applicant's allegation that the conditions posed by the Magistrates Court up to its latest decree in any way were unreasonable since the court had no yardstick to measure the reasonableness of the conditions. At this present state of affairs however, applicant's personal and financial situation are more apparent and more detailed even though not exhaustive. This Court invites the Magistrates' Court to re-evaluate the conditions of bail following an eventual application by applicant to revisit these conditions."[35]

39. Applicant feels aggrieved by the fact that according to him the First Court did not give due weight to the evidence brought by applicant both before the Magistrates' Court and before the First Court; that the Magistrates' Court when refusing to reduce further the bail bond "made a factual mistake in confusing 'closing down' of a business with 'selling a business', which error has not

[35] Fol.649

been rectified to this date. Also, no due weight was given to the evidence of applicant's wife who explained under oath the financial circumstances of her family.

40. He states that he had presented documentary evidence showing when the company owned by him was struck off by Companies House in the United Kingdom, and the grounds for which it was struck off. Also an extract of his bank statement was exhibited to demonstrate the prevailing financial situation, together with the current lease agreement for Kolakovic's residence in Malta.

41. Applicant further claims that the first court:

"… … chose only to refer to the documents filed by the Attorney General which demonstrate the outstanding debt of appellant's family home, which during the course of the initial proceedings was taken by means of foreclosure procedures by the relevant bank. Documents to this effect are not yet in hand and should they so be during the hearing of this appeal such documents shall with permission be brought forward."

42. *Court's Considerations*

42.1 As already stated above, this Court, as an appellate court, does not as a rule, disturb the judgment reached by the first court on appreciation of the facts, except in cases of manifest error. In this case, the Court observes that the First Court had examined the evidence available before it before pronouncing judgment and had remarked that during these proceedings new evidence was produced consisting in documents[36] and the applicant's wife's testimony given on the 20th September 2011[37]. It invited the Magistrates' Court to reconsider the bail conditions in the light of the fresh evidence produced during these proceedings.

[36] Vol.2 – fols.353 et seq.
[37] Vol.2- fols.341 et seq.

42.2 In this regard, this Court observes that from the 18th January 2011, when bail was first granted, the bail deposit was reduced by the Magistrates' Court twice, on presentation of further evidence by applicant, and that it was only during these present proceedings, by a note filed on the 2nd November 2011, did applicant present further documentary evidence regarding his financial situation, whilst, before that date, the evidence before the Magistrates' Court was scanty, except for the fact that applicant and his wife owned property worth £700,000, with a mortgage of £381,000 as well as a shoe business. In the circumstances it cannot be said that the bail deposit of €50,000, which was later reduced to €40,000, and later reduced even further to €15,000 can be considered as unreasonable, bearing in mind the seriousness of the charges.

42.3 In fact, on the 14th March 2012, following an application filed by applicant before the Magistrates' Court, the bail deposit was reduced, as indicated above, and, following a verbal request by applicant during the sitting of the 23rd April 2012, that same court reduced even further the bail deposit to €5,000.

42.4 Applicant complains that he has been unjustly criticised by the First Court for not bringing clear evidence of his financial situation till late 2011, and questions whether the said court would have reduced the initial bail bond from €50,000 to €15,000 had this been the case; he also asks whether that court had realised that the reduction in the said amount was due to repeated submissions by applicant and the presentation of the same evidence.

42.5 In this regard the Court observes that it is incorrect for applicant to state that the first court had reduced the bail on the same evidence and as a result of his repeated submissions, since there was another important factor underlying the Magistrates' Court reasoning for making the said reduction, this being the judgement given by this court on the 14th February 2011 finding a violation of Article 5 sub-articles (3) and (4) vis-à-vis applicant. Also,

there was the passage-of-time factor, examined in the light of the fact that, though bail had been granted to applicant guaranteed by a substantial amount of money, still he could not meet the financial conditions imposed. In fact the bail deposit was reduced further by the Magistrates' Court in view of the fact that, with the passage of time and from the documentary evidence produced by him, it was becoming apparent that applicant, notwithstanding the reductions in the bail deposit, could still not meet the conditions, and with the passage of time the initial grounds for pre-trial detention was becoming less relevant.[38]

The Fourth Grievance

43. This grievance is based on Article 3 of the Convention, and refers to applicant's dental problems and treatment whilst he was held under preventive custody.

44. The facts regarding this grievance and the relative legal basis are adequately outlined in the judgment of the first court, and there is no need for repetition. At this stage, suffice it to say that during the time applicant was held in preventive custody he was in need of dental treatment regarding his porcelain bridge which had become loose. Though treatment was offered to applicant, both at Mater Dei Hospital and at a private dentist's clinic, applicant complains of lack of medical assistance by the prison authorities. He claims that:

"The First Court did not gauge sufficiently the fact that the bridge offered to Kolakovic both by the prison dentist and the state hospital were of an inferior standard to what applicant had prior to his detention. The First Court of the Civil Court also failed to appreciate the documentary evidence exhibited by respondent together with the affidavit of the acting prison director Supt Abraham Zammit, ie the list of funds held by applicant. No mention and no reference to this document are made. Had the

[38] ECHR **Labita v. Italy** – 6/10/2006

First Court analysed this document against the testimony of Kolakovic on this point, it would have clearly transpired that he was in possession of sufficient funds to pay his privately engaged dentist … … this did not occur, since the prison authorities delayed this payment due to their inertia. Such a delay in payment continued to worsen appellant's dental health …"

45. He also claims that:

"Had Kolakovic been granted bail according to law, Kolakovic would not have had to rely on the prison authorities for his dental health, but would have naturally dealt with it himself, just like any free person would have done."[39]

46. In this respect the First Court observed:

"that the issue at stake was one of the remedial procedures which applicant wanted to be carried out on his teeth and the cost of such procedures. There is no doubt that this issue dragged on for too long a period in which applicant's dental health degenerated … …. However, the Court finds it hard to accept that the delays were the responsibility of the prison authorities… …. What transpired from the evidence is that as early as March 2010 when applicant had already been referred to Mater Dei State Hospital, there was the possibility that a denture replacement could be effected free of charge. However applicant wanted inplants which procedure was not carried out at Mater Dei Hospital, as it was not state-funded. There is then a significant gap of time namely till July 2011 till applicant had impants made in a private clinic which he described as still unsatisfactory. The main reason for this undue delay seems to be lack of funds… … …. Evidence shows that before the inplants some remedial dental procedures were done privately by applicant but this was stopped because of non-payment of bills. Here again no direct link established, at least from the records before this Court, that this was due to the fault

[39] Fol.38 - 39

of the prison authorities, even though the Court concedes bureaucratic proceedings on the part of the prison authorities might not have helped the situation in being resolved at an earlier time. However, this fact alone does not attribute fault for applicant's exacerbated dental problems directly to the prison authorities, nor can it be said that there was contributory responsibility on their part. The records show … … that between February 2010 and November 2011 applicant was granted innumerable visits to see a private dentist and therefore it cannot be [validly] said that applicant's dental condition evolved in consequence of a violation of his fundamental human rights."

47. As already stated above, this Court, as an appellate court, does not in principle disturb the appreciation of facts made by the First Court, except in the case of manifest error, or in the case that the conclusion of the First Court could not have been arrived at by a reasonable appreciation of facts. In this case the Court notes that there is satisfactory evidence showing that the deterioration in applicant's dental condition and the delay in treatment was not attributable to the prison authorities but to the fact that applicant wanted a type of treatment which was not afforded at Mater Dei Hospital free of charge, and so he refused treatment at this hospital, and instead engaged the services of a private dentist who, after treating applicant, refused to continue treatment until the dentistry bills were paid. Also, applicant's delay in effecting payment of his dentist bills contributed to the delay in the treatment.

48. Evidence shows that on admission to the Corradino Correctional Facility, on the 10th September 2009 applicant was medically examined by the Facility's doctor, and hr had since attended the clinic eleven (11) times. He was also seen by the Facility's dentist, and on the 13th January 2010 was referred to Mater Dei Hospital. On his refusing treatment and requesting private treatment, the Magistrates' Court authorization was granted on 19th January 2010 for applicant to be treated in a private clinic where he attended for four appointments in 2010, and 10

appointments in 2011. The cost of the transport and that of the escorting officers were not charged to the prisoner.[40]

49. The Court observes that applicant's first allegation that the bridge offered to him both by the prison dentist and the state hospital were of an inferior standard to what he had prior to the detention is gratuitous and not supported by satisfactory evidence. In his evidence Doctor Alexander Azzopardi, Consultant Dental Surgeon at Mater Dei Hospital, confirms on oath that applicant's dental bridge could not be fixed again in place, and applicant refused the treatment suggested by him which was offered for free in the state hospital. This explains why applicant refused treatment at Mater Dei Hospital, and opted to have private treatment.

50. Applicant's second allegation is that the delay in payment of the dentist's bill was due to the *inertia* of the prison authorities, and the First Court had failed to examine the documentary evidence attached to Superintendent Abraham Galea's affidavit in the light of applicant's testimony on this issue. This Court observes that, firstly, there is nothing in the judgment of the First Court suggesting that this part of the evidence was not duly examined; and secondly, from the said affidavit and the attached documents it results that the prison authorities had received, on behalf of applicant, the sum of €2,500 on the 20th June 2011, and the dentist's bills of €1,000 and €1,030.68 where paid on the 1st and the 27th of July 2011, apart from other relatively small payments made.

51. Finally, applicant's argument that, had he been released on bail, he would have dealt with the issue himself is, in the opinion of this Court, a non-starter, since his dental condition was not a relevant factor to be considered in the bail issue, once treatment could be given, and was in fact given, to applicant, even though in preventive custody, with the help of the prison authorities.

[40] Aff. Supt. Abraham Zammit Director CCF – Fols.500-501

52. For the above reasons this grievance is not sustained by the evidence produced, and is being rejected.

Conclusion

For the above reasons, this Court rejects applicant's appeal, and upholds respondent's appeal, thereby revoking that part of the judgment where the First Court had found a violation of Article 6 of the Convention, whilst confirming the rest of the judgment in its entirety.

The entire cost of these proceedings, at first and second instance, are to be borne by applicant.

< Final Judgement >

----------END----------