MALTA

CONSTITUTIONAL COURT

HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI

THE HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE
NOEL CUSCHIERI

Sitting of the 25 th October, 2013

Civil Appeal Number. 49/2012/1

The Police; (Inspector Raymond Aquilina); (Inspector Jesmond J. Borg)

v.

Austine Eze and Osita Obi Anagboso

Preliminary

1. This is an appeal filed by the Commissioner of Police and the Attorney General [appellants] from a judgment given on the 2nd of August 2012 by the First Hall Civil Court in its constitutional jurisdiction, in respect of Osita Anagboso Obi [defendant] following a constitutional

reference made by the Court of Magistrates [Malta] as a Court of Criminal Inquiry, which reference essentially reads as follows:
"That the consititutional issue raised by accused be referred to the First Hall of the Civil Court in its constitutional jurisdiction so that the said Court decides whether there has been a violation of art.34 and 39[1] of the Constitution of Malta and articles 5 and 6 of the European Convention of Human Rights due to the fact:

"1. That the accused is being deprived of his freedom by the fact that he is unable to pay the bail bond ordered by this Court when granting him bail on the 2nd May 2011, which court order was subsequently amended by the decree of the 13th June and the 21st November 2011.

"2. That the case is not being tried by the Court in a reasonable time according to law due to the fact that the Prosecution has requested the Court to hear evidence by letters rogatory at a late stage in the proceedings."

2. By virtue of the afore mentioned judgment the First Hall decided as follows:

"1. The condition that Osita Anagboso Obi deposits the sum of six thousand euro (€6,000) is, under the circumstances, in breach of Article 5(3) of the European Convention.

"2. The court orders that the bail conditions are not to include a deposit of money by Osita Anagboso Obi.

"3. Rejects Osita Anagboso Obi's claim that his right to a fair trial within a reasonable time as guaranteed by Article 39 of the Constitution and Article 6 of the European Convention has been breached for the reason mentioned in the order dated 20th June 2012. However the court advises the Court of Magistrates (Malta) as a Court of Criminal Inquiry to immediately take appropriate measures to establish:-

"i. What is the reason for the delay by the United Kingdom to forward the replies to the request, and if necessary to establish direct contact with the judicial authorities in that country.

"ii. What measures have been taken and are being taken, if any, by the Attorney General to have matters expedited by the requested State/s, and to give any order it deems appropriate to ensure that the Attorney General is diligently pursuing this matter with the foreign authorities.

"Expenses are to be incurred by the Attorney General and the Commissioner of Police."

3. In their appeal application, appellants are requesting this Court to amend the judgment by revoking that part of the judgment where the first Court found a breach of the accused's fundamental human rights with respect to the first and second heads of the judgment, and instead to declare that there is no breach whilst confirming the third head; expenses of both instances to be borne by defendant.

4. Defendant did not submit a written reply; however, in his oral submissions he requested that the appellate judgment be confirmed, for the reasons given by him in the said submissions.

The Facts

5. The relevant facts which have given rise to the issues raised in the reference order are the following.

6. Defendant was arrested on the 11th March 2010, and on the 13th March he was arraigned and charged with having committed acts of money laundering, as defined in Article 2 of the Prevention of Money Laundering Act [Chapter 373 of the Laws of Malta], which crime carries a maximimum fine of two million, three hundred twenty nine thousand, three hundred and seventy three Euro and forty

cents (€2,329,373.40), or imprisonment for a period not exceeding fourteen (14) years, or to both.

7. On the 2nd May 2011, following an application filed by defendant requesting bail, the Magistrates Court granted him bail under certain conditions, amongst which is the deposit of ten thousand Euro (€10,000) and a personal guarantee of ten thousand Euro (€10,000). The reasons given by that court for the granting of bail were that the prosecution had almost concluded all its evidence, and that the accused had been in preventive custody for more than a year.

8. On the 13th June 2011, following a second application by defendant requesting a reduction of the bail bond, the deposit was reduced to seven thousand Euro (€7,000), whilst the personal guarantee was raised to fifteen thousand Euro (€15,000) after the court had considered and expressly stated that it was impossible for the accused to deposit the sum of ten thousand Euro (€10,000).

9. On the 28th September 2011 the Magistrates Court acceded to appellants' request for the issue of letters rogatory to the United Kingdom, The Netherlands and Germany. No specific reasons[1] were indicated in the relative decree, or were registered in the notes of the relative sitting, for the issue of these letters. The said court then, after indicating Article 402 [1][c] of Chapter 9 of the Laws of Malta, ordered that the time limits for the conclusion of the inquiry be held in abeyance, and adjourned the sitting for a specified date.

10. On the 21st November 2011, following a third request by defendant, the Magistrates Court reduced the deposit further to six thousand Euro (€6,000), without stating its reasons in the decree.

11. On the 25th January 2012 defendant presented another application requesting a further reduction of the

[1] According to Article 399 of the Criminal Code, evidence by commission can be ordered by the Magistrates Court if the examination of any witness or any other process of the inquiry by an authority outside Malta is "indesponsably necessary."

deposit. However this request was denied; no reasons were indicated in the relative decree.

12. In all applications appellants had objected strongly to the granting of bail to defendant on the grounds that the latter has no ties with Malta, and has no interest in remaining here.

13. By a note filed on the 4th May 2012 appellants presented the documents transmitted by the Dutch authorities.

14. By a subsequent note filed on the 4th July 2012 appellants presented the documents sent by the German authorities.

15. On the 3rd and 6th August appellants presented the documents sent by the United Kingdom authorities.

16. Also on the 3rd August, following the judgment given by the First Hall, the Magistrates Court revoked the bail condition relating to the deposit of six thousand Euro (€6,000).

17. During the sitting of the 17th September 2012 appellants had declared before the Magistrates Court that *"in view of the fact that all letters rogatory have been filed, the Prosecuion delcares that it has further evidence to produce.*"

The Appeal

18. Appellants are basing their appeal on four grievances, relating to [1] the exclusive competence of the Magistrates Courts to decide on the bail conditions; [2] the amount of the bail bond as security for the observance of the bail conditions; [3] the financial circumstances of defendant; [4] the costs of the proceedings.

The First Grievance

19. This grievance concerns that part of the judgment whereby the first Court ordered that the bail conditions are

not to include a deposit of money by defendant. Appellants maintain that the first Court, sitting in its constitutional capacity, does not have the competence to review the bail conditions fixed by the Magistrates Court and order the removal of the deposit amount indicated in the bail bond. Once the first Court found that the amount of the deposit is in breach of the Convention it should have remitted the acts of the criminal proceedings to the Magistrates Court to reconsider the conditions for granting bail to the accused in the light of its decision, thereby leaving the fixing of the bail conditions within the exclusive competence of the Magistrates Court.

20. As this Court has had occasion to state in **The Police v. Nelson Arias** decided on the 28 September 2012:

"… … as a rule, whenever a constitutional reference is made to the First Hall Civil Court under Article 46[3] of the Constitution that Court's function is circumscribed by the terms of the reference made to it, and that court is required to limit itself to giving its replies to the questions referred to it by the referring Court [*Q.Kos Glenn Beddingfield v Kummissarju tal-Pulizija et 31/07/2000 Vol.XXXIV.i.232; Q.Kos.Nazzareno Galea v Giuseppe Briffa et 30/11/2001 Vol.XXXV.i.540; PA.[K] Pulizija v Frank Cachia 16/02/2011]"* [para.55]

21. In the present case, appellants' grievance, that the first Court went beyond its competence when it ordered that *"the bail conditions are not to include a deposit of money",* is justified, as the first Court's competence was limited by the reference to decide whether or not the condition in question was in breach of the Constitution or the Convention. It was then for the Magistrates Court to dispose of the issue in accordance with the judgment of the Constitutional Court.

22. For this reason, this grievance is considered justified and the appealed judgment will be varied accordingly.

The Second and Third Grievances

23. The Court will be considering these grievances together since they are closely connected. In brief, the first grievance concerns the reasonableness of the amount of the bail bond to be deposited as security for the observance of the bail conditions. The second grievance relates to the factors to be considered by the Magistrates Court in granting bail.

24. In substance, by the first grievance appellants claim that it was reasonable for the Magistrates Court to grant bail to defendant only on condition that he deposits the sum of six thousand Euro (€6,000) as a guarantee for the observance of the bail conditions, chiefly that of his obligation to appear for the trial. Defendant has no ties with this country, and even though he states that his children live in Germany, he still has strong family ties in Nigeria, a country which is not a member of the European Union, and where the issue of a European Arrest Warrant would be ineffective.

25. Appellants argue that *"... ... it follows that if the ... deposit is not adhered to, the said Court considered that it was not reasonable in the circumstnaces to grant bail to the accused without the condition of depositing the said amount."* If the accused is not in a position to deposit the said amount, it follows that the concession granting bail should be revoked, and not that the guarantee be removed. Quoting **Wemhoff v. Germany** appellant states that the imposition of conditions by way of a guarantee to ensure the presence of the accused at the trial is permitted by the Convention. Therefore if the accused cannot afford to pay the pecuniary deposit fixed by the Magistates Court, then it follows that the Court can reject the bail application if *"the only remaining reasons for continued detention is the fear that the accused will abscond."* **[Wemhoff]**. This applies even more in the circumstances of this case, where defendant holds a Nigerian passport and is being investigated in Germany where he had last resided before travelling to Malta.

26. Appellants also point out that, though the first Court stated that there was no evidence showing that defendant

is being investigated by the German authorities with regards to drug trafficking, the information obtained through letters rogatory from Germany show otherwise, as that evidence is to the effect that as a result of a search effected in defendant's apartment in Germany "a not insignificant amount" of cocaine and marijuana were found in his apartment. Therefore it is unlikely that, if he leaves Malta, he will return to Germany.

27. Through their third grievance appellants complain that the first Court should never have ordered the removal of the deposit condition, simply on the basis that *"From the records of the criminal proceedings there is no record whether any information was requested to assess the financial circumstances of the accused."*[2] As can be seen from the letters rogatory the prosecution had included specific requests to the foreign competent authorities regarding the financial circumstance of the accused.

28. Also as it clearly emerges from Article 576 of the Criminal Code, as well as from the wording of Article 5[3] of the Convention, in fixing the bail conditions regard must be had to <u>both</u> the subjective and the objective criteria, that is, the financial situation of the accused, on the one hand, and the nature and quality of the offence and the maximum punishment it carries.

29. Appellants state:

"... … the Honourable First Court reduced this matter merely to the subjective element of the accused and in practice the Court decided that since the accused convinced the Court that he has no means to deposit the amount of €6,000 it follows that the accused should be granted bail without the requirement of depositing a pecuniary guarantee. This conclusion, with all due respect, does not take into consideration the objective element, that is, the necessity that the considerations for the grant of bail will be such as to ensure that the accused adheres to the court orders and appears for trial."

[2] Pages 5 and 6 of the judgment

30. On his part defendant, whilst claiming that he is completely destitute, and therefore unable to satisfy any monetary requirement for the granting of bail, argues that due regard must be had to the length of time he has already served in detention and the fact that the proceedings before the Magistrates Court were being protracted unduly by the prosecution.

31. In declaring that the first Court was satisfied with defendant's version that he has no money to deposit by way of security, that Court has done a correct appraisal of the facts, and in the absence of manifest error, or evidence to the contrary, that appraisal of the facts should not be disturbed by an appellate Court.

32. The relevant part of the appellate judgment reads as follows:

"**Complaint with regards to his detention**.

"Article 5(3) of the European Convention provides:-

""Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.".

"It is evident that the point at issue is not whether Osita Anagboso Obi should be granted bail, since this was granted on the 2nd May 2011. Unfortunately he is still in detention as he claims that he does not have the sum of €6,000 to deposit in court. As a matter of principle, *"Where the danger of absconding can be avoided by bail or other guarantees, the accused must be released, and there is an obligation on the national authorities to consider such alternatives to detention. Moreover, in those countries which have the system of bail on financial sureties, the amount of the sureties must not be*

excessive, and must be fixed by reference to the purpose for which they are imposed, namely to ensure that this particular defendant appears for trial. The sum must never be set exclusively by reference to the seriousness of the charge without considering the accused's financial circumstances." (*The European Convention on Human Rights*, Jacobs, White, & Ovey[3]).

"There is no doubt that the bail conditions imposed by the court are intended to serve as a deterrent to the accused from absconding. The accused has absolutely no ties with Malta. On the 10th March 2010 he arrived in Malta, on his first visit, and was supposed to leave the day after. In fact he was arrested at the Malta International Airport.

"The Constitutional Court, in the case **Richard Grech vs Avukat Generali[4]** held:

""*L-ewwel Qorti wara li ghamlet referenza ghall-principji stabbiliti mill-Qorti Kostituzzjonali fir-rikors fl-ismijiet* ***Carmel Mifsud et v. Onor. Prim Ministru*** *deciz fl-10 ta' Lulju 1990 u r-rikors Kostituzzjonali fl-ismijiet* ***Mario Pollacco v. Kummissarju tal-Pulizija et*** *deciz fis-6 ta' Ottubru 1999, sahqet li meta tigi fissata l-garanzija pekunjarja, il-Qorti trid thares ukoll lejn il-mezzi finanzjarji tal-imputat u ta' dawk il-persuni li jistghu joffru li jghinu lill-imputat, ghax altrimenti jigi daqs li kieku ma jkunx inghata l-liberta' provvizorja xejn."*.

"Absconding from Malta can only be by sea or air. The Constitutional Court, in the case **Kolakovic Jovica vs Avukat Generali[5]**, agreed with first court that:-

""At this juncture, this Court, whilst not oblivious to the reality emerging in some spectacular cases in the past, feels that it ought to subscribe to the view held recently by the Strasbourg Court to the effect that it is hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and

[3] Oxford, Fifth Edition (2010) page 223.
[4] 28th May 2010.
[5] 14th February 2011.

fleeing by air is subject to strict control, the authorities could not have at their disposal measures other than the applicant's protracted detention (vide ***Louled Massoud v. Malta****, ECHR 27th July 2010). Nor should the authorities' inability to adequately monitor movements into and out of Malta be shifted as a burden of denial of release from detention on a person accused of an offence, particularly if such a person is of foreign nationality".*

"In all applications requesting the reduction of the sum to be deposited, the accused claims that his financial circumstances do not permit the deposit of the money. The Attorney General always objected to the request. From the records of the criminal proceedings there is no record whether any information was requested to assess the financial circumstances of the accused.

"This Court has no doubt that had the accused's financial position permitted him to deposit this sum or had it been possible to bring forward a third party who is prepared to help him, he would have immediately done so. A conclusion based on the fact that:-

"i. €6,000 is a minimal amount when one considers that the deposit would mean no further pre-trial detention.

"ii. Osita Anagboso Obi has been in custody for more than twenty eight (28) months.

"In the court's opinion the repercussions which the accused would face if he absconds from Malta while the trial is still pending, serve as a more effective safeguard than the deposit of €6,000. This more so in view of the fact that he has strong family ties in Germany where he has lived for many years, has a partner and two children. From the records of the proceedings it appears that complainant's travelling documents have been exhibited in court. This makes his departure from Malta more difficult. If the complainant decides to leave Malta in breach of the bail conditions, a European Arrest Warrant will be issued and he will be brought back to Malta.

"If what the accused stated in the statement he signed on the 12th March 2010[6], is true, that is that he was acting as a courier for €31,500 and got into all this trouble for €500, then he is truly in dire straits.

"Having heard the complainant testify, the court does not have reason to doubt that he is saying the truth that he does not have the sum of €6,000 to deposit in court. Obviously in similar circumstances there is not much one can do but to decide on what the accused states. It is up to the court to consider whether his statement of facts is credible. The court cannot expect the accused, a foreigner non-resident who has been in detention for more than 28 months, to produce evidence that corroborates his claim that he has no assets in Germany or in his country of origin that could be transferred to Malta to effect payment. What is certain is that he has no assets in Malta[7].

"The fact that the accused is not making use of the legal aid service does not mean that he lied when he declared that his financial circumstances do not permit the deposit of €6,000. The court has no idea of what type of agreement he has with his defence counsel with regards to the payment of professional fees. An accused has every right to choose a lawyer of his own choice. Furthermore, there is no evidence that Obi is being investigated by the German authorities with regards to drug trafficking[8], and this claim is irrelevant for the purposes of this judgment. Although it is true that the accused has no ties with Malta, the court does not agree that the deposit of €6,000 is essential to deter the accused from absconding from Malta. Objectively, the forfeiture of such a small amount of money would certainly not be one of the considerations a person would make in taking such a risk. This more so when you consider that he has been in detention for more than 28 months, and taking into account that there is no certainty as to when

[6] Fol. 54.
[7] Vide report compiled by Dr Anthony Cutajar.
[8] Vide arguments made by the Attorney General in the reply filed on the 25th July 2012.

the criminal proceedings will be concluded. In fact on the 24th September 2011 the court declared:-

".....after having seen Section 402(1)(c) of Chapter 9 of the Laws of Malta order that the time limits for the conclusion of the inquiry shall be held in abeyance until the Letters Rogatory are filed and puts off the case for the 9th November 2011.".

"In the court's opinion insisting that the complainant deposits the sum of €6,000 under the prevailing circumstances is tantamount to denying him release, a fundamental right under Article 5(3) of the Convention. In the circumstances there is no need to consider whether there is also a breach of Article 34 of the Constitution.

"Therefore the requirement that Obi deposits the sum of six thousand euro (€6,000) is unjustly depriving him from his right to be released pending his trial, and therefore is in breach of Article 5(3) of the European Convention."

33. Article 576 of the Criminal Code reads as follows:

"The amount of the security shall be fixed within the limits established by law, regard being had to the condition of the accused person, the nature and the quality of the offence, and the term of the punishment to which it is liable."

34. This Court observes that this provision is consonant with the jurisprudence of the European Court which has identified the following principles relative to the point at issue.

34.1. The gravity of the charges cannot by itself serve to justify long periods of detention on remand. The suspicion against the applicant having committed serious offences could have initially warranted his detention, and the persistence of reasonable suspicion is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices [see

ECHR **Panchenko v. Russia** – Appl.45100/98 – 8th February 2005 para.99];

34.2. The danger of absconding cannot be judged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it seem so slight that it cannot justify detention pending trial [see ECHR **Letellier v. France** – Appl.12369/86 – 26th June 1991 para. 43; see also **Neumeister v. Austria** App.1936/63 – 27th June 1968].

34.3. The expectation of a heavy sentence and the weight of evidence may be relevant but not as such decisive, and the possibility of obtaining guarantees [eg. payment of security, other forms of judicial supervision may have to be used to offset the risk [see ECHR **Letellier and others v. Denmark** – Appl.10486/83 – 9th December 1996][9], and if the risk of absconding can be offset by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account [see **Mangouras v. Spain** [GC] App.12050/04 – 28th September 2010 – para. 79; **Vrencev v. Serbia** App.2361/05 – 23rd September 2008 para.776];

34.4. There must be a proportion of reasonableness between the amount to be deposited by applicant for his release on bail, and his financial circumstances. The level of bail set out should not be set out too high,[10] and should not be aimed at reparation of loss, but to ensure the presence of the accused. [see ECHR *Neumeister supra,*.13-14*; Mangouras, supra* - para.78; Q.Kos. **Richard Grech v. Avukat Generali** – 28th May 2010; Q.Kos **Mario Pollacco v. Kummissarju tal-Pulizija** – 6th October 1999];

34.5. "The authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused

[9] Cited in Karen Reid's "A Practioner's Guide to The European Convention on Human Rights – 4th Edition pg.625

[10] Underlining by this Court

continued detention is indespensible". [see *Mangouras*, supra para.79, and cases cited in this part of the judgment].

34.6. "The amount set for bail must be duly justified in the decision fixing bail [see **Georgieva v. Bulgaria** Appl.16085/03 – 3rd July 2008] and must take into account the accused's means. [see **Hristova v. Bulgaria** Appl.60859/00 – 7th December 2006 para.111]" [see *Mangouras*, supra para.80].

34.7. "While the amount of the guarantee provided by Article 5 para. 3 must be assessed principally by reference to the accused and his assets, it does not seem unreasonable in certain circumstances to take into account also the amount of the loss imputed to him. [see Commission - **Moussa v. France** No.2889/95 – 21st May 1997] [*Mangouras*, supra para.81].

34.8. The guarantee provided for by Article 5 § 3 of the Convention is designed to ensure the presence of the accused at the hearing. Its amount must therefore be "assessed principally by reference to him [and] his assets... in other words to the degree of confidence that is possible that the prospect of loss of the security... in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond". (see **Neumeister v. Austria**, judgment of 27th June 1968, Series A no. 8, p. 40, § 14). The accused whom the judicial authorities declare themselves prepared to release on bail must faithfully furnish sufficient information,[11] that can be checked if need be, about the amount of bail to be fixed. As the fundamental right to liberty as guaranteed by Article 5 of the Convention is at stake, the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable. (see **Iwańczuk v. Poland**, no. 25196/94, § 66, 15th November 2001 and **Bojilov v. Bulgaria**, no. 45114/98, § 60, 22nd December 2004 with reference to **Schertenleib v. Switzerland**, no. 8339/78, Commission's

[11] Underlined by this Court

report of 11th December 1980, Decisions and Reports 23, p. 196, §171*).[ECHR* **Toshev v. Bulgaria** *Appl.56308/00 para.68 – 10th August 2006].*

34.9. In **Salvatore Gauci v. Avukat Generali**[12] decided on the 31st July 1998, this Court held that, according to local case-law in establishing the amount to be deposited as security, the Court must also consider other circumstances, such as the gravity of the charge and the danger to society. The reasonableness of the *quantum* of the security should not be gauged simply by examining whether the accused is in a position to deposit the amount fixed or to obtain another alternative security, but due consideration should also be given to the objective criteria in determining the *quantum* of the security.

35. Regarding the merits of the present case, this Court observes that the point at issue is not whether defendant should have been granted bail but whether the amount of six thousand Euro (€6,000) established by the Magistrates Court as security for the observance of the bail conditions can be considered reasonable and justified in the circumstances.

36. On his part, defendant claims that he is destitute. On the other hand, appellants maintain that the gravity of the crime with which defendant stands charged, coupled with the fact that he has no ties whatsoever with this country, whilst having strong family ties in Nigeria, give rise to sufficient concern that defendant will abscond, and will not appear for the trial.

37. This Court observes that it seems that appellants' concern that defendant will abscond has been shared also by the Magistrates Court when rejecting his application for a further reduction of the bail bond. This concern of the Magistrates Court has been to a certain extent vindicated by defendant's evidence before the first Court, when, in reply to that Court's query where would he be staying if

[12] Vol.LXXXII.1.140

granted bail once he cannot afford the bail deposit, defendant stated:

"I have to see, obviously I cannot stay, live on the streets, but this is something which I will have to see about once I go out of prison. Todate I have not made any arrangement or thought of making any arrangements. My interest is that I want to return to my children. My children, as already stated, live in Germany. They go to school there. My children are German citizens. They were born in Germany. Their mother is German. I am not a German citizen, but I do have visas to live in Germany."

38. This declaration on oath by defendant is of some concern to this Court considering that in his applications for bail defendant indicated an address in Mosta[13] where he would reside if granted bail.

39. Also, in his note of the 25th July 2012, defendant informed the first Court that he has no connections with Malta. He has no property here which he can offer as security. No third party is prepared to act as guarantor. No details of defendant's financial position may be provided since he has no finances.

40. In the circumstances it is not amiss to point out that in his evidence of the 25th July 2012 defendant stated that he had lived in Germany for about ten (10) years and was employed as a salesman until he lost his job. However, in another part of the same deposition, defendant states that he was self-employed. He also states that he has bank accounts in Germany and in Nigeria, however there is no money as he had used the money for his personal business. Also, the mother of his children was diagnosed with cancer and cannot earn any money as she cannot walk.

41. This Court observes that no evidence was brought before the Magistrates Court regarding defendant's financial position, neither did he produce documentary

[13] Apt.2 Ambleside Court, Glormu Cassar Street, Mosta

evidence before the first Court. This led the said Court to initially fix the amount of bail to ten thousand Euro (€10,000), which was subsequently reduced to seven thousand Euro (€7,000) and eventually to six thousand Euro (€6,000). It seems that the Magistrates Court accepted defendant's version as to his financial situation, whilst bearing in mind the gravity of the offence and the maximum term of punishment defendant is facing if eventually found guilty.

42. In this respect, this Court cannot agree with the first Court's observations that *"..obviously in similar circumstances there is not much one can do, but to decide on what the accused states. It is up to the court to consider whether his statement of facts is credible. The court cannot expect the accused, a foreigner non-resident who has been in detention for more than 28 months to produce evidence that corroborates his claim that he has no assets in Germay or in his country of origin that could be transferred to Malta to effect payment."*

43. In the circumstances it was up to defendant to furnish the Court with all the information within his knowledge regarding his financial circumstances. Instead defendant remained passive in this respect, merely relying on his assertion that he has no funds to pay the deposit. In the opinion of this Court, defendant could have, by way of example, obtained by proxy copies of the bank statements dating from a date prior to his arrest regarding the bank accounts held in his name both in Germany and in Nigeria. Also he could have produced a medical certificate in support of his allegation that his partner, and mother of his two children, who lives in Germany is sick to the extent of not being able to earn money. In short, he should have produced that evidence, available to him, in support of his allegation that he is completely destitute and that it was impossible for him to effect any deposit.

44. Regarding the submission relating to the fact that on the 24th September 2011 the Magistrates Court had ordered that the time limits for the conclusion of the enquiry be held in abeyance in view of the presentation of

the letters rogatory, this Court observes that this does not militate in favour of defendant's request to have the bail deposit condition removed, since this does not constitute an obstacle at law for the Magistrates Court to continue hearing other evidence.

45. Regarding defendant's submission that the prosecution was protracting the case unnecessarily, this Court observes that prior to the date of the judgment appealed from, when defendant was still in detention, there is no evidence to support this submission.

46. Besides, defendant failed to explore all possible avenues in an effort to pay the bail bond, such as filing an application requesting that the bail bond be paid from part of the sum of thirty one thousand, five hundred Euro €31,500 seized by the police on his arrest. Given the circumstances, this could have been favourably considered by the Magistrates Court.

47. In the light of the above considerations, particularly having regard to the circumstances of defendant, both personal and monetary, and considering the gravity of the offence and the term of punishment prescribed for that same offence, this Court is of the opinion that the amount of six thousand Euro (€6,000) as bail deposit cannot be deemed at that stage of the proceedings to be excessive or unreasonable, in a way as to give rise to a violation of the Article 5 [3] of the Convention.

48. Regarding the judgment *PA [SK]* **Jonathan Attard v. Kummissarju tal-Pulizija** given on the 1st of April 2013, mentioned by defendant's counsel in his oral submissions, this Court observes that the circumstances in that case were different from those of the present case. In that case, which concerned drug trafficking, the bail bond was fixed at the amount of twelve thousand Euro (€12,000), and the accused, a Maltese citizen living in Malta, had spent four (4) years in continued detention, whilst in the present case, defendant has no ties whatsoever with Malta, and that in his evidence he had expressed his wish to leave this country and return to Germany.

49. Regarding the case of **Alexander Makarov v. Russia** [ECHR Appl.15217/07, 12th March 2009] cited by defendant, this Court observes that even in this case, the facts are radically different to those prevailing in the present case. In ***Makarov***, accused had his permanent residence in the Tomsk region where he was being tried, and had no relatives living outside that region. Moreover, the domestic courts had failed to consider alternative measure, such as the granting of bail, even though the accused had offered a guarantee by the Archbishop of the Tomsk region to ensure his release.

50. In that case the European Court also reiterated the principle that *"the mere absence of a fixed residence does not give rise to a danger of absconding".* [see **Pshevecherskly v. Russia,** no.28957/02 para.68, 24th May 2007]. However in the present case, defendant had expressly stated his wish to leave the Islands and return to Germany, thereby highly increasing the risk of his not appearing for the trial.

51. For the above reasons, the second and third grievances are considered by this Court to be justified.

The Fourth Grievance

52. Appellants claim that they should not have been awarded costs since the delay in the proceedings cannot be attributed to any fault of the prosecution, but is solely due to the fact that evidence through letters rogatory had to be sent abroad to three different countries, and appellant Attorney General, as the designated central authority, has no control on when the evidence requested from abroad is sent back to Malta.

53. In the first place, this Court observes that it cannot but concur with the "advice" given by the first Court to the Magistrates Court under heads 3 [i] and [ii] of the judgment regarding that part of the reference relating to Article 39[1] of the Constitution and Article 6 of the Convention, since, even though the local authorities may

not have control on the length of time employed by the foreign authorities to obtain the evidence required, the local authorities still have a duty to inquire about any delays by the foreign authorities in this respect, and to do their utmost to ensure that the evidence is relayed to Malta as soon as possible, even informing the foreign authorities on the urgency of the matter, given that one of the co-accused, that is defendant, was still in detention.

54. Regarding the matter of costs, this Court observes that, given that the first, second and third grievances are considered to be justified, and are being upheld, an adjustment of that part of the judgment relating to costs is opportune.

Decision

For the above reasons, this Court disposes of the appeal by amending the judgment of the first Court, in the sense that the part contained in heads [1] and [2] of the judgment be revoked, and instead decides that the condition that defendant deposits the sum of six thousand Euro (€6,000) is, under the circumstances, not in breach of Article 5 [3] of the European Convention; the rest of the judgment is being confirmed, save for the part relating to costs.

The costs relating to the proceedings before both Courts are to be borne by defendant.

The Court orders that a copy of this judgment be transmitted to the Court hearing the case **The Police v. Austine Eze and Osita Obi Anagboso**.

< Final Judgement >

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