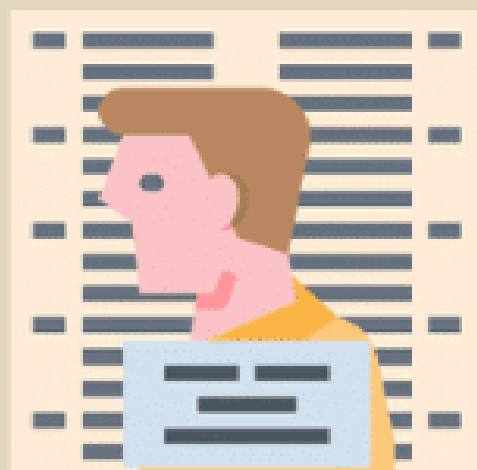




# LAW OF CRIMINAL PROCEDURE



**CRL5011**



LAWNOTESMALTA

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# **Procedure Before the Inferior Criminal Courts, Law of Criminal Procedure**

*Primarily, we will be dealing with the Court of Magistrates as a criminal judiciary and the Court of Criminal Inquiry.*

**Court of Criminal Judiciary - QORTI TAL-MAGISTRATI  
BHALA QORTI TAL-ĠUDIKATURA KRIMINALI**

**Court of Criminal Inquiry** - QORTI TAL-MAGISTRATI BHALA QORTI STRUTTORJA LI  
QUDDIEMA TINSTEMA L-KUMPILAZZJONI (KAZ/EVIDENZA META jkun hemm  
kumpilazzjoni)

## **Article 367 of the Criminal Code**

**367.** (1) Every Court of Magistrates shall consist of a magistrate and shall have a twofold jurisdiction, namely, as a Court of criminal judiciary for the trial of offences which fall within its jurisdiction, and as a Court of inquiry in respect of offences which fall within the jurisdiction of a higher tribunal.

(2) There shall be two Courts of Magistrates, one for the Island of Malta and one for the Islands of Gozo and Comino to be styled Court of Magistrates (Malta) and Court of Magistrates (Gozo) respectively.

***Relevant sections of the law - Articles 370-388***

***Article 370 - Court of Criminal Judiciary***

***Article 389/389A Court of Criminal Inquiry***

**Pulizija vs. Mark Dimech, 1998** - “l-artiklu 367 tal kodici, jitkellem car dwar liem huma, jissejhu l-qorti tal-magistrati, u lohra għall gzejjer t’ Ghawdex u kemuna. kull qorti tal magistrati umbagħad għandha zewg attribuzzjonijiet.”

## Article 370 of the Criminal Code

370.(1) The Court of Magistrates shall be competent to try-

*(a) all contraventions referred to in this Code;*

*(b) all crimes referred to in this Code which are liable to the punishments established for contraventions, to a fine (multa) or to imprisonment for a term not exceeding two years with or without the addition of a fine (multa) or interdiction;*

*(c) all offences referred to in any other law which are liable to the punishments established in the preceding paragraph, unless the law provides otherwise.*

*(2) The offences referred to in sub-article (1) shall still be cognizable by the said Court notwithstanding that, in view of concurrent offences and punishments, of any previous conviction of the application of the provisions of article 18, a punishment higher than any of the punishments mentioned in the said sub-article shall be applicable.*

*(3) (a) Notwithstanding the provisions of sub-article (1)(b), the Attorney General may send for trial by the said Court a person charged with a crime punishable with imprisonment for a term exceeding two years but not exceeding twelve years if there is no objection on the part of such person.*

*(b) On the demand of the Attorney General to the Court to try such crime, the Court shall ask the accused whether he objects to his case being dealt with summarily; the Court shall, in its discretion, give a reasonable time to the accused to reply to this question.*

*(c) If, within the said time, the accused replies that there is no objection on his part to the case being tried summarily, the Court shall note the reply in the records of the proceedings and there upon the Court shall become competent to try the accused and shall proceed to give judgment forthwith, as provided in article 377.*

*(d) If the accused objects to the case being dealt with summarily, the Court shall order that the record of the case be transmitted to the Attorney General, by electronic means, within the term determined in article 401(3), for the case to be dealt with according to law. In such a case the term referred to in article 432 for the filing of the indictment shall run from the day on which the Attorney General shall be granted access by electronic means to the record of the case.*

*(e) Where the number of the accused sent for trial by the Court of Magistrates under the provisions of paragraph (a) is two or more, the provisions of the last foregoing paragraph shall*

*apply only in respect of any one or more of the accused who makes objection to the case being dealt with summarily, and in such case the term fixed in article 432 for the filing of the indictment shall run from the day on which the Attorney General shall have received the record of the case after the decision in each of the cases dealt with summarily shall have become res judicata.*

*(f) Before asking the accused whether he objects to his case being dealt with summarily, as provided in paragraph (b), the Court shall hear such further evidence as may be indicated by the Attorney General in the same note by which he sends the person charged for trial by the said Court in accordance with paragraph (a).*

*(4) (a) Notwithstanding the provisions of sub-article (1)(b), if the crime with which the accused is charged is punishable with imprisonment for a term exceeding two years but not exceeding six years, the Court shall, during the examination of the accused under article 392 but before he is examined under sub-article (1)(b) of that article, ask the accused whether he objects to his case being dealt with summarily; and shall give him a reasonable time to reply to this question.*

*(b) If, within the said time, the accused replies that there is no objection on his part to the case being dealt with summarily, the Court shall ask the prosecuting officer whether the Attorney General has given his consent in writing to the case being dealt with summarily, and if no objection is raised, the Court shall not this fact in the records of the proceedings and thereupon the Court shall become competent to try the accused and shall proceed accordingly:*

*Provided that nothing in this sub-article shall be construed as precluding the Court from proceeding with the necessary inquiry if from the evidence it appears that a graver crime which it has no jurisdiction to try has been committed.*

*(4A) Notwithstanding the transitory provision made in article 1(2) of the Criminal Code (Amendment) Act, 2015 (Act VIII of 2015), and without prejudice to the other provisions of this article, the Court of Magistrates shall be competent to hear and decide all cases concerning crimes punishable with imprisonment not exceeding twelve years which were pending before the said Court prior to the 17<sup>th</sup> March 2015.*

*(5) The provisions of sub-article (2) shall apply, mutatis mutandis, to the crimes referred to in sub-articles (3) and (4).*

*(6) The provisions of article 392A shall also apply, mutatis mutandis, to offences which fall within the competence of the Court of Magistrates as a Court of criminal judicature in accordance with the provisions of this article.*

**Article 370 sub 1 Cap. 9** - Talks about the charges which the Court of Mag. is competent to hear out - those are the original competences. Sub 1, everyone refers to original competence, sub article which gave competence to decide these cases and eventually, as soon as the law was changing, these were being called extended competence.

**What is the concept of the original competence?**

A370 sub 1 - when one says original competence - instances where the Court of Mag. decides the case without the need for any mechanisms or formalities. The Person charged is brought before the Court of Magistrates - arraigned under arrest or notified with the charges. When and where he should appear, charges are read and the Court hears the merits of the case.

Apart from (a) (b) and (c), there are other cases whereby cases are still under the Court of Mag. under criminal judicature. Example: The Arms Ordinance, Chapter 480 of the Laws of Malta Article 63, Environment Protection Act, Article 84(3) - proceedings against any person against any offence.

**Article 370 sub 2 Cap. 9** - Subarticle 2 states that nevertheless the CoM shall be competent to try...under 18 years of age or by any deafmute...does not exceed the jurisdiction of such Court...illi jekk ghandek minuri jew deaf mutes, il-qorti tal-magistrati tista' tkun kompetenti li tiddecidihom...does not exceed the jurisdiction of such...minuri awtomatikament ha jibbenefikaw minn riduzzjoni fil piena. ...the second scenario is any crime excusable according to law where in the opinion of the AG the grounds for the excuse appear from the record of the inquiry.

Mela dan qed jghid li ghandek skuzanti, m'huwiex gustifikazzjoni, skuzanti jfisser li xorta jkun hemm dikjarazzjoni ta' htija, mhux any excuse izda li tkun determinate fil-ligi, il-piena ha tkun inqas...bl-iskuzanti skont il-ligi, il-piena ha tonqos minn 12-il sena jew tigi 12-il sena..wherein the opinion of the AG...irid ikollok il konferma minn l-AG li iva hemm l iskuzanti..jew fic-citazjoni stess, in the charges...or otherwise where the AG issues the articles in terms of 370 subarticle 3, this would be indicated in the same articles of the law..jingat in nota ghar rinviu tal gudizzju.

**Article 370 sub 3 and 4 Cap. 9** - **Sub 3 and 4** - Sub 1 of article 370 deals with the original competence. Do not forget also, that the jurisdiction of Court of Mag, there may be special laws which dictate the competence to decide the case

**Sub 3 and 4** - now deal with the Extended Competence, sub 3, of sub a states that notwithstanding the provisions of 1b, the AG, may send for trial for the said Court, the AG can send the case in front of Court of mag to decide the matter itself, for a term exceeding 2 years but not 12 years, if there is no objection on the part of the person, hence original competence is 2 years - decided by Court of mag. Sub 3 states that even in cases where the crime is punishable to imprisonment from - AG may send for trial any

person charged for a term not exceeding 12 years if there is no objection on the part of the accused.

**Sub-article 3** diga' kien exception ghal din...il kompetenza tal qorti tal-magistrati originali ha tigi estiza...if the crime with which the accused is charged...term exceeding 2 years but not exceeding six years, so this is the bracket, the Court shall...we have the exact time when this mechanism can take place...during the examination of the accused under article 392 but before he's examined under subarticle 1b of that article...can come into force is during the examination of the accused...is usually held at the beginning of the proceedings...l-ewwel tinqara l-akkuza, imabgahd isir l-ezami tal imputat, so at the very initial stages of the case...whether he objects to the case being dealt with summarily.

So we have the limitation between 2 years and six years..we have the exact time wherein the questions to the accused will be made by the magistrate, will be kickstarted by the Magistrate only if the offences fall within this bracket..article 392 states...filwaqt li l-qorti ghandha tistaqsi lill-imputat id dettalji tieghu, hu jekk irid jista' ma jirrispondix. Il-qorti ma tistax tmur kontra d-dritt tal imputata li jibqa' sieket...gieli ismu u kunjomu biex u l bqija xejn, gieli anke xejn...mhuwiex disprezz lejn il qorti...f'dak il-kaz il-ligi tipprovdi li f'kaz li l imputat, ma jwigibx ghall-ezami, il-qorti ghandha tohodha daqslikieku l-imputat qed iwiegeb mhux hati. So silence at this stage will be interpreted as a non guilty plea.

..the Court shall ask the accused if and what he wishes to reply to the charge. Hafna mid drabi jaqbez l-avukat u jghid mhux hati, qas jilhaq jitkellem l-imputat. So the crux is not only...at what stage of the proceedings will this question be made regarding whether the accused objects to his case being dealt with summarily...not during the examination of the accused, full stop...jekk hux hati jew mhux...but the law states..but before he is examined under subarticle 1b of that article...jekk se jirrispondi d dettalji personali tieghu pero' qabel...din il mistoqisja, l ezami tal akkuzat isir.

**Sub (3)(c)** - Mag. poses question to the accused, accused replies there's no objection – Court asks the prosecuting officer [generalment l-ispettur] whether AG has given consent in writing to case being dealt with summarily.

**Sub (3)(f)** - A reference to *artikoli bir-riserva* - *aparti l akkuzat jiinstab taht xiex jinsab hati* sub f can decide to send the note by virtue of which - the person charged may be convicted but can make a reservation.

**Sub (3)(e)** - **What happens in case there are more than 1 accused and 1 or more do not object whilst the others object?** *Sub e* deals with this - where the no of accused - what was read - this will only apply the referral to the other Court will only apply to those who have no objections.

In sub 3 - law refer to - in sub e the law states that the time fixed will start running only if the case of the other accused is a res judicata and he act sent to the AG, hence in the case of more than 1 accused, the Court goes ahead with the determination of the accused and after their case becomes res judicata than AG can file a bill of indictment.

The case will only start moving once the other cases in the Court of mag have become res judicata. The AG must wait for the COA to have a case decided and the TERMINU FOR ATT AL AKKUXA JKUN HAREG.

**Article 370 Sub 4 Cap. 9-** Notwithstanding the provisions of 1b (2 years imprisonment) if the crime with which the accused is charged is for a crime -

2-6 years: another bracket, the Court shall, during the examination of the accused under 392. But before he is examined under 1b, can ask the accused if he objects and shall give reasonable time whether he objects to this question Court.

If the accused is okay and if the accused says he has no objection, then sub 4.

Article 370 Sub 4 (tal-kunsens) - 2 scenarios - the First one is when the punishment is for a term exceeding 2 but not exceeding 3 years and the other is when it exceeds 2 years and not exceeding 12 years 370 sub 3 (l-artikolu - jew inkella, in-nota ta' review tal-gudizzju).

If you notice, these 2, overlap, ghax 2-6 and 2-12 - both refer to extended competence - exceed 2 years but deal with 2 different mechanisms. Both sub 3 and 4 have added formalities which are not seen in sub 1 - in sub 1, as we saw if crime is liable to a punishment not exceeding 2 years, then no extra formalities for the competent to try out the crime.

No added formalities if 2 years imprisonment - Court of Mag as a Court of Criminal Judicature.

Another pillar of extended competence of CoM – concerning offenses liable to punishment between 2-6 years. So between 2-6 there's an overlap – dealt with either by the procedure we dealt with last week (procdura tal-artikoli tal-avukat general) or through this procedure in subart4 (tal-kunses – kunses tal-AG). Jiddeciedi x'jiddeciedi l-AG irid ikun hemm il-kunses tal-imputat.

Time wherein mechanism can come into effect: during examination of the accused i.e. at the beginning of the procedure (tingara l-akkuza u jsir l-ezami tal-imputat). Magistrate kickstarts this mechanism only if offense falls within the bracket.

(4)(b) - Mekkanizmu fl-istadju inizjali tal-proceduri, tiskattah il-qorti suggest sia ghan no objection tal imputat u l-kunsens tal AG u jekk ikun hemm no objection/kunsens, CoM bhala qorti struttorja (bdiet kumpilazzjoni) fl-ewwel seduta kwazi kwazi tnbidel bhala qorti tal-gudikatura criminal i.e. extended competence comes into play in initial stage of proceedings.

AG might not give consent for summary proceedings due to the case being complicated hence orders kumpilazzjoni. There can be an overlap i.e. accused objects to his case being dealt with summarily so inquiry takes place, but later on during proceedings if AG kickstarts the mechanism in 370(3) it could be accused will not object.

If accused objects before replying to whether he is guilty or not; Court stops there and proceeds to inquiry/kumpilazzjoni (Court of criminal inquiry). If prosecuting officer informs Court there's no consent from AG, accused doesn't give his consent = kumpilazzjoni;

Whether AG gives consent depends on parties to the case, type of investigation etc.

*Fil-prattika jista' jkun spettur ma jmorru ghand l-AG biex igib il-kunsens e.g. ma jlehuq fil-weekend.*

**Article 370 Sub 5 Cap. 9** - Another point is sub 5 - which states that the provisions of sub 2, shall apply mutatis mutandis to the crimes referred to in sub 3 and 4. Hence, the general rule is that to determine the competence, to hear the case or not, the recidivist, and concurrent offences, those **MA NAGHTUX KASHOM** biex naraw liem qorti ha tiddeciedi l kaz. One has to look at offence in the abstract sense.

**Which are the cases where the magistrate can proceed to a decision without any need of formalities or decisions? Article 370 sub 1 a-b-c.**

*Article 7 of the criminal code lays down the punishments which may be awarded for the crimes, and the punishments awarded for the contraventions.*

*Multa* = for Crimes

*Ammenda* = for Contravention

**Article 527 Criminal Code - 527.** *Where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact.*



**Important Clarification** - What is the legal position when there are many offences, which fall under the original competence but for other offences do not?

**ANSWER:** If you have a case where the person is charged with more than one crime, one of the offences falls within the original competencies, but the 2nd crime with which he is accused, attracts a punishment of more than 2 years ex; 5 years.

In this case, if you have offences falling within the original competence and offences which do not fall under the original competence under the same charge sheet, in that case, although we have a distinction between the 2 offences, both offences will be tried by the Court which is competent to try the graver offence.

The answer is given in Article 436 sub 4 Criminal Code which states that - gives us the answer which states that, whilst there is a different offences, in this case a charge of homicide with the same - committing it without licence of arms proper, the superior Court will deal with the graver offence and will also deal with the inferior offence.

Article 436(4) Criminal Code - *(4) The Court shall also be competent to try and determine offences which, although of an inferior jurisdiction, are brought before the Court either because they are connected with a graver offence preferred in the indictment or because they are committed by the same person indicted for such graver offence.*

The threshold of whether a crime is going to be decided by the Court of Magistrates or otherwise is a 2 years imprisonment. Before this was 6 months. Nowadays this has changed to two years.

Concurrent offences and punishments are referred to in **Article 17 of the Criminal Code**. This talks about when an accused does not only have one charge but has several charges where in such a case, the law states how the punishment is to be given. This talks about circumstances when the punishment given will be increased.

**Article 18 of the Criminal Code** speaks about continuous offences where the punishment can be increased by one or two degrees. The law states that the offences referred to in sub-article 1 are still cognisable by the said Court regardless of the circumstances.

So the general rule is to determine the competence to decide the case; concurrent offence, continuous offences are not taken into consideration. One needs to look at the offences as it arises out of the law.

One particular judgment is **Police vs Joseph Skoli (COA)** - what must be looked at for purposes of determining the jurisdiction of the Court is the offence as alleged in the summons and not the offence as it results from subsequent stages. Sub-article 1 of Article 370 deals with the original competence - if offence is 2 years.

***If AG has no consent, then he has to move forward with IL-KUMPILAZZJONI***

**Extended competence** - stops at 12 years., crime for more than 12 years imprisonment not tried by Court of mag as a Court of criminal judicature. Hence homicide, more than 20 years - then the mechanisms in sub 3 and 4 can not be used as they have a capping of 6 and 12 years. Hence in that case, the case will start in the Court of Mag in criminal inquiry and then ATT TA AKKUZA TOHROGH u jitla guri.

We also see in sub 3 and 4 - that the AG has considerable discretion - in fact in those cases falling within the extended competence, the AG can decide to either file a bill of indictment, and case is tried before the criminal Court or else send the case to the accused to be tried by Court of mag. In offences between 2 and 12 years, AG can decide if it is decided by Court of mag JEW JITLA GURI - hemm hafna differenzi: waqt guri, the accused, when the case is being heard in front of criminal Court, during that time, the accused is imprisoned.

If out on bail, the accused will remain on bail, so there is a considerable discretion which can be applied by the AG, however this is not absolute as in the latter scenario if the AG decides to send the case to Court of mag, the Court of mag will be competent to decide the case only if no objection on the part of the accused.

Hence, whilst the AG can decide to hear the case in the Criminal Court - the accused can contest, in other circumstances contemplated in the Criminal Court, that the accused can not object but the accused can object if the AG decides to send the case to the Court of mag. Ultimate decision lies within the accused as the Court will have to ask the accused whether he objects or not.

### **Il-Pulizija vs. Raymond Cucciardi 3rd October 2001**

“Din il-qorti thoss.. Mghandiex u ma tistax tippermetti, il ligi ma thallix spazju ghal— ... il-ligi trid li l-qorti timponi...” - COA made is clear that one can not say that even though the Court kept on accepting evidence, that was tantamount to a tacit acceptance that the case would be accepted by the Court of mag, as the Court says there has to be the no objection clause, the Court decided that given that it has to ask the question to the accused, and since these questions were not asked, then the proceedings are null.

## **Il-Pulizija vs. Maurice Attard 1st November 2021**

1. Din hija sentenza fuq l-eccezzjoni ta' nullita' tal-proceduri quddiem l-ewwel Qorti kif sollevata mill-appellant fl-ewwel aggravju tieghu. F'din il-lanzanza l-appellant jallega zewg ragunijiet ghalix il-proceduri ghandhom ikunu dikjarati nulli u t-tnejn li huma konnessi mal-kompetenza tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali jew in-nuqqas taghha;

2. Fl-ewwel eccezzjoni, l-appellant josserva illi ma kienitx osservata l-procedura kif ravvizata fl-artikolu 370(3)(f) tal-Kodici Kriminali meta l-mertu kien jezorbita l-kompetenza tal-ewwel Qorti fejn allura l-appellant, wara li l-ewwel Qorti fil-kompetenza istruttoria taghha irceviet l-atti mill-Avukat Generali bl-artikoli li fuqhom deherlu li setghet tinstab htija (rinviju ghall-gudizzju), naqset milli tistaqsi lill-imputat jekk kellux oggezzjoni li l-kaz tieghu jkun trattat u deciz bil-procedura sommarja. Fis-sottomissjonijiet orali quddiem din il-Qorti, l-Avukat Generali jikkonferma illi din il-mistoqsija qatt ma saret izda dan in-nuqqas ma jgibx il-konsegwenzi allegati mill-appellant la darba d-difiza aderiet ma' dan billi ressqet il-provi taghha, ghamlet il-kontro-ezamijiet tax-xhieda tal-prosekuzzjoni, sahasitra xehed l-imputat niffissu u ghamlet sottomissjonijiet u qatt ma qajmet din il-lanzanza quddiem l-ewwel Qorti;

3. Illi f'sottomissjonijiet ulterjuri l-Avukat Generali osserva ukoll illi llum il-gurnata l-kwistjoni hija sorvolata b'emendi fil-Kodici Kriminali li ziedu l-kompetenza originali tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali;

Jibda biex jinghad illi, u bhala punt ta' tluq, wahda mill-kriterji li jistabilixxu l-kompetenza bejn il-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali u l-Qorti Kriminali hija l-piena li jgorr mieghu reat. Fil-kaz odjern, ghalkemm l-imputazzjoni hija wahda, fl-istess waqt tikkomprendi allegazzjoni ta' kommissjoni ta' offiza gravi b'rizultat ta' debulizza permanenti u ohra ta' offizi ta' natura hafifa fuq persuni ohra, lkoll kawza ta' nuqqas ta' tharis tar-regolament. Naturalment dik l-aktar gravi tkaxkar maghha dik minuri ghal-fini ta' kompetenza u ghalhekk kwantu r-reat l-aktar gravi ravvizat fl-artikolu 226(1)(a) tal-Kapitolu 9 kien jimporta piena ta' prigunerija ghal zmien mhux izjed minn sena jew multa mhux izjed minn €4,658.75;

Illi l-kompetenza originali tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali meta bdiet il-procedura kontra l-imputat kienet dwar reati li jgorru piena ta' mhux aktar minn sitt xhur prigunerija (art 370 (1) (b) Kodici Kriminali) [bl-Att VIII tal-2015 mizjuda ghall-sentejn prigunerija]. Stante li l-ewwel Qorti ma kellhiex il-kunsens tal-Avukat Generali sabiex il-kaz kontra l-imputat jitmexxa bil-procedura sommarja, il-Qorti procediet fil-kompetenza istruttoria taghha sakemm fil-5 ta' Marzu, 2010 l-Avukat Generali baghat lill-imputat sabiex ikun gudikat mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali skond kif jitlob l-artikolu 370(3)(b) u (c) tal-Kodici Kriminali bir-rizerva illi qabel il-Qorti tistaqsi lill-imputat jekk kellux oggezzjoni li l-kaz tieghu jkun trattat bil-procedura sommarja tisma' lil daww ix-xhieda indikati f'dak ir-rinviju ghall-gudizzju;

U hawn huwa, in parti, l-vern tal-kwistjoni skrutinata fejn l- appellant jallega illi din il-mistoqsija qatt ma saritlu u l- prosekuzzjoni ttenni li kien hemm il-kunsens tacitu tieghu billi mhux biss halla l-proceduri ghaddejjin talli pparticipa daqs li kieku kien ta l-kunsens tieghu billi xehed huwa stess, ghamel il- kontro-ezamijiet tax-xhieda tal-prosekuzzjoni u ressaq xhieda in difesa;

7. Illi l-kompetenza tal-Qorti hija dejjem kwistjoni ta' ordni pubbliku ghaliex qorti ma tistax tassumi poteri li mhumhiex moghtija lilha bil-ligi. Issa, is-subartikolu (b) riprodott supra huwa mfassal b'mod illi l-Qorti ghandha taghmel dik il- mistoqsija lill-imputat. Apparti dan l-obbligu is-subartikolu huwa mfassal b'mod li jidher li hu in omagg tal-principju tal- kwistjoni tal-ordni pubbliku tant illi johloq certu solennita' fil- forma tal-mistoqsija billi jittfa' piz fuq il-Qorti li taghti zmien xieraq lill-imputat sabiex iwiegeb ghaliha. Ghalhekk din il- formalita' essenzjali li ma tistax tkun inferita jew dezunta bhalma qed ikun argumentat mill-Avukat Generali u dan ghaliex bl-artikolu 370 huwa inkonfutabbli illi l-kompetenza tal-Qorti meta r-reat ikun jezorbita l-kompetenza original taghha hija radikata minn zewg elementi : l-ordni tal-Avukat Generali li l- kaz jinstema' mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali flimkien man-nuqqas ta' oggezzjoni tal- imputat ghas-smiegh bl-istess procedura;

8. Il-Qorti taghmel referenza ghas-sentenza ta' din il-Qorti diversament preseduta fl-ismijiet Il-Pulizija vs Michael Carter tas-7 ta' Dicembru, 2001 fejn kien ritenut illi meta jsir rinviu ghall-gudizzju fit-termeni tal-artikolu 370(3), in-nota ta' rinviu ghall-gudizzju tassumi rwol simili ghal dak ta' l-att ta' akkuza quddiem il-Qorti Kriminali. Issa ghalkemm il-kwistjoni f'dawk il-proceduri kienet differenti minn dik in disamina billi dik kienet dwar sejbien ta' htija f'reat li mhux inkluz fir-rinviju ghall-gudizzju, il-principju tar-rwol ta' dak ir-rinviju jibqa' ugwalment validu hawn. Ifisser dan, illi l-formalita' rikjesta fit- tqeghid tal-mistoqsija u r-registrazzjoni tat-twegiba ma tistax tkun dispensata u hija wahda fatali;

9. Illi huwa minnu illi dan il-process ghadda minn taht idejn diversi Magistrati sakemm kien deciz, bl-ahhar Magistrat tizbriga l-proceduri sabiex ikun finalment konkluz. Huwa evidenti illi l-izball tan-nuqqas ta' tqeghid tal-mistoqsija baqa' jipperpetwa ruhu pjuttost b'kull Magistrat successiv li ma stenniex li dik il-formalita' ma tkunx sehhet fil-hin taghha. Jibqa' l-fatt izda, illi l-atti processwali juru li dan qatt ma sar u ghalhekk sa dan il-punt l-appellant ghandu ragun. Minkejja dan, izda, jehtieg li jkun konsiderat dak osservat mill-Avukat Generali meta jghid illi stante li fil-mori l-kompetenza originali tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali zdiedet ghall-sentejn allura l-procedura tista' titqies bhala wahda salvata;

10. Illi kif gia osservat supra, il-kompetenza originali tal- Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali kienet emendata bl-Att VIII tal-2015 minn dik dwar reati punibbli b'sitt xhur prigunerija ghal dik ta' sentejn. Ukoll kif gia osservat, ir- rinviu ghall-gudizzju tal-Avukat Generali inhareg fil-5 ta' Marzu, 2010 filwaqt illi s-sentenza appellata kienet prolatata fit- 30 ta' Novembru, 2016. Issa, jista' jkun argumentat illi sal-jum li fih tinghata s-sentenza l-Qorti li tinduna b'dan l-izball tista dejjem taghmel il-mistoqsija u f'kaz ta' twegiba fl-affermattiv tistqasi

ulterjorment jekk ikun mhetieg li l-provi jistemghu mill-gdid mid-data li fiha kellha tkun mqieghda l-mistoqsija, u l-proceduri jkunu sanati u s-sentenza prolatata. Dan izda ma sarx fil-kaz in dizamina u ghalhekk jista' jsegiw l-argument jekk bl-emendi tal-2015 kienx aktar mehtieg li ssir din il-mistoqsija la darba fiz-zmien tal-procedura ma kienitx aktar applikabbli stante zieda fil-kompetenza originali. It-twegiba ghal-din hija provduta fl-artikolu 1(2) tal-Att VIII tal-2015 li fl-emendi dwar, inter alia, iz-zieda fil-kompetenza originali tal-Qorti tal-Magistrati ghal reati soggetti ghall-piena ta' mhux aktar minn sentejn prigunerija jipprovdi:

(2) Id-dispozizzjonijiet ta' dan l-Att ghandhom japplikaw ghalkull proceduri kriminali li jkunu bdew wara li dan jigi fis-sehh ma ghandhom bl-ebda mod jaffettwaw il-validita' ta' kwalunkwe proceduri legali li jkunu gew konkluzi jew li jkunu ghadhom pendenti fiz-zmien tad-dhul fis-sehh tieghu [Sottolinear tal-Qorti].

Illi dan l-artikolu huwa car meta fi kliem iehor jipprovdi li z-zieda fil-kompetenza ma ghandha bl-ebda mod taffettwa il-validita' ta' kwalunkwe proceduri legali pendenti fiz-zmien tad-dhul fis-sehh tal-emenda. Dan huwa kliem tal-legislatur u ghalhekk huwa inkofutabbli li l-procedura li kellha taderixxi maghha l-ewwel Qorti sal-ghoti tas-sentenza kellha tkun dik fis-sehh daqs li kieku l-emenda qatt ma saret;

12. Ghalhekk hija l-fehma konsiderata ta' din il-Qorti illi la darba n-nuqqas ta' osservanza tal-formalita' huwa wiehed fatali u la darba s-saving clause konsiderata fil-paragrafu ta' qabel dan tesigi adezzjoni mal-procedura fis-sehh qabel l-emenda, l-kwistjoni dwar in-nullita' o meno ddur fuq il-procedura li kellha tintuza fiz-zmien tal-process fejn fl-istadju partikolari l-Qorti naqset milli tqieghed dik il-mistoqsija essenzjalment mehtiega biex tkun determinata l-kompetenza taghha anke jekk, gratia argomenti, jintlaqa' l-ewwel aggravju u l-atti jkunu rimandati lill-Qorti tal-Magistrati li issa hi moghnija b'kompetenza originali. Li kieku ma kienx hekk, din il-Qorti tkun qed tiehu konjizzjoni u tiddeciedi fuq sentenza li inghatat minn Qorti priva mill-kompetenza mehtiega biex tiddeciedi dwar dak il-mertu;

13. Illi ghalhekk, filwaqt illi tastjeni milli tiehu konjizzjoni tat-tieni parti tal-ewwel aggravju u tal-aggravji l-ohra, in vista' tal-karenza fil-formalita' tal-proceduri quddiem l-ewwel Qorti liema formalita' hija wahda essenzjali, qed tiddikjara nulla u bla effett is-sentenza appellata. Stante li l-materja in kwistjoni mhix kolpita bl-artikolu 428(3) tal-Kodici Kriminali fejn din il-Qorti altrimenti kienet tkun fl-obbligu li tiddetermina l-kaz mill-gdid hi stess, u stante li l-allegati reati illum jirrientraw fil-kompetenza originali tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, tordna li l-atti jintbaghtu lura lill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali sabiex tisma u tiddeciedi l-kaz mill-gdid.

## **Il-Pulizija vs. Joseph Caruana 14th January 1985**

Answered this question. The Court concluded that the Court can not interpret the accused's silence as a no objection and sent the case back for it to be decided again.

**How does this work in practice?** The law is saying AG - sends case back - 2-12 years the case starts at Court of mag as a Court of QORTI STRUTTTORJA, hence more than 2 he charges will not be filed at the Court of Mag as a Court of Criminal Judicature, but in that case the charges would be filed at the Court of mag as a Court of criminal inquiry, first sitting is at the Court of mag as Court of criminal inquiry, HA NIBDEW KUMPLIKAZZJONI and in practice this direction by the AG to send the case for trial, usually this - what happens is that there is the inquiry, puts forward evidence.

Usually towards the end, after police has presented evidence, and in certain stages the AG sends ARTIKOLI jew nota tar review tal-guzzjdu, the AG sends the acts of the Court of mag and the articles of law under which the Court can find guilt. Hence in the beginning you will have a charge sheet, with which accused is charged, hence, the inquiry- KUMPILAZZJONI and at one time, the AG will remit back to the Court of mag indicating the articles of the law under which he demands the accused should be guilty by the Court of mag.

These artikoli JISTAW IKUNU BIR-RISERVA JEW BLA RISERVA - a proviso before articles are mentioned - Court should listen to these witnesses and then after witnesses are heard, the accused is asked if he has an objection for this case to be heard by this Court. If no objection QORTI STRUTTORJA, TINBIDEL F'QORTI TAL-MAG F'QORTI TA' GUD. KRIMINALI. What is imp is that whilst it is the AG who takes the first step and checks if the case should be by Court of AG, if the case, - case will not be decided by the Court of mag unless the accused declares that he has no objections with this.

# Overview: How a case moves from the inquiry stage to trial in the Court of Magistrates

## 1. Start: The Police Press Charges

- A charge sheet is filed — this lists what the accused is being charged with.
- The compilation of evidence (kumpilazzjoni) begins: the police and prosecution present evidence before the Court of Magistrates.
- This is like an investigation phase — the Court listens, collects testimony, and builds the file (“atti tal-kawża”).

## 2. Attorney General’s Review (Nota tar-Review / Artikoli)

- Once the evidence is mostly presented, the Attorney General (AG) steps in and reviews the acts of the case.
- The AG then sends a note (nota) to the Court, which includes:
  - The articles of law under which the accused should be found guilty (e.g. theft, fraud, assault, etc.).
  - A proviso — meaning, the AG may say: “Before you decide, the Court should first hear these additional witnesses.”

This document is often called l-artikoli (the articles).

## 3. With or Without Reservation: Bir-Riserva jew Bla Riserva

- The AG can send the articles “bir-riserva” — meaning the Court must still hear more witnesses before moving forward.
- Or “bla riserva” — meaning the AG is ready for the Court to proceed with judgment as things stand.

## 4. Ask the Accused: Do You Object?

- After all witnesses listed by the AG are heard, the Court asks the accused:  
“Do you object to your case being heard and decided by the Court of Magistrates?”

This is a legal requirement: the accused must agree for the case to be decided in this Court.

## 5. If No Objection → The Court Changes Role

- If the accused has no objection, then:

- The Court of Magistrates becomes a Court of Criminal Judicature.
- This is what you referred to as: “Qorti Strutturja tinbidel f’Qorti tal-Magistrati bhala Qorti tal-Ġudikatura Kriminali.”
- Basically, the same Court takes on a new legal role: instead of just collecting evidence, it can now judge and sentence.

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If the accused does not object - the Court from the Court of criminal inquiry becomes a Court of criminal judicature - same Magistrate remains. Do not forget what was said, every Court of mag should consist of a Mag. and should have a *2 fold jurisdiction*. GUDIKANT JIBQA L-ISTESS.

If the accused does not object with the case being dealt with summarily, through this mechanism the Court of criminal inquiry becomes Court of criminal judicature IF THE ACCUSED OBJECTS, the Court will send a copy of to the AG and the case is decided by the criminal Court.

Sub article 2 ha jghidilna x’jigri skont x’jirrispondi l imputat...mela l-mekkanizmu huwa qisu bil-kontra ta’ subarticle 3...ha jibghat dik li bil-Malti nsejhulha n-nota tar-rinviju tal-gudizzju..ha jibghat l-artikoli u once li l AG jaghmel l-ewwel pass, imbaghad il-qorti trid tistaqsi lill-imputat jekk ghandux oggezzjoni...ha tistaqsi lill-imputat jekk ghandux oggezzjoni jew le...jekk l imputat jghid li m’ghandux oggezzjoni, imbaghad se tistaqsi, l-ispettur hafna drabi jkun hemm fl-awla, pero’ mhux bilfros ghax minn mindu nbidlet il-ligi jaf ikun hemm rapprezentant tal-AG, il ligi issa tghid ‘prosecuting officer’...bhala qorti strukturja, mela bdiet kumpilazzjoni...fl-ewwel seduta kwazi kwazi tinbidel f’qorti tal-magistrati bhala qorti ta’ gudiaktura kriminali...there is however an important proviso which states that nothing in this subarticle..from proceeding with the necessary inquiry, mela xorta taghmel il kumpilazzjoni..has been committed. So qisu hemm a safeguard.

Jekk l-AG jizbalja jew johrog il kunsens pero’ l-qorti tara hawnhekk jezorbitaw il kompetenza ta’ sitt snin, il qorti xorta...u l-qorti tigi konvertita f’qorti kriminali, irid ikollok limitu ta’ sitt snin habs. Charges johorgu slight injuries, mela tista’ tuza dan...pero’ jigi l ispettur u jesebilek grievous injuries medical certificate..allavolia jkkun gab il kunes tal AG, il qorti hija obbligata illi timxi bil kumpilazzjoni.bhala Prattika suppost ha ttawwal inqas..l-atti pending id-differiment imorru ghand l AG, pero’ ghandek il process ta’ kumpilazzjoni...jtawlu ftit izjed...imma inti qed tghidli x’inhuma l-beneficji...kumpilazzjoni dejjem ha ttawwal izjed...kumpilazzjoni, il-qorti hija marbuta b’certu termini..persuna taht arrest u ma tkunx inghatat bail..jekk ghandek kumpilazzjoni tista’ taghmel rikors ghal-helsien mill-arrest quddiemi l-magistrat li qed jisma’ l-kawza...forum shopping in inverted commas...so you have a different adjudicator, this time it would be the judge, in front of whom you can file a request on behalf of your client requesting bail.



In the case of summary proceedings, you don't have this to and fro of the acts going to the AG, so it's going to be the same magistrate....hemm min gerger ghax jghidlek m'ghandix cans...on the other hand with summary proceedings everything is usually fast tracked rather than prolonged because of the inquiry...circumstances of your particular client..decides not to give the consent to proceedings...deems fit that an inquiry takes place...ikollu izjed kontroll fuq il kawza.

If the prosecuting officer informs the Court that there is no consent...same situation where the accused doesn't give his consent..ma jopponix pero'mbaggħad l AG ma jkunx tana l kunsens...as I said, whether there is this consent of the AG or not depends a lot on the circumstances of the case...type of the investigation relating to the case. It's not written anywhere that for example all these crimes will be dealt with summarily...what we know for sure is...bracket has to be between 2 yrs and six yrs imprisonment. It could also be li l ispetturi stess ma jmorru għand l AG u jitolbu l kunsens...prezentata fil-weekend so ma lhaqtx kellimt lill AG għall kunsens..ihoss li dan mhux kas ta' kunsens..backing/gwida tal AG ghax imbagħad ir-rinviju jkun se johorgu l-AG.

Jekk ha ggib il-kunsens fil-bidu tal procedure mal-ewwel se jkollna guri dizzjoni kriminali, jekk ma ggibux fl-istadju tal-eżami tal-imputat...hafna mid drabi jekk ma jilhaqx johrog wara...wara seduta jew tnejn johorgu l-artikoli...nothing precluding the Court from proceeding with the necessary inquiry. An interesting case which dealt with the situation where during the examination the correct.

## **Article 392A Criminal Code**

We will be dealing with it later on. At the...Court of criminal inquiry mela here we are dealing with..sub-articles 3 u 4...transform itself into a Court of criminal judicature and pass judgement..added mechanism whereby the CoM as a Court of Criminal Inquiry will transform itself into a CoM as a COCJ...but less than 12 years and you don't...jekk l imputat jirregistra ammissjoni u l piena ghar reati hija mhux izjed minn 12 'il sena...imma l qorti tkun kompetenti through 392A...this was made to literally fast track number of proceedings which before the amendments couldn't be so fast tracked...register a guilty plea at the beginning of the proceedings...because the punishment exceeded the original jurisdiction of the Court..either of the two mechanisms..il pulizija tista' toggezzjana biex tisma' x-xhieda habba l-appell..or on the type of punishment because you could have for example the prosecuting officer insisting on effective imprisonment and defense insisting on suspended sentence...both parties agree..free to listen to any other evidence.

**Reference to Article 392;** dettalji tal-imputat. Imputat jista' jibqa' sieket u ma jirrispondi ghal xejn - imputat qieghed iwiegeb li mhux hati. Wara l jirrispondi, jekk jirrispondi, dwar id-dettalji tieghu imma qabel ma' l-imputat jirrispondi hux hati jew le.

During examination procedure wasn't followed: **Pulizija v. Generoso Sammut 31st July .2020 Court of Criminal Appeal**

*Illi huwa indubitat illi fi zmien meta l-appellant gie mixli quddiem il-Qorti bir- reati lili addebitati ta' serq aggravat bl-aggravanti tal-valur, kif ukoll dak tal- offiza ta' natura hafifa, dawn l-akkuzi kienu jezorbitaw il-kompetenza originali tal-Qorti tal-Magistrati kemm taht il-ligi vigenti fiz-zmien ix-xilja tal-appellant, kif ukoll kif inhi l-ligi llum wara l-emendi introdotti permezz tal-Att VIII tal- 2015. Dan huwa fatt mhux ikkontestat. Tant hu hekk illi l-Prosekuzzjoni ressqet il-kunsens bil-miktub tal-Avukat Generali sabiex il-kaz jigi trattat u deciz bil-procedura sommarja u dan fit-termini ta' dak dispost fl-artikolu 370(4) tal-Kodici Kriminali. Gara izda li wara li inqrat l-akkuza u sar l-interrogatorju tal-imputat bla gurament fit-termini tal-artikolu 379(4) u 392 tal-Kodici Kriminali, ma tnizzlitx twegiba fl-ezami ghal mistoqsija dwar jekk huwa kellux oggezzjoni sabiex il-kaz tieghu jigi trattat u deciz bil-procedura sommarja, x'aktarx ghaliex dak in-nhar ma kienx assistit minn avukat.*

## **Il-Pulizija vs Joseph Borg App.Inf. 21/07/2017**

*Bħala konsegwenza kellha tigi segwita l-proċedura maħsuba fis-Sub- titolu II, tat-Titolu II, tat-Taqsima I, tat-Tieni Ktieb tal-Kodiċi Kriminali u ċioe' dik li tirrigwarda l-kumpilazzjonijiet quddiem il- Qorti tal-Maġistrati bħala Qorti Istruttoria. Dan ifisser li l-imputat kellu jiġi eżaminat skont l-artikoli 392 u 395 tal-Kodiċi Kriminali iżda ma jirriżultax li ġie hekk eżaminat. Ghalkemm fil-proċess jirriżulta esibit il-kunsens tal-Avukat Ġenerali sabiex il-każ jiġi trattat bi proċedura sommarja skont l-artikolu 370(4) tal-Kodiċi Kriminali dan ma kienx jiswa għaliex lill-imputat ma ġiex domandat kif tassattivament previst fl-artikolu 370(4)(a)(b) tal-Kodiċi Kriminali jekk l-imputat isibx oġġezzjoni li l-każ tiegħu jiġi trattat bi proċedura sommarja. Di fatti ma jirriżultax li l-imputat qatt ta l- kunsens tiegħu sabiex il-każ tiegħu jiġi trattat bi proċedura sommarja u l-proċeduri ssoktaw quddiem l-ewwel Qorti bħala Qorti ta' Ġudikatura Kriminali li in kwantu tali ma kellhix kompetenza fuq ir-reati miġjuba quddiemha.*

*F'din is-sitwazzjoni din il-Qorti ma tistax tħassar is-sentenza appellata u tgħaddi hi stess sabiex tiddeċiedi l-kawża fil-mertu kif previst fl-artikolu 428(3) tal-Kodiċi Kriminali għaliex l-artikolu 428(1) tal-istess Kodiċi tassattivament jipprovdi li meta l-Qorti Superjuri ssib li l-fatt miġjub fl-akkuża jġib reat suġġett għal piena li taqbeż il-kompetenza tal-Qorti tal-Maġistrati bħala Qorti ta' Ġudikatura Kriminali, bħal ma hu l-każ odjern, għandha tħassar is- sentenza, u tibgħat l-atti lill-Qorti tal-Maġistrati biex tipproċedi skont il-liġi2."*

*Illi l-Qorti ma għandha għalfejn izzid xejn aktar ma' dan it-tagħlim guriprudenzjali li jidher illi gie dejjem segwiet mill-qrati tagħna f'diversi decizonijiet li ingħataw matul is-snin meta gie riskontrat dan in-nuqqas3. U ghalkemm l-persuna akkuzata ma tkunx issollevat dan in-nuqqas quddiem l-Ewwel Qorti u anke issokkombiet għal proceduri quddiemha fejn saħansitra jkun tressqu anke provi in difeża, il-qrati tagħna madanakollu dejjem kienu kawti milli jinterpretaw talli akkwixxenza bħala kunsens tacitu billi l-ligi tistipula illi dan il-kunsens għandu jingħata saħanistra qabel ma l- Prosekuzzjoni tressaq il-kunsens tal-Avukat Ġenerali u huwa biss meta jkun hemm dan il-kunsens miz-zewg nahat illi tigi radikata l-kompetenza tal-Qorti tal-Maġistrati bħala wahda tal-gudikatura kriminali, u dan meta ir-reati ma jkunux jaqghu fil-kompetenza originali tagħha.*

## **App.Inf. Il-Pulizija vs Raymond Cucciardi et – deciza 30/10/2001**

*Illi benche' forse wiehed jista' itendi jahseb illi bil-fatt li l-imputati komplew jippartecipaw fil-proceduri quddiem l-ewwel Qorti, u anke wiehed minnhom xehed u anke dehru f'xi hinijiet wiehed jew iehor mill-avukati tagħhom dan seta' jammonta għal konferma tacita li ma kellhomx oġġezzjoni li l-każ jitkompla jiġi trattat u deciz mill- ewwel Qorti bħala Qorti ta' Kriminali Gudikatura, din il-Qorti thoss illi f'materja daqstant fondamentali u li hija l-bazi fuq liema il-gurisdizzjoni bħala Qorti ta' Gudikatura Kriminali setgħet tigi radikata u ezercitata,*

*m'ghandhiex u ma tistax tippermetti eccezzjonijiet bazati fuq konsiderazzjonijiet li l-ligi evitathom. Il-ligi ma thallix spazju ghal dikjarazzjoni tacita. Il-ligi trid li l-Qorti tponi d-domanda espressament lill-imputati li ghandhom fakulta' li jaghmlu xelta jew ohra. Ma jidhirx mill-process li dan sar, u f'dawn ic-cirkostanzi din il-Qorti ma thossx li tkun qeghda timxi skond il-ligi jekk tikkondona dak li sar u taghti valur legali lill-inadempjenza ta' l-ewwel Qorti u s-silenzju ta' l-imputati jew l-attivitá taghhom, meta dan mhux prospettat mil-ligi li anzi tipprospetta diversament<sup>4</sup>.*

*Tqies ghalhekk illi l-Ewwel Qorti ma kellhiex il-kompetenza titratta u tiddeciedi il-kaz tal-appellant tali li dan in-nuqqas iwassal ghan-nullita konsegwenzjali tal-proceduri kollha. Illi permezz ta' nota ipprezentata fit-08 ta' Lulju 2020, l-appellant ta il-kunsens tieghu sabiex il-Qorti tidderoga minn dak mahsub fl-artikolu 428(1) tal-Kodici Kriminali billi tisma' l-kaz hi stess u tghaddi ghad-decizjoni fuq il-mertu. Illi madanakollu l-Qorti tinsab fl-impossibilitá li taghmel dan billi lanqas hi stess ma hi kompetenti biex tisma' l-kaz stante n-nullita' tal-proceduri kollha quddiem l-Ewwel Qorti, li jridu jinbdew ex novo wara il-qari tal-akkuzi bil-gurament mill-Ufficial Prosekutur. Ghal dawn il-motivi, l-Qorti taqta' u tiddeciedi billi tilqa' l-aggravju sollevat mill-appellant fis-seduta tas-26 ta' Gunju 2020 dwar in-nullita' tal-proceduri quddiem l-Ewwel Qorti u l-konsegwenzjali nullita' tas-sentenza appellata minhabba f'nuqqas ta' kompetenza, tghaddi ghalhekk biex tannulla s-sentenza appellata kif ukoll il-proceduri kollha li saru wara li l-Ufficial Prosekutur ikkonferma l-akkuza bil-gurament fl-udjenza tas-16 ta' Mejju 2008, u wara li rat l-artikolu 428(1) tal-Kodici Kriminali tibghat l-atti lura lill-Qorti tal-Magistrati sabiex dik il-Qorti tisma' l-kaz skont il-ligi.*

Subarticles (5)(6)

*(5) the provisions of sub-article (2) shall apply, mutatis mutandis, to the crimes referred to in sub-articles (3) and (4).*

*(2) x ghandu jigi ikluz jew le meta tikkunsidra piena*

*(6) The provisions of article 392A shall also apply, mutatis mutandis, to offences which fall within the competence of the Court of Magistrates as a Court of criminal judicature in accordance with the provisions of this article*

**Article 392A of the Criminal Code** - introduced in 2002 provides mechanism whereby if accused registers a guilty plea, such case can be dealt with in a more expeditious manner than in the past – possible for Court of crim inquiry (punishment up to 12yrs imprisonment) to transform itself in Court of crim jud and be able to give judgment notwithstanding punishment is between 2 and 12 years and not necessarily have mechanisms in sub-article 3 and 4 in place.

Jekk l-imputat jirregistra ammissjoni u piena mhix izjed minn 12-il sens, qorti m hemmx ghalfejn tistenna l-kumpilazzjoni/kunsens imma tkun kompetenti li tiddeciedi l-kaz hi. Done to fast-track certain proceedings.

## **Article 371: Deals with how jurisdiction is determined**

*371.(1) In determining the jurisdiction, regard shall be had to the alleged offence and not to any extenuating circumstances, even though, by reason of any such extenuating circumstances, the accused shall not be liable to punishment or there may be a descent from a higher to a lesser punishment. In such case the provisions contained in article 389 and following articles shall apply.*

*(2) Nevertheless, the Court of Magistrates shall be competent to try -*

*(a) any crime committed by any person under eighteen years of age or by any deaf-mute where the punishment awardable according to law does not exceed the jurisdiction of such Court;*

*(b) any crime excusable according to law where, in the opinion of the Attorney General, the grounds for the excuse appear from the record of the inquiry and the punishment awardable according to law does not exceed the jurisdiction of such Court:*

*Provided, in either case, that no other person is simultaneously charged with the crime, whether as principal or accomplice, or that the crime is not otherwise connected with any other crime outside the jurisdiction of such Court;*

→ Skuzanti [htija imma minhabba skuzanti piena tkun inqas] – jekk reat bl iskuzanti piena tigi inqas minn 12-il sena kompetenza CoM tibqa’

→ AG jibghat nota ta’ rinovu ta’ gudizzju, jikteb artikolu tal-ligi li l-imputat ghandu jinstab hati tahthom u l-artikoli li jikkontemplaw l-iskuzanti. Jekk bil-maths jigu that 12-il sena CoM kompetenti.

*(c) any theft aggravated by "means", but not also by "violence", or by "person" or by "the nature of the thing stolen", when the value of the thing stolen does not exceed eleven euro and sixty-five cents (€11.65) and, in the opinion of the Attorney General, the crime would be adequately punished with imprisonment for a term not exceeding six months with or without a fine(multa)*

→ To be read in connection with 370(2). In 370(2) we said aggravating circumstances shouldn’t be considered – recidiva/kontinwat

→ In 370 its stated extenuating circumstances shouldn’t be considered

e.g. crime liable to punishment more than 12 years but extenuating circumstances by which cause of that extenuating circumstances the punishment would be less than 12 years – issue shouldn't be considered when considering jur.

### **Pulizija v. Giuseppe Azzopardi, 1949**

This case dealt with this; said if punishment of offense exceeds competence of CoM but bec of extenuating circumstances punishment would fall within competence of CoM, the latter would still not be the competent Court.

*{AG jibghat nota ta' rinvju ta' gudizzju, jikteb artikolu tal-ligi li l-imputat ghandu jinstab hati tahthom u l-artikoli li jikkontemplaw l-iskuzanti. Jekk bil-maths jigu that 12-il sena CoM kompetenti.}*

Jekk xorta mal-excusable homicide ez hemm reat iktar gravi jeccedi 12-il sena jew ez mhux minuri u piena toghla. Minor charged jointly with adult and in adult case punishment is 16 years, minor can benefit from sentence by CoM [xorta jibbenefika mir-riduzzjoni]

### **How jurisdiction between the Courts of Magistrates is determined - Article 372 Criminal Code**

*372.(1) The jurisdiction as between the Courts of Magistrates Shall be determined -*

*(a) by the place where the offence has been committed; or*

*(b) if there is only one accused person or if there are two or more accused persons, they all reside in Malta, or all reside in Gozo or Comino, by the place of his or their residence.*

*(2) If a person is charged with two or more offences committed in different Islands, such person shall be tried by the Court within the territorial jurisdiction of which the graver offence or, if the offences are of equal gravity, the greater number of offences has been committed.*

*(3) If the place where the offence was committed is unknown and the accused is one, or the accused are two or more, residing, however, within the limits of the jurisdiction of the same Court, the jurisdiction shall be solely determined by the place of his or their residence; or if the persons accused reside in different Islands, the jurisdiction as between the Courts shall be determined by the place of residence of the majority of the persons accused; or if the number of the accused residing in Malta and the number of the accused residing in Gozo or Comino be the same, either Court shall be competent to try all the accused.*

*(4) The plea to the jurisdiction by reason of the place where the offence has been committed or of the place of residence of the offender may be waived, and, if not raised immediately after the statement of the facts constituting the offence, it shall be deemed to be abandoned.*

**Pulizija v. Georgio Frendo 1939; decided they are alternative criteria**

**Pulizija v. Giuseppe Said 1939; criteria are not alternative but place where offense took place prevails**

**Pulizija v. Mifsud 2005; accepted claim CoM can be the one where accused resides.**

## **Article 373 Criminal Code - Proceedings on complaint of injured party**

*373. As regards offences referred to in article 370(1), the prosecution shall lie with the injured party or with the persons mentioned in article 542 on behalf of such party, where proceedings cannot be instituted except on the complaint of the injured party:*

*Provided that if the offence in respect of which no prosecution may be instituted except on the complaint of the injured party, is aggravated by public violence or is accompanied with any other offence affecting public order, or if, in the absence of any such circumstances, the injured party shall fail to institute proceedings and shall not have expressly waived the right to prosecute within four days from the commission of the offence, it shall be lawful for the Executive Police ex officio to institute proceedings in respect of the offence*

Article 373 → deals with proceedings or complaints of the injured party - original competence - with them attributed not more than 2 years. Lies with the injured party in 373 where the proceedings can not be instituted except for the complaint of the injured party. This is the exception - "PROVIDED" that is why it is the exception - provided that if the offence, law says not police will TMEXXI, but the individual HA JMEXXI

## **Article 374 Criminal Code - Trial**

**374.** In proceedings instituted on the complaint of the injured party, the following provisions shall apply:

(a) the complainant and the defendant shall appear personally on the day appointed for the hearing of the complaint. They may, however, be assisted by advocates of legal procurators;

→ The procedure with regards to the trial contemplated in 374 is that the complainant and D will appear personally on the day of a hearing and is represented by a LEGAL PROCURATOR OR LAWYER

(b) in the case of contraventions, it shall be lawful for the Court, upon good cause being shown, to exempt either of the parties from appearing personally and to permit the spouse or a near relative, by blood or affinity, of such party, or any other person having the charge of such party or authorized in writing by such party, to appear instead; Non-appearance of parties.

→ In contraventions - either person will appear personally or in contraventions - Court allows representation of them.

(c) if neither of the parties shall appear, the cause shall be struck off the list;

(d) if for the first sitting the complainant does not appear in the defendant alone appears, the latter may demand his discharge;

→ If complainant did not appear but the accused is present, he may ask for his discharge -

→ If D is discharged, the complainant may ask the Court to appoint another day for the case to be heard if he shows to the Court through a sworn declaration that he could not appear in front of the Court for any of the reasons mentioned in the law. Can ask the Court for the case to be re-appointed for hearing.

(e) nevertheless, upon an application by the complainant within four days from the day on which the cause was struck off the list or the defendant was discharged, accompanied by a declaration of the complainant himself sworn before the registrar, to the effect that he was, on account of illness or for any other reasons independent of his will, to be expressly stated in the application, prevented from appearing, the Court shall appoint another day for the hearing of the cause on the same acts;

(f) a written notice of the day appointed for the hearing of the cause shall be given to the parties and to the witnesses within the time prescribed in article 361 and in article 441(1);



(g) in the absence of an application as aforesaid, the right of action shall lapse;

(h) if the defendant does not appear, the second part of article 364 shall apply;Hearing of cause.

(i) if both parties appear, the proceedings shall be conducted summarily and viva voce in the following order:

(i) the complainant or his advocate or legal procurator shall state the facts constituting the offence and shall produce his evidence;

(ii) the defendant or his advocate or legal procurator shall submit his defence and shall produce his evidence;

(iii) the complainant or his advocate or legal procurator may reply, and the defendant or his advocate or legal procurator is entitled to a rejoinder:

Provided that it shall be lawful for the Court, on good grounds, to vary the order of the proceedings; Confirmation of complaint on oath.

(j) it shall be lawful for the Court to require that the complaint be made or confirmed on oath

→ Kawza privata 374 - STILL A CRIMINAL CASE IN criminal proceedings

→ If aggravated by violence or public order or if in the absence of such circumstance, or public order or injured party fails to institute proceedings, lawful for police to institute proceedings with respect to the offence - if offence is aggravated with public violence, or accompanied by a crime affecting public order, and if the victim does not proceed herself within 4 days. What happens? if public violence, affecting public order and the victim does nothing - the default would be that then police would proceed. alternative conditions - can have every condition

**374** - "*IL-KAWZA PRIVATA*" - one ha tkun IL-PULIZIJA VS u ohra tkun CIKKU BORG VS. - still not a civil, criminal one still.

## **Article 375 Criminal Code - Proceedings by the Attorney General or the Executive Police ex officio**

**375.**In proceedings instituted by the Attorney General or the Executive Police, the following provisions shall apply:

- (a) the accused shall appear personally. He may, however, be assisted by advocates or legal procurators;
- (b) in the case of contraventions, the provisions of paragraph (b) of the last preceding article shall apply as regards the accused;
- (c) the Attorney General or the officer of the Executive Police in charge of the prosecution and the accused or his advocate or legal procurator shall be heard in the order set out in paragraph (i) of the last preceding article;
- (d) it shall be lawful for the Court to require that the charges be read out by the Attorney General or the officer of the Executive Police and the report is confirmed on oath by the officer of the Executive Police;
- (e) the accused may cross-examine the said officer.

**375 -** Where proceedings are initiated by the police - in short in 375, please note that through recent amendments the attorney general was added to the executive police, law now also refers to the attorney general, and certain prosecutions are now done by AG.

In short we have 6 stages:

1. Accused is to appear personally
2. In contraventions provisions of sub B of previous article shall apply
3. Hearing which shall be heard in the order set out in para 1 of the last preceding article.
4. Officer of the executive police in charge of prosecution shall be heard in the order set out in para i
5. Charged read out by the AG - summons here - IC-CITAZZJONI - person reads CITAZZJONI BIL-GURAMENTT - by summons

## **Article 376 Criminal Code - Noting down of pleas raised by accused, and of substance of evidence of witnesses.**

376.(1) The magistrate shall take down or cause the registrar to take down -

(a) any plea to the jurisdiction of the Court, or of inadmissibility or extinguishment of action, or of inadmissibility of any evidence as well as any order rejecting such evidence; and

(b) where the Court shall deem it expedient so to do, or where a request is made by any of the parties and the Court shall see fit to accede to such request, the substance of the evidence given by the witnesses, recording any expression having a direct bearing on the merits of the case.

(2) The notes of the depositions taken down as aforesaid, if any, shall in the presence of the parties be read over to the witnesses and a mention of such fact shall be entered in the record. Non-observance of provisions of sub-articles (1) and (2) not to affect validity of proceeding.

(3) The non-observance of any of the provisions of sub-articles (1) and (2) shall not affect the validity of the proceedings; nor shall such non-observance be a bar to the production, where necessary, at any part or stage of the proceedings, of evidence to prove, in the manner prescribed by law, the facts to which the said provisions refer, or to the recalling of the said witnesses.

Article 376 - Mag. shall take down or cause to take down any plea to the jurisdiction of the Court → legislator is stating that the mag shall take down the pleas *eccezzjonijiet*, that are raised by the parties. Plea to jurisdiction. These must be mentioned in the VERBAL. The Mag. is obliged to mention these exceptions.

→ The Court must write down the exceptions in the verbal and also list down the SUSTANZA TAX-XHIEDA. In practice this used to cause a problem as no such notes were written.

→ There are instances where DEFENCE OR AG, where what is being said in the appeal is not the same as the things said in the Court of mag, the Court of appeal has no control of what was said in Court of mag unless you have visibility and proof of what the witnesses testified.

The Court is not obliged to record the substance of this.

Recording of that witness - is recorded so that in appeal, the mag has a transcript of what the witness states.

Sub 2 - notes taken down as aforesaid - mention of such facts shall be taken down in the records

## **Article 377 Criminal Code - Judgement**

**377.** (1) When the hearing is concluded, the Court shall, on the same day, if conveniently practicable, deliver judgment either discharging or sentencing the accused.

(2) Where the offence established by the evidence is one in respect of which the prosecution lies with the injured party, the provision contained in article 403(2) shall apply.

(3) The Court may, notwithstanding any punishment to which it may sentence the offender, order him to remove any nuisance or inconvenience to which the offence relates, or, according to circumstances, to conform with the law, within a time, sufficient for the purpose but in any case not exceeding three months from the date of the judgment, to be fixed by the Court; and, if the offender fails to comply with any such order within the time so fixed, he shall be guilty of an offence and shall, on conviction, be liable to a fine (ammenda) of not less than four euro and sixty-six cents (€4.66) and not more than twenty-three euro and twenty-nine cents (€23.29) for every day during which the default continues after the expiration of the said time. Extension of time-limit.

(4) The Court shall not grant any application for the extension of the time fixed under the last preceding sub-article if such time and the time of the extension exceed in the aggregate three months and the Police oppose such extension.

(5) The Court shall, upon an application to that effect by the Police at any time after that a person has been found guilty of an offence, in the event of a supervening cause or, in any other case, after the expiry of the time-limit granted by the Court under sub-article (3) or (4) hereof, authorise the Police to remove any nuisance or inconvenience to which the offence relates at the expense of the offender, in which case the offender may be made to refund the expense under a warrant issued by the said Court.

- The Court if “conveniently practicable” - shall deliver ... .- HENCE WHAT HAPPENS IS - prosecution who starts, accused shall appear, exception with regards to contraventions but this rarely takes place.

- It is the prosecution who starts producing evidence, then the defendant, who can start by first cross examining the witness of the prosecution, then has a choice on whether he wants to testify or not, and after his testimony he can bring forward any other evidence which he would deem helps his defence. After the closing of D’s evidence, both parties make final submissions on the merits of the case.

Judgement according to 377 should be delivered on same day if conveniently practicable -but there are a number of reasons why not given on same day:

1. As case is not conclude and neither is the case
2. Once evidence is closed and hearing is concluded, mag may need time to go through acts of proceedings and deliver judgement.
3. In relation to 377 read also 382 of the criminal code which basically deals with the requisites of the judgment.

So 377 - once a case is closed the judgment needs to be decided And 382 speaks on the requisites of the sentence.

Very imp as if this article is not followed, not adhered to., could lead to nullity to the judgment, one should state the facts of which he has been found guilty, shall award punishment, if found guilty and 3, it shall quote the article of this law and of any other law creating the offence. If these 3 requisites are not indicated to the judgement., this can lead to the nullity of the judgment.

You can also have instances whereby the Court forgets to pronounce itself on the PUNISHMENT - on the PIENA , PRONUNZJA TAL PIENA -

## **Article 382 Criminal Code - Requisites of Judgement**

*382. The Court, in delivering judgment against the accused, shall state the facts of which he has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence*

### **Motivation**

If these three requisites are not indicated in the judgment, then it could lead to the nullity of the judgment. With regards to the first requisite - the facts of the case - this does not mean the motivation behind the judgement, and despite the lack of motivation does not lead to nullity despite the fact that ideally a judgment is motivated.

**PuiLizija vs Antoine Cassar - decided on 20th Sept 2020** notified same judgment to ministry of judgment as despite the Court - does not give motivation to give judgment, lack of motivation sometimes can be prejudicial to the parties of the case - imagine a Court declaring someone guilty of an offence - very difficult to file an appeal not from merits but from merits as he does not understand the reasoning and visibility of the case itself.

*Lack of motivation does not lead to nullity of case*

**Il-Pulizija vs. Dante Buhagiar - 28 t'Ottubru, 2021 IL-QORTI TAL-APPELL KRIMINALI**  
**Onor. Imhalled Dr. Aaron M. Bugeja**

Il-Qorti giet mitluba sabiex barra milli tapplika l-piena skond il-ligi, tapplika wkoll l-artikoli 383, 384, 385 u 412C tal-Kap 9 tal-Ligijiet ta' Malta ghas- sigurta ta' dawn il-persuni hawn fuq indikati.

Permezz tas-sentenza aktar 'il fuq imsemmija, il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali, wara li rat l- imputazzjonijiet miġjuba kontra l-appellat, u wara li qieset l- ammissjoni mtennija tal-imputat appellat, sabet lill-appellat hati u wara li rat l-artikoli 221(1), 261(a)(c)(e), 262(1)(a), 267, 269(g), 274(c), 276A, 277(a), 279(a), 280(2), 281(a) tal-Kodiċi Kriminali kif ukoll l-artikolu 23 tal-Kapitolu 446 tal-Ligijiet ta' Malta ikkundannatu għal piena komplessiva ta' tliet xhur prigunerija u dan wara li, meta kienet qegħda tagħmel il-konsiderazzjonijiet tagħha, sabitu hati tal- imputazzjonijiet miġjuba kontra tiegħu;

Ikkunsidrat:

5. Illi l-Avukat Ġenerali għandha raġun. Izda l-problemi f'din is- sentenza jmorru ferm oltre minn dak reklamat mill-Avukat Ġenerali.
6. L-artikolu 382 tal-Kodiċi Kriminali jippreskrivi li :
7. Hemm diversi aspetti ta' din is-sentenza li ma jirrispettawx il-vot ta' dan l-artikolu. Qabel xejn, il-Qorti tal-Maġistrati (Malta) sabet lill- appellat hati tat-tieni imputazzjoni, iġifieri dik ta' offiża ta' natura hafifa. Hija ċitat, korrettement l-artikolu 221(1) tal-Kodiċi Kriminali li jispjega meta offiża tista' titqies bħala offiża ta' natura hafifa, nonche li jippreskrivi l-piena relattiva. Izda dan mhux l-artikolu li jikkontempla r-reat. L-artikolu tal-Kodiċi Kriminali li jikkontempla r-reat t'offiża fuq il-persuna huwa l-artikolu 214 tal-Kodiċi Kriminali. Dan l-artikolu, meħtieġ sine qua non, thalla barra mid-deċide tas-sentenza.
8. In-nuqqas t'osservanza tiegħu, jġifieri n-nuqqas tal-Qorti li ssemmi dan l-artikolu tal-Kodiċi Kriminali jew ta' kull ligi oħra li jikkontempla r-reat, kien jammonta għal nuqqas ta' formalita sostanzjali u li jġib in-nullita tas-sentenza tal-Qorti tal-Maġistrati.
9. Problema oħra ta' formalita sostanzjali li tolqot lil din is-sentenza hija dik il-parti li titratta l-piena inflitta. Dan qed jingħad mhux minhabba l-fatt li l-Qorti imponiet piena taħt il-minimum meta la ċitat l-artikolu 21 tal-Kodiċi Kriminali jew li r-raġuni miġjuba minnha ma kienetx wahda li skont il-ġurisprudenza tikkwalifikat bħala raġuni speċjali u straordinarja fis-sensi ta' dak l-artikolu; izda qiegħed jingħad minhabba li

(a) meta hija sabitu hati tal-ewwel żewġ imputazzjonijiet dik il-Qorti erogat piena komplessiva ta' tliet xhur prigunerija iżda ma jirriżultax li dik il-Qorti applikat id-disposizzjonijiet tal-artikolu 17 tal-Kodiċi Kriminali; kif ukoll

(b) minhabba l-fatt li dik il-Qorti għażlet li titratta mal-hati fis-sensi tal-artikolu 23 tal-Kapitolu 446 tal-Liġijiet ta' Malta minhabba li huwa ġie misjub hati minnha li wettaq dawk ir-reati matul il-perjodu ta' żewġ ordnijiet ta' probation separati u għamlet dan billi, suppożitament taht l-artikolu 23 tal-Kapitolu 446 tal-Liġijiet ta' Malta iżda ordnat li t-termini ta' dawk l-ordnijiet tal-probation jerggħu jib dew jiddekorru mid-data ta' dik is-sentenza u estendiethom għal perjodu ta' tliet snin. Fil-fehma ta' din il-Qorti din il-miżura mhix preskritta u permessa taht dak l-artikolu. Dan iwassal biex parti mill-“piena” imposta mill-Qorti tal-Maġistrati titqies li hija inezistenti, b'mod għalhekk tiġi daqslikieku dik il-Qorti ma imponietx piena. Dan ukoll iwassal għall-konsegwenza ta' ksur tal-artikolu 382 tal-Kodiċi Kriminali, bil-konsegwenzi li jikkonsegwu.

10. Imbagħad hemm punti oħra li dik il-Qorti setgħet kienet aktar attenta għalihom, iżda li ma humiex ta' tali gravita li tassattivament iwaslu għan-nullita tassattiva tas-sentenza de quo. Biss meta jitqiesu flimkien mad-difetti imsemmija aktar il-fuq, ikomplu jsaħħu l-konvinzjoni ta' din il-Qorti li s-sentenza de quo għandha tiġi dikjarata nulla.

11. Qabel xejn hemm il-kwistjoni tad-dikjarazzjoni tal-htija tal-appellat li giet magħmula fil-konsiderandi tas-sentenza. L-artikolu 382 tal-Kodiċi Kriminali jeżiġi li l-Qorti tal-Maġistrati tgħid il-fatti li tagħhom l-imputat jiġi misjub hati, iżda ma jgħidx li dan għandu jsir tassattivament fid-dispożittiv tas-sentenza. Pero jagħmel aktar sens ġuridiku li wahda mill-aktar espressjonijiet importanti li tista' tasal għalihom il-Qorti tal-Maġistrati (Malta) bhala Qorti ta' Ġudikatura Kriminali – ossija d-dikjarazzjoni jekk imputat ikunx hati jew mhux hati - issir fil-parti dispożittiva tas-sentenza, aktar milli fil-parti fejn dik il-Qorti tkun qegħda titratta l-motivazzjonijiet li jwasluha għall-konkluzjonijiet eventwali tagħha.

12. Punt ieħor li huwa wkoll ta' min josserva f'dan il-każ huwa li fil-motivazzjonijiet tas-sentenza tagħha, il-Qorti tal-Maġistrati (Malta), korrettement, osservat li l-vitma ta' dan ir-reat kienet persuna ta' sebgħa u sebgħin sena, b'diżabilita, li hija wkoll axxendent tal-hati u li l-istess Qorti osservat li din kienet it-tielet darba li giet misruqa mill-istess hati. Dawn huma ċirkostanzi li dik il-Qorti jidher li ħadet in konsiderazzjoni meta giet biex tqis liema kienu l-artikoli tal-Liġi applikabbli u li kienu mhux biss joħolqu r-reat ta' serq iżda wkoll li kienu jikkwalifikaw ir-reat nonche jżidu l-piena imponibbli. Iżda għal xi raġuni, minkejja li l-vitma ta' dan ir-reat kienet persuna anzjana ta' 77 sena, dik il-Qorti naqset milli tiehu in konsiderazzjoni l-awment tassattiv fil-piena previst taht l-artikolu 257D tal-Kodiċi Kriminali, fatt li jkompli jsaħħah l-argument tal-Avukat Ġenerali li f'dan il-każ, il-piena imponibbli kienet ħafna għola minn dik li imponiet il-Qorti tal-Maġistrati (Malta) f'kuntest fejn, kif spjegat, ma setgħetx tagħmel dan.

13. Illum huwa “ius receptum” li tali nuqqas t’adeżjoni mar- rekwiziti tal-artikolu 382 tal-Kodiċi Kriminali huwa meqjus bħala nuqqas ta’ formalita sostanzjali li jimporta n-nullita tas-sentenza appellata, li saħansitra jista’ anke jitqajjem ex officio.

Deċide

Għall-dawn il-motivi, din il-Qorti qegħda tannulla s-sentenza appellata, u wara li qieset in-natura tal-każ, mhux l-anqas is-sentenza li giet inflitta, biex ma tipprivax lill-partijiet, u partikolarment lill-appellat mill-benefiċċju tad-“doppio esame”, qegħda tagħzel li tirrinviya l-atti lill-Qorti tal-Maġistrati (Malta) biex tkun dik il-Qorti li terġa’ tiddeċiedi l-kawża mill-ġdid skond il- liġi.

### **Article 383 Criminal Code - Power of Court to bind over parties**

383.(1) The Court may, where it deems it expedient, in order to provide for the safety of individuals or for the keeping of the public peace, in addition to, or in lieu of the punishment applicable to the offence, require the offender to enter into his own recognizance in a sum of money to be fixed by the Court.

(2) Such sum shall not be less than one hundred and sixteen euro and forty-seven cents (€116.47) nor more than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) according to the means of the party entering into a recognizance, and the term of the recognizance shall not exceed twelve months.

(3) Where the offender entering into a recognizance is, in respect of the same offence, sentenced to a punishment restriction of personal liberty, the term of the recognizance shall commence to run from the day on which the said punishment is served or condoned

### **Article 384 Criminal Code -Recognizance with surety.**

384. Where, however, there are reasonable grounds to believe that, for providing for the safety of individuals or for the keeping of the public peace, the recognizance referred to in the last preceding article is not sufficient, the Court may moreover require the offender to find a sufficient surety, and the Court may further require that such recognizance, with or without surety, be entered into for an indefinite period, that is to say, until such time as the Court shall be of opinion that there is good cause for the termination of the said recognizance.



## **Article 385 Criminal Code -Detention in default of recognizance.**

385.(1) If, in the cases referred to in articles 35, 36 and 383, any person refuses to enter into his own recognizance, or if, in the case referred to in the last preceding article, any person refuses or is unable to comply with the requirements of the said article, the Court may order such person to be detained until he carries out what is required of him or, where the Court ordered him to find a surety, until such time as the Court, on the application of the person detained, shall declare that the reasons for which he was ordered to find a surety have ceased.

(2) The term of detention shall not exceed twelve months.

(3) The provisions of article 12(1) shall, mutatis mutandis, apply to a person detained under this article.

(4) On satisfying what is required of him, the person detained may at any time obtain his discharge

So this brings us to conclude the topic of Court of mag as a Court of criminal judicature. QORTI TAL GUDIKATURA KRIMINALI -

### **Il-Pulizija v. Donald Cilia, QORTI TA' L-APPELL KRIMINALI, 24 ta' April, 2002**

Rat l-imputazzjoni migjuba mill-Pulizija Ezekuttiva kontra Donald Cilia talli fid-9 ta' Novembru, 2001 u fis-17 ta' Novembru, 2001, ghall-habta ta' 00.30 am, gewwa Triq Ross, San Giljan, xehet gebel jew hwejjeg ohra fl- imsemmija triq bi xkiel, b'inkomdu, bi hsara jew b'perikolu ta' nies ohra;

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tas-6 ta' Frar, 2002, li permezz taghha dik il-qorti sabet lill-imsemmi Donald Cilia hati skond l- imputazzjoni dedotta kontra tieghu u kkundannatu ammenda ta' ghoxrin lira (Lm20);

L-appellant jikkontendi fl-ewwel lok li s-sentenza ta' l-ewwel qorti hija nulla peress li fl-istess sentenza dik il-qorti kkwotat, bhala l-artikolu tal-ligi li jikkontempla r-reat (Art. 382, Kap. 9) l-Artikolu 153(1) tal-Kodici tal-Ligijiet tal- Pulizija. L-appellant ghandu ragun fuq dan il-punt. Il-fatti mputati kjarament jipotizzaw ir-reat kontemplat fl-Artikolu 40(a) tal-Kap. 10, mentri l-Artikolu 153(1) -- apparti li gie revokat bl-Att XXV ta' l-2001 -- jitratta dwar mohqrija ta' annimali, haga li evidentement m'ghandha x'taqsam xejn ma' l-imputazzjoni f'dan il-kaz. L-indikazzjoni zbaljata ta' l-artikolu tal-ligi li jikkontempla r-reat li tieghu persuna tkun giet misjuba hatja gie dejjem ekwiparat fil-gurisprudenza ta' din il-Qorti man-nuqqas ta' tali indikazzjoni ghall-finijiet tal-Artikolu 382 tal- Kodici Kriminali (ara Il-Pulizija v. Mary Grech App. Krim. 7/7/1995) Tali nuqqas jammonta ghal nuqqas ta' formalita' sostanzjali fis-sens tas-subartikolu (3) ta' l-Artikolu 428 tal-Kodici Kriminali, bil-konsegwenza li din il- Qorti thassar is-sentenza ta' l-ewwel qorti u tghaddi biex tiddeciedi l-kawza mill-gdid fuq il-meritu skond l-imsemmi subartikolu. Meta jigri hekk, din il-Qorti ma tkunx marbuta bis-subatikolu (7)

tal-imsemmi Artikolu 428 (ara Il-Pulizija v. Frank Zarb, Joseph Grech u Mario Bugeja App. Krim. 28/7/1995). Ghalhekk din il-Qorti tilqa' l-pregudizzjali sollevata mill-appellant u qed thassar u tannulla s-sentenza appellata, u ser tghaddi biex tiddeciedi l-kaz mill-gdid fuq il-meritu.

Mill-provi -- senjatament mid-deposizzjonijiet tal-konjugi Ciarlo' -- jirrisulta abundantement pruvat li l-appellant, kemm fil-granet indikati fl- imputazzjoni kif ukoll f'okkazzjonijiet ohra, tefa' hmieg ta' kelb mill-proprjeta' tieghu ghal fuq il-proprjeta' tal-imsemmija Ciarlo'. Iz-zewg proprjetajiet huma wahda fuq kull naha ta' Triq Ross, f'San Giljan. L-appellant, fir-rikors tieghu, jikkontendi li galadarba ma hemmx prova li xi haga minn dak li tefa' giet, ossia waqghet, fit-triq li tifred iz-zewg proprjetajiet, ma jistax jinghad li l-imputazzjoni giet ippruvata. Din il-Qorti ma taqbilx. L-Artikolu 40(a) tal-Kap. 10 jipprovdi li "Hadd ma jista', fit-toroq jew fuq it-toroq, bi xkiel, b'inkomdu, bi hsara jew b'perikolu ta' nies ohra, jixhet gebel jew hwejjeg ohra, ukoll minn twieqi, logog, gallarijiet jew bjut" (sottolinear ta' din il-Qorti). Hu evidenti ghal din il-Qorti li, galadarba l-iskop tal-legislatur hu li jipprotegi lil min talvolta jista' jkun ghaddej mit-triq minn affarijiet li jkunu qed jitwaddbu minn direzzjoni ghal ohra, l- espressjoni "fit-triq" tinkludi mhux biss il-wicc tat-triq izda anke l-arja ta' fuq it- triq sa dak il-gholi li normalment wiehed jista' jwaddab b'idejh oggetti u li jistghu jaqghu u jigu fuq il-wicc tat-triq, sia jekk minn iwaddab ikun b'saqajh fuq il-wicc tat-triq u sia jekk ikun fuq proprjeta' privata adjacenti t-triq. Fi kliem iehor, ma hux mehtieg ghall-integrazzjoni ta' dana r-reat kontravvenzjonali li l- gebel jew il-hwejjeg ohra li jintefghu jaqghu fuq il-wicc tat-triq: jekk oggetti jintefghu minn naha ghal ohra ta' triq, ikunu wkoll qed jintefghu "fit-triq" bi xkiel, b'inkomdu, bi hsara jew b'perikolu ta' nies ohra. Kif gie ritenut minn din il-Qorti fis-sentenza taghha tal-5 ta' Mejju, 1994 fl-ismijiet Il-Pulizija v. Charles Chircop, l-ixkiel, inkomdu, hsara jew perikolu ma hemmx bzonn li jkun attwali, fis-sens li xi persuna giet effettivament imxekkla, skomodata jew saritilha xi hsara jew tqeghdet f'perikolu: hija bizzejjed il-potenzjalita' ta' dan kollu. Tenut kont tal-lokalita' u tal-hin, din il-Qorti hi sodisfatta li kien hemm din il-potenzjalita' f'dak li ghamel l-appellant, u cioe' meta tefa' hmieg tal-kelb minn naha ghal ohra tat-triq. Ghalhekk l-appellant huwa hati tar-reat kontemplat fl-imsemmi Artikolu 40(a).

Kwantu ghall-piena, din il-Qorti tara li l-agir ta' l-appellant huwa verament ta' minn jistmerru, mhux biss minhabba l-potenzjalita' ta' inkomdu jew hsara ghal min seta' kien ghaddej fit-triq, izda wkoll ghax dak li ghamel l- appellant kien kjarament intiz biex jivvessa lill-koppja anzjana Ciarlo'. Fic- cirkostanzi, ghalhekk, din il-Qorti hi tal-fehma li r-reat jisthoqqlu piena aktar minn dik tal-kontravvenzjonijiet, u ghalhekk ser tapplika dak li jipprovdi fl- ahhar parti tieghu s-subartikolu (1) tal-Artikolu 319 tal-Kap. 10.

Ghall-motivi premissi din il-Qorti, wara li rat l-Artikoli 40(a) u 319(1) tal- Kap. 10, tiddikjara lill-appellant Donald Cilia hati skond l-imputazzjoni migjuba kontra tieghu u tikkundannah multa ta' tmenin lira (Lm80), pagabbli minnufih jew altrimenti konvertibbli f'sittax-il gurnata prigunerija.

**Il-Pulizija (Spettur A.P. Miruzzi) Vs Paul Cachia, 25 ta' Settembru, 2003 - OORTI TA' L-APPELL KRIMINALI**

Rat l-akkuzi dedotta kontra l-appellant quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli :

1) fit-12.09.2001 mal-wasla tieghu f'dawn il-Gzejjer minn Tunez, permezz tal-bastiment MV "Serenade" bil-hsieb li jiffroda l-Gvern, xjentement attenta jahrab it-Taxxa fuq il- Valur Mizjud (VAT) dovut u/jew xi Ligi jew limitazzjoni dwar l-importazzjoni, ghamel dikjarazzjoni jew ta informazzjoni li bid-dehen tieghu kienet falza f'dettal sostanzjali, billi kellu fil-pussess u/jew taht il-kontroll tieghu numru ta' ghasafar tal-ghana aktar milli fil-fatt iddikjara lill-ufficjali tad-Dwana, liema importazzjoni taghhom hija projbita u/jew ristretta. Dawn ghandhom il- valur ta' LM420.00,0 u li fuqhom kellha tithallas Taxxa fuq il-Valur Mizjud, liema taxxa tammonta ghall-LM63.00,0, liema taxxa ma gietx imhallsa u/jew kawtelata u dan bi ksur ta' l-Artikolu 60(k); l-Artikolu 62(a)(b)(k)(n) ta' l- Ordinanza tad-Dwana Kap. 37, u l-Artikolu 80 ta' l-Att dwar Taxxa fuq il-Valur Mizjud (Att. Nru. XXIII-1998);

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali tal-5 ta' Frar, 2003, li biha wara li rat l-Artikoli 60(k), 62 (a)(b)(k)(n) ta' l-Ordinanza tad- Dwana Kap. 37, u l-Artikolu 80 ta' l-Att dwar Taxxa fuq il- Valur Mizjud (Att Nru. XXIII-1998), sabet lill-imputat hati ta' l-akkuzi fuq imsemmija w ikkundannatu ghall-multa komplessiva ta' disa' mija w hamsin lira Maltin (LM950) u ordnat l-konfiska ta' l-ghasafar u gaggeg, kif ukoll ipprojbiet lill-imputat milli jottjeni xi licenzja ta' importazzjoni ghall-perjodu ta' zmien sena.

Illi qabel xejn , ghalkemm l-appellant ma adduca ebda aggravju dwar dan , din il-Qorti osservat illi l-Ewwel Qorti fil-parti dispozittiva tas-sentenza ccitat biss l-artikoli tal-ligi taht il-Kap. 37 u taht l-Att dwar it-Taxxa tal-Valur Mizjud li jirrigwardaw biss is-sejbien ta' htija tal-ewwel imputazzjoni w dana ghalkemm kienet sabet htija wkoll taht l-erba imputazzjonijiet l-ohra dedotti kontra l-appellant li jaqghu taht ligijiet ohrajn . Issa dan dan in-nuqqas jimporta n-nullita' tas-sentenza appellata ghax ma giex rispettata il-vot tal-ligi indikat fl-artikolu 382 tal-Kodici Kriminali . Dan l- artikolu jiddisponi li l-Qorti, meta taghti s-sentenza kontra l-imputat , ghandha tghid il-fatti li taghhom dan ikun gie misjub hati , taghti l-piena w ssemmi l-artikolu tal-Kodici Kriminali jew ta' kull ligi ohra li tkun tikkontempla r-reat. Illi ghalkemm dan sar fir-rigward tal-ewwel imputazzjoni , ma sarx fir-rigward tal-erba imputazzjonijiet l-ohra.

Illi , kif dejjem gie ritenut , in-nuqqas t' osservanza ta' dak li hemm provvdut fl-artikolu 382 tal-Kodici Kriminali jammonta ghal nuqqas ta' formalita' sostanzjali w indubbjament dan in-nuqqas tal-Ewwel Qorti jgib in-nullita' tas-sentenza appellata w jintitola lil din il-Qorti li thassar is-sentenza w tiddeciedi l-kawza hi stess fuq il-mertu , meta ssib li tkun inkisret jew li ma saritx xi formalita' li trid il-ligi taht piena ta' nullita' jew li tkun xort' ohra sostanzjali a tenur tal-artikolu 428 (3) tal-istess Kodici Kriminali. (Appell Kriminali : "Il-Pulizija vs. Mario Agius" [3.2.1995] u ohrajn )

]

Illi l-appellant jikkontendi li ladarba huwa mar quddiem tad-Dwana w meta gie mistoqsi biex jiddikjara x'kien qed idahhal Malta, hu wiegeb mall-ewwel li kien qed idahhal ghasafar , ma

jistax jinstab hati li pprova jevadi id-dazju jew it-Taxxa fuq il-Valur Mizjud . Il-Prosekuzzjoni pero' ssostni li ghalkemm wiehed jista' ma jkunx ghal kollox preciz meta jigi biex jindika n-numru, mill-banda l-ohra, l- fatt li l-appellant indika kwazi n-nofs tal-kwantita' ta' ghasafar li kellu, jindika li kien ghamel dikjarazzjoni falza w li dan sar bil-ghan li jigi evaz id-dazju jew Vat .

Illi l-ligi tad-Dwana (Kap.37) tikkontempla dan il-kaz fl- artikolu 61 (1) fejn jinghid li meta fiz-zmien tal-ezami minn ufficjal tad-Dwana xi oggetti jkunu jinsabu fi kwantita' akbar minn, jew differenti minn , dawk li jkunu jidhru fuq il- fattura tal-esportatur jew li jkunu dikjarati mill-importatur jew mill-agent tieghu, f'dak il-kaz l-oggetti li jinstabu zejda jew dawk l-oggetti differenti ghandhom jigu konfiskati w din il-konfiska tkun bla hsara ghal kull azzjoni li tista' tittiehed kontra l-importatur skond xi dispozizzjoni ohra tal- ligi. Umbaghad is-sub-artikolu (2) ikompli jghid li d- dispozizzjonijiet ta' s-sub-artikolu (1) ta' dan l-artikolu ma ghandhomx jghoddu meta l-awtorita' kompetenti tkun sodisfatta li d-diskrepanza tkun grat minnhabba fi "zball genwin".

L-Ewwel Qorti meta sabitu hati ta' din l-imputazzjoni , immotivat id-decizjoni taghha billi qalet li ghalkemm "ma hemmx ghalfejn l-ammont ikun ezatt . Pero' ma jridx ikun il boghod mill-verita'. L-imputat iddikjara biss sebghin (70) ghasfur , meta fil-fatt kellu d-doppju . U hawnhekk il-Qorti ma tistax titfa' d-dubbju favur l-akkuzat illi forsi ma kienx jaf ezatt kemm kellu ghasafar . Id-differenza hija kbira wisq biex tigi injorata." Din il-Qorti taqbel ma dan l-apprezzament ta' fatt u zgur li ma tarax li hu verosimili li xi hadd li jiehu l-briga li joqghod imur Tunes biex jimporta tant ghasafar li f' Malta igibu prezz mhux zghir fis-suq, jiehu zball ta' 50% tal-kwantita' li huwa jkun xtara. Hu ovvju li l-appellant ipprova "jilghaba tal-hmar biex ma jhallasx Dwana" kif jghid il-qawl Malti w din l-ispjegazzjoni bl-ebda mod ma tikkonvinci lil din il-Qorti lanqas sal-grad tal-probabbli.

Ghalhekk din il-Qorti qed tiddisponi mill-appell billi fl- ewwel lok thassar is-sentenza appellata ghaliex ma giex rispettat il-vot tal-ligi fl-artikolu 382 tal-Kodici Kriminali u a tenur tal-imsemmi artikolu 428 (3) qed tiddeciedi l- kawza fuq il-mertu w fil-waqt li tiddikjara w ssib lill- appellant hati tal-imputazzjonijiet kollha dedotti kontra tieghu , b'dan illi r-raba imputazzjoni hija assorbita fit-tieni w fit-tielet imputazzjoni , u wara li rat l-artikoli 60 (k) ,61 u 62 (a) (b) (k) u (m) tal-Kap.37 tal-Ligijiet ta' Malta , l- artikolu 80 ta' l-Att Dwar it-Taxxa fuq il-Valur Mizjud (Att. XXIII tal-1998) , ir-Regolamenti 12 (3), 16 (a) u 25 (2) (a) tal-Avviz Legali 146 tas-sena 1993 u r-regolamenti 7 (3) u 8 tal-Avviz Legali 19 tas-sena 1992 ,u l-artikoli 17, 23 u 30 tal-Kap. 9 tal-Ligijiet ta' Malta , tikkundannah ghall-hlas ta' multa ta' erba mija u wiehed u tletin lira Maltin u tminja u ghoxrin centezmu (LM431.28c) fuq l-ewwel imputazzjoni, multa ta' hamsin lira Maltin (LM50) fuq it- tieni imputazzjoni ; multa ta' hamsin lira Maltin (LM50) fuq it-tielet imputazzjoni ; u multa ta' hamsin lira Maltin (LM50) fuq il-hames imputazzjoni , b' kollox multa ta' hames mija w wiehed u tmenin lira Maltin u tminja u ghoxrin centezmu (LM581.28c) u tordna l-konfiska tal-ghasafar kollha inkluzi

Qrati tal-Gustizzja

Pagna 9 minn 10

Kopja Informali ta' Sentenza

dawk dikjarati lid-dwana (u dana billi l-importazzjoni taghhom kollha kienet ipprojbita) u tal-gageg favur il- Gvern ta' Malta w tiskwalifika lill-appellant milli jzomm jew jottjeni licenzji ta' importazzjoni ta' ghasafar ghal zmien sena mill-lum.

# QORTI STRUTTORJA

*That which is based either before Court transforms itself into Court of criminal judicature. Sections dealing with Court of mag as a Court of criminal inquiry 398- 420D.*

Till 409 struttorja - as a court of criminal inquiry ha tidhol fis sehha meta mandekk sitwazzjoni li tidhol taht l-competence ta' 370 1. da mandu x jaqsam xejn aw

Court can start as a Court of criminal inquiry in case we are dealing with a crime liable with more than 2 years imprisonment and with crimes which does not fall under 370 of the criminal CODE, TRID ISSIR IL- KUMPLAZZJONI

There is a mechanism which can be evoked in the beginning - when in the beginning, the mechanism which we spoke about where the Court is treated **BI PROCEDURI SOMMARJI**, in the case there is the consent, the QORTI STRUTTORJA, converts into a Court of criminal inquiry and case moves in 370.

If the mechanism does not in the beginning of the case, hence eventually the Court can have potentially the power to decide but before competent, there must be this compilation. There must be the mechanism where the AG, after KUMPLAZZJONI, if pena is max of 12 years, or even pena is max 12 years, mag., can send the case TO GURI, and in case of crimes which accede 12 years as a punishment then the Court of Mag. bhala qorti struttorja, il-kaz ikun bhala qorti kriminali u tohog l att tal-akkuza.

AG in 6-12 years takes care but then the IMPUTTAT decides if the case is decided by a Court of mag or not.

KUMPLAZZJONI - Stadju li jrid isir fejn il-pena hija izjed minn sentejn 370 (3) and (4) - if the pena exceeds 12 years then the case will always go to criminal Court.

## What is the Court of Mag. as a Court of criminal inquiry?

### Republika vs. Simon Xuereb - 2004 - Court of Criminal Appeal Superior Jurisdiction

Illi in vista li l-ahhar erba eccezzjonijiet gew irtirati , jibqa' biss biex din il-Qorti tiddeciedi dwar l-ewwel u t-tieni eccezzjoni fuq riprodotti.

Illi in sostenn tal-ewwel eccezzjoni , d-difiza fit-trattazzjoni orali ssottomettiet li fil-maggor parti taghhom l-atti tal- kumpilazzjoni kellhom l-intestatura tal-“Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali” minnflok dik ta' “bhala Qorti Istruttorja” u dan kien zball grossolan.

Ghalkemm dan ma ghandux iwassal biex l-atti tal- kumpilazzjoni jigu dikjarati nulli , ghandu pero' jwassal biex l-atti li mhumix komformi mall-ligi , jigu sfilzati

Il-Prosekuzzjoni rribattiet li l-artikolu tal-ligi relattiv jghid tassattivament liema huma l-kazi fejn jistghu jigu attakkati l-atti tal-kumpilazzjoni . Hu minnu li l-intestatura fuq hafna mill-atti hija zbaljata izda l-uniku rekwizit li irid jigi osservat skond il-ligi w cioe' li l-atti kollha jigu ffirmati mill-Magistrat li jippresjedi l-Istruttorja , gie osservat u fil-fatt l-atti kollha jgibu l-firma tal-Magistrat . Ghalhekk minkejja dan l-izball , xorta wahda hemm ir-rekwiziti kollha li trid il-ligi.

Ikkonsidrat ;

Illi l-artikolu 395 tal-Kap. 9 jiddisponi li l-ezami tax-xhieda u tal-imputat ghandu jigi iffirmit mill-Magistrat.

Illi d-difiza fil-kors tat-trattazzjoni ghamlet ukoll riferenza ghall-artikolu 398 (1) tal-Kap. 9 li jiddisponi li :-

“Jekk qabel ma jigi ffirmat att, ikun mehtieg isir fih xi tibdil, korrezzjoni jew zieda, dawn ghandhom isiru b'postilla taht l-att u qabel ma dan jigi ffirmat . It-tibdil , il-korrezzjoni jew iz-zieda li jinhtiegu jsiru wara li l-att jigi iffirmit, ghandhom isiru b'postilla fil-gemb.” u s-subinciz (3) jighid li :- “Il-Magistrat ghandu jiffirma ukoll daww il-postilli jew tahsiriet.” Saret ukoll riferenza ghall-artikolu 98 tal-Kap. 12 rez applikabbli ghall-proceduri penali bl-artikolu 520 tal-Kap.9 u dan l-artikolu jiddisponi li :- “L-atti gudizzjarji maghmulin bis-sahha ta' att null jew li gejjin minn att null , huma wkoll nulli.”

Illi minn ezami tal-atti tal-kumpilazzjoni jidher li min ittraskriva il-maggoranza tad-depozizzjonijiet tax-xhieda bi zball iddatilografhom taht intestatura ta' “QORTI TAL-MAGISTRATI (MALTA) BHALA QORTI TA'GUDIKATURA KRIMINALI” u cioe' minnflok “BHALA QORTI ISTRUTTORJA”. Id-Difiza tghid li dan jirrendi t- traskrizzjoni ta' din ix-xhieda inammissibbli.

Issa kif tajjeb irrilevat il-Prosekuzzjoni l-uniku rekwizit li timponi l-ligi dwar l-ezami tax-xhieda u tal-imputat hija li dawn iridu jigu iffirmati mill-Magistrat li jkun qed imexxi l-kumpilazzjoni . Dan ir-rekwizit hu pjenament sodisfatt fil-kazijiet kollha tax-xhieda indikati.

Illi kif gie ritenut minn din il-Qorti diversament preseduta fis-sentenza taghha fuq eccezzjonijiet preliminari fil-kawza “Ir-Repubblika ta’ Malta vs. Francis Cassar” [28.5.1998], “Proprijament ma hemmx zewg qrati, fis-sens ta’ Qorti tal-Magistrati bhala Qorti ta’ Gudikatura Kriminali u Qorti tal-Magistrati bhala Qorti Istruttoria . L-Artikolu 367 huwa car dwar dan : hemm qorti wahda – Qorti tal-Magistrati – ghall-Gzira ta’ Malta u qorti ohra ghall-Gzejjer t’ Ghawdex u Kemmuna . Kull wahda minn dawn ghandha zewg attribuzzjonijiet : bhala qorti ta’ gudikatura kriminali ghar-reati ta’ kompetenza taghha u bhala qorti istruttoria ghar-reati ta’ kompetenza superjuri.” Illi hu minnu li l-isem korrett tal-Qorti meta tkun qed tmexxi kumpilazzjoni hu “Qorti tal-Magistrati (Malta) bhala Qorti Istruttoria” u li meta tintuza l-intestatura “Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali” , din tirriferi ghal kompetenza w funzjoni differenti ta’ dik il-Qorti u li tali indikazzjonijiet zbaljati – li jidher li qabzu mhux biss lill-iskrivan tal-awla izda ukoll lill-Magistrat u lill-Avukat Generali li kien qed isegwi l-kumpilazzjoni tul il-kors tad-diversi rinvijs – ghandhom jigu evitati . Mill-banda l-ohra pero’ t-traskrizzjoni tax-xhieda setghet saret liberament fuq karta bla ebda intestatura ta’ Qorti u kien ikun bizzejjed li tali traskrizzjoni tindika il-partikolarajiet u generalita’ tax-xhud u tkun iffirmata mill-Magistrat , ghaliex ladarba tkun inserita fil-process tal-kumpilazzjoni , hu ovvjw li tkun traskrizzjoni ta’ xhieda li inghatat f’ dak il-process partikolari quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttoria.

Illi una volta li gie konstatat dan l-izball , forsi idealment is-soluzzjoni kienet tkun li dawn l-atti jintbaghtu lura lill-Qorti tal-Magistrati (Malta) bhala Qorti Istruttoria, biex jigi sanat id-difett billi ssir id-debita rettifika jew korrezzjoni fl-intestatura, izda dan issa mhux legalment possibbli li jsir ghaliex, kif gie ritenut mill-Qorti tal-Appell Kriminali (Superjuri – Kolleggjali) fl-appell “Ir-Repubblika ta’ Malta vs. Ann-Elizabeth sive Anabel Ebejer” [28.2.1985], “L-ebda irregolarita’ u l-ebda difett fl-atti tal-kumpilazzjoni ma jista’ jkollhom bhala konsegwenza taghhom ir-rinviju ta’ l-atti mill-Qorti Kriminali lill-Qorti Istruttoria biex tigi regolarizzata l-pozizzjoni, isir dak li kellu jsir u ma sarx , jew sanat id-difett. Irregolarita’ jew difett fl-atti tal-kumpilazzjoni jistghu iwasslu biss ghall-eskluzzjoni tal-prova li ma tkunx tirrizulta konformi mall-precett tal-ligi , jew inkella ghan-nullita’ ta’ l-att tal-akkuza , wara debita eccezzjoni bil-forma w fl-istadju opportun fil-kazijiet previsti mill-ligi.”

Illi fil-kaz in ezami ma gietx eccepita n-nullita’ tal-att tal-akkuza mill-akkuzat imma biss l-inammissibilita’ tat-traskrizzjoni tax-xhieda fejn hemm dad-difett. Izda din il-Qorti thoss - minghajr bl-ebda mod ma tidher li qed tikkondona jew tinkoraggixxi zbalji simili – li d-difett lamentat mid-difiza mhux tali li jirrendi t-traskrizzjoni mhux “konformi mall-precett tal-ligi” ghaliex l-uniku precett li timponi l-ligi hu li it-traskrizzjoni tax-xhieda trid tkun iffirmata minn



Magistrat u dan il-precett gie fil-fatt osservat. L-intestaura dattilografata mit-traskriuttur ma kienetx mehtiega “ad validitatem” u kienet superfluwa.

## Article 389 - The Court of Magistrates as Court of criminal inquiry.

**389.** *In respect of offences liable to a punishment exceeding the jurisdiction of the Court of Magistrates as Court of criminal judicature, the Court of Magistrates shall proceed to the necessary inquiry*

If do not fall under 370(1) IRID IKUN HEMM L-KUMPILAZZJONI - slightly different as a Court of criminal judicature as a Court of criminal inquiry will not deliver judgements - fact remains that if no mechanism arises for the Court to be competent to listen to case, the Court can not convert and listen to case.

**COMPILARE** - to gather evidence - and to remit the accused for trial - DIGRIET TAL PRIMA FACIE - person is charged can be assisted by a lawyer and will participate in proceedings. THE INKJESTA, precedes the criminal inquiry. Hence do not confuse INKJESTA MAL-KUMPILAZZJONI. **Inkjestja precedes kumpilazzjoni.**

It is very imp to note that whilst in the previous sections, in the Court of criminal judicature, there is a procedure to be followed, if the requisites are not adhered to it can lead to nullity of judgement, in case of a criminal inquiry, certain procedures which have to be followed strictly as if not followed they can lead to nullify of the proceedings. if not followed can lead to nullification of the whole compilation.

**Article 390 Criminal Code** - States how KUMPILAZZJONI starts. Compare with 375(d)

**390.**(1) The Court shall hear the charges read by the Attorney General or the officer of the Executive Police and the report of the Police officer on oath, shall examine, without oath the party accused and shall hear the evidence in support of the charges read. Everything Shall be reduced to writing.

(2) The Court shall examine and reduce to writing the evidence adduced on behalf of the accused.

(3) In cases where no proceedings can be instituted except on the complaint of the injured party, the accused may, even before he is examined, demand the production of the complaint, if the complaint was made in writing, or of other evidence of the complaint, if it was made orally.

(4) The attendance of the complainant shall not be necessary to prove the complaint, if from other evidence it appears to the satisfaction of the Court that the complaint was made.

(5) If, in the course of the inquiry, the accused shall not have demanded nor the Court ex officio shall have ordered the production of evidence of the complaint, the complaint shall be presumed to have been made according to law.

(6) The Court may, having regard to the circumstances of the case, ex officio, order that the answers given by the witness, or the substance thereof, be taken down in shorthand by means of stenographers appointed for the purpose or be recorded by electromagnetic means. Shorthand notes shall be taken down in indelible ink and signed on each page by the stenographers and shall, together with the transcript, be inserted in original in the record. The electromagnetic recording shall be transcribed under the direction of the registrar and the transcript shall be inserted in the record. In either case, the transcript may be handwritten or typewritten and shall be read over to the witness, during or after the sitting, by the registrar who shall make a note of such reading at the foot of the transcript.

### **Article 597 sub 4 Criminal Code**

*(4) The indictment cannot be impugned on the ground of any defect in the record of inquiry, nor can the accused demand that, on the ground of any such defect, the trial on the said indictment be not proceeded with, unless such defect consists in the total absence of the charges being read or of the examination of the accused or of the order committing the accused for trial, or in the refusal of the Court of criminal inquiry, without just cause, to hear the evidence produced by the accused; saving always the right of the accused and the Attorney General to oppose the production, at the trial, of any act tendered in evidence which is not according to law.*

Article 597 sub 4 -Article 390 is sooo important that 597 sub 4, law states that the indictment can not be impugned. 390 is so important that the law specifically stipulated that in the case where there is a total nuqqas tal-qari tal att tal-akkuzi - that can lead to nullity - tant kemm hu improtanti li l-kumpilazzjoni shiha tad droga giet nulla - ghax l-kumpilazzjoni kienet kollha nulla.

→ As per Article 395, it has to be signed by the magistrate. Hence, in the case one finds some kind of form, but not endorsed by mag's signature, then the Court declared such a situation as leading to nullity to the whole inquiry.

→ Mumentu kif tibda l-istruttorja, L-QARI TAL GURAMENT TAL-AKKUZA U L-EZAMI TAL IMPUTAT BIL GURAMENT.

## **Repubblika ta' Malta vs. Saviour Azzopardi et. 2006 - IMHALLEF Galea Debono**

Rat in-noti tal-eccezzjonijiet separati izda identici (kif korretti b' digriet tat-3 t' April, 2006) ntavolati mill- akkuzati Sandro Psaila u Raymond Bonello fl-10 ta' Jannar, 2006, fejn eccepew :-

1. Illi l-Attijiet tal-Istruzzjoni kontra l-akkuzat fl- interita' taghhom huma nulli w inammissibbli skond il- Ligi peress illi dawn manifestament jonqsu milli jissodisfaw id-dispozizzjonijiet tal-Artikolu 395 u 396 tal-Kap.9, billi la l-ezami tal-akkuzat u lanqas id- depozizzjonijiet tax-xhieda w l-esebiti ma gew iffirmati/ kontro-ffirmati mill-Magistrat li kkonduca l- Istruttorja, liema nuqqas konsegwenzjalment jirrendi l-Atti tal-Kumpilazzjoni mhux konformi mal-precett tal- Ligi [Ara Ir-Repubblika ta' Malta vs Ann Elizabeth sive Anabel Ebejer - Qorti tal-Appell Kriminali [Sede Superjuri] – deciza 28.2.1985 u Ir-Reppublika ta' Malta vs.Simon Xuereb – Qorti tal-Appell Kriminali [Sede Superjuri] – deciza 22.4.2004].

2. Illi ghall-istess ragunijiet eccepiti fl-ewwel eccezzjoni, l-Att ta' Akkuza odjern huwa null fit-termini tal-Artikolu 597(4).

3. Illi minghajr pregudizzju ghall-generalita' tat-tieni u t-tielet eccezzjoni, t-traskrizzjoniet esebiti minn Herbert Agius fis-seduta tal-20 ta' Marzu, 2002, huma inammissibbli peress li l-awtur taghhom huwa ghal kollox injot u per tant tali dokument huwa prova li fuqha d-difiza ma' ghandha ebda forma kontroll, (Sic!) kif ukoll ghaliex l-istess dokument jikkostitwixxi “documentary hearsay”.

4. Illi l-istqarrijiet tal-ko-akkuzati l-ohra kollha huma inammissibbli bhala prova fil-konfront tal-akkuzat u dan ghal finijiet kemm ta' l-ewwel kif ukoll tat-tielet kap tal-Att ta' l-Akkuza.

Illi hu ovvju li l-ewwel eccezzjoni li trid tigi trattata hija dik tan-nullita' tal-att ta' l-akkuza stante d-difett fl-atti tal-istruttorja u senjatament in-nuqqas ta' firma tal- magistrat fuq l-ezami tal-akkuzati, billi decizjoni favorevoli dwar din l-eccezzjoni moghtija mill-akkuzati Sandro Psaila, Raymond Bonello u Saviour Azzopardi, tkun wahda dirimenti li tinficja l-process kollu anki fejn jirrigwarda l-akkuzati l-ohra li jew ma ssollevawx din l-eccezzjoni jew addirittura ma tawx avviz ta' eccezzjonijiet preliminari.

Illi l-artikolu 395 tal-Kodici Kriminali jiddisponi li l- ezami tax-xhieda u tal-imputat ghandu jigi ffirmat mill- magistrat.

Bhala fatti, kif jidher mil-folios 33 sa 38 Vol. I , tal- Istruttorja, l-formoli sterjotipati li jirrigwardaw l-ezami tas-sitt akkuzati li ntlew bil-linka w jgibu id-data ittimbrata tal-21 ta' Lulju, 2001 u timbru iehor bl-isem tal-Magistrat Dr. Joseph Cassar B.A., LL.D., huma iffirmati in calce biss minn persuna li iffirmat isimha fuq l-istampat tal-formula “Skrivan” . Invece fuq l- istampat tal-kelma “Magistrat” ma hemmx il-firma tal- Magistrat kif del resto imkien iehor fuq dawn is-sitt folji ma hemm il-firma tal-imsemmi Magistrat.

Issa huwa pacifiku fil-gurisprudenza in materia li l- ezami tal-imputat ghandu jigi firmat mill-Magistrat Istruttur u li minghajr dik il-firma, l-ezami tal-imputat huwa null, u ghalhekk hija nulla l-istruttorja w huwa ukoll null l-att ta' l-Akkuza bazat fuq dik l-istruttorja. (ara "Il-Maesta' Taghha r-Regina vs. Antonio Sammut" Qorti Kriminali – Kolleggjali [12.1.1953] ; "Il-Maesta' Taghha r-Regina vs. George Pulo" ; Qorti Kriminali , [ 2.2.1953] konfermata mill-Qorti Kriminali – Kolleggjali b' sentenza tat-12 ta' Jannar, 1953, u "Il-Maesta' Taghha r-Regina vs. Carmelo Refalo" (Qorti ta' l-Appell Kriminali – [ 12.2.1975] fejn gew citati z-zewg sentenzi precedenti w intqal li fihom – fejn kien hemm in- nuqqas effettiv u totali tal-firma tal-magistrat – referibbilment ghall-ezami tal-imputat, dan huwa ekwiparabbli ghan-nuqqas tal-ezami stess. Fejn kien hemm in-nuqqas tal-ezami tal-imputat fl-istruttorja, l- att ta' l-akkuza bazat fuq l-istess istruttorja dejjem gie annullat (ara. "Sua Maesta' la Regina vs. Giuseppe Formosa" (Qorti Kriminali – Kolleggjali [23.2.1900] u "Sua Maesta' la Regina vs. F.S. Decesare" [30.3.1898] u ohrajn.)

Illi umbaghad skond l-artikolu 597 (4) (gja 591(4) ) tal- istess Kodici Kriminali, hemm lok ghall-impunjazżjoni tal-Att ta' l-Akkuza minnhabba difett fl-attijiet tal- kumpilazzjoni, meta inter alia dan id-difett ikun jikkonsisti fin-nuqqas ghal kollox ta' l-ezami tal- imputat. U kif gie ritenut mill-Qorti Kriminali – Kolleggjali fis-sentenza ta' Pulo appena citata : "ezami "mhux firmat" ghandu jigi logikament ekwiparat ghall- ezami "nieqes ghal kollox" , ghaliex altrimenti ma kienx ikun hemm sens li tigi mposta l-formalita' tal- firma."

Ghalhekk din il-Qorti, rinfaccata bin-nuqqas ta' firma tal-Magistrat Istuttur fuq kull wahda mill-folji li jirrigwardaw l-ezami tas-sitt akkuzati, ma tistax hlief tiddikjara l-att tal-kumpilazzjoni nulli, ghaliex hu null l- ezami tal-akkuzati u kwindi tiddikjara ukoll null l-Att ta' l-Akkuza odjern bhala null u bla effett fil-konfront tas-sitt akkuzati, stante li kif gie ritenut minn din il- Qorti fis-sentenza "Regina vs. G. Pulo" fuq citata , din l-eccezzjoni hi ukoll sollevabbli mill-Qorti "ex officio".

In vista ta' din id-decizzjoni, mhux il-kaz li din il-Qorti toqghod tinvesti l-eccezzjonijiet l-ohra li taw id-diversi akkuzati u li ma gewx ceduti w rtirati kif fuq intqal.

Ghaldaqstant, fil-waqt li qed tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet kollha tal-akkuzati li gew minnhom ceduti w irtirati kif fuq intqal kif ukoll minn dawk li ma gewx ceduti, ghajr l-ewwel parti tal-ewwel eccezzjoni w t-tieni eccezzjoni tal- akkuzati Sandro Psaila w Raymond Bonello w t-tieni eccezzjoni tal-akkuzat Saviour Azzopardi, kif sussegwentement limitata ghan-nullita' ta' l-att ta' l- akkuza minnhabba d-difett fl-ezami tal-akkuzat konsistenti fin-nuqqas ta' firma tal-Magistrat fuq l- istess ezami , din il-Qorti qed tilqa' l-istess hames eccezzjonijiet u anki "ex officio" ghal dak li jirrigwarda l-akkuzati l-ohra li ma ssollevawx eccezzjoni simili, qed tiddikjara l-atti tal-istruttorja kontra s-sitt akkuzati nulli w bla effett u konsegwentement qed tiddikjara l-att ta' l-akkuza numru 16 tas-sena 2005 kontra s-sitt akkuzati

null u, wara li rat l-artikolu 449 (6) tal-Kap.9 , tordna li s-sitt akkuzati jergghu jigu imqieghda fl-istess stat li kienu qabel ma gie prezentat l-att ta' l-akkuza.

## **Article 391 Criminal Code - Examination of Witnesses**

391.(1) The witnesses shall be examined by the Court. The name and surname of the witness, the name and surname of the parents and, if the witness is a person to whom articles 4, 9 and 13 of the Identity Card and other Identity Documents Act, applies, the number, if known to the witness, of his legally valid identification document issued under the said Act, as well as the place of birth and abode of the witness and the language in which he shall have deposed, shall be noted down at the head of every deposition:

Provided that the Court may, in exceptional circumstances and to provide for the safety of the witness, omit the above particulars, other than the name and surname of the witness and the language in which he shall have deposed, making a note to that effect on the record of the proceedings.

(2) If the magistrate is conversant with the language spoken by the witness, he may himself translate the deposition into the language in which the written proceedings are conducted; otherwise, or at the request of the accused, a sworn interpreter shall be employed.

(3) Where the witness is a minor under the age of eighteen (18) years the witness shall be examined and cross-examined in one sitting and his testimony shall be recorded by audio-visual means. The audio-visual recording shall form part of the record of the proceedings:

Provided that for special and exceptional reasons which arise after the witness has given his testimony the Court may authorize the hearing of the witness in a subsequent sitting

Article 391 EZAMI TAX-XHIEDA AND ARTICLE 616 - cross-reference to it. Article 391 states that witnesses shall be examined by the Court. What the Court must ask to identify them. Court may in certain circumstances, omit name - when witness is COMES TO JIXHED, Court asks him his name and identity but cannot ask him certain stuff as a matter of privacy

When a minor, under age of 16, witness shall be examined and cross examined in one sitting and his testimony shall be recorded by audio visual means. That witness is done once, hence in the witness, cross-examination is also done. General rule that minors should testify via video conferencing, exceptions can crop up after testimony of such witnesses.

## **Article 392 Criminal Code - Examination of Accused**

392.(1) The examination of the accused referred to in article 390(1), shall, without threat or promise, and without oath, be made in the following manner:

(a) the Court shall ask him his name and surname, his age, his place of birth and abode, his trade, profession or calling, the name and surname of his parents and whether his parents are alive or dead;

(b) the Court shall ask the accused if and what he wishes to reply to the charge.

(2) Before asking any of the above questions, the Court shall explain to the accused the nature of the charge preferred against him and shall inform him that he is not obliged to answer any question nor to incriminate himself; that he may, if he so desires, be assisted by advocates or legal procurators and that whatever he says may be received in evidence against him.

→ 392 sub 2 - whatever he says may be given - qabel l worti ssaqsih d dettalji, l qorti hija obligatta tispjegal u l akkuzi kontra ttiegħu u tinformah li mhux oblogat li jirrispondi - dritt li jekk irid ma jirrispondix, waqt l-ezami innifsu. he can refuse to answer questions which could incriminate him. ex in money laundering case - police found a lot of cash - police might use a declaration against him, even personal information can be received as evidence against him - depends the merits of the case.

(3) The Court shall note at the head of the examination that the requirements of the last preceding sub-article have been complied with.

(4) The answers shall be taken down by the magistrate in the manner provided in article 391, stating the language in which they are given.

(5) If the accused stands mute, the Court shall note down the circumstance and shall proceed with the case as if the accused has pleaded not guilty.

→ Article 392 - deals with the examination of the accused. The law states that examination of the accused, in 390 1, the law states that the examination of accused in 390 1 without threat or promise or without oath shall be made in the following manner - age, name, place

→ Court shall note down at the head of examination that the last preceding subarticle have been complied with, answers shall be taken down by the magistrate under 391 and if the accused stands mute, Court shall note down the circumstances and state he did not respond and took down the fact that he is not guilty, even if he did not answer whether he is guilty or not.

Sometimes, the accused does not answer personal questions then his lawyer says he is not guilty when asked.

### **Article 393 Criminal Code - Cross-examination by the accused**

*393. The accused may cross-examine the witnesses, and his questions, together with the answers, shall be taken down at the end of the examination-in-chief.*

- says that the accused may cross-examine witnesses and the answers shall be - first ezami tax-xhud mill-prosekuzzjoni umbaghad mid-difiza - we are seeing that all that happens in the acts need to be noted down.

#### **Noting down points of fact submitted by the accused.**

**394.** Any point of fact which, upon the examination of any witness or in the course of the inquiry, is submitted by the accused, shall be noted down by the Court in the corresponding part of the record.

#### **Depositions of witnesses and examination of accused to be signed by magistrate**

**395.** The depositions of the witnesses and the examination of the accused shall be signed by the magistrate.

**Article 395** - shall be signed by the magistrate - law requires the witnesses - mhux iffirmit mil mag - this will deal to nullity of proceedings and bill of indictment. nullity of proceedings and bill of indictment.

#### **Article 396 Criminal Code - Counter-signing of exhibits**

*396. Every document produced in the course of the inquiry shall be countersigned by the magistrate, and a record of such production shall be entered on the document itself by the registrar or the officer acting on his behalf.*

**Article 396** - law states that every document produced by the inquiry - mag. should sign every page in the process.

**Repubblika ta' Malta vs. Ismael Hamesh** - aaron bugeja 5th december 2020 - “*dawk il pagani fil process li ma jirrizultawx li huma in konformi mal-inkwerenti*”

**Repubblika ta' Malta vs. Keith Cremona** 15th December 2022 - Different or less strict approach - decided by the criminal Court - the Court adopted a less strict approach and went into 395 and

If transcribed and there is the signature of the transcriber, it is enough - since WITNESS HAS BEEN TRANSKROTTA, then the witness is enough.

### **Article 397 Criminal Code - Powers of Magistrate during Inquiry**

**397.(1)** The Court may order the attendance of any witness and the production of any evidence which it may deem necessary, as well as the issue of any summons or warrant of arrest against another principal or accomplice whom the Court may discover. The Court may likewise order any inquest, search, experiment, the taking of any sample and any other measure or thing necessary for the fullest investigation of the case..

- Sub 1 - the idea mistaken that qorti struttottrja li ma taghmel xejn hlief tisma l-provi, l-qorti mhux hekk biss riedet. This article gives power to Mag. to have a more active or investigative power. One of the powers is to order that tharrek xhud biex jixhed jew tigi prodotta evidenca li hi thoss li jkun necessarju al fini tal kawza li ghandha quddiemha.

(2) The Court may also, under such safeguards as it may consider necessary for the purpose of decency, examine or order to be examined by experts any part of the body of the accused or of the party on whom or with whom the offence is alleged to have been committed, if the Court is of opinion that from such examination a proof might result either against or in favour of the accused.

- Sub 2 - could be defence asks for - in fact it may result in favour or against - X'inuma l-mizuri? Il-Qorti tqabbad espert forensiku ex. f kaz ta rape. jezamina l feriti, ukoll ordni mill-qorti biex l akkuzatt jigi ezaminat. Espert mediku biex ikun jista jaghmel dawn l-ezamijiet – mat-tir principali tal-kumpilazzjoni.

(3) The Court may, moreover, at the request of the Attorney General or the Police, order that any accused person be photographed or measured or that his finger-prints be taken:

Provided that when an accused person, who has not been previously convicted of crime, is acquitted, all photographs (both negatives and prints), finger-print impressions, and records of measurements taken, shall be destroyed or handed over to the person acquitted.

(4) The photographs, finger-print impressions and measurements referred to in the last preceding sub-article shall be taken in accordance with such regulations as may from time to time be made by the Minister responsible for justice.

(5) The Court may also order the arrest of the accused not already in custody

- Sub 5 - L-ahhar poter - court may order arrest.



**Article 397 of the Criminal Code** - Powers of the Mag. During the inquiry - we have seen the Courts of Mag. as the Court of criminal inquiry does not deliver judgement, does not deliver merits of case but one of its main functions of collecting and preserving evidence, and another function is to decide if sufficient grounds for TRIAL - Apart from these 2 main functions, the Mag. During inquiry, it is not only limited to compiling evidence but through 397, the role of mag is also investigative - in fact we will see that this particular article of the law goes beyond just listening to evidence and just that.

The court has a right to also TORHOG MANDAT TA ARREST - may issue any warrant of arrest, or accomplice.

These powers are very far reaching. The Court of Mag. as a QORTI STRUTTORJA ghandha hafna poteri. These ample wide ranging powers have to be balanced with the human rights of the individual. This article has been at times questioned at Constitutional levels because there were individuals who claimed that a certain decree, to conduct certain tests for any other measures which it could have imposed during the proceedings, went against their fundamental human rights.

### **Article 398 - How and where alterations, corrections, or additions may be made**

*398.(1) Where, previously to the signing of any act, it is necessary to make thereon any alteration, correction or addition, the same shall be made by means of a note at the foot of the act itself and before the act is signed. Any alteration, correction or addition required to be made after the act is signed shall be made by means of a note in the margin.*

*(2) No erasure may be made in any act, nor may any blank space be left therein unless it be lined, and if it is necessary to make any cancellation, the same shall be made in such a manner as to leave the word cancelled distinctly legible.*

*(3) The magistrate shall sign any such notes or cancellation*

## **Article 399 Criminal Code - Evidence by Commission**

**399.**(1) When the Court decides that the examination of any witness or any other process of the inquiry by a foreign authority is indispensably necessary, the request for legal assistance and the Court's decision shall be served, within three working days, on the Attorney General who may, within five working days, make any submissions in writing as he may deem appropriate.

(2) The accused may, not later than four working days from any such decision, submit an additional request for the examination of any witness or any other process of the inquiry, and appoint some person to represent him at the examination or process. Such term may, upon good cause being shown, be extended:

Provided that such term as extended shall not exceed thirty days from the date of the decision.

(3) The Court shall order the transmission of the request for legal assistance to the foreign authority within three working days upon the expiry of the period referred to in sub-article (2).

(4) The Criminal Court shall have competence to order the transmission of the request for legal assistance to the foreign authority upon an application being made by the Attorney General or the accused upon the expiry of the time period referred to in sub-article (3).Cap. 12.

(5) The provisions of article 622B of the Code of Organization And Civil Procedure providing for the audio-recording or video-recording of evidence or by any other means shall apply to a request for the examination of any witness under this article

(6) The provisions of articles 618 and 619 of the Code of Organization and Civil Procedure shall apply for the purposes of this article:

Provided that where there exists any treaty, convention, agreement or understanding between Malta and another country or which applies to both such countries or to which both such countries are a party, the request shall be made and transmitted in terms of the said treaty, convention, agreement or understanding.

(7) For purposes of this article a letter of request shall contain the following:

- (a) the object of and the reason for the request;
- (b) details of the person or persons named in the request including, where available, address, date of birth and nationality;
- (c) a description of the offences with which a person has been charged and the punishment to which the offences are liable;
- (d) a summary of the facts giving rise to the request; and

(e) a copy of the relevant legislation that criminalises the conduct attributed to the offender and gives information on the offence, penalty and rights a person may be afforded

## Article 399 of the Criminal Code

Evidence by commission - ITTRI ROGATORJI - there are times when a witness abroad can not come to Malta. This was more applicable in the past when there were no laws on video conferencing - Still applicable in certain circumstances. If you have a witness who is abroad and you need to testify in Court, we have this procedure in 399 - which has to be read with the other provisions in the COCP as a number of cross references exist. Request is sent to a foreign authority - list of questions need to be put to the witness abroad - witness is asked these questions - foreign authority will record these answers and send them back to Malta. Not only time consuming but sometimes this procedure has to happen many times. If through answers, prosecution needs further clarification, this process has to be repeated all at once again.

PROCEDURE - requires a lot of formalities to follow.

## **Article 400 - Accused may be assisted by an advocate or Legal Procurator**

*400. The accused may, in the course of the inquiry, be assisted by advocates or legal procurators.*

## **Article 401 - Term for conclusion of the inquiry**

401. (1) The inquiry shall be concluded within the term of one(1) month which may, upon good cause being shown, be extended by the President of Malta for further periods each of one (1) month, each such extension being made upon a demand in writing by the Court:

Provided that the said term shall not in the aggregate be so extended to more than three months:

Provided further that unless bail has been granted, the accused shall be brought before the Court at least once every fifteen days in order that the Court may decide whether he should again be remanded in custody.

(2) On the conclusion of the inquiry, the Court shall decide whether there are or not sufficient grounds for committing the accused for trial on indictment. In the first case, the Court shall commit the accused for trial by the Criminal Court, and, in the second case, it shall order his discharge.

(3) In either case, the Court shall order that the Attorney General be granted access by electronic means to a scanned copy of the record of the inquiry, together with all the exhibits related to the case, within three (3) working days.

(3A) Where the Court has committed the accused for trial by the Criminal Court, the Court shall, besides giving the order mentioned in sub-article (3), adjourn the case to another date, being a date not earlier than one (1) month but not later than six (6) weeks from the date of the adjournment. The Court shall also adjourn the case as aforesaid to a date falling after the Court shall have received the note of referral according to sub-article (2) of article 405 from the AttorneyGeneral and falling before the date when it shall grant access again by electronic means to the record of the inquiry together with all the exhibits and documents in the case to the Attorney General in terms of any provision of this Code.

(4) In deciding whether there are or not sufficient grounds for committing the accused for trial on indictment the Court shall not consider any question of prescription or any plea as is mentioned in article 449(1)(d).

(5) During the term stipulated in sub-article (3A), the CriminalCourt shall be competent to decide on demands that are filed during the said term.

→ Il-kumplazzjoni must be concluded within 1 month - so important that the law says that it can only be extended if by permission of the president of Malta, and also for 2 more times as the period can not be for more than 3 months.

→ When an accused is not granted bail - then the Court can make it clear that the accused is appearing in front of it every 15 days. Unless bail has been granted, the accused must be brought before the Court. What happens after 30 days? During 30 days, police are obliged to bring enough evidence for the Court to be convinced that the accused is under ATT TAL AKKUZA.

→ If the Court sees even after protection has shown evidence, and no guilt, the Court will see and determine that the akuzat is liberat, order his discharge, not acquittal - different.

**Discharge = ma tkunx dahlet fil mertu tal-kawza - discharge is not an acquittal**

Upon the conclusion of the inquiry, the Court must give its decree, digriet tal-prima facie. digriet jew for proceedings jibqu ghaddejjin, u jitqieghed taht att ta' akkuza, or the Court will say there is not enough reason for him to be put under 'att tal-akkuza' and it discharges him.

From difiza tal prima facie, id-difiza ma tistax tappella - akuzat m'ghandux rimedju at that point in time, li hemm pero li l-433 tal criminal code gives right to ag to present a rikors quddiem l qorti kriminali, fejn jikkontesta d-digriet tal prima facie, ag can give rikors quddiem qorti kriminali u jitlob li d digriet tal prima facie jigi revokat.

## **Article 433 Criminal Code**

**433.\*(1)** If the Attorney General is of opinion that there are not sufficient grounds for the filing of an indictment against the accused, he may, within the terms prescribed in the last preceding article, by warrant under his signature, order the discharge of the accused, filing a declaration to that effect in the Criminal Court.

(2) The Attorney General may also withdraw an indictment already filed, by making in Court a declaration to that effect. to arrest a person discharged by the Court of Magistrates.

(3) Finally, the Attorney General may, within one month from the day on which he is granted access by electronic means to the record of the inquiry, apply to the Criminal Court for the issue of warrant for the arrest of any person discharged by the Court of Magistrates. The provisions of sub-articles (3A) and (3B) shall apply to an application made under this sub-article.

(3A) The application shall be appointed for hearing and shall be served on the person discharged together with a notice of the date of the hearing.

(3B) Where the Criminal Court is of the opinion that there are sufficient grounds for an indictment to be filed against the person discharged it shall forthwith issue a warrant for the

arrest of that person; and in such case the term for filing the indictment shall commence to run from the day of the arrest.

(3C) Where the person discharged fails to make an appearance at the hearing without good cause the Court shall order his arrest in order to appear for the hearing of the application.

(4) In all cases referred to in the preceding sub-articles of this article, the Attorney General shall make a report to the President of Malta stating the reasons for his action. Power of Attorney General, in cases where he is of opinion that the offence is triable by the Court of Magistrates.

→ Jurisprudence says that *prima facie*, is a superficial level of proof wherein the Court must be satisfied that there must be sufficient grounds for the accused to be put under indictment

**What the Mag must decide is if the person is accused, does the person have a case to answer or not?** Our constitutional Court stated that our level of proof is the same level of proof required in civil cases but other cases, said somewhere between *POSSIBLI U PROBABBLI*.

→ **ID DIGRIET, jghid x jghid irid jigi notifikat lill AVUKAT GENERALI**

Digriet tal-*prima facie* - what happens, the mag has to decide whether there are sufficient grounds to accuse the accused on trial for indictment. The Court shall in either case order a record of the inquiry for the exhibits of the case - now acts are scanned by AG and sent over by electronic means.

→ We saw that if Court orders discharge the case would not continue at that point in time, but reference is article 433 of the criminal code where the AG may file a request in front of criminal Court - hence although when Court orders discharge, The case stops there, THE AG can as acc to 433 ask for a re-arrest U JRESSAQ RIKORS QUDDIEM L QORTI KRIMINALI

→ If a case is prescribed - the Court will not go into it - the Court sees if enough reasons exist for the case to continue.

→ Not a decision on the merits of the case - the fact the case will proceed, does not automatically mean the accused will be found guilty of charges against him. During term in 3A, criminal Court shall be competent to decide on the files and demand on the said term. IL-FILE JIBQA L-QORTI, IL-QORTI MA TISTAX TIEHU KONNIZZJONI ISSA LIL L-AKKUZAT, JEW L-HADD IEHOR LI JKUN URUD JARA, IMMA KWALISSI - The moment the Court adjourns the case and orders that an electronic transmission of documents are sent to AG, from that moment in time, anyone who wishes to file a request in Court can not do so before in front of Court OF MAG, but has to do so before the criminal Court.

Sub 5 - Within 1 month and when Court adjourns the sitting - particular time frame as to when sitting is adjourned, the ag has another timeframe within which he can make 2 decisions; RINVIJU either send back the - request the Court to hear further evidence or issue the BILL OF INDICTMENT Or Article 370.

### **George Grima vs. Kummissarju tal-Pulizija Fil-Qorti tal-Maġistrati (Malta) bhala Qorti ta' Ġudikatura Kriminali**

L-iskop ta' dawn il-proċeduri huwa li l-Qorti tal-Maġistrati twettaq forma ta' "judicial review" fuq l- operat tal-Pulizija meta, fil-każijiet kongruwi, ma tipproċedix bil- prosekuzzjoni tal-azzjoni penali minkejja n-notitia criminis magħmula lilha. Dan jōhrog ċar mis-sentenza tal-Qorti Kostituzzjonali fl- ismijiet:- Adrian Busietta v. L-Avukat Generali et deciża nhar it-13 ta' Marzu 2006.

Il-livell ta' sodisfaċiment u suffiċjenza provdut mill-Liġi stess lill-Qorti tal-Maġistrati f'dan il-każ huwa li prima facie jkun hemm bażi għall- prosegwiment tal-azzjoni penali. Jekk il-Qorti tal-Maġistrati ssib li hemm prima facie lok li tinbeda l-azzjoni penali kontra l-persuna inkriminanda allura tordna lill-Pulizija sabiex jipproċedu b'din l- azzjoni. Jiġifieri wiehed mill-eżamijiet li trid tagħmel dil-Qorti, (jekk mhux ukoll it-test prinċipali f'din il-proċedura) huwa li tara jekk il- Pulizija tkunx ibbażat id-deċiżjoni tagħha ta' inerzja konsegwenti n- notitia criminis fuq raġunijiet ġustifikati jew le.

Dan l-eżami ta' sindakar da parti tal-Qorti jeħtieġ li almenu jiġu sindikati l-elementi fil-pussess tal-Pulizija li fuqhom tkun ibbażat id-deċiżjoni jekk tistitwix l-azzjoni penali o meno u tara jekk sal-grad prima facie din id- deċiżjoni kienetx ġustifikata jew le.

Fil-fehma ta' diversi Qrati Superjuri Maltin, bil-grad prima facie il- Legiſlatur ried jirrifletti grad ta' indaġini li ġie mfisser mill-Qorti tal- Appell bhala "mal-ewwel daqqa t'ghajn". Il-Qorti Kriminali fil-każ Fl-Atti tar-Rikors Anthony Xuereb vs. Il-Kummissarju tal-Pulizija deciż nhar it-23 ta' Settembru 2010 u li kien preċiżament jittratta każ tal-proċedura msemmiya fl-Artikolu 541 tal-Kodiċi Kriminali l- Imhallel Michael Mallia jghid li għal dak li għandu x'jaqsam mal-grad prima facie l-Qrati Maltin donnhom sabu t-triq tan-nofs bejn il-grad tal- possibbli u dak tal-probabbli u għalhekk "jekk il-Maġistrat jidhirlu illi l-provi migbura quddiemu jisthoqqilhom aktar investigazzjoni, allura f'dak il-każ huwa bizzejjed sabiex il-grad ta' prima facie jiġi milhuq u l-kawza tkun tista titkompla".

Fil-każ Il-Pulizija vs Giovanni Calcaterra, dekretat mill-Qorti Kriminali nhar is-27 ta' Frar 2014 ġie inter alia dekretat li dan il-grad ta' prima facie huwa l-istess għall-każijiet kollha fejn il-Qorti tal- Maġistrati hija meħtieġa bil-Liġi li tilhaq dak il-grad, inkluż fi proċeduri ai termini tal-Artikolu 401 tal-Kodiċi Kriminali quddiem il- Qorti tal-Maġistrati bhala qorti istruttoria. Dan ifisser li l-grad ta' prima facie jistrieħ fuq livell ta' konvinċiment ferm aktar baxx minn dak

meħtieġ minn min irid jiġġudika l-fatti sabiex ikun jista' jsib htija, u kif intqal fis-sentenza hawn fuq imsemmija in re Xuereb, jistrieħ fuq livell bejn il-grad tal-possibbli u dak tal-probabbli – u dipendenti fuq jekk il-Qorti tqisx li hemm provi biżżejjed li kien jisthoqqilhom aktar investigazzjoni.

Sabiex il-Qorti tkun tista' tordna li jittiehdu proċeduri penali jridu jiġu soddisfatti żewġ testijiet importanti – it-test tal-evidenza ossija sufficjenza probatorja u dak tal-interess pubbliku li tittiehed l-azzjoni penali. F'dan il-każ, f'dan l-istadju tal-proċeduri u tenut kont tad- dekors taż-żmien mill-avvenimenti originali, dawn it-testijiet ma ġewx soddisfatti. Konsegwentement il-grad tal-*prima facie* kif imfisser mill- każistika ta' dawn il-Qrati ma ġiex soddisfatt.

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## Time for Filing Indictment - Article 432 Criminal Code

432.(1) The Attorney General shall be allowed the term of one month for the filing of the indictment, to run from the day the Attorney General is granted access by electronic means to the record referred to in the last preceding article. The said term shall, on the demand of the Attorney General, be extended by the Court to an additional period of fifteen days, and, on the expiration of this other period, by the President of Malta to a further additional period of fifteen days, and, where the matter is such that the determination of the true nature of the offence necessarily depends upon the lapse of a longer period of time, to such longer period:

Provided, however, that where such a longer period extends beyond forty days, the accused shall have the right to be released on bail.

(2) If the record of inquiry is found to be defective through thenon-observance of any of the provisions of this Code or of any other law relating to such inquiry, the Attorney General may file a demand in writing that the Court proceed afresh with the inquiry or that the record be rectified, according to circumstances, pointing out the defect and the relative provisions of this Code or of such other law.

(3) The Court shall, within the term of five (5) working days which shall run from the day on which the demand is filed by the AttorneyGeneral, which term may, upon a demand in writing by the Court and on a just cause being shown, may be extended by the President ofMalta to a further period of five (5) working days, conclude the fresh inquiry or rectify the record, and shall grant the Attorney General access by electronic means to the said record; and in such case the term for filing the indictment shall commence to run from the day on which the Attorney General shall have been given access to the record of the fresh inquiry or the record as rectified.



## **Article 402 - Suspension of term for inquiry,**

402.(1) The terms referred to in the last preceding article, in article 407 and in article 432(3) shall be held in abeyance -

(a) if it is alleged or if there is reason to believe that the accused was insane at the time of the offence or that he is insane at the time of the inquiry;

(b) if the accused owing to illness or for any other cause, is unable to appear;

(c) if there has been any order for the examination of any witness or for any other process of the inquiry under article 399;

(d) when the Court accedes to a request made in terms of article 46(3) of the Constitution.

(2) Such terms may also be held in abeyance - in case of illness of witnesses,

(a) if any witness is so infirm as to be unable to give evidence even in his place of abode; in case where the accused cannot be found.

(b) if the accused cannot be found and there is reason to believe that he has absconded or left Malta. Appointment of experts.

(3) In the case referred to in sub-article (1)(a), the Court shall appoint one or more experts to examine the accused and the facts relating to the alleged insanity. Insanity at the time of the offence.

(4) If from the report of the experts, it appears that the accused was insane at the time of the commission of the offence, the Court shall order that the Attorney General shall be given access by electronic means to a scanned copy of the record of the inquiry within three (3) working days and shall make an order as provided in article 623.

(5) If, upon receipt of the scanned record by electronic means, the Attorney General decides to contest the finding of the experts that the accused was insane, he may, within the term prescribed in article 432(1), request that the inquiry into the merits of the case be proceeded with, or file an application before the Criminal Court submitting the issue to that Court, so that action may be taken as provided in articles 620, 627 and 628

Provided that the Attorney General shall file such application if the accused by application to the Court of criminal inquiry makes a request to that effect before access to the scanned record by electronic means is granted to the Attorney General in terms of the last preceding sub-article.

(6) If from the report of the experts, it appears that the accused was insane at the time of the inquiry, the Court shall proceed with the inquiry into the merits of the charge. Inquiry may be continued in the absence of the accused.

- Sub 6 - if from a report of experts, the accused was insane - TAHT STAT TA GENN is one question - as to whether he had volition. But during the act he was WELL, and now he is not okay, then kumpilazzjoni *F'DAK L KAZ TIBQA GHADDEJJA*.
- Imagine, kumpilazzjoni ilha ghaddejja snin, now he is and has dementia. psychiatrist - law is saying kumpilazzjoni must continue.
- 402 sub 5 - if the accused files a request in the criminal Court - AG must file such an application - he has no choice.

(7) In the cases referred to in sub-articles (5) and (6), the inquiry may be continued in the absence of the accused, and if he is not assisted by an advocate or legal procurator, the provisions of article 519 shall apply.

- Sub 7 - Court must continue to an adequate defence to the accused. If the AVUKAT DIFENSUR Mhux f pozizzjoni jikkomunika mal-klijent tieghu.
- The following articles speak on the issue of insanity - be careful as insanity can appear at the time of the offence - plea at the time of the offence or plea when insanity is during the criminal proceedings. In case insanity is alleged, the Court must appoint 1 or more experts to examine the accused and the facts relating to the alleged insanity. If from the report it appears the accused was insane at the time of the commission of the offense, the Court shall ask for the Court of the criminal inquiry to be sent to the AG, and as provided in 623, made an order to - which deals with place of custody of an insane person. The Court will order the accused to be placed in mount carmel hospital.
- If you plead insanity, no legal provisions will come to play and doesn't mean he will be out of prison. The Court has to make an order under 623 which states that the accused is placed in custody in Mount Carmel hospital. If experts decide he was insane at the time of the offence, the Court has to make 2 orders; AG may either send back records to the Court of criminal inquiry, that the merits would be proceeded with or else file an

application in the criminal Court, submitting an issue to the Court so that action can be taken in terms of Article 620, 627, 628 of the criminal Court.

- *GURIN = gurati ha jddeciedu jekk l-akkuzat kienx afflitt mill-genn jew le.*
- Plea first raised in front of COM - 402 1 - these are held in abeyance - Mag. appoints experts and this kickstarts into the case of insanity - whether he is insane or not. AG has to be given access to the act and the accused has to be placed in custody. AG may contest the findings. JEKK IKUN HEMM TALBA MILL-AKKUZAT BIEK DIN L-KWISTJONI TIGI - if the accused by application to the Court of criminal inquiry, makes a request
- The experts who are psychiatrists, would have filed their report that the accused is insane biek naslu al gurin. The case is sent to the office of the AG. Before doing this, the accused may find the application himself requesting the GURIN.

## Article 402A - Terms under Article 401 to run anew

**402A.** *Where in respect of a person charged before the Courts of Magistrates as a Court of criminal inquiry a Court has made an order for his temporary surrender to a foreign State requesting his extradition or to any other foreign competent authority requesting his surrender, the terms referred to in article 402(1) shall, from the date of his return to Malta, recommence to run anew.*

402a - Temporary surrender to a foreign state - this article talking about an accused - in Malta - law is contemplating this situation

## **Article 403 - When Court is of opinion that offence is triable by the Court of Magistrates as Court of criminal Judicature**

**403.** (1) If, on the conclusion of the inquiry, it appears to the Court that the offence is not one within the jurisdiction of the Criminal Court but is one within the jurisdiction of the Court of Magistrates as Court of criminal judicature and for the prosecution of which the complaint of the injured party is not required, the Court conducting the inquiry shall give judgment as provided in article 377 and shall order that the record, together with a copy of the judgment, be transmitted to the Attorney General, as provided in article 401(3).

(2) The provisions of sub-article (1) shall apply also in the case where the offence is one triable on the complaint of the injured party and such party does not appear to waive the complaint

403 - Conclusion of the inquiry - STARTS BHALA KUMPILAZZJONI but the kompetenza mhux tal qorti kriminali imma tal magistrati u under 377 tkun tista tghaddi gahs sentenza

## **Article 404 Criminal Code - Duty of Executive Police to continue investigation after discharge of accused for want of evidence**

**404.** In every case where the Court of Magistrates discharges an accused for want of evidence, it shall be the duty of the Executive Police to continue to make further and fuller investigation into the case.

## **Article 405 - Re-examination of witnesses or examination of new witnesses upon demand of Attorney General**

**405.** (1) The Court shall, after ordering that the Attorney General be granted access by electronic means to the record of the inquiry and to all the exhibits in the case, after ordering the committal of the accused for trial, and before the filing of the bill of indictment, upon the demanding writing of the Attorney General, further examine any witness previously heard or examine any new witness.

(2) The Attorney General shall, for such purpose, transmit to the Court the demand, stating therein the subject on which the examination re-examination is to take place.

(3) The witnesses shall be examined or re-examined in the presence of the accused in order that he may have the opportunity of cross-examining them, and, for such purpose, the Court shall order the accused, if in custody, to be brought up, and, if not in custody, to be summoned to appear before it

- Sub 3 - Witness shall be examined and cross examined by the accused.

(4) If the accused fails to appear for the summons, the witness shall be examined and his deposition shall be considered as if it had been taken in the presence of the accused.

- Sub 4 - If accused fails to appear at the summons - witness as if taken by the accused = as long as he is notified, proceedings can go on.

(5) The provisions of the preceding sub-articles shall apply in the case of witnesses whom the accused may wish to examine or re-examine. In such cases, the demand shall be communicated to the Attorney General. The Court shall then cause the Attorney General or the Commissioner of Police to be notified of the day appointed for the hearing of the witnesses in order that they or any other officer under their charge may, if they so desire, appear and cross-examine the witnesses.

- Sub 5 - The law states that the provisions of the preceding sub-articles - in such case, demand shall be communicated to the AG - jekk l-akkuzat waqt l-kumpilazzjoni jixteq jamel kontro ezami - jista jamel dan pendente l kumplazzjoni - L-AG jilqa' l atti lura biex jinstema dax-xhud.

(6) Access by electronic means to the depositions of witnesses taken under this article shall, without delay, be transmitted to the Attorney General.

(7) When the demand for the examination of witnesses is made by the person charged, the term for the filing of the indictment shall commence to run from the day on which access by electronic means to the scanned record of the inquiry, together with access by electronic means to the depositions of the witnesses so examined, shall be re-transmitted to the Attorney General.

(8) The Court shall proceed to take any other action or measures relating to the inquiry as may be demanded in writing by the Attorney General.

- Sub 8 - Court shall proceed to take any other measure as may be demanded in writing by the AG - KUMPILAZZJONJOI L BALLUN IJED F'SAQAJN L-AG u L-Qorti sa certu punt ma tantx tista tindahal fl provi tal AG Court qed TISMA L PROVI LI L AG JKUN IRID IREESSAQ FL ISTADJU TAL RPOVII
- 405 - is the summary of what happens in the KUMPILAZZJONI → l-ewwel within 1 month kumpilazzjonni trid tinghalaq, QORTI HAS TO GIVE DIGRIET TAL PRIMA FACIE, either way file has to be transmitted to AG and AG, ag has 3 options.

- 405 - After trial, WARA DIGRIT AL PRIMA FACIE u qabel ma johrog l-att tal-akkuza, the Court SHALL - upon demand in writing of the AG, review tal AG, further - any witness to be heard and examine any new witnesses. We are seeing the ball will be within the AG who will send a review after the COM would have ordered the accused for trial but before the filing for writing.
- AG is obliged to mention and explain what he wants out of these witnesses and evidence that the Court wants to hear - why the witness is there - the purpose why this witness should testify acc to him. AG can ask also for other evidence, a judgment of the Court to prove the person is a recidivist.
- In truth, no limit to the number of times this can take place. The law is not telling you this to and fro can happen - no time limit this can take place. Could be the case is a complex case and no witnesses have to be heard.
- CONS Court CASES - where sentence states that KUMPILAZZJONI TINGHALAQ FI ZMIEN XAHAR U MMEXXU GHALL-ATT TAL-AKKUZA - Hence, even though the law imposes no limit from a cons perspective, cons Courts have at times intervened and interpellated that KUMPILAZJONI IS CLOSED.
- Article 405 - to and fro of the acts - following recent amendments acts stay in mag offices but Ag is given access through scanned copy. Ag would send back IN NOTA ir-rinviju - indicates witnesses and evidence he wishes the Court to hear and the subject of the examination and reexamination to take place. This same procedure is applicable for the accused should he wish to examine or reexamine witnesses pending the inquiry.

→ What usually happens is during compilation - PROVI jitressqu -u d-diiza tressaq l provi taghha - difiza jaf thoss li tressaq certu xheida 405 sub 5 - this procedure in 405 is the procedure pending the compilation. F KAZ LI XI HADD IKUN IRID IRESSAQ IX-XHIEDA, 406 - amended by act 5 of 2022 - and in article 406 we have a mechanism whereby the AG or accused can file a request for examination of new witnesses made after filing of the indictment. This request contrary to article 405 may not necessarily be acceded to by the Court.

→ The Court may allow such a request but may also reject it and in sub 2 you may find the grounds where the Court may accept such request. One of them is if the Court is satisfied that the witnesses are about to leave Malta or are in danger of life, or are unable to attend in Court and the Courts - the general rule in 406 is that the Court should not generally accept such requests. Permission shall not be granted - unless . exceptions are present.

## **Article 406 Criminal Code - Application for the re-examination of witnesses or the examination of new witnesses made after the filing of the indictment.**

→ Article 406 - procedura biex jinstemghu x xhieda imma wara li jkun hareg l-att ta akkuza

**406.(1)** Where the indictment has already been filed, the demand of the Attorney General or of the accused, referred to in the last preceding article, shall be made by an application to the Criminal Court. Such application shall contain a list of the proposed witnesses and a clear indication of the subject on which they are to be examined. The Court, if it allows the application, shall order the hearing of the witnesses, and shall, for this purpose, direct that the application be transmitted to the Court of Magistrates as a Court of criminal inquiry, and the latter Court shall proceed in accordance with the provisions of the said article.

(2) The record of the proceedings shall be forwarded by the registrar to the Court of Magistrates together with the said application.

(3) The Court of Magistrates shall send back the record, together with the depositions taken, to the Criminal Court, and shall order that the Attorney General be granted, within three (3) days, access by electronic means to the scanned evidence of the witnesses if heard.

(4) The demand for the hearing of witnesses in the cases referred to in this article shall not be granted, unless the Court is satisfied that the witnesses are about to leave Malta or are in danger of life or are in such a condition as to be probably unable to attend in Court on the day appointed for the trial; and if the hearing of the witnesses takes place after the lapse of the term fixed in article 438 for the filing of the list of the witnesses to be produced at the trial, their depositions shall not be admissible except with the leave of the Criminal Court to be granted only if the said Court, having regard to the circumstances of the case, is of opinion that the evidence resulting therefrom is relevant.

The law states the depositions of these witnesses shall not be admissible apart from the criminal Court - In terms of article 406, the request will not automatically be acceded to but a number of requirements which the law imposes and at the end of the day it is the criminal Court to decide whether to accept such requests or not but the law grants such parameters.

Article 407 Criminal Code - speaks on terms for the inquiry - Term within which to conclude inquiry, in case of contestation by Attorney General of insanity of accused and in case of fresh evidence.

**407.** In the cases referred to in the first part of article 402(5) and in the last preceding two articles, the inquiry shall be concluded within the term mentioned in article 401(1) to be reckoned from the day on which the record is received by the Court.

## Article 408 Criminal Code - Access to accused during inquiry

**408.(1)** During the inquiry and until access by electronic means of the scanned record is given to the Attorney General, no access to the party accused, when in custody, shall be allowed except with the permission of the inquiring magistrate..

(2) Such permission shall not be granted if the magistrate deems it prejudicial to the ends of justice

Article 408 - practical disposition of the law which states what happens to the accused and access to the accused and if proceedings are pending, visitors would only be allowed with the inquiring magistrate.

## Article 409 speaks on proceedings held behind closed doors.

**409.(1)** It shall be lawful for the Court to order the proceedings to be conducted with closed doors, if it appears to it that the ends of justice would be prejudiced if the inquiry were conducted in open Court.

(2) In any such case, the officials attached to the Court and taking part in the inquiry shall be bound not to disclose the proceedings thereof under the penalty provided in article 257.

### **Application by person in custody alleging unlawful detention**

**409A. (1)** Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a Court may at any time apply to the Court of Magistrates, which shall have the same powers which that Court has as a Court of criminal inquiry, demanding his release from custody. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the



application on the applicant and on the Commissioner of Police or on the public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing.

(2) On the day appointed for the hearing of the application the Court shall summarily hear the applicant and the respondents and any relevant evidence produced by them in support of their submissions and on the reasons and circumstances militating in-favour or against the lawfulness of the continued detention of the applicant.

(3) If, having heard the evidence produced and the submissions made by the applicant and respondents, the Court finds that the continued detention of the applicant is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the applicant it shall allow the application. Otherwise the Court shall refuse the application.

(4) Where the Court decides to allow the application, access by electronic means to the scanned record of the proceedings, including scanned copy of the Court's decision, shall be transmitted to the Attorney General by not later than the next working day and the Attorney General may, within two (2) working days from receipt of the access by electronic means of the scanned record and if he is of the opinion that the arrest and continued detention of the person so released from custody.

→ Article 409A - PENDING CRIMINAL PROCEEDINGS - any person in custody - if a person has a case against him and is saying time has passed and I am illegally arrested, then the rikors must be done under 412B - but if saying police have ZAMMEWNI B'MOD ILLEGAL, then rikors under 409A

→ This application is usually dealt with in urgency - and - the whole situation is treated with a certain urgency. The application of the person alleging a lawful detention has to be served on the commissioner of police and there is the procedure of how the case is - on the same day. This is an additional power of the Court of mag as a Court of criminal inquiry

→ Sub 4 - AG's right of appeal sub 4 was substituted by Act 5 of 2022.

→ Article 409A - speaks about the situation when a person alleges he is being held in unlawful detention - HABEAS CORPUS - illegal arrest - compare 409A with 412B. They both speak about unlawful detention and the remedy allowed to such a person in such circumstances. 409A is the disposition which speaks about the situation where a person is unlawfully detained under authority of the police.

# GENERAL PROVISIONS APPLICABLE TO THE Court OF MAGISTRATES WHETHER AS Court OF CRIMINAL JUDICATURE OR AS Court OF CRIMINAL INQUIRY

*Next few articles of the law apply to both the Court of Mag. as a Court of criminal judicature and Court of mag as a Court of criminal inquiry.* Article 410  
Criminal Code

410.(1) In any proceedings instituted by the Attorney General or by the Executive Police on the complaint of the injured party, it shall be lawful for the complainant to be present at the proceedings, to engage an advocate or a legal procurator to assist him, to examine or cross-examine witnesses and to produce, in support of the charge, such other evidence as the Court may consider admissible. Examination on oath of complainant.

(2) Where the complainant is to be heard on oath, his evidence shall be taken before that of any other witness of the prosecution, saving the case where, in the opinion of the Court, his evidence becomes necessary even at a later stage of the proceedings, or where the accused applies for such evidence at any stage of the proceedings, or where the Court sees fit to vary the course of the taking of the evidence. Police and party injured may be assisted by advocate or legal procurator.

(3) In any proceedings instituted by the Executive Police ex officio, it shall be lawful for the Police and for the party injured to engage an advocate or a legal procurator to assist them; such advocate or legal procurator may examine or cross-examine witnesses, produce evidence or make, in support of the charge, any other submission which the Court may consider admissible.

(4) Without prejudice to the provisions of sub-article (3) and subject to the provisions of sub-article (6), any party injured having an interest in being present during any proceedings instituted by the Executive Police shall have the right to communicate that interest to the police giving his or her particulars and residential address whereupon that injured party shall be served with a notice of the date, place and time of the first hearing in those proceedings and shall have the right to be present in Court during that and all subsequent hearings even if he is a witness.

(5) Without prejudice to the provisions of sub-article (3) and subject to the provisions of sub-article (6), any person not served with the notice referred to in sub-article (4) and claiming to be an injured party may apply to the Court to be admitted into the proceedings as an injured party and if his claim that he is an injured party is allowed by the Court that person shall thereupon have the right to be present at all subsequent hearings even if he is a witness.

(6) The failure to serve the injured party with the notice of the date of the first hearing after an attempt has been made to that effect or the absence for any reason of the injured party at any sitting shall not preclude the Court from proceeding with the trial or inquiry until its conclusion.

→ Article 410 deals with representation during criminal proceedings of the injured party - and the law states that the injured party can have a legal prosecutor to assist him - and can produce evidence in control of the charge - a number of sub articles dealing with this scenario - article 411 deals with taxation of fees.

## Article 412 Criminal Code - Days on which the Court of Magistrates may hold sittings.

412.(1) The Court of Magistrates shall hold its ordinary sittings every day, except Saturdays, public holidays as provided in the National Day and other Public Holidays Act, and Wednesday and Thursday of Holy Week.Exceptions.

(2) Nevertheless, where the matter relates to the binding over of the offender under articles 383 and 384, or to the performance of any act in connection with any inquest or other inquiry referred to in this Code or to any bail or to the issue of any urgent summons or to the examination of any witness who is about to leave Malta or is in danger of life, it shall be lawful for the magistrate to sit for the despatch of business on the days mentioned in sub-article (1) and in any place where it may be necessary.

(3) The Court of Magistrates (Malta) shall hold its sittings in Valletta and the Court of Magistrates (Gozo) shall hold its sittings in Victoria:

Provided that it shall be lawful for the Minister responsible for justice, by notice, to fix any other place where the said Courts,as Courts of criminal judicature, may hold their sittings:Sec. 3 of Ordinance II of 1867 incorporated.

Provided further that the Court of Magistrates, even as a Court of criminal judicature, may hold its sittings at the Lazarettoor in any other place that it may deem proper, if the accused or any

witness is performing quarantine, and the Court itself shall not deem it expedient to adjourn the cause until the expiration of the period of quarantine

→ Article 412 - days on which the Court of Mag. can hold sittings = everyday except for during the weekend - wednesday and thursday of holy week - [please note that wed and thur of holy week not public holidays but in terms of 412, Court of Mag. should not hold sittings UNLESS

→ PREZENTATA - Wednesday and the holy week criminal Court registry is closed - subsidiary Legislation 12.29 - regulation 9 sub 2.

Subsidiary legislation 12.21

Sub legislation 9.09 - makes cross reference to Subsidiary legislation 12.21

Sub 3 - exceptions to when Court may hold sittings

## Article 412A - Conditions on a person charged or accused not in custody.

**412A.** (1) When the person charged or accused brought before the Court of Magistrates, whether as a Court of criminal judicature or as a Court of criminal inquiry, is not in custody the AttorneyGeneral or the Police may thereupon or at any stage of the proceedings thereafter request the Court to impose conditions upon the person charged or accused in order to ensure the appearance of that person at the proceedings on the appointed time and place or to otherwise ensure that that person will not in any way unlawfully interfere in the correct administration of justice in those proceedings:

Provided that regulations made by the Minister responsible for justice in accordance with the proviso to article 574(1) shall apply in respect of the enforcement of the conditions imposed by the Court under this sub-article, also including insofar as they may provide for the use of electronic or other systems for the management of bail.

(2) The Court may require the giving of sufficient security by the person charged or accused by the mere recognizance of the same person charged or accused in order to ensure that he abides by the conditions imposed upon him by the Court and the provisions of articles 576 and 584, shall apply to the security given under this sub-article.

(3) The sum given by way of security shall be forfeited to the Government of Malta and a warrant of arrest shall be issued against the person charged or accused where that person fails to observe any of the conditions imposed by the Court in pursuance of the provisions of this article and in any of the other circumstances mentioned in article 579 provided that the Court may decide not to apply the provisions of this sub-article or not to apply them to their full extent where the Court

considers that the infringement of the condition imposed by the Court is not of serious consequence.

→ 412 A - interesting remedy wherein when the person charged or accused brought before Court of mag is not in custody, Court may impose bail conditions - law imposes - PERSUNA LI TRESSAQ B'ARREST.

## Article 412B - Application by person in custody pending criminal proceedings alleging unlawful detention

412B. (1) Any person in custody for an offence for which he is charged or accused before the Court of Magistrates and who, at any stage other than that to which article 574A applies, alleges that his continued detention is not in accordance with the law may at any time apply to the Court demanding his release from custody. Any such application shall be appointed for hearing with urgency and together with the date of the hearing shall be served on the same day of the application on the Commissioner of Police or, as the case may be, on the Commissioner of Police and the Attorney General, who may file a reply thereto by not later than the day of the hearing.

(2) The provisions of article 574A(2) and (3) shall mutatis mutandis apply to an application under this article.

(3) Where the application is filed in connection with proceedings pending before the Court of Magistrates as a Court of criminal inquiry before a bill of indictment has been filed or if the term referred in sub-article (3A) of article 401 is still running, the application shall be filed in the Criminal Court and the foregoing provisions of this article shall mutatis mutandis apply thereto.

(4) The provisions of article 409A(4) shall apply to a decision of the Court of Magistrates under this article.

→412B - Rikors HABEAS CORPUS - application pending criminal proceedings - know the difference between 409A and 412B - and sub 3 was substituted by act 5 of 2022. In both cases, and under both articles, AG has a right of appeal. If Court allows the application, the AG in 409a, AG may within 2 days - may apply to criminal Court to obtain the re-arrest. MHUX APPELL FIL VEIRTA GHAX JIGII PREZENTAT QUDDIEM QORTI KRIMINALI MHUX QORTI TAL APPELL.

412B - jista' jkollok sitwazzjoni fej l-AG ma jaqbilx ma din is-sitwazzjoni.

Protection Orders - Article 412C - - quite self-explanatory - once a protection order may be imposed on the IMPUTAT PENDENTI l-proceduri. Need a person charged/accused, with an offence before the Court of Mag. Court MAY either ex officio or to the parties of the proceedings. - issue against the accused.

The following sub articles speak about the procedure which needs to be followed when the protection order is issued. Protection order shall remain in order for a period not exceeding 5 years but can be revoked or extended for a further period. This order through an application to the Court can be varied or revoked.

*EZ. QORTI TOHROHG ORDNI LI L AKKUZAT MA JERSAQX LEJN  
MARSAXLOKK GHAX L-VITTMA TOQGHOD HEMM.*

IMP for sub article 11 - that if without **reasonable excuse** (many cases on what this means), accused contravenes any prohibition or restriction, guilty of an offence and liable to a fine of 7000 or imprisonment not exceeding 2 year.

*Pulizija vs. Stephan Muscat* - Court of Criminal App. 20th Oct 2020 - please keep in mind that when a protection order is in place, the prohibition is on the person who is charged with the offence, on the accused.

**Article 412D Criminal Code** - treatment order, can be ordered with or separate with a protection order

# **OF THE Court OF MAGISTRATES AS Court OF CRIMINAL INQUIRY**

## **ARTICLE 392A - Admission of guilt by the accused during the examination**

392A. (1) If the accused, in answer to the question in article 392(1)(b) or in any stage of the proceedings, states that he is guilty of the offence charged and the said offence is liable to a punishment not exceeding twelve years imprisonment, the Court shall warn him in the most solemn manner about the legal consequences of that reply, and shall allow him a period of time for him to reply.

(2) Saving the provisions of sub-article (3) and notwithstanding any other provision of this Code or of any other law, if the accused persists in his statement that he is guilty of the offence charged, such reply shall be registered, and the Court as a Court of criminal judicature shall proceed to pass on the accused such sentence as would according to law be passed on an accused convicted of the offence and shall order that within six (6) workingdays, the Attorney General shall be given access to a scanned copy of the records, together with access to a scanned copy of the judgment.

(3) Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the Court shall, notwithstanding the confession of the accused, order that the proceedings be continued as if the accused had not pleaded guilty.

(4) The provisions of article 370(2) and of article 371 shall mutatis mutandis apply to proceedings under this article in respect of an offence to which sub-article (1) applies.

(5) At any stage of the proceedings, the accused and the Attorney General may agree and may request the Court by means of an application, so that in the case where the accused pleads guilty, the Court of Magistrates as a Court of criminal judicature, shall apply such sanction or measure or, where it is so provided by law, a combination of sanctions and measures, of the type and quantity agreed upon between them, and in respect of which the accused may be sentenced when he is found guilty for the offence or the offences with which he has been charged

(6) In pronouncing judgement the Court shall not take into consideration any agreement on the sentence to be awarded which is not made in accordance with sub-article (5).

(7) If the Court is satisfied that the sanction or the measure, or the combination of sanctions or measures requested, as provided for in the preceding sub-article, are such that it shall be lawful for it to impose upon finding the accused guilty of the offence for which the accused has pleaded guilty, and the Court feels that it should not order that the case continues in accordance with the provisions of sub-article (3) or for any other reason that it should dismiss the request, and after having clearly explained to the accused the consequences of his request, the Court shall, where an admission of guilt is made by the accused, proceed to award the sentence indicated to it by the parties wherein it shall be declared in its decision that the sentence which is being awarded is being so awarded on the request of the parties.

(8) The provisions of article 453A(3) to (5), both sub-articles inclusive, shall, *mutatis mutandis*, apply to the proceedings under this article

→ 392A deals with the admission of guilt by the accused, during the examination - or in any stage of the proceedings - amendments before 2014, this used to only be relevant with procedures where the accused is guilty. If an offence is liable to imprisonment not exceeding 12 years - if a person admits, or halfway through proceedings, Court should inform him and speak to him in a very SOLEMN manner that he can be imprisoned. Gives him time to think about his response and - if accused is admitting after Court has informed him, then although MAX piena is of 12 years, Court of mag, may proceed and give a judgment and an order that within 6 days, AG is given the acts. If the accused admits, the Court can hand a sentence.

→ Sub 3 - It is a safeguard that if Court sees that if there is doubt on the circumstance, Court may refuse the admission and proceed nonetheless with the procedure - but Court can order proceduri *biex jimxu u tghaddi ghas-sentenza*. The Court shall notwithstanding the confession of the accused and - SAFEGUARD OF THE IMPUTAT.

Sub 4 - cross reference with other

Sub 5 - With sentence bargaining, it is a procedure where the accused and the AG agree on a PIENA, and IDHALLU RIKORS KONGUNT, iffirmit miz 2 partijiet fej jinformaw l-Qorti li f'kaz li l akkuzat JAMMETTI L-HTIJA HUMA JISSUERIXXU DIN IL PIENA. This sentence bargaining can be done at any stage of the proceedings. What is imp is that the AG and accused may request the Court by means of an application is that when the accused pleads guilty, of the time and quantity agreed upon between them and the term he is sentenced for when he is guilty.

Sub 6 - In pronouncing judgment - No agreement on the sentence to be awarded in acc with sub 5 - Court can ignore it - if Court is satisfied within that rikors and it is within parameters of the law.



**Il-Pulizija vs. Emanuel Testa** - 17th July 2002 - Judge Vincent DeGaetano - Despite the accused's guilty plea being registered, there is nothing which precludes the Court to calibrate and hear evidence in order to further calibrate evidence.

**Il-Pulizija vs. Mark Xerri** - 23rd May 2019 - Judge Edwina Grima - The Court found accused guilty solely on the admission of evidence in the beginning of proceedings - formalities were not observed and the Court revoked the a decision of guilt as formalities were not adhered to - in this case.

**Article 392B** - similar to 392A - but in this case the admission of guilt which can be done similar to 392a, ether in 392 1b - declaration of guilt would be - liable to imprisonment exceeding 12 years - in that case it is not possible for the Court to proceed with the sentence itself - under 392b, Court cannot decide piena hi - latti jmorru quddiem l qorti kriminali u eventwalment tkun il qorti kriminali li tghaddi ghas sentenza. once accused insists the declaration of guilt, Court must order l atti jew l ag jinghata access ghall-atti, tinnottifika r registratur tal-qorti, then ag has one month to present a note in the criminal Court - to which the note should present it as an indictment.

**Ammissjoni skond l-Artikolu 392B 916/2024 Ir-Repubblika ta' Malta vs TAINARA FERNANDES DA SILVA, 27th March 2025**

Rat l-akkuzi kontra Tainara Fernandes Da Silva ta' 22 sena, imwiolda fil-11 t' Awwissu 2002, gewwa l-Brazil, bint missier mhux maghruf u Luzineide Fernandes Da Silva, u detentrici ta' Passaport Braziljan bin-numru GJ819304, u minghajr residenza f'Malta, akkuzata talli:

Nhar it-tlieta (3) ta' Novembru tas-sena elfejn erbgħa u ghoxrin (2024) għall-habta ta' l-ghaxra (10:00hrs) ta' filghodu, gewwa l-Ajruport Internazzjonali ta' Malta u/jew f'dawn il Gzejjer Maltin:

1. Importat, jew gieghlet li tigi importata jew ghamlet xi haga sabiex tigi importata medicina perikoluza (kokajina) f'Malta, bi ksur tad-dispozizzjonijiet tal-Ordinanza Dwar il-Medicini Perikoluzi, Kapitolu 101 tal-Ligijiet ta' Malta;
2. Kellha fil-pussess tagħha d-droga kokajina specifikata fl-ewwel skeda tal- Ordinanza dwar il-Medicini Perikoluzi Kapitolu 101 tal-Ligijiet ta' Malta, meta ma kienitx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-

Il-Qorti kienet gentilment mitluba sabiex tordna 'Ordni ta' Qbid u Iffrizar u tissekwestra u/jew zzomm fidein terzi persuni b'mod generali l-flejjes u l-propjeta' mobbli jew immobbli kollha li jkunu dovuti lil jew ikunu jappartjenu jew li missu lill- imputata jew huma propjeta' tagħha, kif ukoll sabiex il-Qorti tipprojbixxi lill-imputata milli tittrasferixxi, twieghed, tipoteka jew tbiddel jew tiddisponi minn kwalunkwe proprietà immobbli jew mobbli li tkun proprietà ta' jew inkella

mizmuma minnu, ai termini tal-artikolu 22A ta' l-Ordinanza Dwar il-Medcini Perikolużi, Kapitolu 101 tal- Ligijiet ta' Malta.

Il-Qorti kienet gentilment mitluba sabiex fil-kaz ta' htija, barra li tinfliggi l-pieni stabbiliti mil-Ligi, tordna wkoll il-konfiska tal-oggetti kollha esebti.

Il-Qorti kienet mitluba li f'kaz ta' htija barra milli tapplika l-piena skond il-ligi tordna lill-imputata thallas l-ispejjez li ghandhom x'jaqsmu mal-hatra tal-esperti skont l- artikolu 533 (1) tal-Kap 9 tal-Ligijiet ta' Malta.

Ghaldaqstant filwaqt li esebew il-fedina penali tal-imputata, kopja tal-passport tal- imputata u l-Ordni tal-Avukat Generali, talbu li dan il-kaz jigi trattat skond il-ligi.

Rat il-verbal tal-udjenza quddiem il-Qorti tal-Magistrati (Malta) Bhala Qorti Istruttoria tal-10 ta' Marzu 2025 fejn hemm registrat illi l-akkuzata, allura imputata TAINARA FERNANDES DA SILVA fil-prezenza tal-interpretu nominata mill-Qorti Imelda Fede, ammettiet l-imputazzjonijiet migjuba kontra taghha u l-Qorti spjegatilha l-konsegwenzi legali tal-ammissjoni rregistrata minnha. Dik il-Qorti assigurat ghal darba darbtejn illi l-imputata illum akkuzata fehmet it-twissijiet moghtija minnha dwar in-natura tal-imputazzjonijiet li hija tinsab akkuzata bihom, il-piena marbuta ma l-istess, d-diskrezzjoni tal-Qorti Kriminali f'kaz li hija tikkonferma l-ammissjoni u li ghaldaqstant tindika li taccetta l-konsegwenzi tal-istess ammissjoni.

Rat l-ordni tal-Qorti tal-Magistrati (Malta) Bhala Qorti Istruttoria kif registrata fil verbal tal-udjenza tal-10 ta' Marzu 2025 li bih ai termini tal-artikolu 392B (1) tal-Kodici Kriminali, wara din l-ammissjoni ordnat li l-atti tal-kumpilazzjoni, kif ukoll l-oggetti kollha li ghandhom x'jaqsmu mal-kaz jintbaghtu lill-Avukat Generali fi zmien tlett (3) ijiem u li r-Registratur ta' din il-Qorti jkun notifikat b'din l-ammissjoni;

Rat in-nota tal-Avukat Generali pprezentata fir-registru ta' din il-Qorti fl-24 ta' Marzu 2025 li biha ddikjara li ai termini tal- artikolu 392B (2) tal-Kap IX tal-Ligijiet ta' Malta, l-imputazzjonijiet kif addebitati quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttoria u li ghalihom l-imputata rregistrat l-ammissjoni, ghandhom jitqiesu bhala Att ta' Akkuza ghall-finijiet u effetti kollha tal-ligi;

Rat ir-rikors kongunt tal-Avukat Generali u tal-akkuzata Tainara Fernandez Da Silva prezentat fir-registru ta' din il-Qorti nhar is-26 ta' Marzu 2025 fit-termini tal-artikolu 392B(5)(a) tal-Kodici Kriminali fejn talbu lil din il-Qorti sabiex issib lill imputata illum akkuzata hatja tar-reati kollha kif addebitati fil-konfront taghha u timponi piena ta' prigunerija effettiva ta' hames snin u sitt xhur flimkien ma multa ta' €7,000 u dan oltre kwalsiasi sanzjoni u jew konsegwenza ohra konsegwenzjali ghad-dikjarazzjoni u sejbien ta' htija ai termini tal-Kapitolu 9 tal-Ligijiet ta' Malta. In oltre, l-partijiet iddikjaraw illi din il-Qorti ghandha taghti qies l-Artikolu 29 tal-Kap. 101 applikabbli b'zewg gradi.

Hadet in konsiderazzjoni il-gurisprudenza tal-Qrati taghna dwar il-piena f'cirkostanzi fejn tkun registrata ammissjoni, fosthom **Ir-Repubblika ta' Malta kontra Nicholas Azzopardi** deciza mill-Qorti tal-Appell Kriminali fl-24 ta' Frar, 1997, **Il-Pulizija kontra Emanuel Testa** deciza mill-Qorti tal-Appell Kriminali fis-17 ta' Lulju, 2002, **Ir-Repubblika ta' Malta kontra Mario Camilleri** deciza mill-Qorti tal-Appell Kriminali fil-5 ta' Lulju, 2002 fejn kienu diskussi regoli generali li ghandhom iservu ta' gwida lill-Qorti fil-kominazzjoni tal-piena f'kaz ta' ammissjoni bikrija fejn, fis-sentenza appena citata ta' **Emanuel Testa** saret referenza ghal dak citat fis-sentenza kontra **Nicholas Azzopardi** senjatament meta il-Qori kkwotat b'mod estensiv Il-Blackstone's Criminal Practice (Blackstone Press Limited – 2001 edit.) ghaliex ddikjarat li taqbel mal-principji hemm enuncjati u taghmel dawk il-principji bhala taghha:

*“Although this principle [that the length of a prison sentence is normally reduced in the light of a plea of guilty] is very well established, the extent of the appropriate “discount” has never been fixed. In Buffery [1992] 14 Cr. App. R (S) 511 Lord Taylor CJ indicated that “something in the order of one third would very often be an appropriate discount”, but much depends on the facts of the case and the timeliness of the plea.*

*In determining the extent of the discount, the Court may have regard to the strength of the case against the offender. An offender who voluntarily surrenders himself to the police and admits a crime which could not otherwise be proved may be entitled to more than the usual discount. (Hoult (1990) 12 Cr. App. R. (S) 180; Claydon (1993) 15 Cr. App. R (S) 526) and so may an offender who, as well as pleading guilty himself, has given evidence against a co accused (Wood [1997] 1 Cr. App. R. (S) 347) and/or given significant help to the authorities (Guy [1992] 2 Cr. App. R. (S) 24). Where an offender has been caught red handed and a guilty plea is inevitable, any discount may be reduced or lost (Morris [1998] 10 Cr. App. R. (S) 216; 6 Landy [1995] 16 Cr. App. R. (S) 908). Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage (Hollington [1985] 85 Cr. App. R. 281; Okee [1998] 2 Cr. App. R. (S) 199.) Similarly, some or all of the discounts may be lost where the offender pleads guilty by adducing a version of the facts at odds with that put forward by the prosecution, requiring the Court to conduct an inquiry into the facts (Williams [1990] 12 Cr. App. R. (S) 415.) The leading case in this area is Costen [1989] 11 Cr. App. R. (S) 182, where the Court of Appeal confirmed that the discount may be lost in any of the following circumstances: (i) where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, be passed, (ii) cases of ‘tactical plea’, where the offender delayed his plea until the final moment in a case where he could not hope to put up much of a defence, and (iii) where the offender has been caught red handed and a plea of guilty was practically certain....”*

*Rat l-artikoli 2, 9, 20, 22(1)(a)(1B)(3A)(a)(b)(c)(d) u 26 tal-Kapitolu 101 tal-Ligijiet ta' Malta; ir-Regolamenti 4, 4(a), 8 and 9 tal-Legislazzjoni sussidjarja 101.02 (L.N. 292/1939) u l-artikoli 17(h), 18, 20, 22, 23 and 533 tal-Kodici Kriminali, tiddikjara li qed isib lill-akkuzata TAINARA*

*FERNANDES DA SILVA* hatja tar-reati ammessi minnha u tikkundannha għall-piena ta' prigunerija effettiva ta' hames snin u sitt xhur flimkien ma' multa ta' €7,000.

Tikkundanna wkoll lill-istess *TAINARA FERNANDES DA SILVA* thallas l-ispejjez tal- perizji inkorsi f'dan il-process u dan ai termini tal-artikolu 533 tal-Kap 9 liema ammont ikun konvertit minnufih fi prigunerija skond il-ligi f'kaz illi l-hatja tonqos milli thallas l-istess fi zmien sittin jum mil-lum.

*Dawn l-ispejjez jikkonsistu fis-segwenti:*

1. *Is-somma ta' €409.46 li gew imhallsa lil Dr Mario Scerri skond Dok MC a fol.58 tal-atti.*
2. *Is-somma ta' €249.36 li gew imhallsa lil PS 586 Mario Azzopardi skond Dok MA a fol. 80 tal-atti;*
3. *Is-somma ta' €382.79 li gew imhallsa lil Dr Godwin Sammut skond Dok GS a fol. 104.*

*B'kollox din il-Qorti qed tikkundanna lil akkuzata thallas is-somma ta'€1,041.79 inkorsi f'dan il-process ai termini tal-Artikoli 533 tal-Kap. 9, liema ammont ikun kkonvertit minnufih fi prigunerija skond il-ligi f'kaz illi l-hatja tonqos milli jhallas l-istess fi zmien sittin (60) jum mill-lum.*

*Il-Qorti mhux se tordna l-hlas tal-ispejjez konnessi mal-hatra tal-interpretu Imelda Fede u dan peress li mill-atti ma jirrizultax kemm thallsu.*

*Tordna li z-zmien li l-akkuzata ghamlet taht arrest preventiv jigi mnaqqas mill- perjodu ta' prigunerija impost b'din is-sentenza.*

*Tordna ukoll il-konfiska favur il-Gvern ta' Malta tal-oggetti kollha li dwarhom sar ir- reat u l-konfiska favur il-Gvern ta' Malta ta' kull flejjes jew proprjetà mobbli u immobbli ohra tal-hati.*

# OF APPEALS FROM JUDGMENTS OF THE Court OF MAGISTRATES AS Court OF CRIMINAL JUDICATURE

The Court of Criminal Appeal in its Inferior Jurisdiction

Inferior jurisdiction - this does not exist in the law as such. We will be dealing with **Articles 413 - 429 Criminal Code**

It is only this Court of magistrates which delivers judgments. The elements of the CoM are regulated by Article 382. One of the reasons warranting an appeal could touch upon these elements in Article 382:

***382.** The Court, in delivering judgment against the accused, shall state the facts of which he has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence.*

Apart from the fact that the legislation only mentions the CoM, but it refers to the CoM as a Court of Criminal Judicature, the word inferior in the bracket does not arise in law, but it is a way of distinguishing between the two Courts of appeal.

The Court of Appeal in its inferior presided by one judge, whereas in superior presided by three judges. Do not confuse the right of appeal with issues of double jeopardy. An appeal is a review of a process which was carried out in front of the CoM, so it is not a completely different case, but will be based on that of the CoM.

## Article 413 Criminal Code - Appeals from judgments of the Court of Magistrates as Court of criminal judicature.

413.(1) Any judgment of the Court of Magistrates may be appealed against -

(a) by the party convicted;

(b) in cases relating to summary proceedings for offences within the jurisdiction of the Court of Magistrates as a Court of Criminal Judicature under article 370(1), by the Attorney General, and, in the cases mentioned in article 373, by the complainant where:

(i) the inferior Court rules that it has no jurisdiction to take cognizance of the offence;

(ii) the fact of which the party accused has been convicted is liable to a punishment exceeding the jurisdiction of that Court as a Court of criminal judicature;

(iii) the punishment awarded by the inferior Court, is, by reason of its quality or quantity, different from that prescribed by law for the offence for which the party convicted has been sentenced; (iv) the accused or defendant is acquitted on the ground (i) that the fact does not contain the ingredients of an offence, (ii) of extinguishment of action, (iii) of a previous conviction or acquittal;

(v) the defendant, in a case in which he has been allowed to prove the truth of the fact attributed to the complainant in accordance with the provisions of article 253, is declared to be exempt from punishment;

(vi) the Police, or, as the case may be, the complainant has not been allowed at the trial to produce, in support of the charge, some indispensable evidence which was admissible according to law;

(vii) the party accused was released from any of the obligations referred to in article 321 of the Code of Police Laws or in article 377 of this Code, or from the observance of any of the prohibitions made, or from the observance or execution of any of the prohibitions or orders made or given, by the Police or by any other public officer, under the Code of Police Laws or any other law;

(viii) the judgement of the inferior Court is null by reason of lack of formality or procedural requirements;

(c) in all other cases by the Attorney General.

(2) Where a judgement is given in respect of several offences and a right of appeal under paragraph (c) of the preceding sub-article, or under any other law, is competent in respect of one of those offences, an appeal shall lie in respect of any other of those offences within the jurisdiction of the Court of Magistrates as a Court of criminal judicature under article 370(1) connected with that offence.

There is connection between offences when -

(i) the facts of the offences are substantially the same; or

(ii) an offence has served as a means for the commission of another offence; or

(iii) the proof of an offence or of a circumstance there has a bearing on the proof of another offence or of a circumstance thereof.

(3) Where the accused or defendant is acquitted on any of the grounds laid down in sub-article (1)(b)(iv), (v) and (vi), the Court shall clearly state such ground in the judgment, in default whereof the decision shall be null, and such nullity shall constitute a ground for appeal by the Attorney General, and, in the cases referred to in article 373, by the complainant

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#### **413 - The Backbone of the Ground of Appeal. VERY IMPORTANT**

The law contemplates 3 scenarios -

Right of party convicted.

Right of appeal of AG.

Right of complainant.

413(1)(a) - an unfettered general right of appeal to the party convicted. This right contrasts with the AGs and complainants rights, which is not unfettered and it is only in those cases contemplated in the law that an appeal may be lodged. The convicted party is granted a very wide right of appeal - both on points of fact (witness not credible, did not reach level of proof required by law) and on law (prescription, elements of crime not fulfilled, etc). Convicted may appeal from the conviction (the declaration of guilt) or else from the application of punishment.

Who is the party convicted? Profs Mamo notes state that the term party convicted is to be understood not only as a person found guilty of an offence, but any person charged who feels aggrieved by the sentence given.

**Police vs Luqa Briffa(16/04/1913) & Police vs Cassar (19/06/1939)** - In both cases were found to be insane and hence was a defence. Such persons should have an opportunity to appeal from the order. This is because the accused were found insane and sent to hospital. In this case, they could appeal.

**Police vs Kola Abela 30/11/1990** - The Court acquitted the accused but ordered the destruction of a rural room. *Persuna processata li tkun milquta avversament...*

There are exceptions to the right of appeal to the party convicted. They come from other sections of the law. See 28I(2) of the Criminal Code - effects of suspended sentence. See also 28H - Court's direction on restitution of compensation.

Right of appeal of the AG and the complainant in cases relating to summary proceedings for offences within the jurisdiction of the COM as CCJ under 370(1) (this is known as the original competence). The circumstances have to come from these limitations.

**Complainant** - The cases where he can appeal: Offence must fall within the original competence in 370(1). The proceedings have to be for an offence that can only be instituted on the complaint of the injured party (373). The injured party must have connected the prosecution as specified in article 3 of the Civil Code (Kawza privata). If proceedings were conducted by the police ex officio (article 373), despite the complaint of the injured party being necessary, the right of the appeal belongs to the AG and not the complainant.

**Police vs Carmela Zammit** - 21/01/2020 by Judge Aaron Bugeja. It lists the criteria for an appeal by the injured party to proceed.

AG might have a right of appeal under other specific laws not mentioned in 413(1)(b). See dangerous drug ordinance (art. 33). 413(1)(b)(i) and (ii) - if the COM says it does not have competence. If the AG feels that this is not right, the AG may appeal.

There are exceptions in the law when the magistrate can give a punishment below the minimum. Article 21 - gives powers to the Court to go below the minimum. **Special and exceptional circumstances**. May the AG appeal against article 21? Depending on the circumstances, the AG may or may not appeal.

If the Court invokes article 21 and invokes it correctly, the AG cannot appeal. Article 21 of the ccf is a provision wherein the magistrate would be allowed to give a punishment below the min indicated in the law. In this case, and with reference to the ag's or complaints right of appeal, if the AG just feels that the punishment was unduly lenient but it was within the max and min brackets of the law, in such case the ag has no right of appeal. But if the mag gives a punishment which is below the statutory min indicated in the law but would be still in line with the law with the correct application of article 21, there is still no right of appeal for the AG.



Another reason why in terms of this subarticle, the AG could have a right of appeal, if the Court find the accused guilty of the offence but fails the forfeiture of the corpus delicti, being that sometimes this is a consequence of the punishment, in this case should Court of magistrates, the ag would have had a right of appeal. Il-Pulizija vs Colin Falzon - 13th july 1993.

The case of **Carmel sive Charles Zammit - 29/07/2002** - the right of appeal by the AG and the application of article 21 by the COM.

*What happens in case the punishment awarded by the inferior Court is by reason of its quality or quantity different from that prescribed by the law? **Article 413(1)(b) the AG and the complainant have a right for appeal in such cases.***

**413(1)(b)** - The fourth candle in sub-article b lists three reasons although the under which the ag or complainant could also file an appeal. So the main requirement is that there has to be an acquittal on the three grounds. If acquitted on either of these three grounds, the AG has a right of appeal. First reason – keep in mind the word fact as indicated in the law has been interpreted to mean the fact as contained in the charge, we are dealing with the fact as charged and not the fact as proven. We are talking about facts as a charge.

This ground has been interpreted to mean as well as a mistake of law and through this extended interpretation the parameters of the AG have been extended. Here, Kif giet interpretat il-ligi fid dawl tal-provi kien skorret. Here we are dealing with interpretation of the law whether the prosecution have managed to prove the case beyond reasonable doubt. If the magistrate does interpret the law, the AG has no right of appeal. We are always talking about the original competence of the Court of magistrates - max of 2 years imprisonment.

In the case of a wrong interpretation of the law this has not clearly arisen from the judgment itself or from the record of the proceedings during registration and could not arise simply from the supposition of the AG. It has to be the result for the sentence, minn xi verbal etc. If the AG appeals on the wrong interpretation the law and the Court decides that there was. No wrong application, the Court of appeal should not simply reject the appeal but should declare it null and void.

### **Pulizija vs Glenn Zammit – 11th January 2022**

“The Attorney General may enter an appeal, inter alia, whenever the party accused has been acquitted on the ground that the fact does not contain the ingredients of an offence. The word “fact” in this provision had at all times been held to mean the fact as contained in the charge apart from the evidence, and not the fact as it subsequently appears from the evidence. If the Magistrates acquits the accused because the fact is not proved, or because the fact, as it appears

from the evidence, does not amount to an offence, then no appeal lies. An appeal will lie if the Magistrate, considering the fact solely and simply as contained in the charge, apart from the evidence, has come to the conclusion that that fact does not constitute an offence. In effect, this means that on a question of fact no appeal lies, but an appeal will lie on a question of Law. “

The second reason found is the extinguishment of action. This refers to prescription, if the magistrate decides that the case is preskitti and the ag doesn't agree, he can appeal.

The third reason The law mentions a previous conviction or acquittal – double jeopardy, if the magistrate decides that the accused has already been convicted or acquitted to the same fact, if the AG does not agree, he has a right of appeal under this article.

(5) is not really applicable for today.

We can almost say this is not applicable because articles 252 and 253 speak about defamation - malafama which has been repealed by the act of 2018 and is no longer applicable. The Media and Information Act repealed them. So one can say, this sub-article cannot be used by the AG anymore. Today, defamation is no longer a crime.

(6) Another ground of appeal for the AG is if the prosecution OR the complainant would have wanted li jressqu prova quddiem il qorti tla agistarati u din il qorti tkun cahdet it albe li tressaq din il prova. What are the required< sometimes during the prosecution of the case, the magistrate decides not to hear a witness for a number of reasons. In that case, if the evidence is deemed to be indispensable for the case and admissible, then the AG has a right to appeal. The law with regards to the co-accused, is clear that whatever he says is admissible against the other co-accused unless his case is decided. The witness for the evidence is indispensable for the case and admissible. The mere fact that the witness was not allowed to bring forward evidence does not mean the AG has a right to appeal but it must be indispensable AND ADMISSIBLE..

Therefore, the requirements are two; they have to be indispensable and admissible (ma kien hemm l-ebda impediment fil ligi beix tdik il ligi titressaq). The mere fact that the prosecution is not allowed to bring a witness, does not automatically allow the AG a right of appeal but there tends to be the aforementioned two requisites.

**Profs Mamo** states that such evidence must have been improperly disallowed and that it was indispensable and merely irrelevant. The evidence must be such that had it been allowed, it would have affected the acquittal or otherwise of the accused. It has to have a bearing on the merits of the case. There were certain circumstances where the police would have notified the witness but the witness did not show up despite being notified. In that case, if the COM decides to do away with the witness and continues the case and acquits the accused, notwithstanding the

prosecution saying the witness was needed, then the AG has a right to appeal. This is if the AG does not renounce the witness.

There were instances where the prosecution's states that he wants. as witness and doesn't have a riferta, jekk il-pulizija naqqset li tharrek dan ix-xhud, il qorti tista timxi minghajru ghax il-prosekuzajoni tkun li naqqset mid-doveri taghha li ressqet il provi.

In such cases, The CoA has consistently held that the CoM would not have followed the correct procedure and the CoA annuls the decision in such cases. On the other hand, if the witness is duly notified, the COM should adjourn the case on another date and instead issue a warrant of arrest for the witness to come and testify. The jurisprudence lays down that if the witness is duly notified, then another date is issued and the witness is arrested.

The witness must be duly notified and the prosecution does not renounce that witness. All this must be minuted in the acts of the case. If the witness is NOT notified, then the Magistrate can decide to proceed with the case and decide there and then, if there isn't enough evidence and the Court acquits the accused, then the AG does not have this right to appeal. In this scenario, if the AGappeals, the appeal would be rejected.

Mandat t'arrest – lejn l-imputat jaresatwh lejl qabel biex jaghmlu car li jitla l-qorti.

Madat ta' akkumpanjamnet – ordni li l-pulizija issib ix xhud u tikkamponjah il qorti

This deals with the orders which can be given with a judgement. Go through the articles indicated. In that case the AG has a right to appeal in those circumstances.

This was added by **Act XXIV of 2014**. Under this sub-article, the AG has greater discretion on whether to file an appeal or not. Id-dritt tal-appel tal-AG tat-termini sub article 1(b) speaking of the original competence of the magistrates, refer to regaunijalet li jista jkun hemm fejn jigi d-dikjarat li s-sentenza hija nulla, minhabba nuqqas ta' formalita jew minhabba li procedulament during the procedures, kien hemm xi nuqqas. Refer to Article 382 which speaks on the formalities li ghandek bzonn bei xikun hemm sentenza.

The AG would be able to appeal in terms of this article. The CoM has to award punishment and quote the section of the law creating the offence. If not done, this would lead to the nullity of the judgement and the AG has a right to appeal. We speak of appeal because we are still speaking of (b). If he wants to file an appeal then he can. We see examples of what can lead to a right to appeal under this article. We are seeing what makes a sentence null, either by formality or the procedure was not followed. One of which being if the judgement does not follow the requirements under article 382. If the person accused has been found guilty and he feels the judgement was null because article 382 was not followed, he also has a right to appeal. All these

grounds, which would lead to the nullity of the judgement, in theory, would also apply to the accused to file an appeal.

You could also have a situation where the crime of which the accused is convicted does not tally with the article quoted in the judgement. The article creating the offence is mentioned but mentioned wrongly. Example; found guilty of fraud 308-310, but instead of indicating these laws, it indicates another article which has nothing to do with the crime. The AG in that case. If it is an offence which falls under this article (382) may appeal on the basis of article 413(b)(viii). So in that case, the judgement would be null. As per article 382, the CoM has to state the facts of which he has been found guilty. If the CoM fails to give the fact for which the accused has been found guilty, this would lead to the nullity of the judgement and in this case, the right of the AG to appeal.

Other cases where a judgement may be null by reason of lack of formality or procedural requirement, are the following. We are also going to refer to a number of case laws, it is not always the AG who files the appeal but these are what could be the ground for revoking the nullity of the judgement;

- One of these could be the non-observance of formalities under article 370 of the Criminal Code which not only establishes the competence of the CoM but also speaks of which procedure needs to be followed for the CoM as a Court of criminal inquiry to be converted as a CoM of criminal judicature. Il-kunsens u l-procedura l-oħra tal-artikoli, fejn il-qorti hija obbligata li ssaqsi l-avukat jekk għandux oggezzjoni li l-kaz jigi trattat mill-CoM.
- You could have a failure of the Court to ask the accused whether he objects with his case being dealt with summarily in terms of article 370(3)(b)(c).
- The procedure in terms of article 370(3)(b)(c) was carried out but it was carried out in the absence of the prosecuting officer.

**Il-Pulizija vs Bernard Grech December 1998** – il qorti mxiet minghajr l-akkuzat kien assestiti mill avukat

These are grounds on which the AG can have right of appeal in the case of procedures under 370(1).

F'dawk li ma jaqawx taht dawk l-AG għandu dritt illimitat li jista' jappella. L-imputat għandu unlimited right in respect of the nature of the crime he is convicted on. Il-procedurti taht l-original competence, the AG and complainant can appeal only under the instances under sub-article b. In regards to other procedures li ma gewx decizsi taht l-original competence, the

AG has an unfettered right of appeal. Having a right of appeal is not the same as winning the appeal so keep this in mind.

## Article 414 – this was substituted in 2022 - Demand of Police for transmission of record of proceedings to Attorney General.

414.(1) Where the proceedings have been instituted by the Police, the Court by which the judgment has been delivered shall, on a demand in writing by the Police or by the injured party served with the notice of first hearing or admitted into the proceedings as provided in sub-articles (4) and (5) of article 410, to be made to it not later than four (4) working days from the delivery of such judgment, grant access by electronic means through the registrar, within three (3) working days from such demand, to a scanned copy of the judgment, together with a scanned copy of the record of the proceedings and the notes of the depositions, if any would have been noted in writing, to the Attorney General.

(2) In the case of judgments by the Court of Magistrates (Gozo), the scanned copy of the judgment, together with the scanned copy of the record of the proceedings and the notes of the depositions, if any would have been noted in writing, shall be sent by electronic means

→ Talks about the procedures that have to be adopted for the AG to appeal. Here, the police can meta tingata sentenza jekk ma tigbux is sentenza jew ma jkun irid jerfa r-responsabilita', jaghmel rikors quddiem l-qorti, biex il file imur quddiem l-AG u l-AG jiddeciedi jekk m'ghandux isir appell jew le. Hawn hekk jigi msehh it 12 working days li l-AG ghandu cans biex jiddeciedi jekk ma jridx jappella jew le. L-injured party wkoll jista' jiddeciedi.

→ L-injured party jista' biss jappella f'kawza privata. Taht dan ir-rimedju pero jista jaghmel rikors biex il-file imur quddiem l-AG u imbad jiddeciedu l-AG jekk ma jrid appell jew le. The ultimate decision rests on the AG however the AG can call the complainant's lawyer to see why he thinks that there should be an appeal. This rikors has to be done not later than four working days from the date of judgment. A mechanism where the AG will be notified with proceedings.

→ Article 414 basically is a mechanism or procedure which has to be done by the police for the injured party, who is entered into proceeding as per 410 4 and 5 of the criminal code, wherein they have to file a request not later than 4 working days from delivery of judgment requesting the acts be transmitted to the AG. Once acts arrive or he is granted access to the acts, it is from this moment that the 12 working days from which one has to file an appeal start running.

→ So according to 413, the right of appeal by law is vested in the party convicted or the AG/complainant. So the police not mentioned in 413 have no right of appeal. Police have no right of appeal.

→ If police do not agree with the judgement of the Court of Mag. It is through this article 414 that they are granted a remedy. What they are granted is a mechanism whereby they can request the Court in the records of proceedings to the ag and it is the ag who will decide whether there is ground for appeal or not. When a sentence is given, the inspector can present a nota tal-appell, pero mhux l appell. Jekk ma ssirx din n-nota l-AG ma jistax jappella. Jekk l-parte civile li ma jkunx mexxa l proceduri hu, jekk ikun parte civile, u jkun gie institwit bil 414 jew 415, in that case procedures can not be continued privately imma bil-puluzija.

→ Victim can be parte *civile* in those proceedings and if she does not like the outcome, she has a right to use this mechanism , within 4 working days — HUWA L-AG LI ULTIMATELY JIDDECIEDI JEKK HEMMX LOK GHALL-APPELL JEW LE. The ultimate decision is of the AG.

→ Procedure in 414 is imp as before AG was not a party of proceedings and hence would not know that a judgment was delivered. AHSEB U ARA KEMM HA JAQBEL JEW MA JAQBILX MAT-TALI KAWZA. To know if it merits an appeal or not. Hence 414 - this changed following Legal Notice of 378 of 2020 which is titled prosecution of offences. Where AG no longer can conduct prosecutions in the Court of Mag. If he would be prosecuting the case he would be made aware when judgment would be delivered.

→ 414 baqa kif kien qatt ma nbidel pero. U jghidlek li this demand in writing can be done by the police or the injured party. Hence the note of 414 is necessary for the AG's right of appeal.

**What happens if the police file the note within 4 working days?** But the Registrar did not abide within the working days time limit to abide by the AG. Within 3 working days sentence and file irid ikollu access ghalihom l-AG. In this case AG's appeal would still be valid so long as AG files appeal within the time frame of 417. Within 4 working days tidal n-nota fl appeal u within 12 working days minn meta gew l-atti f'idejh - should not suffer for - time period.

**Il-Pulizija vs. Charles sive Carmelo Spiteri 1983** - note filed on time but the registrar sent acts and registrar 1 day late. Defence argued that AG's appeal was null. The Court rejected this plea.

**Il-Pulizija vs. Joseph Deguara** - 20th April 2004 - COA - Judgment was delivered on the 21st Nov. 2003, Commissioner of Police filed the note on the 24th of November and the appeal by the AG was filed on the 26th January. Hence, more than 12 days passed. In the appeal application AG actually declared he said he received the acts on the 21st Jan. Dahlet n-nota meta support,

file baqa l-qorti xahrejn shah. Meta f'Jannar mar and l-AG, AG appella tard ovjament u fl-appell stess l-AG kiteb nota jispjega dan.

**What if proceedings were conducted in a particular language but the note in 414 was filed in a different language?** In-Nota hija nulla ghax ma segwitx l-lingwa tal-proceduri u l-appell huwa null.

**Il-Pulizija vs. Elizabeth sive Alice Piscopo** - 10th Dec 1996 - Appeal 7 of 1996 - Note filed in English and proceedings in Maltese - brought the nullity of the AGs appeal as this is a sine qua non condition hence it should be drafted in the language of the proceedings.

When judgement delivered according to Article 392A, if the person pleads guilty, in front off the Court of criminal inquiry, when *DURING KUMPILAZZJONI*, dak li jkun jammetti allura f dak il kaz, jekk jammetti l-qorti istruttoria tigi konvertata f'qorti kriminali – the Courts in the case say that the records together with a copy of judgement be transmitted to AG within 6 working days. Court is ordered by law li tibghat hi l-file lil AG- hence, sentenza fuq hekk.

**Il-Pulizija vs. Abdul al Hafis Mamilas** - decided on the 6th jan 2002. Qorti qalet - “*nonostante li ma gietx,.. L procedura tal 414*” “*Jekk il ligi tghidlek il qorti stess trid tibgaht il-file, dan il kaz qata l verdett darba ghal dejjem*”

## **Appeal from interlocutory decrees - Article 415 Criminal Code**

*415.(1) An appeal from an interlocutory decree which does not bar the continuation of the cause, may be entered only after definitive judgment and together with an appeal from such judgment.*

*(2) If no appeal lies from the definitive judgment, no appeal from any interlocutory decree shall be allowed.*

*(3) The voluntary execution of an interlocutory decree shall not operate as to bar an appeal therefrom.*

*(4) An appeal from the merits shall include an appeal from the interlocutory decrees, even though such decrees may not have been specifically indicated.*

DOES not bar = ma jwaqqafx.

The General rule on interlocutory decrees - That is the general rule, not each digriet jista jkun appellat imma kull digret li ma jwaqqafx l-proceduri, ma jistax jigi appellat hlief fl-ahhar wara li tinghata sentenza u flimkien ma appell mis sentenza.

Digriet = decizjoni tal qorti imma mhux sentenza finali, fl-ahar tal proceduri

Digriet = decizjoni jew direzzjoni dwar issues li jqumu ex. prosekuzzjoni trid ittella xhud u n-naha lohra ma tridx, allura l-qorti tati digriet fuq kull issue li l-qorti hemm issue biex tiddeciedi dwarha dak ikun dirgtiet.

**Interlocutory decree** - form of pronouncement intended to regulate the hearing of the case ex DIGRIET FEJN L-QORTI TAQTA L-PROVI - taghlaqom - direzzjoni li qorti trid taghti biex nimxu.

→ *Article 415* does not refer to all interlocutory decrees but to only those which do not bar the continuation of the proceedings. In fact 415 1, says “which does not bar the .. of the case” . Whether the Court decides to admit a witness or otherwise - process is still continued and no appeal shall lie from such decree but an appeal can lie from the decree from the definitive judgment - inkella nimxu bis sulluzzu hafna tta hela ta hin u ma naslu qatt.

→ TISTA TAPPELLA BISS WARA LI TIGI DECIZA S SENTENZA - ha tappellah biss wara li jkun emm s-sentenza u ma appell fis sentenza. If on the other hand if an appeal is delivered which bars proceedings on prescription, then in that case an appeal would lie immediately.

→ 415 was drafted to avoid waste of time in unnecessary appeals. If you want to appeal you can do so.



**Il-Pulizija vs. Alfred Grima - 1994** - COA held that this decision rejecting a plea of prescription could only be appealed after delivery of the judgment.

Sub 3 - the acquiescence usually operates as a bar, most times you can not appeal - INT MXEJT MAGHHA KIF HA TAPPELLAH - l-ligi tghid wkoll li l-voluntary execution ta dak id-digriet, ma jfissirx li tlift d-dritt li ttappella minnu. Jekk hemm digriet interlokuraotru u huwa tali li ma tistax tappella minnu umbad - ma jfissirx li inti ghada wara s-sentenza ma tistax tappella ghax ghandek din il protezzjoni f'sub 3.

Sub 4 - Appeal from merits - oqghodu attenti - despite the generality of these sub-articles, this provision has been interpreted restrictively- SPEAK ON DIGRIET B'MOD CAR IMP. Be careful that 415(4) tohodiex *ala lettera* trid tara r-rekwiziti tal-appell, li trid ssemi l-aggravji li tindika l punti li fuqhom qieghda tappella.

## Article 416 Criminal - Stay of execution of judgements by appeal by party convicted when not in custody

**SOSPENSJONI** → MA JIDHOLX HABS DAKINHAR JEKK SENTENZA TINGHATA MIL-QORTI TAL-MAG, U MA JEHILX L-HABS *ai termini* Article 416, hemm procedura fejn malli tinghata s-sentenza l-imputat jista' jitlob s-sospensjoni tas-sentenza biex ma tidholx fis-sehh b'dikjarazzjoni l-qorti biss viva voce in Court u ma tidholx il-habs "*ha nitlob s-sospensjoni tramite l-416 tal kodici kriminali*". Importanti ghax il-persuna ma tidholx l-habs dak hin.

IMPORTANT - Il-mument li inghatajt sentenza ta' habs u ma taghmel xej u ma tappellax, allura titlef d-dritt tieghek li tappella. Important if the convicted person wants to appeal. Serious implications if not followed.

Sub 1 - A person convicted and is not in custody. Il-habs irid ikun in konnessjoni mal-kawza li nqatghat. On making even orally, a declaration that he desires to enter an appeal against the judgement obtained from the inferior Court, a stay of execution of judgment provided he gives sufficient security, — in praise when given sentence of imprisonment - his lawyer says ha nfirma sospensjoni tal-appell. **HATI JOBBLIGA RUHU LI HA JIDHER ALL PROCEDURI TAL-APPELL F'KAZ LI JIGI INTAVOLAT.** Through this simple procedure, l-impuat ma jidholx l-habs dak il-hin u allura tidhol s-sospensjoni tas-sentenza. In Court they formally say 'TTINI CANS GHAX HA NAPPELLA'.

If he simply asks or obtains a stay of execution of the judgement - if person convicted desires to appeal he will - have to do some things - important not only to avoid imprisonment but because the person reserves the right to appeal and to do so you must do 4 things;

1. Make an oral declaration that he desires to lodge an appeal
2. Obtain a stay of execution of judgment
3. Give sufficient security in terms of 577 1 before the superior Court
4. Provisions relating to bail would apply to him as well

→ Failure to make this declaration - subject to very limited exceptions - has always been interpreted that the accused has shown acquiescence to the judgment itself. This Procedure is CRUCIAL as the majority of cases, even if you have an appeal before 12 working days that appeal can be declared null.

**12 working days ghad-dritt ta' appel** - l-persuna ha tiddecidei jekk iridx jappella jew le - jekk ma jridx jappella ma jigix prezentat l-appell u mat-12 working days jidhol l-habs.

**Il-Pulizija vs. Issa Islam Taufi** - 2nd feb 2006 - no request was made in terms of Article 416(1) of the Criminal Code.

IS-SOSPENSJONI => Jekk xi hadd jehel xi haga, l-Avukat "**HA JITLOB IS-SOSPENSJONI**" in 416 - jekk ma tintalabx, din is-sentenza tidhol fis-sehh b'mod immedjat. Hence, if 1 year prison, the person must go to Corradino straight away. However, with this procedure the person can ask for a stay of execution of judgment, ma tidholx fis-sehh dak il-hin - 12 working days to appeal - to see if he wants to appeal or not from this sentence jekk titlob s-sospensjoni, mhux bilfors ha tintavola appell.

So tista ma tappellax allura wara li jghaddi t-terminu tal-appell, within 12 working days, s-sentenza tidhol fis-sehh jekk ma jkunx hemm appell. Jekk hemm appell, meta tinqata mill-appell umbaghad ma tistax titlob s-sospensjoni - **dritt ghall-kordin**. Imma din isir mill-qorti tal-appell.

So one needs to make an oral declaration that he wants to lodge an appeal - obtain from inferior Courts a stay of execution of judgment. The importance of this procedure is that failure to make this declaration in 416 (1), subject to very limited exceptions - would have shown that the accused has asked for acquiescence to the judgement. If from atti ma jidhirs li tkun intalbet s-sospensjoni tas-sentenza, dak l-appell jigi null - ligi tghidlek "*oral request*": trid tirrizulta mill-atti.

Meta jinghata s sentenza, see that 416(1) talba has been recorded in the acts of the proceedings - and hence the appeal presented is null.

Exceptions - accepted by the Courts

1. When talba ghas-sospensjoni giet mitluba imma ma gietx registrata - araw li din tigi recorded in the acts.
2. Where the punishment given is a suspended sentence - best to always ask for it - or conditional discharge.

Apart from some limited exceptions, the appeal application would be null and void. In what stage should this declaration be done?

You can not obviously make this declaration before judgment is done - but the law does not stipulate at what stage this declaration is null but just says the party convicted in custody - this stage - with article 449 sub 3 of the criminal code - on decisions - on the pleas - in 449 sub 1 - criminal Court - once att tal-akkuza is out, eccezzjonijiet prezentati and in termni 449 sub 3 law

says that in case the AG or accused need to appeal they must appeal by means of a note immediately after by means - 449 3 does not stipulate the exact stage when this should be done. The Courts have traditionally taken the position that this is to be done.

**Article 665:** every decision should be enforceable as soon as it is delivered. Whilst 416 does not say when this should be asked, 449 3 not

Article 499(3) -says what time this should be said

449 - appell li jsir minnhom - eccezzjonijiet minnhom

Fi x'hin u fliema stadju ssir t-talba

→ Nonetheless the Courts have taken the stance that it must be done immediately when Court is decided in light of Article 665 - every sentence is enforceable with immediate effect once done. You must ask the suspension asap, inkella 665 will come into effect.

#### **Pulizija vs. Joseph Oliva - 12th June 2008**

D filed application for execution of judgment but the COA still declared the appeal null and void. INGHATAT S-SENTENZA, HADD MA TALAB S-SOSPENZJONI, waqt t-terminu tal-appell, l-akkuzat talab ghas-sospenzjoni during termini tal-appell. COM accepted this - but COA did not accept this and declared the appeal null and void. Hence, what should be done is as soon as judgement is delivered, before you leave the Awla, Dak il-hin titlob l-magistrat s-sospenzjoni - tirriserva t'12 il gurnata biex tappella.

#### **Pulizija vs. Christopher Mercieca, 21st Dec 2012 Gozo**

Here, there was the form signed by the appellant - and the Court's deputy registrar indicated that - accused requested stay of execution of judgment but from the acts of the proceedings this was not there. F'dan il kaz kien hemm l-formula li tigi ffirmata, imma ma kienx talab s-sospenzjoni ghax talab z-zmien biex ihallas l-multa bil-mod. The reality is that int ridt tappella jew ridt li thallasha bil mod allura accettaha.

#### **A diff approach adopted in Pulizija vs. Andre Sant - decided on the 14th August 2003**

In this case, the Court of criminal appeal said the declaration must be made at any time within the time limit of filing the appeal. It was possible to obtain the stay of execution of judgment - but before the appeal is filed - *ma tantx hemm bhalha dis-sentenza* - wide interpretation - this talba can be done at any time qabel tista titfa' l-appell pero ovjament qabel tipprezenta l-appell.

*416 b'diff ghal 499(3) ma jirrikjediex li din it talba trid ssir minnufih - in any case, ma tridx tkun ghadha fis seh - li jkun hemm l-akkonixxenzza tal-hati li wara jappella minnha.*

416 (1A) PERSUNA LI MHUX IN CUSTODY IMMA ON BAIL - titressaq b'arrest inghata l-bail allura mhux arrestat pero qigeghed on bail conditions in konnessjoni b'appell - when the party convicted is not in custody for the offence for which the person is not convicted - that party was on bail - in a case where a person is arrested.

An arrested person in connection to that sentence and is arrested still, he does not have to ask for *sospensjoni tal appell* - jekk m'intix on bail u nghataj l-habs, ha nkompli fej kont - jekk jien kont l-habs, fuq din il kawza u ma nghatajtx bail u nghatajt sentnenxa ta habs, jien ha nkompli fejn kont. Hence in this question ma jidholx s-sospensjoni, pero li jigri jipprezentaw l-appell u pending l-appell jaghmlu rikors ghall-bail.

Sub 2 - security u x irid ikun hemm - GARANZIJA

Sub 3 - Jitkellem fuq id-decizjoni li tkun inghatat when party convicted iis in custody - temporary release.

Sub 3A - Failure to make a declaration of appeal in sub 3 shall not preclude the person from appealing judgement - DIFFERENZA LI tghidlek li jekk ma taghmilx declaration ta' appell in 3 - ma jimpediex - jekk int arrestat mal-kawza u int ma taghmel xejn fl-awla - it will not preclude you from eventually filing an appeal - appell irid jidhol entro t-terminu.

*If you do not ask - for appeal you can still appeal it if you obtain execution of sentence you can be eligible so that you are granted bail.*

Sub 4 - In a case where AG wants to appeal - in no case would the appeal in the AG would operate as a stay of execution of the judgment - but appell ta AG or complaintant ma jaffetwawx l-ezekuzzjoni tas-sentenza, jien nibqa liberat sakemm l-appell ma jigix deciz finalment.

## **Last amendment was made in 2022 - Article 417 of Cap. 9 - Very Important Article**

**Article 417 Cap. 9** - The form and time for entering the appeal and sub 1 says that the appeal shall be brought before the Court of criminal appeal by an application to be filed within 12 working days - 12 working days !! (no diff between a sentence in Gozo and Malta) shall run for the person convicted and complainant from the day on which the definitive judgment is delivered and on ag from day on which he receives the record.

It is 12 working days for each party, it starts to run from day on which the definitive judgment is delivered but for person convicted from that day and from AG, from when he has ACCESS - wara l procedura li diga semmejna in terms of 414 - IN NOTA TAL APPELL!! Fejn jaghmel dak r-rikors biex l atti jkun jistghu jmorru ghand l-AG.

417 1 - requirements to have an appeal presented - this must be made by means of an application, rikors, before the Court of criminal appeal - time limit is 12 working days and there is no distinction between decisions of COM Malta and Gozo- these time limits have to be observed *ad valitatem* = 12 working days are PEREMPTORY TERMS - CAN NOT BE EXTENDED - case of 414 where it was delayed 12 working days till apply

It does not speak of times, so appeal can be filed till the very last working day of the closing of the respective registry.

**Article 418 Cap. 9** - speaks about the constitution of the Court of the criminal appeal from appeals from judgements of the COM - qorti tal appell (inferjuri).

**Article 419 Cap. 9** - Important - speaks on the contents of application for appeal - rikors ta appell x ha jkun fih? Ha jkollu indications common to judicial acts, occu, and 3 imp elements -

- (a) a brief statement of the facts; LI WASSLU GHALL KAZ
- (b) the grounds of the appeal; IL-PUNTI TA APPELL - L-AGGRAVJI
- (c) a demand that the judgment of the inferior Court be reversed or varied IT-TALBA - THASSAR U TIRREVOKA/TEMENDA

BIEX TAGHMLU APPELL DAWN 3 IMP HAFNA

If appeal is made by AG - the application shall be filed by him.

Since the 2018 amendments, the words under pain of nullity, has been removed and hence when you read case law before 2018, take note of this amendment, as what would have been deemed as null before 2018 would not necessarily be deemed null nowadays. It doesn't mean you can make an appeal any way you want, you still have to be careful - TALBA AGRAVJI FATTI FIL QOSOR but whereas before an appeal was null only because fatti fil qosor ma kienux fil-qosor jew bil-kontra, illum l'gurnata jaf jiirnexxilek ssalvah. RIKORS IRID JIGI FFFIRMAT MINN MINN AG jew persuna misjuba hatja.

Indications common to judicial acts - the details in every Rikors ipprezentat:

1. Court in which it is being filed, Court OF CRIMINAL APPEAL
2. OCCU - Police vs/ Repubblica ta malta vs
3. Other indications such as no. of the summons
4. Name of the Mag.
5. Charges against accused and also other details from which one is appealing
6. Reference needs to be made to appeal judgement if it is appealed.

These are the indications common to all judicial acts, not only the appeal application - note as well that by 520 of the criminal code, article 157 COCP is also applicable to the Court of criminal justice. It is Article which saves the acts in instances of corrections - a reference to Article 175 cocp - abbazi tal 175, one can ask for a Korrezzjoni tar-Rikors, sakemm din ma tkunx wahda straordinarja u li tbiddel l atti tal-kaz. Pero din il korrezzjoni trid tittiehed in kunsiderazzjoni fl-149.

Article 175 could come handy in case there is a need to correct a mistake in a judicial act. What if there is a mistake in the heading of an appeal ex. A wrong indication of the Court? These are some before 2018 so now it might have a different outcome - through recent amendments in 2018 could in certain cases not lead to nullity.

**Pulizija vs Anthony Abdilla - 9th January 1989** - The Court said D requested a correction in occu - Court rejected such request and declared null - *“ghalkemm il qorti ghandha tfittex il praticibilita, l isem tal qorti ghandha tkun bil precizjoni kollha”*

A different approach in **Pulizija vs Gereda Murad, 9th March 2006** - here the indication to the Court said *“fil qorti tal-appell”* - D filed a request asking for a correction - to be changed to qorti tal-appell kriminal - The Court in this case, acceded to the request and laqat t-talba tal korrezzjoni.

### **What if an appeal is filed in a diff language not used in the proceedings?**

Conflicting judgements - which take into account who would be prejudiced by this issue.  
The general rule is that the language of the proceedings and appeal application must correspond. **JEKK KAWZA KOLLHA BL-INGLIZ, APPELL BL-INGLIZ.**

Nonetheless conflicting jurisprudence with most recent caselaw that it would not lead to nullity if accused does not suffer any prejudice

**Pulizija vs Martin Barnes, 11th Dec 1986** - A decree in the acts of the proceedings where Court said English. The accused however filed an appeal application in the Maltese. The appellant tried to renounce to have proceedings in the English language. But the Court said that since it is a public order it may be raised *ex officio* and declared case null and void. ENG - APPELL BIL MALTI - Court SAID THIS IS PUBLIC ORDER hence appeal is null.

**DECIDED DIFFERENTLY** - In a **case decided on the 22nd of Nov. 2001** - Proceedings in the English language as appellant did not understand Maltese but appeal filed in maltese. The COA quotes **Republika Ta Malta vs. Martin James Denning 1994** - which referred to the issue of prejudice and declared that appeal was not null.

**BRIEF STATEMENTS OF THE FACTS** - il-fatti fil qosor - Kemm ha jkunu qosra, kemm ha jkunu twal? The law states brief statements of the facts - One judgement on this issue was **Il-Pulizija vs Jianqi Yang, 2008** - what is brief depends on the circumstances. From a brief statement the Court must have a basic idea of what has happened and what will be discussed. In the Yang case the Court said *“il principji stabbiliit jigu risappunti f dawn it t3 punti, ir rikors ikun fih, esponit b’mod car u konkret, b mod li l kontroaprit ghandha tiddefendi ruhha u titrattha... ttirrikjedi ... illi ghalhekk ma jkunx - mhux l-kompitu ghal qorti li tispjija l fatti..”*

The grounds of appeal - **L-AGGRAVJI** - r-raguni li inti thoss li s-sentenza tal-qorti kenet skorretta - l-aggravji jrdi jkunu cari wkoll - more than 1 ground of appeal must specify the ground depending on the judgement of the first Court. They depend on the facts of the case and the manner in which the facts on the issue has - AGGRAVJU FUQ S SENTENZA NNIFISHA - jew fuq l-fatti

AG has a general right of appeal in all other cases - a simple vague declaration which would require an analysis of the Court, would not be enough.



**Il-Pulizija vs Robert Caligari Conti - 10th dec 1996** - dealt with the brief statement of the facts - bil-fatti fil qosor.

**Il-Pulizija vs. Silvio Attard 10th Dec 1996** - also possible not only on the merits of the appeal but also on the basis of punishment - possible for a person to have an appeal on more than one ground and also solely on punishment.

There are cases that even though no aggravju fuq l piena l qorti tal-appell xorta tista tnaqqas l piena

### **It talba**

Demand that the judgement of the inferior Court be reversed or varied talba ghar-revoka jew ghal varjazzjoni. If you ask for revocation you ask for revocation of all - so if gie liberatt mInn wahda u hati minn 2, trid titlob l-varjazzjoni allura u mhux r-revoka tat-talba principali tkun ghall-varjazzjoni. Jekk instab hati ghal kollox, titlob r revoka ghal kollox.

If what you are requesting demands the reversal of the whole judgment - if you agree that your client is guilty but disagree with punishment awarded, you ask for a reform , whilst confirming the decision of guilt of the Court.

You ask for revocation - for sentence - in this case you ask for a revocation - *konfirma ta htija imma kancellata dwar s sentenza*.

A demand that the judgement be reversed or varied, fit-talba taghmel referenza ghas-sentenza - always interpreted as meaning that the Court which pronounced the judgment - the appeal application would be null and void. Rikors ta' appell requirements on 419 done.

**ACT 3 OF 2022** - amendment - When appellant is not the AG application should have its address of the appellant - in the rikors and if he changes the address, he should inform the registry. You should include the address of the appellant. This requirement was introduced for the process biex jimxi ghaliex biex l-appell jinstema, l-appellant irid jigi nnotifikat u kien hemm cirkostanzi fe' l-appell ma setax jimxi ghax ma ssibux l-appellant.

Another important fact on 419 is What happens if the name of the accused is not mentioned correctly? If an appeal is filed by a person whose name does not correspond to the name of the accused, then it is null. If the judgment is delivered in the name of a person, and that person does not reflect the proper identity of the person, that judgement would not be able to be enforced. Ex wrong id card. Does not exist - in that case, you can not say the sentence is null but that such is not enforceable. But if a person is mistaken that is null.

420 → speaks on free legal aid -

421 → KIF JISNTEMA L-APPELL - look at amendments in 2022 - shall be given to parties and injured party - x'jigri, jidhol l-appell fir-registru u tohog l-avviz tas-smigh li jigi notifikatt lill persuna misjuba hatja u wkoll lill-injured party, u jghidlek min hi - 410 4 u 5 - hemm proviso fuq l-injured party li jghidlek li jekk din ma tkunx giet notifikata din ma jipprekludux l-qorti milli tmur ghas senenza finali.

Proviso in 2022 - if service is not delivered to the appellant in person, notice shall be affected at the residence mentioned in the appeal. BEFORE, the marixxal kellu jaghti n-notifika lill appellant through this proviso, tista thallijilu fl-address tieghu jew fl-indirizz l-gdid habba l-amendment fuq dik wkoll.

Jekk ma tistax ssibu within legal hours, if you do not find him, even if the notice is not delivered he shall immediately affix notice - and is notified by law.

Article 421 sub 3 - injured party jista jkun assistit u anke - jamel s-submissions tieghu u jista' jkun assistit minn kull avukat.

What happens if non-appearance jekk l-appellant ma jidhirx ghas-smigh tal-appell? Hawnhekk tbiddlet l-ligi wkoll - jekk l-appellant ma jidhirx ghas-smigh tal-appell - jaqa' dezert u l-kawza tal-qorti tal-Mag, tidhol fis-sehh pero hemm way out - but in an application by appellant filed within 8 days (before it was 4) together with a declaration sworn before the registrar by appellant - Court shall appoint another day for the hearing of appeal.

8 days - could be extended by proviso which says that in exceptional circumstances,

Jekk appella l-AG u l-appellat ma giex, ma tistenniex imma tghaddi ghas-sentenza

**Article 422 of the Criminal Code** - if you do not appear for the appeal you made l-appell jaqa dezert u din hija imp hafna. ir-repurkosssjonijie f'kaz ta' appell fejn ma deherx jaqa dezert.

**Article 424 of the Criminal Code** - jitkellem fuq xhieda godda - f'appell provi godda ma jinstemewx pero hemm exceptions fil-424 li jghidlek li ghalkemm no new witnesses may be produced, you have an exception.

**Article 428 of the Criminal Code** - Powers of the appellate Court - this is 424, good to know about it - Court can have powers, the exception exists certain cases that when heard before the com, the xhieda ma giex transcribed, in that case they would need to jixhdu wkoll jergu quddiem l qorit tal appell - but are not considered as new witnesses.

Apparti l exceptions in 424, when you have an aggravju on piena, sometimes defence asks for a probation officer to state the imputat progress. Drugs Court - new amendments in the law - an imputat can ask for his claim to go in front of drugs court.

428 → says what happens when there is a NUQQASIJET JEW FIS SENTENZA JEW FIL PROCEDURA TAL COUR OF MAG - if the superior Court finds that the fact of the offender constitutes an offense, it shall quash the judgment and shall transmit the record to proceed according to law

COM iddecidiet kaz li ma jkolliex gurdizzjoni li tiddeciedei, tingha l kaz lura fil qorti tal mag biex tibghaha isfel.

Plea to jurisdiction shall not be allowed if not raised to inferior Court and to having it raised was tacit or waived.

If case has been declared null due to procedure, this would be null and the court decides. META TIGI DDIKJARATA NULLA S-SENTENZA = jerga jkun hemm ri-ezami mill gdid biex ikun hemm senenza ohra, pero mhuc jigi liberat.

7 - is very imp - if an appeal is made only to the party convicted, the party may not be increased. If guilty appeals = only better than how she is not worse for sure it is not possible

# **The Criminal Action**

*The criminal action can take one for the 2 forms, 2 main branches:*

- 1. Civil Action**
- 2. Criminal Action**

When we consider the notion of the criminal action, we have to focus on a very important aspect as to what makes this action different from the civil action. One of the most important aspects we will deal with as it will underpin the rest of the course.

The concept of criminal action - that which is found in our criminal code and in our case the criminal action basis is divided into 2 → **The Distinction made between Crimes and Contraventions.**

**Article 3 of the Criminal Code**, states that every action gives rise to a criminal action and a civil action. Therefore, this begs the question as to what makes a criminal action and what makes a civil action according to the laws of the secular state.

Section 3 of the Criminal Code says that every criminal offence gives rise to a criminal and a civil action - this is not an absolute rule, as there is actually nothing absolute in our criminal procedure. Hence, even though as a rule every criminal offence gives rise to a criminal and a civil action, there are instances where the happening of a criminal offence does not give rise to a civil action

Ex. A person driving a car recklessly and hits a pedestrian - reckless driving earns the person a criminal action. The harm done to a pedestrian gives rise also to the pedestrian to sue the tortfeasor/offender for damages for his reckless driving. Not always like this however.

The case of a person who is driving in a negligent manner and goes against this rule where you have to stop wherever the traffic lights are from amber not red. Nobody is hurt, what happens there, this action leads to an infringement of a law of a criminal nature, as when the law attaches a sanction to a particular code of conduct that normally is presumed to have a criminal nature, even this is gradually eroding, especially in administrative law.

The manner in which criminal action is instituted before Courts of criminal jurisdiction.

Court of Magistrates - Action is instituted by means of a summons. If a person is arrested, he is physically taken to the Court to answer for his crime (those who are arrestable offences) and especially where the sanction is imprisonment.

So as a rule, the criminal action is exercised either by summons or by issuance of the bill of indictment: The **BOI (att tal-akkuza)** is not filed before the Court of Magistrates. It is only filed before the Criminal Court and it is drawn up and **filed by the AG and not** by the commissioner of police.

The procedure before the Court of Magistrates and the Criminal Court is different - procedure before the Court of Magistrates is less formal than the Criminal Court. Whether the criminal action is exercised before the Court of Magistrates as a Court of criminal judicature. Or before a criminal Court - the end result is that the person is seeking the person charged - If found guilty of a criminal offence. Article 7 lays out the differences between offences/punishments.

**Crimes** - More serious criminal offences. **Multa**

**Contraventions** - Act of a criminal nature but of a minor nature. **Ammenda**

In Crimes, the punishments are more serious and consequence, so in the case of crimes Article 7 says a person can have interdiction, solitary confinement or fine *multa*. In the case of contraventions, the punishments awarded by law are detention, fine in the form of amends, or reprimand and admonition. These are the punishments established by the Criminal Code, but there again in 1854 there was a degree of harmony in the drafting of the criminal code where the practitioner used to go pick up the criminal code, had both procedural and civil - the practitioner.

All of a sudden, this book that our forefathers enjoyed in their daily practice in criminal law and other forms and introductions and other forms of criminal law and procedure started to creep in not only through the criminal code itself but also through other pieces of legislation. Maltese is promulgated haphazardly, without an impact assessment. 170 years later we have a criminal justice system which gradually became archaic.

**Retribution vs Rehabilitation** on the offender. The world we are living in is more focused on the rehabilitative aspect rather than the retributive aspect. If a lot of emphasis is put on the rehabilitative process, the accused sees it as an opportunity as an out of jail free card.

**Articles 28A to 28H and 24 of the Probations Act** - Suspended sentence - Court can issue restitution order and can make a direction of the offender, give back anything stolen or obtained by fraud or any other unlawful gain to the detriment of the victim.

One of the reasons the legislator started favouring this merger the criminal and civil action was the possibility and avoid to have conflicting judgements between Court of civil and criminal jurisdiction as there is a rule which says that the criminal action and civil action stemming from the same fact / happening, yet both actions can be exercised simultaneously at different Courts or at different times, as both actions are separate one and the other.

Some people whilst having been lawfully married the first time, decide to contract the second marriage, whereby the 2nd is in breach of the law, Bigamy. Not bigamous if the 1st marriage would not be valid, so how do you determine whether the person committed the crime of bigamy.

Most times it entails the necessary qualifications whether the first marriage was valid or not - to determine this an action has to be brought in front of the civil Court. As a rule, the hearing of a civil case emanating from a criminal offence, emanates from the civil case as if conducted before 2 Courts, in our system, given that these are separate and distinct, these can come to different conclusions. Civil and criminal standard of proof necessary.

In order for a Court to find a person guilty, the Court must be sure of the guilt of the accused, beyond a reasonable doubt that the person committed the offence, anything other than that tantamount to an acquittal. In Civil proceedings you have a different standard of proof - on a balance of probabilities. He weighs the evidence and based on that balance, he decides who is right and who is not. Therefore, the standard is much lower and it is therefore more difficult for a person to be found guilty in a criminal Court as opposed to civil Court.

It could be the other way round with the criminal standard being so high, we have the person not found guilty of a criminal offence but in a civil offence, the person is found guilty on a balance of probabilities. You may have issues when these may crop up and also issues of prescription being different in the criminal action and the civil action. The rules of prescription in - as a rule, criminal procedure would entail a longer period of prescription than the ordinary civil action.

Another important aspect of prescription is that whilst in civil proceedings prescription can be waived, in a criminal law context, the institute of prescription is deemed to be a rule of public policy hence cannot be waived by the parties. Even if the accused does not plead prescription which would run in their favour, the Court is entitled to raise protection *ex officio* nonetheless, even at appellate stage.

## *Who is vested with the criminal action?*

One important distinction between criminal and civil procedure is the question of juridical interest. When it comes to criminal procedure, Article 4 states that the criminal action is a public action, and prosecuted in the name of the Republic of Malta through the executive police or Attorney General, so the public prosecution of the criminal action is vested in the AG.

The exercise of the criminal action is vested in the state and exercised by the executive police or AG as the case may be. However, Maltese law of criminal procedure, allows also another form of public prosecution, taken also from principles of English criminal procedure and this refers to as (informally) private prosecutions. When the prosecution of the criminal action is in instances entrusted to a complainant. However, as a rule, it is the organs of the state who are vested with the power to prosecute the criminal action. Now, therefore this takes us to focus a bit more on the key players here, and these are:

1. **The Executive Police** - As far as the powers of police are concerned, Dr. Filletti will go through them.
2. **Attorney General** - someone else will deal with it - office instituted by the Constitution. The Office of Attorney General as the institution itself, Article 91 focuses principally on the role of the Attorney General, then there is a specific piece of leg. Cap. 90 of the laws of Malta which focus on the office of the AG, the legal set up within which this public officer exercises the functions. Hence AG office is a public office, acting in acc with advice of Pm, and the republic. Qualifies = have the basic requirements to be appointed.
3. **The complainant** - (In a limited manner and to a certain extent).

Complete misunderstanding in this jurisdiction as to the role of the AG - role of the jurisdiction as a hybrid jurisdiction (mixed jurisdiction - taken certain aspects from legal procedure, from common law system) - role of AG taken from English law. Office of the AG, role of AG, protector of public prosecutions.

Before 2022, the office of the AG covered both a civil and a criminal limb. One of the main issues which cropped up was the **2007 Joseph Lebrun case** - started reassessing the office of the AG with this jurisdiction. Many people think of the role of the AG as the *lunga manus* of the - Office of the AG falls under the heading of the executive. Decades ago, debate went on in political circles of a healthy nature, that is healthy but when politics comes into this equation, it is very dangerous.

The system before 2020 allowed the AG a lot of power in both Civil and criminal sphere - the office of the AG incorporating as- chief prosecuting officer and - offered an unparalleled power

which could come in handy for the executive of the day. On the one hand we have the AG, advising the government on all matters of public administration, on issues also touching international cooperation and foreign affairs and at the same time, wearing the other hat of chief office of prosecutor on the land. There were no issues until the mid-2000s. Nowadays, following the amendments, there was the separation between the Civil limb (entrusted to the state advocate) and the criminal limb (entrusted to the attorney general). The separation of the roles was a long time coming and strictly speaking, it encourages a specialised approach which nowadays is laudable.

Many think of an AG = lawyer engaged in a public prosecution. There is no doubt about that from a formal perspective. Basic requirement. So yes the AG has to be a practising lawyer, but is the ag just another lawyer? In our system, the role of the AG is not a trial lawyer acting for the state. The powers conferred on AG not just executive powers. The decision to prosecute is that just a. Many lawyers, article 433 of the criminal code, in order for the AG to be able to exercise his problems properly to a certain extent were deliberating. The AG has powers to arrest people, not any longer, - yet if you go to article 433, you find that it is still there as legislators take a long time to do anything. Article 433(3) - the product of the Joseph Lebrun case.

Constitutional cases - attack the AG to act immediately. Just one thing - chicken feed. No big deal, so what, at the end of it the role and powers of the AG are spelt out in the law, Ag enjoys huge powers in relation to the role to exercise the functions, you will see that the AG's ordinance was amended till very recently where the AG now has not only the powers to conduct prosecutions but to decide whether the action of - to criminal offences.

Role has been shifting on the AG office - you will tell me the power to prosecute will be given by Executive police, but you have to put the police in their proper historical context as well, in the past first years of British protectors of Malta, Thomas Maitland, back in 1812, the idea was to have specific judicial police to cater for specific situations. We managed to ruin the harmony in the criminal code. But you will say all of this is pure —, but are you that sure that case law supports that point of view? If I were you, I wouldn't be that sure.



Interesting 20th century cases: Criminal Court presided by Francesco Buhagiar, Roberto Ganado, Eduardo Ganado - **19/06/1933 Case of Geraldo Debono**

The Law which we have till this day “the AG” - do you recall what Prof. Mamo used to refer to the AG as? As Chief Magistrate - he did not invent the word, that is the word of the source in this case.

**Judge Aaron Bugeja** believes that the proper understanding of the AG is that of a judicial officer. For judicial cooperation in criminal matters the AG for European Union purposes is to be judicial officer. Creating Mayhem in prosecution services - mayhem = unable to perform their functions.

*“Dwar l-irwol tal-Avukat Ġenerali quddiem il-Qorti Istruttorja, il-Professur Anthony Mamo fin-Notes on Criminal Procedure jgħid illi The functions of the Attorney-General commence from the day on which he receives the records of the enquiry made by the Court of Judicial Police as a Court of Enquiry [illum il-Qorti tal-Magistrati (Malta) Bħala Qorti Istruttorja ossija dina l-Onorabbli Qorti]. From that day and until the indictment is filed in H.M.’s Criminal Court [illum il-Qorti Kriminali] the Attorney-General enjoys a considerable measure of jurisdiction and may exercise certain most important judicial functions (Rex vs. Debono, C.C. 19/6/1933 – L.R. Vol. XXVIII p. IV p. 34). Il-Professur Anthony Mamo fin-Notes on Criminal Procedure jgħid ukoll illi If an indictment is filed the Attorney General, as already stated, appears as prosecutor before H.M.’s Criminal Court [illum il-Qorti Kriminali] at the trial of the offence. His jurisdiction then ceases and all his acts become subject to the jurisdiction of the Court. Here he appears as one of the two parties engaged in the judicial contest, to represent, it is true, the interests of the community in the repression and punishment of crime, but nevertheless, as a party. For this reason, it is not open to the defendant to challenge or object to him [...]”*

*It must be emphasized that this description of the Attorney-General as a ‘party’ applies to him only as prosecutor before H.M.’s Criminal Court. Before the filing of the indictment and so long as he is exercising the functions which we have already mentioned, assigned to him by the law with reference to the acts of the enquiry he is not a party, but an authority independent of the Court of Inquiry and indeed, exercising a jurisdiction – as a general or chief magistrate – superior to that of that Court (C.C. Rex vs. G. Debono 19/6/1933; Rex vs. G. Ebejer 4/5/1931 – L.R. Vol. XVIII p. IV, pp. 34, 37);*

*Il-Pulizija v. Edward Cassar et l-Avukat Ġenerali kien issottometta dan illi ġej: Kif dejjem gie ritenut mill-Qorti tagħna, l-esponenti, fil-kors ta’ istruttorja għandu funzjonijiet u setgħat ġudizzjarji u fl-espletament ta’ tali funzjonijiet u setgħat l-esponent hu ġerarkikament u ġurisdizzjonament oghla mill-Magistrat Istruttur (ara Sua Maestà il-Re vs. Geraldo Debono, Corte Criminali, 19 Giugno, 1933, Vol. XXVIII.IV.34; u Sua Maestà il Re vs. Geraldo Ebejer et,*

*Corte Criminale, 4 Maggio, 1931, Vol. XXVIII.IV.7; ara wkoll in-notamenti ta' Sir Anthony Mamo dwar il-proċedura penali (R.U.M. Publication), p. 142 u 144). Dan mhux qed jingħad b'xi sens triomfalistiku wisq anqas ta' supervja, iżda sabiex jiġi sottolineat li meta l-attijiet tal-Istruttoria jkunu għand l-esponent dawna ikunu għadhom f'sede ġudizzjarja u jibqgħu l-attijiet tal-Qorti tal-Maġistrat tal-Pulizija Ġudizzjarja u l- Qorti tal-Appell Kriminali nhar is-26 ta' Ġunju, 1986 fl-ismijiet Il-Pulizija v. Edward Cassar et, hawn fuq imsemmija, dik l-Qorti irriteriet, fost affarijiet oħra, imbagħad dan illi ġej: Illi fl-eżerċizzju ta' dawn il-funzjonijiet l-Avukat Ġenerali għandu poteri diskrezzjonali importanti u f'ċertu każ u f'ċertu sens jaġixxi f'vesti ta' ġudikant. Inghad f'ċertu sens għax in realtà ċerti deċiżjonijiet li jista' jiehdu l-Avukat Ġenerali jittiehdu mhux għax strettament għandu funzjoni li jiġġudika lill-imputat iżda in forza u bħala konsegwenza fil-fatt li f'idejh u f'idejh biss hi fdata d-deċiżjoni jekk jmexxi quddiem il-Qorti Kriminali permezz tal-Att tal-Akkuza jew jekk joħroġ "nulle prosequi".*

*[...] Infatti l-ewwel konklużjoni ovvja li temerġi minn eżami tad- dispożizzjonijiet li għalihom saret referenza hija li fil-qadi tal-funzjoni tiegħu li jippreżenta l-att tal-akkuza, l-Avukat Ġenerali mhux biss għandu d-dover li jara li l- atti tal-kumpilazzjoni li fuqhom neċessarjament l-Att tal-akkuza jrid jkun bażat jkunu istruwiti tajjeb iżda l-leġislatur ipprovdietli mezzi u poteri indiskutibilmement idoneji biex fi żmien raġonevoli u mingħajr preġudizzju indebitu tal-akkużat jkun jista' jespleta dan l-inkarigu li tafdal l-istess liġi kif ingħad. Issottometta tajjeb għalhekk l-Avukat Ġenerali appellant illi sakemm ikun għadu ma sarx l-att tal-Akkuza u purche jkun għadu fit-terminu stabbilit mil-liġi (jew dak originali ta' xahar; jew dak prorogat) hu jista' dejjem jirrinwija [...] U taqbel ukoll din il-Qorti li dan jemerġi mill-obbligu li għandu li jkompli jinvestiga u jistruwixxi, dejjem sa fejn hu umanament possibbli l-proċess, qabel ma jakkuza lil xi hadd jew addirittura qabel ma jillibera lil xi hadd jew qabel ma jordna rettifika tal-atti jew li l-kumpilazzjoni terġa' tibda mill-ġdid"*

Using the role of the AG, that is surpassed by not calling them judicial authorities or not part of the judicial authorities. If they are caught they know they are in deep trouble. To my mind, it is elementary - this Geraldo Debono case not something that was a one of - other cases repeating the same view, with different Judges professing the same idea even as recent as the 1980s- not something you only find in the 1930s and 1960s.

Choosing who sits on the bench is deemed to be the power of the sovereign. The AG office does have constitutional protections. Decision to prosecute is slowly shifting from the police to the AG - a positive move as we have seen this in England and Wales where the crown prosecution service who make the vast majority of decisions when it comes to prosecuting serious crimes. Should be a prepared body of professionals that deals with cases. Consulting with the executive police is very important as they can give you their ideas on the ground, something which the AG lacks, so having a robust system of consultation with the executive police is very important. The last word would be that of the AG

Who are the key players in the exercise of criminal action? Alongside the AG, there is also the executive police, a key role to play in prosecution of criminal action. Some amendments carried out in mid 2020(role of AG expanded), powers to police to carry out services to police in Article 410 sub 3, where the Criminal Code gives power to executive police to be able to engage an advocate or legal procurator. This was meant to give executive police more access to professional assistance when it comes to exercise the prosecutorial functions.

## Article 410(1) Criminal Code

*410.(1) In any proceedings instituted by the Attorney General or by the Executive Police on the complaint of the injured party, it shall be lawful for the complainant to be present at the proceedings, to engage an advocate or a legal procurator to assist him, to examine or cross-examine witnesses and to produce, in support of the charge, such other evidence as the Court may consider admissible.*

The 3rd key player in prosecution of the criminal action who is not one of those mentioned by article 4 but we have in our statute book, the possibility of the private party the prosecution of the criminal action in certain circumstances.

Here, when we deal with private prosecutions, a different kettle of fish - in Article 410 sub 1 - to examine or cross examine witnesses - words in the law are very important not only reflect words but concepts.

Whenever the Police proceed with the projection of a criminal action but the criminal action is constitutive on the complaint on the injured party, *IL-KWERELA*, it shall be lawful for the complainant, so in this context whenever complainant files a complaint, it shows that the the complainant is interested in instituting the criminal action, since he would have been directly affected. Hence, the complainant is entitled to be present, engage a lawyer to cross-examine witnesses - there needs to be also this particular figure taken into consideration. So there again, there is the need most of the time for the complainant to have assistance.

*Is the complainant obliged to have a lawyer assisting them?* NO, not even a person accused should be compelled to have legal assistance but obviously it is advised, for common sense. If you are sick, you can decide not to call a doctor, it is advisable but you call.

Here the law is referring to the **private party**, hence who is this private party? This private party is not the injured person themselves. Ex; defilement of minors - this offence is directed towards a person who is a minor. We do have a minor - what about the minor, should be at the centre of legal protection. Situation where normally the complaint, the age of the minor involved, depends

(if a minor is still a toddler or who is still in kindergarten, then most of the time not able to logical thinking vs. a 15 year old). Must see the exact context we are talking about.

The complaint is not normally lodged by minors themselves, although it could be - injured party would be minor, injured directly and if someone else reports than, though the minor would not be a complainant, it doesn't mean he is not a private party to the issue.

Where criminal action is prosecuted *ex officio* Article 410 sub 2 check if or 4(2) of the criminal code says that criminal action - *ex officio* power granted by the law to the office in question), so criminal action is prosecuted *ex officio* when in all cases where the complaint of the private party is not requisite to set the criminal action in motion or the prosecution does not leave the action of the private party. Speaks of 2 diff scenarios in this article:

1. **Scenario 1** - Where the law provides that the criminal action is prosecuted *ex officio* (by power granted by law in this case by the executive police), where the complaint of the private party is not a requisite to set the criminal action in motion, so the law - hence there are instances where the law itself requires the complainant of the private party in order for the criminal action to be set in motion (hence police can exercise action of their own right).
2. **Scenario 2** - There are instances where the law tells you that the criminal action can be taken by executive police - Article 543 of the Criminal Code - there are also situations where the law itself tells you that in order for criminal action to be instituted by the police, the complaint of the private or injured party is required. Instances like these are for example Article 221 sub 1 and 3 - in that instance, the complaint of the injured party is required. Same as with Article 226, complaint of the injured party is required, misappropriation, wilful damage to property, involuntary damage - instances where the law itself tells you that no criminal action can be taken by executive police unless they receive the complaint of the injured party. Scenario 2 - The Police can exercise criminal action provided that in regards to specific cases by the law, they receive the complaint by the private party without which they can not prosecute the case - Article 410 sub 2 - where the prosecution leave the criminal action to the private party - situation where the police can exercise the criminal action and prosecute themselves provided that they have the complaint of the injured party.

## **Article 543 Criminal Code**

543. It shall be lawful for the Police to institute proceedings even without the complaint of the private party in any of the following cases:

- (a) in the case of crimes for which the law does not expressly provide that the complaint of the private party is requisite;
- (b) in the case of any offence consisting in the carrying of prohibited weapons, or in the case of any offence against any law relating to fishing, vehicles, or boats, or to any art or trade;
- (c) in the case of any offence committed against a person who, by reason of physical or mental infirmity, is incapable of instituting criminal proceedings, even though such offence be one in respect of which, if committed against any other person, the complaint of the private party would be requisite;
- (d) in the case of any offence affecting public order or the community in general;
- (e) in the case of any offence involving domestic violence

Provided that for the purposes of this paragraph "domestic violence" shall have the same meaning assigned to it by article 2 of the Gender-Based Violence and Domestic Violence Act:

Provided further that it shall be lawful, after proceedings have commenced before the Court in virtue of this article for an offence mentioned in this paragraph, for an alleged victim of an offence involving domestic violence to request the Court to stay proceedings against the alleged perpetrator, and when such a request is made the Court may decide and direct the continuation of proceedings against the alleged perpetrator, giving particular consideration to the best interests of the complainant, any minors involved, and any other relevant third parties, and shall cause such request and decision to be registered in the records of the case.

- (f) in the case of rape as defined in article 198:

Provided that it shall be lawful, after proceedings have commenced before the Court in virtue of this article for an offence mentioned in this paragraph, for an alleged victim to request the Court to stay proceedings against the alleged perpetrator, however, if such request is made, the Court

may decide to continue the proceedings against the perpetrator, giving particular consideration to the best interests of the complainant, any minors involved, and any other relevant third parties

3. **Scenario 3** - Article 4 (2) - The private parties themselves institute the action - essentially, in this - the private party would be the exercise and prosecution of the criminal action. In order for this second hypothesis or 3rd depends to take place, certain conditions must be fulfilled, article 370 and 373 Criminal Code. Article 373 of the Criminal Code provides with this 3rd alternative where the private parties themselves the criminal action, or albeit articles 373 Criminal Code .

**Very Important** - All criminal actions start before the Court of Magistrates - always! Here, we are focusing on the jurisdiction of the Court of Mag. as a Court of Criminal Judicature. This is what 370 1 deals with. Other sub articles in 370 focus on what goes on in Court of Mag. Once a criminal offence falls within 370 sub 1, we know that the criminal action in that case is to be instituted before the Court of Mag as a Court of Criminal Judicature, in those cases therefore, in order for us to be able to determine whether case in question can be prosecuted by the private party we have to consult not only 370 sub 1, not only the specific article of the law, but also even Article 373 of the Criminal Code, which states that as regards offences, prosecution of the criminal action shall lie within the injured party or with the persons mentioned in Article 542 Criminal Code on behalf of such party, and other related persons.

# NOTIZIA CRIMINIS

**NOTIZIA CRIMINIS** - Criminal procedure is interlinked and intertwined, you have to follow each lecture and build one on the other.

**NOTIZIA CRIMINIS** = *Information* on the happening of a criminal offence. If the Court of Mag. is the first port of call for criminal action in our jurisdiction, it is the executive police who are entrusted by law in enforcing law. Like the AG and Courts of justice, the executive police have a very important legal and social role to play in our society.

Not citizens should keep law and order. You do not attack the institutions by only writing newspaper articles but by instilling ideas which are anti-social, peddling them as being progressive as being the cool ideas of the day. Executive Police entrusted with law and order in this land. Just like in this case, the roles of police officers carry a lot of responsibilities and they are obliged by law to observe public order and peace and collect evidence both in favour and against a person suspected - obliged to bring offenders to justice before Courts of law, before being able to do so, they must get to know that a criminal offence must have happened.

## CONCEPT OF NOTIZIA CRIMINIS

BASICALLY, in order for law enforcement to start taking action and investigating crime, they have to know about the commission of a criminal offence, short of that, unless one assumes that law enforcement agencies have the power to read minds or an all seeing eye, one does not really expect them to take action.

**NOTIZIA CRIMINIS** = *how do all these laws regulate notizia criminis?*

**3 methods relate to how this relates to law enforcement**

1. *By means of a report - report is referred to as **rapport**.*
2. *By means of information - information is referred to as **denunzja**.*
3. *By means of complaints - complaint is **kwerela**.*

These terms are very important to grasp correctly in order to inform law enforcement of the happening of a criminal offence. Hence, these are ways through which the executive police and other agencies are formally informed of the criminal occurrence that could lead to the exercise of the criminal action.

## *Can the police act on a newspaper report, on anonymous information?*

Quite a hard nut to crack really. These are the 3 forms which the law recognises for the process of the criminal investigation to be set into motion but here the law is focusing on how information is relayed on law enforcement for them to start the criminal action. Quite subtle but does this include the power to investigate?

The concept of *notitia criminis*, not something endemic, but we have borrowed where you will see this area of law has been heavily influenced not only by English law but also Italian and French systems. 2 main forms on how the police learn on the happening of a criminal offence, through direct or indirect knowledge. Here we are dealing with the situation of persons relaying a set of facts which do not necessarily imply the commission of a criminal offence.

Ex. One finds a dagger down the hall with a reddish substance. You decide to tell law enforcement about this. Who told you that this is a product of a criminal offence in the first place? It could have been someone who, in a sudden frenzy, wanted to kill his pet rabbit as he was hungry and forgot his knife there. Is that a criminal offence? No, that is not, until now. So you can not take things for granted as in order for you to reach a conclusion you have to understand what really happened. It is a fact finding mission. Through the facts that result, one can then arise at some sort of conclusion as to whether.

***Notitia criminis** is a Latin term that literally means "notice of a crime". It represents the point at which law enforcement or the judicial authorities become aware—through any means—that a crime may have been committed.*

At the same time, we can not underestimate the effect of *notitia criminis* as the action prompting investigations. Hence, direct and indirect knowledge in the UK and even in Malta, this takes place directly when the police get to know of a criminal offence without third parties.

Ex: As part of the duty of detecting criminal offences, police are obliged to take a proactive stance. Police not expected to be reactive when it comes to detection of criminal offences, obliged to be proactive, to take the initiative, to see whether a given set of facts constitutes a criminal offence, this is where things become more spicy. Does this duty of detection also include the proactive stance? And what is this proactive stance?

Many investigative journalists reach their conclusions based on their assumptions, should the police dismiss that? The role of common citizenry and whistleblowers and investigative journalists in the disclosure process, in the discovery of facts leading to criminal offences, has been very much important. We have to face this also in this jurisdiction. Executive police had a



duty to bring criminals to justice. In English law, they do not have an obligation but a civic duty - to prevent the happening of criminal offences, which helps prevent the happening of further criminal offences.

People tend to manipulate and turn and twist events - not all people are honest. Not as rare as one may think. We also see that this procedure that we have here has to also be read in conjunction with the role of the AG and the CPS of England and Wales. The way it is aligned, slowly more aligned with the English system of prosecuting criminal offences.

The concept of *notizia criminis* that we have in this jurisdiction is also very similar in various aspects in Italian law, so for example, in Italian, *notizia criminis* can be done through information which can be done and guarded through the judicial police, Article 347 Codice Penale. There is also the concept of **DENUNCIA** - at Italian law, which can come from private individuals, public officials or persons in charge of a public service. In Maltese *DENUNZJA*, which at Maltese law does not focus on the information that a public officer is duty bound to disclose at law, as that falls under report. However, a close connection exists between report and information, and one of the methods that law enforcement learns about the happening of a criminal offence. *Il referto*

**KWERELA** in Italian law, which is a complaint also in Italian law, only that in Italian law unlike denuncia, the right of the kwerela belongs to the injured party who within 3 months of the alleged crime has an obligation to denounce it. Similarity in Maltese law, in order for a piece of information. for there to be a kwerela.

Concept of info and report on one hand and kwerela on the other [direct interest of person succumbing the offense i.e. victim. The very most important distinction between reports on the one hand the KWERELA - personal direct interest must be there of the victim, whereas in information there is no such requirement.

Secondly, we saw that in Italian law there is a concept that in Maltese law it is referred to as DENUNZJA. There is also the idea of what in Malta we all *report*, that in Italian law becomes IL REFERTO. To disclose what happened during a criminal offence and therefore, that office is duty-bound to inform his superiors.

Querela - In Italian and Maltese both have this concept which requires the relaying of information to law enforcement by persons who would have been directly affected by a criminal offence, seeking criminal action against perpetrators.

There is also the concept of confidential reports being filed - This concept is not completely alien to Maltese Law, only that we don't call them by that proper name. These informants would be entrenched in the crime scene - information being relayed by the police. Confidential reports can

be given to the police only on the basis of confidential intimation, the police might have a reason/basis for starting an investigation, following which if the investigation leads somewhere - as a result of their investigation. There are also investigative journalists who publish articles and then are analysed and actioned by the police.

Jurisprudence in Malta tells us that the evidence given by one co-accused cannot be used against or in favour of another co-accused unless the proceedings become *res judicata*. Our case law sets this jurisdiction apart. It creates an automatic hurdle in law enforcement - creates delays in various cases. You have to appreciate the testimony of co-participants in the finding of guilt in other perpetrators or co-participants.

In Malta, we do have the element of report, information and complaint.

**Article 535 of the Criminal Code** - *Any person may give information to any officer of the Executive Police....*

We are dealing with a **criminal offence** here.

If the tile layer becomes cross, starts smashing all over the place, then you can really and are entitled as the person suffering the actions of the tile layer, to lodge a complaint with the executive police. It gives rise to a claim for civil liability and civil redress. But Article 535 is not referring to this scenario, but when any person can give evidence to the police. Please note that in this context of Article 535, this information referred to by law refers to any offence. So no need to prove personal interest of the person relaying the information, could be anyone of us. Who might see a student trying to break into the offices to steal computers. I do not have a direct attachment to the computer or university but witnessing a person committing a criminal offence, and hence obliged by 535 to relay info to the law enforcement. And for them to hopefully prosecute the criminal offence.

*(2) Nevertheless, no action shall be taken by the Police upon any anonymous report or information, except in the case of a flagrant offence or where the report or information refers to some fact of a permanent nature. In any such case, it shall be lawful for the Police to proceed on such report or information, after ascertaining the flagrancy of the offence or the permanent fact.*

Article 535(2) - fact of a permanent nature - there are various interpretations to 535. - contains an element of DENUNZIA AND OF REPORT - has been interpreted to mean both. Reporting a crime is not obligatory but in certain circumstances, it is obligatory such as the duty of public officers to report observed crimes. There are various instances and they are scattered in maltese law, cap 602. Minor protection - article 9; minor risk of suffering may report to

the police, in this instance it makes it a duty to anyone knowing of such info to relay such info and any professional omitting to relay commits an offence. Minors here are subject to special protection where professionals are duty-bound to report a crime that may hurt / jeopardise the health of a minor. In not doing so, such professionals shall be subject to a criminal offence.

## Article 137 Criminal Code - Failure or refusal of magistrates or Police to perform certain duties.

*137. Any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police, who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours, shall, on conviction, be liable to imprisonment for a term from one to six months.*

→ **Article 137 of the Criminal Code** - Obliging them to act and if the person forming part of executive police - officer of executive police - is liable to breach of duty and in committing a criminal offence. Such Police Officers will then have the duty to report to their superiors and if they do not, they are criminally liable. Bear in mind that this is only applicable to specific criminal offences.

## Article 540 Criminal Code - Duty of Police on receipt of report, information or complaint

**540.** Upon the receipt of any report, information or complaint requiring proceedings to be taken, the Executive Police shall as soon as possible inform the Court of Magistrates (Malta), or the Court of Magistrates (Gozo), or a magistrate, as the case may be, in order to receive the necessary directions for such proceedings:

Provided that if upon the report, information or complaint the party concerned has been summoned or, in any case where the Executive Police is authorized to proceed forthwith to the arrest of the party concerned, such party has been actually arrested, it shall be lawful for the Police to inform the Court of such report, information or complaint at the moment that the party summoned or arrested is brought before it.

→ Upon the receipt of any one of the *notizia criminis* established by law, the executive police should inform the Court of Magistrate in Malta or Gozo or a Magistrate, judicial officer - in order for the Court of Mag or that Mag in their individual capacity as a Mag. To receive the necessary directions and also proceedings. If upon the report or complaint, the person has been

summoned, it shall be lawful for police to inform of such a complaint. Essentially, it all boils down to these basic concepts. The citizen has no duty to report an offence but the executive police are duty bound to carry inspections - executive police have a duty to detect and prosecute criminal offences.

On the other hand, make no mistake, ordinary citizens also have obligations - even though many of us, all of us enjoy more the fruits of our rights than our obligations.

## **Article 61 of the Criminal Code - Failure to disclose**

*61. Whosoever, knowing that any of the crimes referred to in the preceding articles of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, On conviction, to imprisonment for a term from nine to eighteen months.*

— sounds too colonial and in fact it is. But it still has its own logic as subversive forces in the land can do a lot of harm to society in general.

Nowadays with all these narratives going around in social media, we are being made to believe that what is objectively wrong in the immortal unit of measure is something that is right

Executive police can proceed to such report - the NOTIZIA CRIMINIS which can take these 2 forms;

Needs to breach law enforcement, the police in the first place. As far as anonymous info, the executive police as a general rule do not take anonymous info. But the police many times incentivised people to come forward with info on an anonymous basis. For them to garner intelligence on which to follow specific leads in their investigation. When police start investigating anonymous information, these would be relating to ascertaining reliability of the source. When it comes to criminal proceedings in a Court of criminal justice, it is not possible for a Court of law in this jurisdiction to rely on anonymous information as an admissible piece of evidence.

Some legal practitioners interpreted article 520 interpreted it - 520 sub 2 - power in the said Courts, which may cause unnecessary delay. Farfetched to consider this provision as - whether it is relevant to this issue would have to be determined by the Court. It could be a breather, giving the executive police some space. As if the source of info is considered to be relevant by the criminal jurisdiction, then this question becomes very pertinent and relevant in itself.

If I relay info that my colleague is being bribed - and go anonymously, if criminal action is taken by certain — the issue of where did you get such info? Is that important in ascertaining the

information - in trials by jury, deliver a stronger position that once the info is anonymous, not possible for the defence council to - new process issues can and do come into the picture.

As you have seen, the action taken - does suffer exceptions in its own right, the fact that the kicking of the information - If a person is caught *in flagrante* by the police, if an issue of a permanent fact, person built an illegal structure - even if what kicked off the investigation - the fact it stemmed from anonymous information doesn't mean the evidence and prosecution fails. Whenever an informer comes forward with info, they have to relay certain info to the executive police and shall as far as possible furnish certain particulars. Should make known the principles -

## Contents of Information

*536. The informer shall clearly state the fact with all its circumstances and shall, as far as possible, furnish all such particulars as may be requisite to ascertain the offence, to establish the nature thereof as well as to make known the principals and the accomplices.*

Is Article 536 mandatory? Should we stick to the letter, comma and dot when it comes to relaying info to executive police ? aim behind this article is coming from an era when people were illiterate, barely spoke maltese let alone english and italian - hence lack of education also led to different communication skills - wherever a person is renouncing a piece of information, they had to renounce all information and make known the principles. This article aimed at discovery and not hinder investigations. Not always possible to tell every detail to police - but law is wary of having situations of persons giving their wrong information - which is catered 110 and 111 of the criminal code.

## Form of Information

**537.** An information may be laid either verbally or in writing:

Provided that where an information is laid verbally, it shall, except in cases which admit of no delay, be reduced to writing forthwith and shall be signed by the informer, or, if he is unable to write, by the Police officer by whom it is reduced to writing.

- Info can be verbally or in writing - verbal information relayed - shall be produced in writing and shall be signed by informer, and if unable to write signed by Police officer.

*The aim behind articles 536 and 537 is the fact that informers do not follow 536 and 537 to the letter does not render the information that is provided, null.*

Law also talks about the concept of COMPLAINT - most imp. Different from reports and information. In a complaint there must be an injured party who delivers notizia criminis - a

person directly affected by the criminal offence, the victim or their representatives who aims to reach justice.

## **Article 538 - Complaint**

*538. Every person who feels himself aggrieved by any offence and desires to lodge a complaint for the punishment of the offender; if known, or, if not known, in case he should be discovered, may make such a complaint to any Police officer, even by letter.*

The complaint - KWERELA - can be made in writing or verbally - can lodge it yourself with the police, no need for a lawyer for this. Perfectly normal for an individual to file a complaint with a magistrate. The Complaint then acts positively - by reference to certain specific offences, the lodging of a complaint is a - sine qua non.

There are cases where in order for criminal proceedings to start, a complaint needs to be lodged by the complainant - Traditionally, we find that the complaint of the injured party is requisite for an essential condition for the exercise of the criminal action. Conversely in some circumstances, the withdrawal of the complaint itself may lead to the termination to the criminal action of the action itself.

Without a complaint no action can be taken and if lodged and withdrawn the criminal action case comes to halt. Kwerela are usually found in the domain of family issues and the law acknowledges that if the complainant withdraws his complaint then the police discontinue the case in order to ***tone down tension*** between the parties.

The concept of *kwerela / notizia criminis* - those modes that are recognised according to Maltese law as being the lawful way as to how the happening of a criminal offence is relayed to law enforcement on the basis of which investigations and eventual criminal prosecutions may start. In certain circumstances, the complaint of the injured party is a substantial important factor for criminal prosecution to proceed. On the other hand, where this is the case, the lack of proof of the complaint or its withdrawal may lead to the termination of the criminal action as well.

This is corollary to the principle where the complaint of the injured party is a requisite to set the criminal action in motion.

**The historical path**, especially the position before *Act 13 of 2018*, which brought a lot of changes also to the way and how the injured party operates. Act 13 of 2018 aimed to implement the provisions in the Istanbul Convention - perhaps various practitioners criticise the way this convention has been brought to the form. Since 2011, when this convention was adopted, various

standards had to change and we find that the concept of complaint was affected as various offences required the complaint of the injured party.

Following those amendments, the prosecution for those offences, require no complaint as a sine qua non condition for the criminal action to be set in motion. This does not mean that law enforcement shouldn't be alerted. So there has to be something and someone to inform the police. The question which arises is that now it is not always necessary for the complaint of the victim to set the action in motion and continuation. This is especially important where for example, sexual offences are involved. If the victim believes that going to and from Court, reciting his / her ordeal, will cause him / her more distress, then the law acknowledges this and allows for the case to discontinue. So what is the state going to do in this situation? Should it force the victim to testify? Take action against the aggressor without her?

*AFTER ACT 13 OF 2018, THEY DO NOT REQUIRE COMPLAINT OF INJURED PARTY TO START CRIMINAL ACTION. CRIMINAL PROCEDURES INDEPENDENT ON THE WILL OF THE VICTIM.*

Here, emphasis lies on those offences which fall within the purview of domestic violence. All acts or omissions including verbal, physical, sexual, psychological or economic violence causing physical or moral harm or suffering.

## **Article 2, Cap. 581**

*"family or domestic unit"* includes;

- (a) current or former spouses, civil union partners or cohabitants in accordance with the Cohabitation Act, and their children;
- (b) persons having or who had a child in common;
- (c) persons related to each other either by consanguinity or affinity, civil union and, or cohabitation up to the third degree inclusively;
- (d) persons who are or have been in a sentimental, and, or intimate relationship; and
- (e) spouses whose marriage has been dissolved or declared null;

Wide net the law cast - idea is to bring about cultural change. Does this really bring about the desired cultural change? Hence where cases are ex officio, in cases of rape, abduction, violent

and indecent assault - once action is taken, interesting proviso - “alleged victim of the offence to stay proceedings of the alleged perpetrator” - even if victim decided to drop the case, the proviso states that - Article 540A proviso - again – not happy w drafting of this provision as it says the Court may stay proceedings. What does that mean? Withdrawal of complaint? The extinction of criminal action? What does that mean? Putting criminal action in limbo? Well, it seems so - but the most important aspect is what the Court can do. Lawful for an offence mentioned in this paragraph, for an alleged victim of offence.

Offences which today as we have seen are classifiable as falling under domestic violence - we have others which can be considered as part of the purview of this law. Article 543 of the criminal code which deals with the instances where the executive police may proceed with the exercise of the criminal action ex officio, by the power and in accordance to the power granted to them in the law, we find among other things, offences involving domestic violence - which are subject to the proviso explained to us. Lawful after proceedings commenced, before a Court of criminal jurisdiction for the victim to stay proceedings and once request is made, the Court may decide in favour of the continuation of the proceedings against the alleged perpetrator whilst giving the best interest to minors and 3rd parties. One interesting aspect of this proviso is that as a rule, once this alleged victim decides to make a request to the Court, proceedings are stayed, whatever that might mean.

## Article 543 Criminal Code - Cases in which Police may proceed ex officio

*543. It shall be lawful for the Police to institute proceedings even without the complaint of the private party in any of the following cases:*

- (a) in the case of crimes for which the law does not expressly provide that the complaint of the private party is requisite;*
- (b) in the case of any offence consisting in the carrying of prohibited weapons, or in the case of any offence, against any law relating to fishing, vehicles, or boats, or to any art or trade;*
- (c) in the case of any offence committed against a person who, by reason of physical or mental infirmity, is incapable of instituting criminal proceedings, even though such offence be one in respect of which, if committed against any other person, the complaint of the private party would be requisite;*
- (d) in the case of any offence affecting public order or the community in general;*
- (e) in the case of any offence involving domestic violence:*

*Provided that for the purposes of this paragraph "domestic violence" shall have the same meaning assigned to it by article 2 of the Gender-Based Violence and Domestic Violence Act:*



*Provided further that it shall be lawful, after proceedings have commenced before the Court in virtue of this article for an offence mentioned in this paragraph, for an alleged victim of an offence involving domestic violence to request the Court to stay proceedings against the alleged perpetrator, when such a request is made the Court may decide and direct the continuation of proceedings against the alleged perpetrator, giving particular consideration to the best interests of the complainant, any minors involved, and any other relevant third parties, and shall cause such request and decision to be registered in the records of the case.*

*(f) in the case of rape as defined in article 198:*

*Provided that it shall be lawful, after proceedings have commenced before the Court in virtue of this article for an offence mentioned in this paragraph, for an alleged victim to request the Court to stay proceedings against the alleged perpetrator, however, if such request is made, the Court may decide to continue the proceedings against the perpetrator, giving particular consideration to the best interests of the complainant, any minors involved, and any other relevant third parties.*

**Article 374 Criminal Code** - The Court may require the complainant to make or confirm the complaint in order for criminal proceedings to proceed - to confirm it on oath - focusing on procedure which falls within the competence of the Court of Mag.

374, 375 - have to be followed on this particular family of crimes and conventions - on the Court of Mag.

So when it comes to offences falling beyond the Courts of mag - then we have an interesting provision in 390 sub 4 - wherein the case of compilation proceedings - the attendance of the complainants is not necessary to prove the existence of the complaint provided there is evidence on the word of the complainant to prove the complaint was actually carried and done. This does not mean the testimony of the complainant is necessary, here we are dealing with determining the existence of the complaint in the first place. Make distinction between one and the other - read 390 sub 4 within the broader historical context. These instances have been slowly reduced considerably - there are still some crimes falling within the parameters of thai article - 293.

***Article 390(4) Criminal Code*** - (4) *The attendance of the complainant shall not be necessary to prove the complaint, if from other evidence it appears to the satisfaction of the Court that the complaint was made*

***Article 293 Criminal Code*** - 293. *Whosoever misapplies, converting to his own benefit or to the benefit of any other person, anything which has been entrusted or delivered to him under a title*

*which implies an obligation to return such thing or to make use thereof for a specific purpose, shall be liable, on conviction, to imprisonment for a term from three to eighteen months:*

*Provided that no criminal proceedings shall be instituted for such offence, except on the complaint of the injured party*

Court of mag as a Court of criminal inquiry - attendance of complainant is not necessary to prove the complaint - on the other hand if during the course of the criminal inquiry, the accused would not have demanded the proof of the complaint or the Court *ex officio* did not request or require the production of evidence of the complaint being made, the law creates a presumption of the existence of the complaint being made. This emerges from wording of law itself.

**Repubblika ta' Malta vs. Dennis Pandolfino u Anthony Pandolfino 19th April 2007 - Court of Criminal Appeal said**

F'dan il-kaz ma kienx hemm verdett tal-gurija peress li z-zewg appellanti, akkuzati quddiem l-ewwel Qorti, ghazlu li jigu gudikati mill-Qorti Kriminali komposta mill-Imhallef biss u ghalhekk minghajr gurija.

Permezz tal-Att ta' Akkuza numru 11 ta' l-2004 – Att ta' Akkuza konsistenti f'seba' kapi – Denis Pandolfino gie akkuzat fl-Ewwel Kap talli fl-2002 u fis-snin ta' qabel stupra zewgt itfal subien, AB u RB2, meta dawn kienu ghadhom ma ghalqux it-tmax-il sena, u b'dan ukoll li r-reat sar b'diversi atti maghmulin fi zminijiet differenti, li jiksru l- istess disposizzjoni tal-ligi, izda li gew maghmula b'rizoluzzjoni wahda (ghalhekk reat kontinwat) (piena mitluba mill-Avukat Generali skond il-ligi minn tliet snin sa ghaxar snin prigunerija);

“Illi l-piena ghar-reati li taghhom iz-zewg akkuzati nstabu hatja, bl-applikazzjoni tal-artikolu 17 tal-Kodici Kriminali tvarja minn piena minima ta' tliet snin u tmien xhur prigunerija u multa ta' ghaxar liri Maltin ghall-piena massima ta' hmistax il-sena u tliet xhur prigunerija.

“Din il-Qorti thoss li l-gravita` w n-natura tar-reati li qed jinstabu hatja taghhom il-hatja kif ukoll l- incidenza, ripetizzjoni w kontinwita` taghhom tirrikjedi li l-piena mhux biss tkun wahda karcerarja effettiva imma wkoll li ma tkunx wahda vicin il-minimu tal- gamma wiesgha tal-piena li l-ligi thalli f'idejn il- gudikant, imma tkun wahda li tirrifletti s-serjeta` u l- gravita` tal-kaz.

“Iz-zewg hatja rispettivament hadu vantagg mill-fatt li omm il-minuri kienet tghix hajja imgerfxa rresponsabbli ghall-ahhar biex raw kif ghamlu u akkwistaw taht idejhom, Denis Pandolfino b'mod temporanju u Anthony Pandolfino b'mod fit-tul, tifel kull wiehed minn ghandha, biex imbaghad setghu jabbuzaw minnhom kif u x'hin riedu. Dan ma kienx xi incident fugaci jew ta' darba, imma “system of conduct” ta' kull wiehed miz-zewg hatja ippjanat biex jissodisfa l-perversita` taghhom rispettiva.”

Kif inghad, minn din is-sentenza appellaw kemm Denis Pandolfino kif ukoll huh Anthony Pandolfino. L-aggravji ta' Denis Pandolfino huma diretti lejn is-sejbien ta' htija dwar l-Ewwel u dwar it-Tieni Kap, kif ukoll dwar il-piena inflitta. Huwa jikkontendi bazikament li l-ewwel Qorti ma setghetx issibu hati skond dawn iz-zewg kapi peress li ma kienx hemm provi bizzzejjed li kienu jwasslu għac-certezza morali tal-htija tieghu fir-rigward taz-zewg reati ta' stupru u ta' korruzzjoni ta' minorenni. Huwa jishaq fuq dak li huwa jsejjah "divergenzi" bejn id-diversi versjonijiet mogħtija miz-zewgt itfal, deposizzjonijiet li huwa jqis bħala inattendibbli. Ighid ukoll li l-piena kienet wahda gravuza.

Anthony Pandolfino, min- naha tieghu, filwaqt li huwa wkoll jikkontesta, fuq bazi fattwali, s-sejbien ta' htija dwar ir-Raba' Kap (dwar l- istupru), kif ukoll jilmenta dwar il-piena, għandu wkoll aggravju strettament legali u cioe' li f'dan il-kaz ma kienx hemm il-kwerela meħtiega għalbiex ikun hemm l-azzjoni gudizzjarja fir-rigward tar-reati ta' stupru u ta' korruzzjoni ta' minorenni. Huwa dan l-ilment li ser jigi trattat l-ewwel.

Dan il-punt dwar in-nuqqas tal-kwerela, gie anke sottomess quddiem l-ewwel Qorti, cioe' quddiem il-Qorti Kriminali, u infatti dik il-Qorti, f'pagni 9 sa 11 tas-sentenza appellata iddeliberat dwar din l-eccezzjoni ta' natura legali, u caħditha. Bid-dovut rigward lejn l-ewwel Qorti, pero', din il-Qorti hi tal-fehma li għalkemm dik il-Qorti waslet għall-konkluzjoni korretta, cioe' li tichadha, ir- raguni għala kellha tichadha ma kinitx dik imsemmija fis- sentenza appellata, izda kellha tkun raguni kompletament differenti. **Kif tajjeb josserva l-appellant, f'kazijiet simili bħal dawk in dizamina ma jistghu jittiehdu ebda proceduri kriminali għal stupru vjolent (Artikolu 544(a)) u korruzzjoni ta' minorenni (Artikolu 203(3) tieni proviso) mingħajr il- kwerela tal-parti leza, li, naturalment fil-kaz ta' minorenni tista' ssir ukoll minn haddiehor (Artikolu 542).** F'dan il-kaz huwa veru li ma giet ezibita ebda kwerela u anqas saret il- prova tagħha. Rinfaccata b'din l-eccezzjoni, il-Qorti Kriminali jidher li ppruvat targumenta li dawn iz-zewg reati kienu akkumpanjati minn reat li "jinteressa l-ordni pubbliku" (l-ewwel parti tal-paragrafu (d) tal-Artikolu 543) u reat "li jmiss l-ordni pubbliku" (proviso tal-Artikolu 373), u dan senjatament b'referenza għar-reat kontemplat fl- Artikolu 208A (ir-reat taħt is-Seba' Kap), cioe' r-reat ta' wiri, pussess, tqassim ecc. ta' ritratti indidenti ta' persuni ta' taħt l-eta'.

Dawn iz-zewg disposizzjonijiet ta' ligi pero', cioe' l-Artikoli 543(d) u l-proviso tal-Artikolu 373, huma rrelevanti għar-risoluzzjoni tal-kwistjoni. Dak li hu relevanti huwa l-Artikolu 390(5) tal-Kodici Kriminali, li jipprovdli li jekk, matul il-kumpilazzjoni, l-imputat ma jitlobx u l- qorti ex officio ma tordnax il-prova tal-kwerela, din il- kwerela titqies li saret skond il-ligi. Kif inhu risaput, il-kumpilazzjoni tingħalaq fl-istadju kontemplat fl-Artikolu 401 tal-Kodici Kriminali, meta l-Qorti Istruttoria trid tiddeciedi jekk hemmx ragunijiet bizzzejjed biex l-imputat jitqieghed taħt Att ta' Akkuza. Fil-kaz in dizamina dana l-istadju seħħ fil-11 ta' Dicembru 2002 (fol. 192

tal-attijiet ta' l-Istruttorja). Sa dak l-istadju la l-imputati ma kienu talbu, u anqas il-Qorti Istruttorja ex officio ma kienet ordnat, prova tal-kwerela. Konsegwentement, għall- finijiet tal-proceduri kollha li sehnew wara dik id-data, "il- kwerela [kellha] titqies li saret skond il-ligi". L-abbili difensur tal-appellant, fil-kors tat-trattazzjoni tiegħu quddiem din il-Qorti – il-Qorti ta' l-Appell Kriminali – irrefera għas-sentenza tal-Qorti Kriminali<sup>3</sup> kollegjalment komposta<sup>4</sup> tal-20 ta' Ottubru 1953 fl-ismijiet Il-Maesta' Tagħha r-Regina v. Mikiel Azzopardi. Din is-sentenza, però, ma tagħmilx għall-kaz in dizamina, għax fil-kaz ta' Azzopardi kien hemm effettivament ir-recess, ossia irtirar, tal-kwerela – haga li f'dan il-kaz ma kienx hemm. Mill- mument li saru l-Care Orders fir-rigward tat-tfal, kienet biss il-Ministru responsabbli mill-hrug tagħhom li setgħet tirtira l-kwerela, haga li fil-kaz in dizamina mhux biss ma saritx izda addirittura l-Ministru responsabbli insistiet li l- proceduri jitkomplew b'aktar speditezza (ara r-rikors magħmul quddiem il-Qorti Kriminali fis-7 ta' Settembru 2004).

Għalhekk dana l-aggravju tal-appellant Anthony Pandolfino huwa infondat u qed jigi michud. Il-Qorti ser tghaddi issa biex tikkonsidra l-aggravji taz- zewg appellanti fil-meritu, u cioe' fir-rigward tal-ilment tagħhom li ma kienx hemm provi bizzejjed li a bazi tagħhom l-ewwel Qorti setgħet tikkonkludi li huma hatja ta' stupru vjolent. Din il-Qorti ezaminat fid-dettal l-attijiet kollha, kemm ta' l-istruttorja kif ukoll tal-Qorti Kriminali, inkluzi t-traskrizzjonijiet tad-deposizzjonijiet li l-partijiet talbu li jsiru. Din il-Qorti marret oltre, u rat ukoll il-video cassettes tad-deposizzjonijiet tat-tfal AB u RB kemm quddiem il-Qorti Istruttorja kif ukoll fil-kors tal-proceduri quddiem il-Qorti Kriminali. Minn dawn il-provi din il-Qorti m'għandhiex l-icken dubju li kemm l-appellant Denis Pandolfino kif ukoll l-appellant Anthony Pandolfino ripetutament ivvjolentaw – effettivament issodomizzaw – lit-tfal li kienu fdati lilhom, b'Denis Pandolfino jikkommetti dan l-att kemm fuq AB kif ukoll fuq RB. Huwa veru li hemm diversi diskrepanzi bejn il-versjonijiet mogħtija mit- tfal, però wiehed ma jridx jinsa li hawn si tratta ta' tfal li meta avveraw ruhhom l-atti ta' korruzzjoni u ta' stupru – atti ripetuti fuq medda ta' zmien – kienu għadhom bilkemm għalqu l-ghaxar snin. Tfal ta' dik l-eta', għalkemm forsi ma jkunux jifhmu l-portata shiha ta' dak li jkun qed jigri, jistgħu jirrealizzaw maz-zmien il-gravita' tal-akkadut u, minkejja l-mekkanizmu difensiv tal-mohh li jipprova jidfen l-esperjenzi trawmatici, jaslu biex jiftakru l- essenzjal ta' dak li jkunu għaddew minnu u jesprimuh skond il-kapacitajiet ta' komunikazzjoni tagħhom. Wiehed, però, ma jistax jippretendi precizjoni ta' dettal f'dak li huwa zmien jew frekwenza, jew dettalji ta' cirkostanzi sekondarji, trattandosi, kif diga' ngħad, ta' atti ripetuti.

Hekk, per eżempju, din il-Qorti setgħet tinnota li AB, meta xehed quddiem il-Qorti Istruttorja (fejn, din il-Qorti jiddispjaciha tosserva, kien hemm interruzzjonijiet ripetuti u totalment ingustifikati da parti tal-Avukat Dott. Melvyn Mifsud) dan it-tifel kellu problema biex jesprimi ideat temporali – anqas kien jaf kemm kien fih granet xahar! Minkejja dan, huwa seta jfisser b'mod car l-atti ta' sodomija prattikati fuqu mill-appellant Anthony Pandolfino, u b'dettal

partikolari li difficilment tifel ta' dik l-eta' jista' jivvintah jekk ma jkunx verament ghadda minnu, u cioe' l- ugiegh assocjat mal-penetrazzjoni.

Meta ddepona fil-Qorti Kriminali erba' snin wara li kien iddepona fil-kors tal- Istruttorja – u issa tfajjel ta' hmistax-il sena – huwa kien aktar sod emozzjonalment u aktar cert fir-risposti tieghu, u baqa' jiftakar l-essenzjali aktar 'l fuq imsemmi. RB – it-tifel iz-zghir – mill-banda l-ohra, meta xehed fl-Istruttorja kien kapaci jesprimi ruhu (dejjem fil-limitazzjonijiet ta' tifel ta' ghaxar snin) ahjar minn huh, u meta gie biex jiddeskrivi dak li kien pinga, seta jispjega b'mod car dak li huwa kien pinga bhala l-frott tal-immaginazzjoni tieghu u dak li kien pinga ghax verament kien gara.

Anke dan RB, meta ddepona fil-Qorti Kriminali, l-essenzjali tal-atti, evidentement trawmatici, baqa' jiftakarhom. Kemm il-Qorti Istruttorja kif ukoll il-Qorti Kriminali ikkontrollaw b'mod legalment korrett il-mistoqsijiet in kontroezami biex jassiguraw li dawn it-tfal ma jigux imhawwda b'mistoqsijiet vagi, kapzjuzi jew li min ikun qed jaghmel il-mistoqsijiet joqghod jaqbez minn haga ghal ohra b'mod li x-xhud jispicca anqas ikun jaf fuqhiex ikun qed jitkellem. Anqas ma tista' din il-Qorti, takkolji s-suggeriment li sarilha li ma hemmx prova ta' penetrazzjoni ghax ma kienx hemm ezamijiet medici – tali prova tirrizulta abbondantement mid-deposizzjoni taz-zewgt itfal. Ghalhekk l-aggravju taz- zewg appellanti fir-rigward tal-kapi ta' stupru qed jigi michud.

Ghall-motivi premessi, tichad l-appelli u tikkonferma s-sentenza appellata. Il-Qorti fl-ahharnett tordna d- distruzzjoni tal-materjal pornografiku kollu ezibit in atti kemm-il darba l-Avukat Generali ma jindikax, permezz ta' nota li ghandha tigi presentata mhux aktar tard minn gimgha mil-lum, li dan il-materjal, jew xi whud minnu, huwa mehtieg in konnessjoni ma' xi investigazzjoni jew investigazzjonijiet ohra.

**Example of Denunzia - Il-Pulizija (Spettur Dorianne Tabone) vs. Luke Cremona - QORTI TAL-MAGISTRATI (MALTA) BHALA QORTI TA' ĠUDIKATURA KRIMINALI, 27 ta' Frar 2025**

Il-Qorti kienet giet mitluba sabiex tohrog Ordni ta' Protezzjoni, inkluza fil-mori tal-kawza a beneficiju ta' Audrey Micallef u dan fit-termini tal-Artikolu 412C tal- Kapitolu 9 tal-Ligijiet ta' Malta.

Il-Qorti kienet mitluba ukoll sabiex tohrog Ordni ta' Trattament ai termini tal- Artikolu 412D tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Il-Qorti kienet mitluba wkoll sabiex f'kaz ta' htija, minbarra li tinfliggi l-pieni stabbiliti mill-Ligi, tordna lill-imsemmi Luke Cremona sabiex ihallas l-ispejjez li jkollhom x'jaqsmu mal-hatra ta' esperti, jekk ikun il-kaz, hekk kif ikkontemplat fl-Artikolu 533 tal-Kapitlu 9 tal-Ligijiet ta' Malta.

Rat is-sentenza mogħtija minn din il-Qorti nhar is-sebgha (7) ta' Awwissu tas-sena elfejn u erbgha u ghoxrin (2024), permezz ta' liema sentenza, wara li rat l-Artikoli 17, 82A, 83B, 95, 533 u 579(2), tal-Kodiċi Kriminali, Kapitolu 9 tal-Liġijiet ta' Malta, kif ukoll l-Artikolu 49 tal-Att biex jirregola Komunikazzjonijiet Elettroniċi, Kapitolu 399 tal-Liġijiet ta' Malta, sabet lill-imputat **Luke Cremona** ħati ta' l-imputazzjonijiet kollha dedotti fil-konfront tiegħu, iżda bl-applikazzjoni tal-Artikolu 7 tal-Att dwar il-Probation, Kapitolu 446 tal-Liġijiet ta' Malta poġġietu taħt Ordni ta' Probation għal żmien tliet (3) snin.

Il-Qorti kienet wissiet lill-ħati bil-konsegwenzi jekk huwa jikkommetti reat ieħor waqt il-perjodu ta' tali Ordni, kif ukoll il-konsegwenzi jekk huwa ma jobdix id- direttivi tal-Uffiċjal tal-Probation.

Il-Qorti kienet poġġiet ukoll lill-imputat taħt Ordni ta' Trattament għall-perjodu ta' tliet (3) snin u dan sabiex jingħata t-trattament u l-kura kollha meħtieġa, sabiex jindirizza l-problema ta' rabja li huwa għandu, kif ukoll sabiex jirriabilita ruħu mill-vizzju ta' l-abbuż ta' droga u sabiex jiġi segwit minn Psikjatri u Psikologi.

Il-Qorti kienet wissiet lill-ħati bil-konsegwenzi jekk huwa ma jikkonformax ruħu ma xi rekwiżit jew kondizzjoni tal-istess Ordni ta' Trattament;

Il-Qorti kienet ordnat ukoll il-konfiska ta' parti mid-depożitu fl-ammont ta' erba' mitt Euro (€400) kif stabbilit fil-ħelsien mill-arrest taħt garanzija bid-digriet ta' din il-Qorti diversament preseduta nhar it-tlieta u ghoxrin (23) ta' Jannar tas-sena elfejn u erbgha u ghoxrin (2024);

Rat in-nota tas-*Senior Probation Officer* Marilyn Testa ta' nhar it-tletin (30) ta' Settembru tas-sena elfejn u erbgha u ghoxrin (2024), li permezz tagħha avżat lil din il-Qorti illi l-Uffiċjal tal-Probation Mary Rose Farrugia giet nominata sabiex isegwi lil Luke Cremona matul l-Ordni ta' Probation<sup>1</sup>;

Rat ir-rikors tal-Uffiċjal tal-Probation Mary Rose Farrugia u r-rapport anness ta' nhar l-erbgha (4) ta' Ottubru tas-sena elfejn u erbgha u ghoxrin (2024)<sup>2</sup>, li permezz tiegħu għamlet denunzja ai termini tal-Artikolu 21 tal-Att dwar il- Probation, Kapitolu 446 tal-Liġijiet ta' Malta u nfurmat lill-Qorti:

Rat id-digriet ta' din il-Qorti ta' nhar is-sebgha (7) ta' Otturbru tas-sena elfejn u erbgha u ghoxrin (2024)<sup>3</sup>, li permezz tiegħu ordnat in-notifika tar-rikors lill- Kummissarju tal-Pulizija, sabiex jiehu ħsieb ukoll jinnotifika lid-denunzjat, lill- Uffiċjal tal-Probation u lill-avukati difensuri u appuntat id-denunzja għas-smiegh għall-ħdax (11) ta' Ottubru tas-sena elfejn u erbgha u ghoxrin (2024);

Illi din il-Qorti hija sodisfatta li l-imsemmi Luke Cremona naqas milli jhares il-htigijiet tal-Ordni ta' Probation, fosthom, billi matul il-perjodu tal-Probation, huwa naqas milli joqghod ghad-direttivi kollha tal-Uffiċjal tal-Probation u naqas milli joqghod mar-rakkomandazzjonijiet tal-Uffiċjal tal-Probation dwar rijabilitazzjoni sabiex jeghleb il-vizzju tad-droga, u lanqas ma kien qed jagħmel kuntatt mal-Aġenziji ta' rijabilitazzjoni li ġew riferuti lil-Uffiċjal tal-Probation. Illi jirriżulta ukoll li d-denunzjat finalment spiċċa miżmum taht arrest preventiv in konnessjoni ma' każ ġdid.

Dawn il-fatti jirriżultaw mix-xhieda tal-Uffiċjal tal-Probation Mary Rose Farrugia tal-erbatax (14) ta' Ottubru u tal-erbgha u ghoxrin (24) ta' Ottubru tas-sena elfejn u erbgha u ghoxrin (2024), li matulhom hija kkonfermat il-kontenut tar-rikors tagħha bil-ġurament;

Din il-Qorti għalhekk ma tistax tinjora l-fatt illi minkejja li kien ġewwa l-Aġenzija għas-Servizzi Korrettivi, il-*Probationer* ġab ruħu sew u għaraf jagħmel sforz sabiex jipprova jtejjeb haġtu. Għaldaqstant, fiċ-ċirkostanzi filwaqt illi tittama li l-*Probationer* jibqa' jikseb l-ghajnuna sabiex joqghod il-bogħod mid-droga u mill-ħajja ta' kriminalita' li din iġġib magħha, il-Qorti tqis illi m'għandhiex titratta mal-*Probationer* għar-reati mertu tal-imputazzjonijiet li dwarhom ingħata l-Ordni tal-Probation bis-sentenza tagħha tas-sebgha (7) ta' Awwissu tas-sena elfejn u erbgha u ghoxrin (2024), iżda sejra minflok timponi l-ammenda li tikkontempla l-liġi għall-ksur tal-Ordni tal-Probation.

Għal dawn il-motivi, il-Qorti wara li rat l-Artikolu 21 tal-Att dwar il-Probation, Kapitolu 446 tal-Liġijiet ta' Malta u wara li tqis li ġie ppruvat għas-sodisfazzjoni tagħha li Luke Cremona naqas milli jsegwi l-htigiet tal-Ordni tal-Probation imposta fuqu minn din il-Qorti permezz tas-sentenza tagħha ta' nhar is-sebgha (7) ta' Awwissu tas-sena elfejn u erbgha u ghoxrin (2024), fl-ismijiet 'Il-Pulizija vs Luke Cremona', qegħda tikkundanna lill-istess Luke Cremona għall-ħlas ta' ammenda ta' mija u ħamsin ewro (€150), kif ukoll tordna li l-Ordni ta' Probation ta' tliet (3) snin mogħtija minn din il-Qorti titkompla għall-perjodu li kien fadal, mid-data tad-denunzja tal-Uffiċjal tal-Probation, u cioe' l-erbgha (4) ta' Ottubru tas-sena elfejn u erbgha u ghoxrin (2024).

Il-Qorti qegħda twissi lill-*Probationer* dwar il-konsegwenzi f'każ li jikser xi waħda mill-kondizzjonijiet imsemmija fl-Ordni ta' Probation mogħtija minn din il-Qorti nhar is-sebgha (7) ta' Awwissu tas-sena elfejn u erbgha u ghoxrin (2024).

**Joseph Gaffarena v. Kummissarju tal-Pulizija, 3rd November, 2003 - S.T.O. Prim Imhallef Vincent De Gaetano**

Dan hu provvediment wara r-rikors ta' l-Avukat Generali tat-28 ta' Ottubru, 2003 li permezz tieghu qed jappella, skond ma jipprovdi s-subartikolu (3) tal-Artikolu 541 tal-Kodici Kriminali, minn decizjoni mogħtija mill-Qorti tal-Magistrati (Malta) fil-25 ta' Lulju, 2003. Permezz ta' din id-decizjoni, mogħtija in segwitu għal dik li hi komunement imsejha "procedura ta' challenge

lill-Kummissarju tal- Pulizija”, il-Kummissarju tal-Pulizija gie ordnat “li jiehu passi kontra Sebastian Dalli taht il-provediment tal-art [recte: il-provvedimenti tal-artikoli] ikkontemplati fit-Titolu V tal-Kap. 9 Delitti Kontra l-Fiducja Pubblika”.

Qabel xejn ghandu jigi precizat li r-raguni ghala r-rikors ta’ l-Avukat Generali sar kwazi tlett xhur wara d-decizjoni tal- Qorti tal-Magistrati (Malta) kienet li dik il-Qorti, evidentement bi zvista, ma kienitx innotifikat lill-Avukat Generali bid-decizjoni taghha fiz-zmien indikat fis-subartikolu (3) tal-imsemmi Artikolu 541. Kif irrisulta fil- kors tat-trattazzjoni fl-udjenza tal-31 ta’ Ottubru, 2003, kien biss meta membri tal-Korp tal-Pulizija marru biex jiehdun parir minghand l-Avukat Generali dwar kif ghandhom jipprocedu fir-rigward tal-imsemmija decizjoni li l-istess Avukat Generali sar jaf li effettivamente din kienet inghatat. Ghalhekk permezz ta’ rikors datat 14 ta’ Ottubru, 2003, l-Avukat Generali talab lil dik il-Qorti li tinnotifikah skond kif titlob il-ligi; u dik il-Qorti, b’digriet datat 16 ta’ Ottubru, 2003, ordnat in-notifka. Kien biss fis-17 ta’ Ottubru, 2003 li l-Avukat Generali gie formalment u skond il-ligi notifikat bid-decizjoni. Ir-rikors ta’ l-Avukat Generali gie, ghalhekk, prezentat entro t-terminu ta’ sebgħat ijiem tax-xogħol min-notifika indikat fl-Art. 541(3).

Permezz ta’ ittra datata 24 ta’ Ottubru, 2001 mibghuta mill-Avukat Dott. Keith Bonnici a nom ta’ Joseph Gaffarena – ittra li l-Kummissarju tal-Pulizija jghid li qatt ma irceva (ara r-risposta tieghu, għar-rikors ta-challenge, tal-20 ta’ Ottubru, 2002) – l-imsemmi Kummissarju gie mitlub sabiex “jiehu dawk il-passi necessarji kontra Sebastian Dalli għal frodi fil-konfront [ta’ Joseph Gaffarena]” (sottolinear ta’ din il-Qorti).

Fis-16 ta’ Settembru, 2002 Joseph Gaffarena pprezenta r-rikors ta’ challenge u talab li l-Qorti tal- Magistrati (Malta) “joghghobha tordna lill-Kummissarju tal- Pulizija jipprocedi kontra l-imsemmi Sabastian Dalli għar- reat ta’ frodi u reati ohra relatati u dan a bazi ta’ l- imsemmija kwerele [tal-24 ta’ Ottubru, 2001]” (sottolinear ukoll ta’ din il-Qorti).

Il-Qorti tal-Magistrati (Malta), wara li semgħet il-provi, ipprovdiet hekk (fid-digriet tagħha tal-25 ta’ Lulju, 2003);

“In kwantu għalhekk ir-reat ikkontemplat taht l-art 308, 309, 310 tal-Kap. 9 din il-Qorti tichad it-talba tar- rikorrent.

“Il-Qorti pero` ssib li in kwantu f’dokument pubbliku saret dikjarazzjoni falza hemm f’dan ir-rigward lok għar-rapport, denunzja jew kwerele, fatt dan li tista’ tghid kien logikament anke rikonoxxut mill-Ufficial Prosekutur waqt li kienet qed tiehu l-istqarrija ta’ Sebastian Dalli. F’dan il-konfront tilqa’ t-talba u għaldaqstant tordna lill-Kummissarju tal-Pulizija li jiehu passi kontra Sabastian Dalli taht il-provediment tal-art ikkontemplati fit-titolu V tal-Kap. 9 dwar Delitti Kontra l-Fiducja Pubblika.”



Il-procedura hekk imsejha “tac-challenge” kontemplata fl-Artikolu 541(1) tal-Kodici Kriminali hi, f’certu sens, procedura straordinarja. Ir-regola hi li l- azzjoni kriminali hi essenzjalment wahda pubblika u tmiss lill-Istat (Artikolu 4(1), Kap. 9). Tali azzjoni titmexxa ex officio fil-kazijiet kollha hlief f’dawk il-kazijiet fejn hi mehtiega l-kwerela tal-parti privata jew f’dawk il-kazijiet fejn il-ligi espressament thalli t-tmexxija ta’ l-azzjoni f’idejn il-parti privata (Artikoli 4(2) u 373, Kap. 9). Il-procedura tac-challenge – li ma tapplikax ghal kontravvenzjonijiet jew ghal delitti fejn it-tmexxija tal-azzjoni kriminali tmiss lill-parti privata – trid ghalhekk tigi applikata b’mod rigoruz ghal dawk il-kazijiet biss li trid il-ligi u fit-termini li trid il-ligi.

ii. L-Artikolu 541(1) tal-Kap. 9 jaghmilha cara li huwa biss f’dawk il-kazijiet fejn il-Pulizija Esekuttiva ma tkunx trid tagixxi “wara d-denunzja, ir-rapport jew il-kwerela ta’ delitt” li hu koncess li jkun hemm l-intervent gudizzjarju. Huwa biss meta l-Pulizija Esekuttiva ma tkunx trid tagixxi fir-rigward tad-delitt jew delitti specifikatament indikat jew indikati fid-denunzja, fir-rapport jew fil-kwerela li d- denunzjant jew minn jaghmel ir-rapport jew il-kwerelant jista’ jitlob l-ordni tal-Magistrat skond l-imsemmi Artikolu 541(1), u dan, s’intendi, wara li jkun ottempera ruhhu mad-diversi rekviziti procedurali indikati fl-imsemmija disposizzjoni. Din il-Qorti tifhem li dan ir-reat ma hemmx ghalfejn jigi specifikat bl-isem tekniku tieghu; huwa bizzzejjed li mid-denunzja, mir-rapport jew mill-kwerela jkun jirrizulta car liema reat qed jigi deunzjat jew rappurtat jew fir-rigward ta’ liema reat li jkun sar kontra tieghu il- kwerelant jitlob li jittiehdu passi.

Fil-kwerela tieghu tal-24 ta’ Ottubru, 2001 Joseph Gaffarena, tramite l-legali tieghu, talab li jittiehdu proceduri kontra Sebastian Dalli “ghal frodi”. Issa, ghalkemm l-espressjoni generika “frodi” kienet tikkompreni, fiz-zmien meta saret il-kwerela, ghaxar delitti differenti fl-Artikoli 293 sa 310 tal-Kap 91, hu evidenti, speċjalment meta si tratta ta’ kwerela radatta minn avukat bhalma kienet f’dan il-kaz, li l-kwerelant kien qed jillimita t-talba tieghu ghal procediment kontra Dalli fir- rigward ta’ dawn l-ghaxar delitti jew fir-rigward ta’ xi wiehed minnhom. Ifisser, ghalhekk, li jekk il-Pulizija Esekuttiva tiddeciedi li ma tipprocedix fir-rigward ta’ Dalli, Gaffarena seta’ jintavola r-rikors ghac-challenge fir- rigward ta’ xi wiehed minn dawk l-ghaxar delitti – ghax kienu dawk u dawk biss li kienu l-meritu tal-kwerela – u mhux fir-rigward ta’ xi delitt jew delitti ohra. Dan qed jinghad interament bla pregudizzju ghall-kwistjoni – imqanqla mill-Avukat Generali izda li din il-Qorti tara li f’dan il-kaz m’ghandhiex ghalfejn tippronunzja ruhha dwarha – ta’ jekk kwerela tistax issir biex jittiehdu passi fir- rigward ta’ diversi reati b’mod generiku, jigifieri billi wiehed jindika biss it-titolu jew is-subtitolu relattiv tal-Kodici Kriminali.

iv. Gara`, pero`, li fir-rikors promotur tal-procedura tac- challenge Gaffarena talab lill-Qorti tal-Magistrati sabiex “tordna lill-Kummissarju tal-Pulizija jipprocedi kontra l- imsemmi Sebastian Dalli ghar-reat ta’ frodi u u reati ohra relatati u dana a bazi tal-imsemmija kwerela.” Tali talba Gaffarena ma setax jipproponiha in kwantu tirreferi ghal “reati ohra” u cioe` mhux dawk li jaqghu taht l-isem generiku ta’ “frodi”. Ma hux l-iskop tal-procedura tac- challenge li

tinfetah indagini lil hinn mir-rapport, denunzja jew kwerela. Kif tajjeb osserva l-Avukat Generali fir-rikors tieghu, il-procedura in kwistjoni m'ghandhiex isservi bhala a fishing expedition biex wiehed jipprova jara x'jirrisulta mill-provi (jekk jinstemghu provi, ghax il-Qorti tal-Magistrati tista' tiddispensa mis-smigh tal-provi) biex imghad dik il-Qorti tiddeciedi hi id-delitt li fir-rigward tieghu il-Pulizija Ezekuttiva ghandha tipprocedi. Fi kliem iehor, id-delitt li dwaru jista' jsir l-ordni lill-Kummissarju tal-Pulizija taht l-Artikolu 541(1) irid ikun wiehed li jkun gie predikat b'mod car fid-denunzja, fir-rapport jew fil-kwerela.

v. Il-kwerela tal-24 ta' Ottubru, 2001 kienet tirreferi biss ghal delitti ta' frodi. Il-Qorti tal-Magistrati, ghalhekk, wara li cahdet it-talba fir-rigward ta' xi wiehed jew aktar minn dawn id-delitti, ma setghetx tordna lill-Kummissarju tal-Pulizija li jipprocedi fir-rigward ta' xi delitt kompletament differenti, cioe' delitt taht it-titolu V – titolu li llum jikkompreni tlieta w ghoxrin delitt differenti – u, per di piu', minghajr ma jigi specifikat id-delitt partikolari li dwaru kien qed isir l-ordni. Konsegwentement it-talba ta' l-Avukat Generali timmerita li tigi milqugha.

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A complaint may be lodged with any officer of the executive police - the police force is regulated by the police act and the police officer is any person serving in the police force and also includes the commissioner of police. Once a complaint is lodged with the executive police, police start investigating the offence, as long as it is prosecutable in Malta according to article 5 of the criminal code.

In order for police to assess if they have jurisdiction, and start investigating and prosecuting - this process would require the one of the forms of relaying of info on the *notitia criminis*. It has to be in writing, and it has to be signed by the complainant or if not by the police officer. Advisable that complaints and reports are lodged in writing by a lawyer but not a requirement. Complaints may be lodged by the complainant - we do have a right of representation.

**Article 542:** complaint may be made by persons other than the actual person other than person directly, descendant or on behalf of – for any offence committed to the prejudice of such institute or body corporate = SO the right of representation is quite a wide net as far as representation is concerned. Normally, parents or guardians are entitled to lodge complaints on behalf of children or pupils. Duty of care is deemed to be inherently vested in the parents or guardians themselves.

**Rex vs. Thomas, 1932:** Complaint could be lodged by de facto guardians.

**Abidilla vs Abdilla, 1953:** ascendant was entitled to lodge complaint on behalf of descendant who was a person with special needs and could not lodge the complaint himself

The law is silent as to whether minors can lodge complaints themselves. As a rule - it seems impossible for victims of crime to lodge a complaint themselves. Minor, in Mamo notes, again Mino used to say that as far as the *kwerela* is concerned, you have to read his thinking in line

with his position literally. Your mother is your parent. Minors could be victims of offences taking place within the household.

**Giordimaina vs Psaila, 1954** - The Court admitted the possibility of minors lodging complaints themselves but confirmed that it would be better if a guardian confirms the complaint but it would not be possible for a guardian or parent to withdraw that complaint.

The fact that they are minors doesn't mean they are not good actors, can deceive someone also - sometimes you have minors who are perfectly coached to lie and deceive - by parents, guardians, family members. As a practitioner you have to be aware of this situation.

Should know how to make a good assessment - can deceive the Court. Try to cross check as much as you can. The justice system is not foolproof. Now, especially in this situation where we have this Act 13 in operation, before you could have a complainant who could withdraw the complaint. Now with Act 13 in operation, these DV cases are prosecuted *ex officio* and go beyond the complaint itself unless the staying of proceedings issue crops up. Now, the fact a complaint is made and procedure relating to staying of proceedings has to be distinguished from waiver of complaint.

In this particular context, we see that certain provisions were introduced and limited the possibility of an action being based on the complaint of the injured party in relation to various offences, which before the introduction of this law required the complaint of the injured party as a requirement for the institution of the criminal action, at least in certain circumstances. But thanks to this law, rape, abduction, violent indecent assault etc, do not require the complaint of the injured party for the criminal action to be set in motion. This also reflects the predominant position that is being adopted nowadays to limit as much as possible those instances where both the taking and the continuance of proceedings in these cases are dependent on the discretion of the parties involved. This applies across genders.

Complaint lodged has to be waived. Now you have to make this assessment, assess which crime you are dealing with, under which purview this crime falls and assessment of this complaint to criminal proceedings.

**Buckley vs Borg Cardona 1943** - authorisation to lodge a complaint did not require a fresh authority to withdraw the complaint. So traditionally once a complaint was lodged, it was perfectly logical for the complainant to withdraw the complaint.

## **Article 545 - Waiver of Complaint**

*545.(1) When proceedings cannot be instituted except on the complaint of the private party, the complainant may, at any time before final judgment is delivered, waive his complaint.*

*(2) The party charged or accused may object to any such waiver, in which case the trial shall be proceeded with as if the complaint had not been waived*

*(3) If the complaint is waived after the opening of the trial and it appears that the complaint is frivolous or vexatious, or made with the object of extorting money or other effects, or of making any other gain, the Court may, notwithstanding the waiver, proceed to deliver judgment, acquitting the person charged or accused and directing that proceedings be instituted against the complainant, in accordance with the provisions of article 528:*

*Provided that if the complaint does not amount to any of the offences specified in the said article, it shall be lawful for the Court to sentence the complainant to detention or to a fine (multa or ammenda), according to the gravity of the case.*

Power of Court to order proceedings against calumniators, etc., where absolute innocence of accused is established.

**528.** Where the absolute innocence of a person accused is established, it shall be lawful for the Court, if there are grounds for so doing, to order proceedings for calumnious accusation or false evidence to be instituted against any informer, complainant, witness, or other person responsible, observing the provisions contained in article 523.

Article 528 - you see here the law can also TBIDDEL U TAQLEB THE POSITION COMPLETELY - if waiver takes place after the trial - Court competent to try the case proceeds with the sentencing, if waiver takes place after that the Court of mag as a Court of criminal inquiry, the Ag and Court of criminal appeal would be

**Pulizija vs Carmenu Cassar 21/04/1945** - the complainant may waive the complaint and the person charged may decline to accept the waiver. According to Italian law, *remissione della querela*, a waiver of a complaint can be expressed or tacit and acts of omissions which are not compatible with the intention to continue with criminal action imply an intention to waive.

## **Article 422 - Non-appearance of appellant**

422.(1) If, on any day appointed for the hearing of the appeal, the appellant fails to appear, his appeal shall be taken to have been abandoned and the judgment appealed from shall be carried into effect; but on an application by the appellant, filed within eight days from the day above-mentioned, together with a declaration sworn before the registrar by the appellant to the effect that he was, on account of illness or for any other reason independent of his will, to be expressly stated in the application, unable to attend on the day appointed as aforesaid, the Court shall appoint another day for the hearing of the appeal, in which case the provisions of sub-articles (1) and (2) of the last preceding article shall apply:

Provided that the Court may, in exceptional circumstances, appoint another day for the hearing of the appeal even where the application is filed after the term mentioned in sub-article (1) has lapsed.

(2) If the respondent fails to appear, the Court shall hear the appellant, and shall deliver judgment according to law.

(3) Where the appellant was on bail as provided in article 416(1A) and (3) prior to the abandonment of the appeal, his request for temporary release from custody may be made in the same application mentioned in sub-article (1)

→ The person promoting the action has to take direct interest and a proactive stance in their quest to achieve justice, failing which the lack of showing interest can carry consequences.

→ What if the complaint is lodged with the executive police? You may also have a tacit waiver of the complaint, by the complainant, however it does not preclude the executive police from proceeding with criminal action ex officio if it falls under 373 proviso. In this case, the tacit waiver does not have the same effect as the express waiver. Thus if the complaint is lodged and waived or withdrawn, it is not possible for a complaint to be raised the same as the first complaint - it is deemed as extinguished.

**Rex vs Michelango Maria Mizzi** - Once the complaint is waived in respect of one offence mentioned in one count of the BOI, it does not affect the other crimes in the same BOI, where the complaint of the injured party is not required.

**Rex vs Savona** - the waiver of one of the co-participants does not apply to the other co-defendants.

Nowadays, the concept of complainant has been fused with victim status. We no longer focus on the complainant but “**who is the victim**”? We have developed categories of victims, including victims whose relationship to the defender makes them vulnerable. Gender-based violence, terrorism, close-relationship violence, sexual violence, domestic-based violence, victims with disabilities and others.

A risk assessment is made by the Officers who identifies any risk by the interested person. This happens at the earliest stage of the investigation and the implications that stem from this provision are enormous. There are circumstances where the EP has discretionary powers to act without the need of adhering to article 540.

## Article 540 Criminal Code - Duty of Police on receipt of report, information or complaint.

540. Upon the receipt of any report, information or complaint requiring proceedings to be taken, the Executive Police shall as soon as possible inform the Court of Magistrates (Malta), or the Court of Magistrates (Gozo), or a magistrate, as the case may be, in order to receive the necessary directions for such proceedings:

Provided that if upon the report, information or complaint the party concerned has been summoned or, in any case where the Executive Police is authorized to proceed forthwith to the arrest of the party concerned, such party has been actually arrested, it shall be lawful for the Police to inform the Court of such report, information or complaint at the moment that the party summoned or arrested is brought before it.

## Article 541 Criminal Code - Procedure in cases where Executive Police refuses to take proceedings on report, information or complaint

Article 541. Procedure in cases where Executive Police refuses to take proceedings on report, information or complaint. Informally known as a **challenge procedure**. This article is substituting the lack of action not taken by the EP, where the Court of magistrates is invited to review the discretion that the EP have to not take action following a *notitia criminis*. The law is still talking about the Commissioner of Police, despite the fact that there are a lot of LNs who shifted the more serious offences (to prosecute) to the AG - see 541(4).

The Court of criminal justice therefore, can order the Commissioner of Police to institute criminal action. Find the case of *Stellingwerf vs Commissioner of Police*. Here, the Court of

Magistrate explained the genesis and the basic issue highlighting the concept of challenge proceedings “illi din il-procedura, hija procedura specjali li hija intiza....”

Article 347 - Complaint by the injured party.

Article 543 - Cases where Police may proceed ex officio.

Article 544 - act 13 of 2018 redefined this article. Cases in which a complaint of a private party is requisite.

The procedure that has to be followed in case of private prosecutions in article 374 which lays down the principles highlight private prosecution whereas 375 focuses on the procedure to be followed in proceedings ex officio. These two cannot be confused. We are speaking about the complaint here.

374 applies to instances where criminal action is reserved for the private parties. Pietru Cutajar case - the Court explained how this article ought to be interpreted.

### **Il-Pulizija vs. Pietru Cutajar 12/09/1996 of Criminal Appeal (inferior) De Gaetano Vincent**

Bl-espressjoni "l-offiz ma jkunx mexxa l-azzjoni kriminali" (artikolu 373 - proviso) il-Qorti ta' l-Appell Kriminali fehmet li l-offiz ma jkunx ghamel il-kwerela kif din ghandha ssir skon il-ligi. L-effett ta' l-artikolu 337 (1) (2) (re: sentenza) u 403 (1) (2) (re: meta l-Qorti tkun tal-fehma li r-reat hu ta' kompetenza tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali) hu car: metar-reat li jirrizulta mill-provi (u ghalhekk mhux ir-reat li persuna tkun originarjament giet bih akkuzata jew imputata izda reat kompriz u involut f'dak ir-reat originali) ikun jirrikjedi l-kwerela tal-parti, il-Qorti xorta wahda tista' tghaddi ghas-sentenza anke fl-assenza tal-kwerela jew prova taghha, kemm-il darba l-parti offiza ma tidhirx biex tirrinunzja ghall-azzjoni. U dan japplika sia jekk ir-reat originali kien ta' kompetenza tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali kif ukoll jekk kien ta' kompetenza tal-Qorti Kriminali.

L-effett ta' l-artikolu 390 (3) (4) (5) tal-Kodici Kriminali (re: in-necessita' tal-kwerela fil-kumpilazzjoni) hu bazikament li fil-kumpilazzjoni - u allura meta si tratta ta' reat ta' kompetenza tal-Qorti Kriminali - jekk ir-reat in kwistjoni jkun jehtieg il-kwerela sabiex l-azzjoni titmexxa din il-kwerela hi prezunta salv il-prova kuntrarja. Kemm jekk hi prezunta li saret kif ukoll jekk tkun verament saret il-kwerela, din, galadarba saret, tista' tigi rtirata skond l-artikolu 545 (1) tal-Kodici Kriminali. Biex ikun hemm ir-rinunzjatal-kwerela skon l-artikolu 545 (1) tal-Kodici Kriminali, mhux biss ir-reat irid ikun wiehed li fil-konfront tieghu l-azzjoni ma tistax titmexxa minghajr il-kwerela, izda l-kwerela trid tkun effettivament saret jew tkun prezunta skond il-ligi li saret.

Wiehed ma jistax jirtira kwerele li ma jkunxghamel jew li l-ligi ma tippresumix li jkun ghamel. Meta si tratta ta' xi wahda mill-ipotesijiet ikkontemplati fil-proviso ta' l-artikolu 373, il-ligi stess tipprovdli li mhix mehtiega l-kwerele sabiex titmexxa l-azzjoni u li ghalhekk l-azzjoni tista' titmexxa ex officio. Galadarba ma tkunx mehtiega l-kwerele, il-mahfra tal-parti leza jew offiza ma tistax tammonta ghal rinunzja tal-kwerele fis-sens ta' l-artikolu 545 (1).

→ The complaint does not have to be confirmed on oath in all cases. The Court “may” require the complainant to confirm it on oath.

→ The presence of the complainant in front of a Court of Magistrates in a criminal enquiry is not necessary to prove the complaint if from other evidence it is assumed that the complaint would have been made.

→ In case of private complaints in front of a Court of Magistrate in its criminal judicature, the complainant's presence is required.

### **Il-Pulizija vs. Alfred Debono (Court of Criminal Appeal) (1993)**

The accused was charged with misappropriation and he argued that pending proceedings, a civil contract was signed whereby the debt was acknowledged by the accused. The Court decided that by doing so, the complainant had tacitly renounced his right of filing the complaint and therefore there was a passive waiver of the complaint.

If the complaint is lodged and waived or withdrawn, it is not possible for a fresh complaint to be logged in relation to the same facts complained of previously. Therefore the withdrawal of the complaint would be deemed to extinguish the rights to the criminal action. There are various judgements relating to this, even old judgements

### **Johan Frederik Stellingwerf vs. Commissioner of Police (CoM)**

This case stated “Illi din il-procedura ta’ sfida lill-kummissarju tal-pulizija ai terminu tal-artikolu 541 tal-Kodici Kriminali hija procedura specjali u hija ntiza biex il-Qorti tiddetermina fuq bazi prima facie, jekk hemmx lok sabiex in-notitia criminis li tkun saret lill- Pulizija, tigi tradotta fil-konsegwenti azzjoni penali. L-iskop ta’ dawn il-proceduri penali huwa li l- Qorti tal-Magistrati twettaq forma ta’ judicial review fuq l-operat tal-Pulizija meta fil-kazijiet kongruj ma tipprocedux bil-prosekuzzjoni tal-azzjoni penali minkejja n-notitia criminis moghtija lilha. Dan johrog car mis-sentenza tal-Qorti Kostituzzjonali fl-ismijiet Adrien Busietta vs l-Avukat Genrali, deciza fit-13 ta’ Marzu 2006.

Il-livell tas-sufficjenza progratorja provdut mil-ligi stess lill-Qorti tal-Magistrati f’dan il-kaz, li huwa prima facie, ikun il-bazi ghal prosegiment ghall-azzjoni penali. Jekk il-Qorti tal-Magistrati



ssib li hemm prima facie adoc li tinbeda l-azzjoni penali kontra persuna inkriminanda allura tordna lill-Pulizija biex jipprocedu b'din l-azzjoni. Jigifieri, wiehed mill-ezamijiet li trid taghmel din il- Qorti, jekk mhux ukoll investur principali f'din il-procedura, huwa li tara jekk il-Pulizija tkunx ibbazat id-decizjoni taghha ta' inerzja, konsegwenti notitia criminis, fuq ragunijiet gustifikati jew le. Dan l-ezami ta' sindakar da parti tal-Qorti almenu jehtieg skritinju tal-elementi fil-pussess tal- Pulizija u li fuqhom tkun ibbazat id-decizjoni jekk tissustix l-azzjoni penali o meno u tara sal-grad prima facie jekk din id-decizjoni kinitx gustifikata jew le.

Fil-fehma ta' diversi Qrati superjuri Maltin, bil-grad 'prima facie' il-legislatur irid jirrifleti grad ta' in ragini li gie mfisser mill-Qorti tal-Appell bhala "mal-ewwel daqqa t'ghajn". Il-Qorti Kriminali fl- atti tar-rikors tal-kaz Anthony Xuereb vs. il-Kummissarju tal-Pulizija deciza nhar it-23 ta' Settembru 2010 u li kien precizament jittratta kaz tal-procedura msemmija fil-Artikolu 541 tal- Kodici Kriminali, l-Imhalled Michael Mallia jghid li ghal dak li ghandu x'jaqsam mal-grad prima facie, il-Qrati Maltin donnhom sabu t-triq tan-nofs bejn il-grad tal-possibli u dak tal-probbabli. U ghalhekk jekk il-Magistrat jidhirlu li l-provi migbura quddiemu jisthoqqilhom aktar investigazzjoni, allura f'dak il-kaz huwa bizzejjed sabiex il-grad tal-prima facie jigi milhuq u l-kawza tkun tista titkompla.

**Pulizija vs. Giovanni Caltatella, aggudikat mill-Qorti Kriminali fis-27 ta' Frar 2014**, gie inter alia mistqarr li dan il-grad ta' prima facie huwa l-istess ghal kazijiet kollha fejn il-Qorti tal-Magistrati hija mehtiega bil-ligi li tilhaq dak il-grad, inkluz proceduri ai termini ghal artikolu 401 tal-Kodici Kriminali minn din il-Qorti tal-Magistrati bhala Qorti Istruttoria. Dan ifisser li l-grad ta' prima facie jistrieħ fuq livell ta' konvinciment u sufficjenza progatorja aktar baxx minn dak mehtieg minn min qed jiggudika l-fatti sabiex ikun jista jsib htija. Kif intqal fis-sentenza hawn fuq imsemmija ta' Anthony Xuereb jistrieħ fuq livell fejn il-grad tal-possibli u dak tal-probabbli u dipendenti fuq jekk il-Qorti tqisx li hemm provi bizzejjed u li jkun jisthoqqilhom aktar investigazzjoni. Dan japplika wkoll, u ghalhekk b'mod partikolari ghal procedura ta' artikolu 541 tal-Kodici Kriminali bhal dak indizamina.

Kif deciz mill-Qorti Kostituzzjonali fil-kawza **Mario Charles Kenneth Stevens vs. l-Avukat Generali nhar l-14 ta' Frar 2006**, l-elementi tal-prima facie jridu jirrizultaw fir-rigward tal-elementi kollha tar-reat jew reati inezamina. U dwar dan il-principju, din il-Qorti taghmel referenza ghal dak mistqarr minn din il-Qorti preseduta mill-Magistrat Dr Carmel J. Agius, fis-sentenza tieghu fis-16 ta' Lulju 1981, fil-procedura sui generis ta' estradizzjoni bl-ismijiet The Police vs. Alfred John Gaul. F'dik il-kawza, dwar dak li tfisser il-frazi prima facie, u kif fil-prattika ghandu jigi mhaddem dan il-principju, l-abbli gudikant kien stqarr hekk.

**Ir-Repubblika ta' Malta Versus Norbert Gabor Pintye - 9 ta' Jannar 2025** F' isem ir-Repubblika ta' Malta akkuzat talli gewwa Lavender Court, Flat 4, Triq it-Tamar, San Pawl il-Bahar, Malta u/jew fi bnadi ohra f'dawn il- gzejjer, fl-14 ta' Ottubru tas-sena 2024, f'xi hin bejn nofsinhar (12:00) u s- siegha u nofs ta' wara nofsinhar (13:30)

1. Minghajr kunsens, ikkommetta kongungiment karnali, jigifieri penetrazzjoni vaginali, anali jew orali b'organu sesswali, ta' gisem ta' persuna ohra, u cioe' ta' Evelin Szarvas, liema delitt sar fuq il-persuna ta' koabitant, li qieghda tghix mieghu fl-istess dar, u li ghandha tarbija komuni mieghu;
2. Talli fl-istess data, lok, hin u cirkostanzi, bla ordni skont il-ligi tal-awtorita' kompetenti, u barra mill-kazijiet li fihom il-ligi taghti s-setgha lill-privat jarresta lill-hati, arresta, zamm jew issekwestra lil xi persuna kontra l-volonta' taghha, u cioe' lil Evelin Szarvas, liema delitt sar bhala mezz biex persuna , u cioe' Evelin Szarvas tigi mgieghla taghmel xi haga jew toqghod ghla xi haga li toffendi l- misthija tas-sess taghha.

3. Talli fl-istess data, lok, hin u cirkostanzi, ikkawza lil haddiehor u cioe' lil Evelin Szarvas biza' li ser tintuza vjolenza kontriha jew kontra l-proprjeta' taghha jew kontra l-persuna jew il-proprjeta' ta' xi hadd mill-axxendenti, dixxendenti, ahwa subien jew bniet jew xi persuna imsemmija fl-artikolu 222(1) tal-Kap. 9 tal- Ligijiet ta' Malta;

Din l-Onorabbli Qorti hija gentilment mitluba sabiex f'kaz ta' htija tikkundanna lill-akkuzat ghall-hlas ta' spejjez li jkollhom x' jaqsmu mal- hatra tal-esperti jew periti fil-proceduri hekk kif ikkontemplat fl-artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta, u kif ukoll tordna li s-sentenza tigi notifikata lir-Registratur hekk kif kontemplat fl-artikolu 6(2) tal-Kap. 518 tal-Ligijiet ta' Malta.

Il-Qorti hija mitluba sabiex barra milli tapplika l-piena skont il-ligi, tapplika ukoll l-artikoli 383, 384 u 385 tal-Kap 9 tal-Ligijiet ta' Malta ghas- sigurta' tal-vittmi imsemmija kif ukoll ghall-familjari taghhom.

Il-Qorti hija mitluba li tohrog ordni ta' protezzjoni ai termini tal-artiklu 412C tal-Kap 9 tal-Ligijiet ta' Malta, kemm waqt il-mori tal-kawza kif ukoll f'kaz ta' htija ma' kull piena li l-Qorti jidhrilha xierqa.

Il-Qorti hija mitluba li tohrog ordni ta' trattament ai termini tal-artiklu 412D tal-Kap. 9 tal-Ligijiet ta' Malta, kemm waqt il-mori tal-kawza kif ukoll f'kaz ta' htija ma' kull piena li l-Qorti jidhrilha xierqa.

Rat illi l-*parte civile* Evelyn Szarvas fis-seduta tat-12 ta' Dicembru 2024, irrinunzjat ghal dak kollu rinunzjabbli u talbet sabiex il-kawza odjerna titwaqqaf.

Ikkunsidrat

Illi fit-12 ta' Dicembru 2024, il-*parti civile* tenniet illi hi qed tirrinunzja ghal dak kollu rinunzjabbli u qed titlob sabiex dawn il-proceduri jitwaqqfu ai termini ta' l-Artikolu 543(e) tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Rat illi fl-istess seduta Dr Darlene Grima ghar-Repubblika ta' Malta ma sabitx oggezzjoni ghal tali talba.

Rat l-Artikolu 543(e) tal-Kapitolu 9 tal-Ligijiet ta' Malta u kkunsidrat illi huwa fl-ahjar interess ta' l-istess *parte civile* Evelyn Szarvas u l-minuri iben il-partijiet, illi dawn il-proceduri ma' jitkomplewx.

Decide

Ghal dawn il-motivi, il-Qorti ai termini ta' l-Artikolu 543(e) tal-Kapitolu 9 tal-Ligijiet ta' Malta, tiddikjara Procediment Ezawrit.

**Il-Pulizija (Spettur Godwin Scerri) vs Philip Bartolo QORTI TAL-MAGISTRATI (MALTA) BHALA QORTI TA' GUDIKATURA KRIMINALI, 16th June 2021**

Nakkuzah talli nhar id-9 ta' Novembru 2019, fil-hinijiet ta' filghodu gewwa r-residenza Hill Crest Flat 1 Triq Dun Manwel Grima (il-Manikata) l-Mellieha, minghajr il-hsieb li joqtol jew li jqieghed il-hajja ta' martu Bernice Bartolo f'periklu car, ikkgunalha hsara fil-gisem jew fis-sahha liema hsara hija ta' natura gravi, hekk kif certifika mit-tabib Dr. Alec Mifsud numru mediku 3421, bi ksur tal-Artikoli 216, 222(1) et tal-Kapitolu 9 tal-Ligijiet ta' Malta."

Il-Fatti fil-qosor

Illi l-akkuzi kontra l-imputat inhargu wara rapport li sar mill-allegata vittma mal-Pulizija.

Il-Ligi u Gurisprudenza Applikabbli

Illi l-Artiklu 543 tal-Kodici Kriminali jaqra hekk:

Illi l-Qrati taghna gia kellhom okkazonijiet li japplikaw dan l-Artiklu u senjatament is-sub inciz (e).

Fil-kawza Il-Pulizija vs Dona Debono deciza fil-25 ta' Mejju 2017, il-Qorti, dik il-Qorti ghamlet referenza ghall-kawza Il-Pulizija vs Mohamed Ramadan fejn ukoll gie applikat dan l-Artiklu u intqal hekk fir-rigward:

"Illi skont l-istess tieni proviso tal-artikolu 543(e) tal- Kodici Kriminali l-vittma ta' delitt li jinvolve vjolenza domestika ghandha s-setgha li titlob li l-proceduri penali dwar reati jinvolve vjolenza domestika jigu mwaqfa. Jidher li meta l-vittma taghmel din it-talba, is- setgha li jkollha l-qorti mhix daqstant li twaqqaf il- proceduri, daqskemm li tordna li dawn jitkomplew jekk il-Qorti thoss li hemm ragunijiet bizzejjed biex dawn jitkomplew filwaqt li tinghata konsiderazzjoni partikolari ghall-ahjar interess tal-minuri involuti.

Il-Ligi tat is-setgha lill-Pulizija jipprocedu *ex officio* f'kull kaz li jinvolve vjolenza domestika – irrISPettivament minn natura jew forma tar-reat, dment

(a) Li jkun jinvolve vjolenza u

(b) Dment li din tkun vjolenza domestika skont l-artikolu 2 tal-Kap 480.

L-Att dwar il-Vjolenza Domestika ma jippreskrivi ebda tifsira ghall-kelma "vjolenza". Dan ghalhekk jista' jinvolve diversi tipologiji ta' reati li fin-natura taghhom jinvolve elementi ta' vjolenza. Din il-ligi ma taghmilx distinzjoni dwar dawk ir-reati ta' vjolenza jekk l-azzjoni penali dwarhom hijiex procedibbli fuq il-kwerela tal- privat jew le. Ghalhekk, ladarba l-Ligi hija siekta fuq dan il-punt, jidher li dan l-artikolu 543(e) tal-Kodici Kriminali huwa applikabbli irrISPettivament jekk ir-reat li jinvolve vjolenza domestika jkunx wiehed minn dawk li jehtiegu l-kwerela tal-parti offiza jew le.

.....

F'dan il-kaz prezenti pero' l-proceduri inbdew *ex officio* mill-Pulizija Ezekuttiva in kwantu whud minnhom gew kommessi bi vjolenza domestika kif imfissra fl-artikolu 2 tal-Kapitolu 2 tal-Kapitolu 481 tal-Ligijiet ta' Malta. Dan ifisser ghalhekk li l-proceduri f'dan il-hlas

tmexxew indipendentement mill-kwerela tal-privat u indipendentement mill-azzjoni privata.

Ghalhekk anke jekk il-privat jirtira l-kwerela, ladarba l-procediment *ex officio*, il-prosekuzzjoni tal-azzjoni penali titkompli quddiem il-Qorti ghalix f'dak il-kaz l-azzjoni ma tigiix ritenuta estinta bl-irtirar tal-kwerela.

Dan ifisser li ghalkemm il-procediment ikun immexxi *ex officio*, l-istess procediment jista' jigi mwaqqaf fuq talba tal-vittma. Ghalhekk il-kontinwazzjoni tal-azzjoni kriminali mibdija *ex officio*, (li allura tkun obligata li tibqa' ghaddejja sas-sentenza) issa tista' tigi mitmuma fuq id-decizjoni tal-vittma. Mill-banda l-oħra l-Qorti hija akkordata d-diskrezzjoni li tmur kontra din id-decizjoni tal-vittma u tista' tordna l-kontinwazzjoni tal-proceduri kontra l-allegat awtur.

Id-decizjoni li l-proceduri jitwaqfu hija tal-vittma u mbagħad ikun jispetta għall-Qorti jekk tiddecidix li tezercita d-diskrezzjoni tagħha biex tordna li dawn il-proceduri jitkomplew minflok li jitwaqfu b'decizjoni mill-vittma. L-effett ta' tali decizjoni tal-vittma hija li l-azzjoni penali ma titkomplix li tigi prosegwita. Il-Ligi hija siekta dwar l-effett legali ta' tali decizjoni fuq in-natura tal-azzjoni penali. Il-fatt li l-proceduri penali tkun qegħda tigi estinta – bhal meta sehh xi wahda mir-ragunijiet li in bazi tagħhom l-azzjoni penali innifisha tigi mitmuma bhal kazijiet ta' mewt tal-awtur, mahfra presidenzjali, recess tal-kwerela (fejn l-azzjoni titmexxa biss bil-kwerela tal-privat), preskrizzjoni jew *ir-res judicata*. Dan għaliex jekk tirrizulta xi wahda minn dawn il-fatturi l-azzjoni penali ssir estinta u ebda Qorti ma tista' tordna li l-proceduri jitkomplew. Ladarba estinta l-azzjoni penali tispicca. Mentri dak li jipprovd t-tieni proviso tal-artikolu 543(e) huwa differenti – fis-sens li meta l-vittma tagħzel li titlob li l-proceduri jieqfu, il-Qorti għandha s-setgha u d-diskrezzjoni li tagħzel li dawn jitkomplew. Kieku bid-decizjoni tal-vittma l-azzjoni penali tigi meqjusa estinta ebda Qorti ma tista' tkompli tagħha għaliex dak li huwa estint *ex lege* ma jkunx għad fadallu hajja legali. U ladarba l-procedimenti penali jkun inbeda *ex officio* ikun kontro-sens li l-istess procediment jigi estint bid-decizjoni tal-vittma.

Fil-fehma tal-Qorti għalhekk, f'dan il-kaz kontemplat mit-tieni proviso tal-artikolu 543(e) tal-Kodici Kriminali il-ligi tipprovd għal sitwazzjoni fejn il-kundizzjoni tal-prosegwiment mill-prosekuzzjoni tal-azzjoni penali tigi affettwata b'tali mod li ladarba l-vittma tiddeciedi li l-proceduri kontra l-awtur allegat jieqfu, jinholq ostaklu għat-tkomplija tal-prosekuzzjoni tal-azzjoni penali biex b'hekk il-prosekuzzjoni tal-kaz tkun tista' tieqaf hemmhekk; izda, għar-raguni hawn fuq imsemmija din id-decizjoni tal-vittma ma tistax iggib l-estinzjoni tal-azzjoni penali.

Ladarba d-decizjoni tal-vittma li titlob it-twaqqif tal-proceduri kontra l-awtur allegat ma ggibx l-estinzjoni tal-azzjoni penali, ma tistax titqies li hija decizjoni li tolqot jew tidderimi l-meritu tal-azzjoni penali, u konsegwentement li għalhekk hija prekluzza milli tigi dikjarata mill-Qorti tal-Magistrati bhala qorti istruttoria. Għalhekk dik it-talba tal-parte civile hija għalhekk proponibbli wkoll quddiem il-Qorti tal-Magistrati bhala qorti istruttoria. Fuq din it-talba, il-Qorti imbagħad hija intitolata li jew tilqa' t-talba u b'hekk it-tkomplija tal-prosekuzzjoni tal-azzjoni

penali tieqaf (ghalkemm l-azzjoni ma tkunx estinta) jew (ladarba l-azzjoni ma tkunx estinta), tezercita d-diskrezzjoni tagħha li tordna l-prosekuzzjoni tal-kawza titkompla.”

Ikkunsidrat:

Illi fil-kaz in ezami il-proceduri inbdew fuq talba tal-allegata vittma illi ghamlet rapport mal-Pulizija fil-konfront tal-imputat, Illi ma hemmx dubju illi l-agir li dwaru rrapporta l-allegata vittma jaqa’ fil-parametri tal-ligi dwar vjolenza domestika.

Illi fid-dawl illi l-allegata vittma ghazlet li titlob li dawn il-proceduri jitwaqqfu u din kif jipprovdi wkoll l-Artiklu 543(e) tal-Kodici Kriminali, u dan minn jeddha u hekk kif beda jinstema’ l-kaz, il-Qorti hija tal-fehma illi tali talba ghandha tintlaqa’ u li hija ghalhekk ma ghandhiex tuza d-diskrezzjoni moghtija lill-Qorti taht l-istess Artiklu 543(e) tal-Kodici Kriminali u dan fl-interess tal-allegata vittma, tal-partijiet u tal-bon ordni tal-familja.

Decide:

Ghal dawn ir-ragunijiet, il-Qorti wara li rat l-Artikolu 543 tal-Kodici Kriminali, Kapitolu 9 tal-Ligijiet ta’ Malta, qeghda tilqa’ t-talba tal-allegata vittma u tordna li dawn il-proceduri fil-konfront tal-imputat jieqfu u konsegwentament twaqqaf dawn il-proceduri fil-konfront tal-imputat.

### **Il-Pulizija vs Raymond Debono Qorti tal-Appell Kriminali 14th November 2018**

Rat l-akkuzi dedotti kontra l-appellat Raymond Debono quddiem il-Qorti tal-Magistrati (Malta): Talli b’diversi atti maaghmulin minnu wkoll jekk fi zminijiet differenti li jiksru l-istess disposizzjonijiet tal-ligi, nhar it-28 ta’ Frar, 2012, kif ukoll fil-jiem ta’ qabel, f’dawn il-Gzejjer, bi ksur tal-artikoli 43(1)(a) u 18(1) tal-Att dwar Servizzi tal-Ivjaggar u tat-Turizmu ghal Malta, Kapitolu 409 tal-Ligijiet ta’ Malta, u bi ksur tar-Regolament 3(1) tal-Legislazzjoni Sussidjarja 409.15, opera jew ippermetta l-operazzjoni ta’ attivita’ turistika (stabbiliment li jipprovdi l-ikel) fil-post Nina’s Café fi Triq Ordinanza, l-Belt, Valletta, minghajr ma kien fil-pussess ta’ licenzja valida mahruga mill-awtorita’.

Illi bid-dovut rispett lejn l-Ewwel Onorabbli Qorti, ghalkemm huwa deziderabbli li kawzi sommarji jigu decizi fi zmien qasir, preferibbilment f’seduta wahda, certament ma jkunx fl-ahjar interess tar-retta amministrazzjoni tal-gustizzja jekk kif appena ma jitfa’ccax xhud f’kawza sommarja, il-Qorti jaqbdu u jilliberaw lill-akkuzat! Jekk wiehed jagħmel ukoll referenza għad-diċitura tal-ligi, u, senjatament, l-artikoli 374 u 375 tal-Kap. 9 tal-Ligijiet ta’ Malta, m’huwiex speċifikat b’ebda mod illi l-provi f’kawza sommarja għandhom jinstemgħu f’seduta wahda biss u dan peress li l-ligi tgħid biss illi *‘t-mexxija tal-kawza għandha ssir fil-qosor u bil-fomm u fl-ordni...l’* kif preskritt fl-artikolu 374 b’applikazzjoni ukoll għall-artikolu 375.2

Kwindi filwaqt li huwa rikonoxxut li l-kawza sommarja m’għandhiex iddum tkaxkar inutilment (*ergo* t-terminu ‘sommarja’) il-ligi ma tispeċifikax li kull prova trid bilfors tinstema f’darba allavolja hekk ikun desiderabbli.

Illi *inoltre* jekk wiehed jara wkoll l-artikolu 377(1) tal-Kodiċi Kriminali, li jitratta l-ghoti tas-sentenza f'kawza sommarja jinghad li *'meta jinghalaq is-smiegh tal-kawza<sup>3</sup>, il-qorti, dakinhar stess, jekk jista jkun<sup>4</sup>, taghti sentenza billi tillibera jew tikkundanna l-imputat'*. Illi minn dan l-artikolu tal-ligi l-esponent jislet zewg punti: (1) fl-ewwel lok is-sentenza ghandha tinghata meta jinghalaq is-smiegh tal-kawza, u, (2) fit-tieni lok, ma hemm ebda obbligu rigidu li l-Qorti trid taghti s-sentenza taghha dak in-nhar stess li tinstema' l-kawza. Issa fil-każ *de quo* l-prosekuzzjoni f'ebda hin ma ddikjarat li kienet qed taghlaq il-provi. Għall-kuntrarju l-prosekuzzjoni kienet ghadha lanqas biss bdiet tipprezenta l-provi taghha!

Illi kif inghad ukoll fis-sentenza tal-Qorti tal-Appell Kriminali ppreseduta u deciza mill-Imhalled J. Galea Debono nhar il-21 ta' Gunju, 2007:

*'filwaqt li l-Qorti tifhem il-pressjoni li biha jkunu qed jahdmu l-Qrati tal- Magistrati speċjalment fis-seduti tad-distrett fejn ikollhom numru kbir ta' kawzi li huma jkunu jixtiequ jiddisponu minnhom, la darba l-prosekuzzjoni kellha xhud imharrek u din ix-xhud addiritura ghamlet talba b'rikors biex tigi ezentata milli tidher fil-gurnata in kwistjoni ghal raguni li prima facie kienet tidher serja u gusta, l-Ewwel Qorti kelha tiddiferixxi l-kawza ghal data ohra u mhux taghmel kif ghamlet u tghaddi biex taghti s-sentenza minghajr ma' tisma' x-xhud ewlieni u certament idispensabbli tal-prosekuzzjoni.'*

Illi *inoltre*, fil-każ *il-Pulizija vs Clive Debono*, deciza minn din l-Onorabbli Qorti ppreseduta mill-Imhalled J. Galea Debono (14/9/2004) inghad illi l-fatt li ma jidhirx xhud jew xhieda ma tiggustifikax lill-Qorti tippriva lill-prosekuzzjoni minn prova indispensabbli, u taqbad u tghaddi ghas-sentenza.

Kwindi, dejjem bid-dovut rispettt lejn l-Ewwel Onorabbli Qorti, l-istess Onorabbli Qorti ma setghetx legalment u ragjonevolment iccahhad lill-prosekuzzjoni minn din il-prova ndispensabbli.

Ikkunsidrat,

Illi fil-qosor l-aggravju tal-Avukat Generali hu msejjes fuq il-fatt li l-prosekuzzjoni ma kellhiex l-opportunita' li tressaq il-provi taghha.

Illi jigi rilevat li fis-seduta tal-14 ta' Mejju, 2015 l-imputat, il-prosekuzzjoni u l-avukat tal-Malta Tourism Authority kienu prezenti. Dak in-nhar l-avukat ta' l-imputat kienu assenti izda mill-verbal ma jirrizultax li ebda wiehed miz-zewg xhieda ndikati fic-citazzjoni ma kienu prezenti. Anki fl-assenza tal-avukat ta' l-imputat, il-prassi li kellha tigi uzata hi li jixhed min ghandu jixhed izda jigi riservat il-kontro-ezami ta' dan l-istess xhud. Mill-verbal ma hemm indikata l-prezenza ta' ebda xhud.

Illi fis-seduta tal-14 ta' Jannar, 2016 l-Avukat Generali qed jilmenta li gjaladarba kien hemm rikors għall-differiment l-ewwel Qorti kellha tilqa tali talba u tiddiferixxi l-kawza ghal data ohra. It-talba kienet tirrigwarda x-xhud Emanuel Agius li fl-14 tax-xahar kellu appuntament l-isptar Mater Dei. Il-parte civile pprezentat r-rikors fit-13 tax-xahar jigifieri gurnata qabel is-smiegh

tal-kawza. Gie ezebiet l-appuntament izda jirrizulta li l-appuntament kien gie ffissat fit-12 ta' Novembru, 2015, jigifieri xahrejn qabel is-seduta. Jigi rilevat ukoll li d-digriet tal-ewwel Qorti jgib id-data tat-13 ta' Jannar, 2016 u it-talba kienet giet michuda. Il-kawza kellha tinstema fid-9.00 a.m. u l-appuntament l-outpatients kien iffissat għall-10.30 a.m.

Fis-seduta ndikata, il-prosekuzzjoni ma ghamlet ebda talba biex jixhed xi xhud iehor. Fic-citazzjoni hemm indikati zewg xhieda izda r-rikors sar għall-xhud wiehed biss. Għalhekk, l-ewwel Qorti kienet gustifikata li tghaddi għas-sentenza.

Illi fit-tieni lok, l-Avukat Generali talab lil din il-Qorti biex tghaddi biex tiddisponi minn dan il-kaz skont il-ligi. Wiehed kien tistenna li l-Avukat Generali jagħmel talba biex jinstemghu x-xhieda mitluba izda ma gara xejn minn dan u ebda talba f'dan is-sens ma saret.

Għaldaqstant, għal dawn ir-ragunijiet din il-Qorti tichad l-appell tal-Avukat Generali u tikkonferma s-sentenza appellata.

## **Obstacles to criminal action**

The concept of authority to proceed - one of the causes that can lead to an obstacle to the exercise of criminal action. The general rule in Malta's jurisdiction is that all crime carries punishment. This action may be vested in the Executive Police, the injured party, or the Republic itself. There are certain circumstances that due to the active person in the crime, bring an exception to this rule.

*The first issue is, can there be no limits to the institution of criminal action? The answer is, Yes, there are limits. Question number two; does the criminal action live forever? No it does not.*

LN 378 of 2020 and 192 of 2024

The AG has been given more power to decide whether a prosecution is or is not instituted in situations that are found in the schedule of the LN.

Article 76 of the Customs Ordinance, article 83(1) of the VAT Act. Without that letter to prosecute, the Police or the AG cannot prosecute.

There are other laws that require the authorization by other mostly government bodies or government authorities that require to give their consent or authorization. For example in the customs ordinance, in this particular case, it is the Commissioner for Revenue who is entitled to issue the letter to prosecute. If there is no such letter to prosecute, no prosecution takes place. So, if no such letter to prosecute is issued, that would be an obstacle to the exercise of the criminal action, even though the fact constituting the offence would have been limited, without that particular letter to prosecute, the Executive Police would not be in a position to institute criminal proceedings. Same goes under the Import Duties Act, The Financial Markets Act requires the consent of the Attorney General etc



## **Immunities from criminal prosecution**

Article 5(1) - No criminal action against the President of the Republic of Malta.

If during compilation of evidence the person charged pleads insanity - this is because the accused has to understand clearly what is being said to him and if for some reason they are not able to follow and understand the criminal proceedings against them, that criminal inquiry is suspended until the person recovers.

## **Causes of extinction of Criminal Action**

- 1) **Death of the Offender** - Once it's dead, it cannot be resurrected. When the accused dies, the criminal action becomes extinct because in criminal law, the action is **personal**. This does not prejudice the civil action.
- 2) **Presidential Pardon**. Article 93 of the Constitution of Malta and 515 of the Criminal Code (the prerogative of mercy). Do not confuse the institute of pardon with the institute of forgiveness of or by the complainant. The institute of pardon is the one that is reserved to a head of state. Sometimes, it is referred to as the prerogative of mercy and this institute of course, tends to be one of the most highly controversial. Of course, there is also a reason why it is controversial. This institute owns its origin to ancient times and it entails the State in certain circumstances to self-derogate from basic principles of criminal justice in relation to specific offenders.

We have seen that criminal justice really requires balance. Pardon is one such instance where the State topples this balance for some reason or another, in favour of the accused. Basically, a Court of criminal justice would have found a person guilty of committing that criminal offence, it would have sentenced the person to a punishment established by law and here, comes the President of Republic who literally has the power to go against the sovereign decisions of Courts of criminal justice in whole or in part.

The law goes beyond that. Pardon can be given even before a person is actually indicted before the Court of criminal justice. According to Judge Bugeja this can cause an imbalance. So, this pardon could hinder criminal proceedings from starting or else once they have been started, can give rise to the extinction of a criminal action altogether.

- 3) **Forgiveness** - There is the issue of the authority to proceed. In certain circumstances the criminal action requires a condition for its exercise. So, for example, in those cases requiring the complaint of the injured party, if there is no such complaint, then the

criminal action is stuck and it is an obstacle in itself.

Il-Pulizija vs. Peter Farrugia (Criminal Court) (1962) by Mr. Justice William Harding

It was held that in case of “rinunzja tal-parti offiza meta tista ssir, din iggib l-inproceddibilita tal-azzjoni kriminal”

The forgiveness of the injured party in those cases where the law allows the waiver of the complaint, if the complaint is a *conditio sine qua non* for the criminal action.

Ir-Repubblika ta' Malta vs. Spiridione Tanti sive Tanti Costa (1991) (Court of Criminal Appeal in its superior jurisdiction)

It was held “Il-Qrati tagħna dejjem irretenew li l-fatt li f'delitt kontra l-familja u l-morali prosegwibbli biss fuq istanza privata, dawn jirrikorru f'post pubbliku jew f'post espost għall-pubbliku jsiru prosegwibbli ex officio proprju għaliex awtomatikament ikunu akkompanjati b'reat li jolqot l-ordni pubbliku”. This goes to highlight that if proceedings are instituted by the police ex officio because there are the legal extremes for so doing then, the effect of a waiver is practically nullified.

Pulizija vs. Alfred Debono (2003)

Here the Court of Criminal Appeal held that once there was a settlement agreement reached by the parties, the settlement amounted to a tacit waiver of the complaint and consequently, there could be criminal actions in terms of Article 293 of the Criminal Code instituted because this related to a case of misappropriation.

Il-Majesta tagħha Regina vs. Mary Said (1955) (Criminal Court sitting on appellate stage)

Here it was held that “Illi meta l-fatti dedotti fl-att tal-akkuza bħala konstitwenti reat ta' korruzzjoni ta' minorenni jammontaw ukoll għal reat taħt il-liġi tal-qirda fil- prostituzzjoni, ir-rinunzja għall-kwerela ta' fatti tal-parti offiza mhix operattiva biex tipproduci estinzjoni tal-azzjoni għax ir-reat ta' korruzzjoni ta' minorenni, li normalment huwa persegwibbli ad istanza privata, ikun akkompanjat minn reat ieħor li jkun persegwibbli ex officio”.

So, here you can see that the simple fact that a criminal offence is prosecuted ex officio by the executive police even though it could require all things being equal the complaint of the injured or private party for the institution of the criminal action, if proceedings are instituted ex officio then, the waiver of the complaint does not also bring about the extinction of the criminal action.

- 4) **Immunities** - to the exercise of the criminal action relates to certain immunities. Certain high offices enjoy a certain degree of immunity. For example, under the criminal code Article 5(1), no criminal action is to be prosecuted against the President of Malta in respect of acts done in the exercise of the functions of his office.

So that office is granted immunity in relation to acts carried out in the exercise of his office. If the president of Malta goes on a killing spree, this is not in the exercise of this office so there would be no immunity here.

Diplomats under Article 3 of Chapter 191 (the Diplomatic Immunities and Privileges Act) and under the Vienna Convention on Diplomatic Relations, diplomatic agents enjoy immunity from criminal jurisdiction of the receiving state within those areas falling within the parameters of this convention.

Insanity of the person charged or accused can be an obstacle. Under Article 33 of the criminal code, every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person was in a state of insanity.

Presidential pardon - the prerogative of mercy is left in the hands of the head of state. In Malta it is the president. Before 1974 it was the prerogative of the British crown. In an ideal world this should not exist, why? Because the prerogative of mercy implies the happening of a criminal offence, the criminal offence being either possibly investigated or also prosecuted and convicted and all of a sudden the offender would be pardoned.

Article 93 of the Constitution of Malta. - Prerogative of mercy.

**Article 515 of the Criminal Code - Prerogative of mercy.**

**515.** (1) Nothing in this Title shall affect the prerogative of mercy, but the Prime Minister on an application made to him by a person convicted on indictment or without any such application may, if he thinks fit, at any time either -

(a) refer the whole case to the Court of Criminal Appeal and the case shall then be treated for all purposes as an appeal to that Court by the person convicted; or

(b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case, refer that point to that Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Prime Minister with its opinion thereon accordingly.

(2) The power of the Court of Criminal Appeal to exercise its functions under this article may be exercised notwithstanding that the person concerned is for any reason not present.

**5) Prescription** - The most important extinction of the criminal action is the institute prescription. Prescription of the criminal action is therefore from a legal juridical perspective the most significant of them all. It is not simply a procedural concept but rather it is deemed at law to directly affect the substantive nature of the criminal action. In fact, prescription of the criminal action extinguishes the criminal action itself. Therefore, it operates directly in relation to criminal action. There is a lot of debate in relation to the reason behind the institute of prescription in criminal matters. Of course,

we encounter prescription also in civil procedure however, the rules governing prescription at criminal procedure are different.

The moral issues stemming from prescription are even more felt. From a criminal law perspective, the passage of time is deemed to dilute or diminish the element of the perception of harm that is caused to society through criminal offending. The effects that a criminal offence leaves on society, therefore slowly starts to fade away from the standpoint of society, though not necessarily so from the standpoint of the alleged victims and their family. In reality, human nature is what it is. While at first society would feel deeply aggrieved by the commission of the criminal offences and of course, the more serious the criminal offence, the more aggrieved society feels, by time, this sense of grievance starts to wade away.

## Article 687: Sentences not barred by prescription

*687. (1) Sentences awarding punishment shall not be barred by prescription notwithstanding the lapse of any time.*

*(2) The period of prescription in respect of all criminal offences shall be suspended from the moment a charge and, or bill of indictment is served on the person charged or accused until such time as a final and definitive judgment is delivered in the proceedings which commenced as a result of such charge or bill of indictment.*

→ At criminal law, prescription is deemed to operate on the mere passage of time and it is deemed to be a question of public order. At criminal procedure therefore once prescription operates by the passage of time, even if the state or the injured party fail to institute criminal proceedings, the institute runs nonetheless.

There is an exception under Article 692.

## Article 692 - an exception - Prescription not to run when offender is unknown.

*692. The period of prescription in respect of crimes shall not commence to run when the offender is unknown.*

Prescription under criminal law is a matter of public policy. The period of prescription varies depending on the seriousness of the offence. The more heinous it is, the longer period of prescription you will find.

**Il-Pulizija vs. Reverendo Grazzju Grima (1894)**, where it was held that “Prescription does not run when the offender is not known in the case of crimes”. The issue as to what the meaning of unknown has been the subject of considerable debate.

**Rex vs. Giovanni Buhagiar (1906)**, where the Court held that the word unknown meant the total and absolute ignorance of the identity of the offender. Now, one has to distinguish between the total and absolute ignorance of the identity of the offender from any difficulty that could be encountered in practice to trace and to find the person committing the offence. Basically, if the shortcomings stem from the lack of action by the investigative or prosecuting authorities, that on its own does not qualify the offender as being unknown. Why? Simply because it is the duty of the investigative officer and of the prosecutor to trace the offender. In this case therefore, the provision was not applied since the victim of that particular case had declared that she immediately suspected that it was the person accused who broke into her house.

**Il-Pulizija vs. Lawrence sive Lorry Cuschieri (Court of Criminal Appeal) (2001).**

*“il-Qorti tosserva li, sabiex it-terminu preskrizzjonali ma jibdiex jiddekorri, a tenur ta’ l-Artikolu 692 tal-Kap 9, irid ikun hemm ‘ignoranza assoluta’ ta’ l-awtur tad-delitt. Illi fil-kaz in dizamina, dan l-element ma jikkonfigurax.”*

## Article 688 - Prescription barring criminal actions

688. Save as otherwise provided by law, criminal action is barred

- (a) by the lapse of twenty years in respect of crimes liable to the punishment of imprisonment for a term of not less than twenty years;
- (b) by the lapse of fifteen years in respect of crimes liable to imprisonment for a term of less than twenty but not less than nine years;
- (c) by the lapse of ten years in respect of crimes liable to imprisonment for a term of less than nine but not less than four years;
- (d) by the lapse of five years in respect of crimes liable to imprisonment for a term of less than four years but not less than one year;
- (e) by the lapse of two years in respect of crimes liable to imprisonment for a term of less than one year, or to a fine (multa) or to the punishments established for contraventions;
- (f) by the lapse of three months in respect of contraventions, or of verbal insults liable to the punishments established for contraventions.

## **How to determine which period of prescription is applied? The answer is in Article 689**

*Extenuating circumstances and previous conviction not to be taken into account in the reckoning period for prescription.*

**689.** *For the purposes of prescription, regard shall be had to the punishment to which the offence is ordinarily liable, independently of any excuse or other particular circumstance by reason of which the offence is, according to law, liable to a lesser punishment; nor shall any regard be had to any increase of punishment by reason of any previous conviction.*

- You have to look at the punishment arising from the law for which the crime is ordinarily liable. In this context, this related to the punishment mentioned in the article of the particular statute of the offence, without taking any considerations to the personal considerations to the offence. So no regard may be taken to any excuse that may arise. However, there are certain objective criteria independent of the personal considerations of the accused, when you come to determine the punishment.

For example; when dealing with theft, it can be simple or aggravated. If it happens to be aggravated by any one of the aggravations established by law, will this be taken into consideration? Yes you do. Because there the aggravation is an objective criteria.

For example; in the case of defilement of minors, the fact that the victim is a minor, the person of the victim, where he/she is less than 12 years of age, that brings an aggravation which is reflected in higher punishment, - this becomes an objective criterion and so this is taken into consideration. So the fact that the personal circumstance of the victim becomes an objective consideration which raises the punishment to the accused and which in turn affects the prescription.

Article 17 - concurrence in relation to punishments. There are certain criteria which are aimed at grouping together offences to avoid duplication of punishments, allowing a possibility of an increase in punishment.

## **Prescription is a mode of extinction of the criminal action**

The third characteristic relating to prescription is that it is a mode of prescription of the criminal action. This is the principle characteristic of this institute, because the operation of prescription leads to the prevention of a conviction. Therefore, if not prosecuted within the prescription it is useless for the prosecution to start the criminal action. This can be seen from

### **Article 694 - Application of prescription ex officio**

*694. Prescription shall be applied ex officio, and it shall not be lawful for the party charged or accused to waive prescription.*

- Once the prescription depends on time, it is very important to know when this time limit starts to run. The principle is that the day is not computed for the purposes of calculating the period of prescription. As to when the prescription starts to run, you have to look at article 691.

### **Article 691 - Commencement of prescription**

*691. (1) With regard to a completed offence, the period of prescription shall run from the day on which the offence was completed; with regard to an attempted offence, from the day on which the last act of execution was committed; with regard to a continuous offence, from the day on which the last violation took place; and with regard to a continuing offence from the day on which the continuance ceased.*

*(2) Where the criminal action cannot be instituted or proceeded with except on a special authorization, or after the determination of any issue upon separate proceedings, the period of prescription shall be suspended, and shall continue from the day on which the authorization is granted or the issue is determined.*

→ Therefore you have to assess prescription by referring to the nature of the criminal nature of itself and when prescription starts to run by reference to the nature of the crime itself.

The completion of the offence vs the completion of the effects of the offence - that is why in so far as instantaneous prescription, start to run from when the offence is completed. As far as attempts - start on the last day of execution so once need to distinguish between preparatory acts and the commencement of the acts. In the case of a continuous offence, in order to determine when a prescription starts to run, one has to look at when the last violation took place. Please look at article 18 - which deals with the concept of continuous offence.

## Article 18 Criminal Code

18. *Where the several acts committed by the offender, even if at different times, constitute violations of the same provision of the law, and are committed in pursuance of the same design, such acts shall be deemed to be a single offence, called a continuous offence, but the punishment may be increased by one or two degrees.*

→ This is why it is important to determine on which the last violation took place, because if they are grouped together, what is determining is to understand exactly when the last violation took place.

→ A very important aspect that we have in our law is Act 3 of 2002, which allowed prescription to be suspended by the proceedings. Nowadays Article 693 states that:

## Article 693 Criminal Code - Interruption of Prescription

693. (1) The period of prescription is interrupted by any act of the proceedings served on the party charged or accused in respect of the fact with which he is charged.

(...)

(2) The period of prescription is also interrupted by the warrant of arrest or, where there are no grounds for the arrest, by the summons, although the warrant of arrest or the summons shall have had no effect on account of the fact that the party charged or accused had absconded or left Malta.

(3) Where the period of prescription has been interrupted, it shall recommence to run from the day of the interruption.

(4) The interruption of prescription shall operate in regard to all persons who took part in the offence, even though the act of interruption takes place against one person only.

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Once the period of prescription is interrupted, the period starts to run afresh. The concept of suspension, is that it is held in abeyance from the moment the bill of incitement or the charge sheet would have been served. The period of prescription is deemed to be suspended till the final and absolute judgment. In such cases, there is no risk that the right of action lapses. This is one of the amendments introduced since the codification of criminal law in this jurisdiction.



There are some cases where special authorisation for the criminal action to start - Article 691(2) - *(2) Where the criminal action cannot be instituted or proceeded with except on a special authorization, or after the determination of any issue upon separate proceedings, the period of prescription shall be suspended, and shall continue from the day on which the authorization is granted or the issue is determined.*

Another issue of prescription, is that for a prescription to be successfully pleaded, the whole period must elapse - calendar days! It lapses on the last of its statutory operation.

The importance of their being effective service for the prescription to be interrupted or suspended as the case may be.

Another principle relating to prescription to criminal action is that the prescriptive period of criminal action affects the prescriptive period of the civil action stemming from the criminal action.

## Article 2154 of the Civil Code

**2154.** (1) With regard to the prescription of civil actions for damages arising from criminal offences, the rules laid down in the Criminal Code relating to the prescription of criminal actions shall be observed.

(2) Nevertheless, any person who has stolen a thing, or who has become the possessor thereof by means of an offence of fraud, or who has received or bought such thing, knowing it to have been stolen or fraudulently acquired, cannot prescribe for it, notwithstanding any lapse of time.

→ Some authors argue that apart from the 4 we mentioned, there is another one which kills the criminal action, the concept of *res judicata*, this is quite debatable. Because *res judicata* does it kills the action, but once the *res is judicata*, so once the action is taken, whereas the others kill the action before the action starts. The concept of *res judicia* stops the prosecutor from taking action again on the same juridical facts another time. So it can possibly be one of the methods of extinction. Kills from any further criminal action for the same fact.

→ In our context, we find the *res judicata* in Article 527 of the Criminal and Article 39 of the Constitution.

## **Article 527 of the Criminal Code**

**527.** *Where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact.*

→ By time, judicial interpretation extended this to apply also to convictions.

Certain conditions must apply for the *res judicata* to apply:

The person must be the same person which would have undergone the criminal action.

One must be speaking of the same fact.

**Rex vs Carmelo Galea, 1918** - it was held that by the same fact, it is understood that it is the same fact upon which the previous judgment was decided upon. In this case, Ms. Mifsud, had a lover, they were charged with adultery, they were found guilty. There was a complainant who still felt aggrieved. The Court considered that there was a tacit waiver and the Court exempted these two convicts from punishment.

The public prosecutor felt aggrieved by the fact that they were convicted and yet they received no punishment. So the prosecutor re-proposed a criminal action claiming that they committed the act of defilement given that their adulterous act was committed in the presence of a minor. In the second prosecution the Court accepted the plea of *ne bis in idem* since the fact forming the subject matter of the case was substantially the same as was the action leading to the crime of adultery.

Even though some circumstances were not mentioned in the original bill of indictment, the Court still held that the juridical fact was still the same and accepted the plea of *res judicata* and consequently *ne bis in idem*.

This position was also adopted by local jurisdiction; *Pulzija vs Nicolai*.

This means that if a person is charged with a minor offence stemming from a fact, which could give rise to various breaches of the law, but the police or the AG decided to prosecute him on a minor offence stemming from that fact, and in this prosecution he is either convicted or acquitted, then it is not possible for the person to sit in another criminal prosecution stemming from the same juridical fact, from which he would have been prosecuted. This is why it is important for the prosecutor to know what the juridical fact could lead to.

**Republika ta' Malta vs David Gatt** - "l-istess fatti".

**Pulzija vs Philip Ciantar** - *“ghalhekk huwa veru li bilkelma fatt ..., anka juridiku, b'mod li anke jekk il fatt jghati lok ghal diversi imputazzjonijiet ...”.*

**Ir-Repubblika ta' Malta vs. David Gatt, 9 ta' Novembru, 2012, Onor. Imhallef Lawrence Quintano**

David Gatt qua l-akkużat f'dawn il-proċeduri kienet il- persuna li kienet bieghet id-doża tad-droga herojina li kienet effettivament qatlet lid-defunta Rachel Bowdler, fejn l-akkużat dolożament, bil-ħsieb li joqtolha jew li jqegħdilha ħajitha f'periklu ċar, prepara din id-doża qerridija għall-istess vittma. Irriżulta wkoll li meta l-vittma dehret li kienet qed tbaġhti mill-konsegwenzi ta' din id-droga, l-istess David Gatt kien ta struzzjonijiet b'theddid lis-sinjuri Decelis sabiex ma jċemplux lill-ambulanża u meta dehret li kienet mietet, hu kien qalilhom ukoll kif u fejn għandhom jiddisponi mill- kadavru tagħha.

Illi l-esponenti jishaq li dan l-agir huwa bi ksur tad-dritt tar- rule against duplicity, hekk Prattikata u applikata sa mis- seklu 18. Illi l-“House of Lords”! fil-kaz DPP v. Merriman [1973] AC 584, permezz ta' Lord Morris of Borth-y-Gest, tghid :-

“It is ... a general rule that not more than one offence is to be charged in a count in an indictment....The Question arises – what is an offence? If A attacks B and, in doing so, stabs B five different times with a knife, has A committed one offence or five? If A in the dwelling house of B steals 10 different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery CJ in....Jemmison v Priddle [1972] 1QB489atp.495. I agree....That it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course, depend upon the circumstances ....”

In a similar vein, Lord Diplock said (at p. 607C) : The rule against duplicity, viz, that only one offence should be charged in any count of an indictment ....has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, [sottolinear tal- esponenti], it was the practice, as early as the 18th century, to charge them in a single count of an indictment .....

Ikompli l-Blackstone jishaq billi jghid :

“The test of whether it is proper to have a single count is : can the separate acts attributed to the accused fairly be said to form a single activity or transaction? It follows from that test that, if the particulars of a count can sensibly be interpreted as alleging a single activity, it will not be bad for duplicity, even if a number of distinct criminal acts are implied.

Ikompli l-Blackstone u jghid :

“thus, the rule against duplicity rests ultimately on common sense and pragmatic considerations of what is fair in all the circumstances”.

Ikompli l-Blackstone jghid :

“the forging discussion of the rule against duplicity demonstrates the distinction between an allegation that the accused has committed a number of distinct offences, which must always be put in separate counts, and an allegation merely that he committed a number of distinct criminal acts which formed part of one activity or transaction, which can properly go into a single count.”

Illi minghajr pregudizzju għall-eccezzjoni precedenti, l-esponenti qieghed jressaq eccezzjoni a tenur tal-artikolu 449(1)(d) tal-Kodici Kriminali fil-konfront kemm tat-Tieni Kap u fl-eventwalita` li tintlaqa` l-eccezzjoni precedenti, anke fil-konfront tat-Tielet Kap.

Illi minn analizi tal-fedina penali esebita in atti tal-akkuzat, jidher li l-esponenti nhar il-25 ta' Marzu, 2002 gie misjub hati ta' traffikar a tenur tal-Kapitolu 101 tal-Ligijiet ta' Malta u li gie hekk ikkundannat u moghti piena ta' sena prigunerija u LM 200 multa.

Illi jista` jkun ukol li hemm aktar sentenzi li jolqtu l-principju ta' ne bis in idem u li ma humiex misjub fil-fedina penali tal-esponeti stante li tali fedina penali hija aggornata biss sas-6 ta' Frar, 2008 u għaldaqstant l-esponenti jirrizerva li f'kaz li jezistu sentenzi ohra f'dan ir-rigward li jelenka l- istess matul is-seduta li ser tinzamm in konnessjoni ma' dawn l-eccezzjoni preliminari.

Għaldaqstant l-esponenti fid-dawl ta' dawn il-kazijiet decizi, qieghed jaghti eccezzjoni ta' gudikat li bih l-akkuzat kien ga gie misjub hati u dan a tenur tal-artikolu 449(1)(d) tal-Kodici Kriminali.

Id-difensur issottometta li dan l-agir tal-Avukat Ġenerali huwa ksur tad-dritt tar-rule against duplicity. Huwa rrefera għal dak li ntqal dwar dan fil-kaz 'DPP v Merriman' (1973) permezz ta' Lord Morris u dak li qal Lord Diplock waqt li kkwota tliet brani mill-Blackstone fosthom:

‘the foregoing discussion of the rule against duplicity demonstrates the distinction between an allegation that the accused has committed a number of distinct offences, which must always be put in separate counts, and an allegation merely that he committed a number of distinct criminal acts which formed part of one activity or transaction, which can properly go into a single count.’

It-trattazzjoni dwar din it-tieni eċċezzjoni tidher a fol 96 – 98 ta’ dan il-proċess. Id-difża saħqet li din ir-rule against duplicity li teżisti fir-Renju Unit għandha b’estensjoni tapplika għal Malta għaladarba l-Qrati tagħna jirreferu għall- Proċedura Kriminali Ingliża meta jkunu qed jiddeċiedu punti ta’ proċedura kriminali tal-Kap 9 tal-Liġijiet ta’ Malta. Waqt li d-difża kkonċediet li meta jkun hemm imputazzjonijiet jew atti tal-akkuża, il-Prosekuzzjoni dejjem għażlet li tagħmel Kapi differenti, ma jfissirx li dan għandu jibqa’ hekk għal dejjem. Barra minn hekk, jekk tkun skartata r-rule of duplicity, allura jiskatta l-artikolu 17(b) u mhux l-artikolu 17(h).

Il-Prosekuzzjoni ma’ dan ma qablitx u ssottomettiet li meta għandek sitwazzjoni ta’ traffikar ta’ żewġ drogi differenti jsiru imputazzjonijiet u / jew akkużi differenti. Il-Qorti ser tiegħu konjizzjoni ta’ dan il-fatt meta tiġi biex tagħti l-piena. Ma hemm xejn x’jobbliga lill-Avukat Ġenerali li jagħmel Kap wiehed. L-Avukat Ġenerali ssottometta wkoll li regola li tapplika l-Ingilterra mhux bilfors tapplika Malta.

### **Konsiderazzjonijiet tal-Qorti**

L-artikolu 589 tal- Kap 9 jgħid hekk dwar x’għandu jkun il- kontenut tal-Att tal-Akkuża ‘589. L-att tal-akkuża jsir fl-isem tar-Repubblika ta’ Malta, u għandu -

(a) isemmi l-qorti li jingieb quddiemha;

(b) jagħti ċar il-partikularitajiet tal-akkużat;

(ċ) ifisser il-fatt li jikkostitwixxi r-reat, bil-partikularitajiet li jkunu jistgħu jingħataw dwar iż-żmien u l-lok li fihom ikun sar il-fatt u dwar il-persuna li kontra tagħha r-reat ikun sar, flimkien maċ-ċirkostanzi kollha li, skont il-liġi u fil-fehma tal-Avukat Ġenerali, jistgħu jkabbru jew inaqqsu l-piena;

u

(d) jispiċċa b’gabra fil-qosor li fiha l-imputat jiġi akkużat tar-reat kif miġjub jew imfisser fil-liġi, u bit-talba sabiex jitmexxa kontra l-akkużat skont il-liġi, u sabiex l-istess akkużat jiġi ikkundannat għall-piena stabbilita mil-liġi (hawn jingħad l-artikolu tal-liġi li jikkontempla r-reat) jew għal kull piena oħra li skont il-liġi tista’ tingħata skont kif jiġi iddikjarat hati l-akkużat.

Fil-fehma tal-Qorti kemm it-tieni Kap kif ukoll it-Tielet Kap għandhom l-elementi kollha elenkati fl-artikolu 589.

It-tieni, bħalma sewwa sssottometta l-Avukat Ġenerali, mhux kull dottrina jew prinċipju li hemm fil-proċedura kriminali Ingliża bilfors japplika għal Malta. Malta għandha Kodiċi ta’ Proċedura Kriminali tagħha u fejn hemm bżonn hemm referenzi għal dak li jipprovdi l-Kap 12. (Ara b’mod partikolari l-artikolu 520 li jagħmel referenza għal 128 artikolu tal-Kap 12.

Is-seba’, il-Qorti mhix qed tara dik id-duppliċita’ li minnha qiegħed jilmonta l-akkużat. L-Att tal-Akkuża huwa intiż biex l-affarijiet ikunu ċari kemm għall-akkużat, kemm għall-ġurija u kif ukoll għall-imħallef li jrid jindirizza lill- ġurati. Il-fatt li kemm l-erojina kif ukoll il-kokaina

huma tnejn ‘drogi’ ma jfissirx li meta wiehed jittrafikhom dan ikun qed jagħmel ‘ a number of distinct criminal acts which formed part of one activity.’ Kull darba li għandek il-bejgħ ta’ xi droga għandek ‘a distinct criminal activity’ u ma jistax tali bejgħ jitqies bhala ‘one activity or transaction’.

Għaldaqstant il-Qorti qed tiċhad it-tieni eċċezzjoni.

It-Tielet Eċċezzjoni – Ne Bis in Idem

Fit-2 ta’ Lulju, 2012, l-abbli Avukat Difensur iritira t-tielet eċċezzjoni (ara fol 125). Għaldaqstant il-Qorti mhix qed tieħu konjizzjoni tagħha.

### **Il-Pulizja vs. Clint Chetcuti 12th December 2024, Qorti Tal-Appell Kriminali**

**Clint Chetcuti detenur** tal-karta tal-identita’ Maltija **0579092M**, akkuzat quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali talli:

- Meta b'diversi atti magħmulin b'rizoluzzjoni wahda, għax-xhur minn Lulju 2023, Awissu 2023, Settembru 2023, Ottubru 2023, Novembru 2023 u Dicembru 2023 meta hekk ordnat minn xi Qorti jew marbut b'kuntratt naqas li jagħti lil Diandra Cilia Srouer u/jew lil uliedu s-somma f'fissata minn dik il-Qorti jew stipulata bil-kuntratt bhala manteniment għaliya u/jew għall-ulied fi zmien 15 -il jum minn dak il-jum li fih skond dik l-ordni jew dak il-kuntratt, ikollha tithallas dik is-somma.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali ta’ nhar it-23 ta’ Settembru 2024, fejn filwaqt li caħdet l-eċċezzjoni ta’ preskrizzjoni kif sollevata mid-difiza, ma sabitx lill-appellant hati tal-imputazzjoni hekk kif dedotta fil- konfront tiegħu għax-xahar ta’ Dicembru 2023 u konsegwentarnent illiberatu minnha izda sabet lill-appellant hati tal-imputazzjoni hekk kif dedotta fil-konfront tiegħu kwantu għax-xhur rimanenti u cioe’ dawk ta’ bejn Lulju u Novembru 2023 u kkundannatu xahar detenzjoni.

Rat ir-rikors tal-appell tal-appellant Clint Chetcuti, preżentat fir-reġistru ta’ din l- Onorabbli Qorti nhar it-8 ta’ Ottubru, 2024 , fejn talab lil din l-Onorabbli Qorti sabiex jogħgobha tirriforma s-sentenza appellata u dana billi;

1) Tirrevoka s-sentenza tal-Ewwel Onorabbli Qorti u tiddikjara l-azzjoni kriminali meħuda kontra l-appellant bhala preskritta.

**L-aggravji huma ċari u manifesti u jikkonsistu fis-segwenti: Illi l-fatti li taw lok għall-proċeduri odjerni kienu s-segwenti:**

#### **A. Azzjoni Preskritta bit-Trapass taz-Zmien**

Jirrizulta mir-riferta li tqassmet lill-appellant illi l-istess appellant gie notifikat b'dawn il-proċeduri u cioe’ bl-akkuza nhar il-11 ta’ Gunju 2024.

Jirrizulta wkoll illi r-rapport li għamlet il-parte civile kien jinkwadra manteniment dovut għax-xhur ta’ Lulju 2023 sa Novembru 2023 u dan skond digriet datat 13 ta’ Gunju 2023,

L-appellant qatt ma kellu jigi akkuzat talli naqas li hallas il- manteniment ghax-xahar ta' Dicembru 2023 u dan stante li kien thallas. Fuq dan il-punt l-Ewwel Onorabbli Qorti rrimarkat illi: "Irid jinghad li d-difiza ghandha ragun meta tikkontendi li ma tistax tifhem kif l-akkuza tinkludi x'xabar ta' Dicembru 2023 meta r-rapport relattiv sar Novembru 2023 (u konsegwentament ma seta' qatt jinkludi xahar futur ta' Dicembru 2023) u meta naturalment l-affidavit esebit mill-Prosekuzzjoni wkoll jinkwadra ruhu sa Novembru 2023, u l-parte civile stess fix-xchieda taghba ddikjarat li ntavolat rapport mil-Pulizja ghax-xhur ta' bejn Lulju u Novembru 2023.

Ghaldaqstant l-akkuza fil-konfront tal-appellant kellha ttrissali sa Novembru 2023 u mhux Dicembru 2023. Illi ghaldaqstant il-kalkoli ta' jekk l-akkuzi kienux preskritti u dan kif gie irrimarkat mil-ewwel Onorabbli Qorti u cioe' s-6 xhur u 15 -il gurnata minn meta kien dovut il-manteniment kellu jitqies ix-xahar ta' Novembru 2023 u mhux Dicembru 2023.

Illi l-appellant pero' ma jaqbilx mal-kalkoli ta' kif saru mil-Ewwel Onorabbli Qorti fejn bi zvista flok ikkalkulat is-6 xhur u 15 -il gurnata mid-data ta meta l-pagament kien dovut u cioe' sitt xhur u hmistax -il gurnata mit-13 ta' Novembru 2023 ikkalkulat is-6 xhur u 15-il gurnata mit-28 ta' Novembru 2023 u cioe' mid-data tad-digriet li kien inhareg mil-Qorti tal-Familja liema Qorti kienet varjat id- digriet tat-13 ta' Gunju 2023 u liema digriet mhuwiex mertu ta' dawn il-proceduri stante li jikkaverja l- manteniment mix-xahar ta' Dicembru 2023.

Illi stante li l-appellant ma giex notifikat fi zmien sitt xhur minn meta gie kkunsmat ir-reat cioe' mil-hmistax -il jum li fih kellu jithallas il- manteniment dovut ghax-xahar ta' Novembru tas-sena 2023 l-azzjoni kellha tigi ddikjarata bhala preskritta mil-Ewwel Onorabbli Qorti

## **B. Dwar il-Piena Kominata**

Minghajr ebda pregudizzju ghas-suespost filwaqt li llum il-gurnata l-appellant qieghed jinjora l-obbligi tieghu f'dak li jirrigwardja hlas ta' manteniment, fil-perijodu indikat fl-akkuza l-istess appellant kien ghaddej minn problemi finanzjarji.

(ii) Ghal-evitar ta' kwalsiasi malintiz, l-appellant huwa konxju mill-fatt li fuq skorta ta' giurisprudenza kopjuza in materja, tibdil fil-mezzi finanzjarji ta' min huwa obligat ihallas il-manteniment ma tiggustifikax in-nuqqas tieghu li jonora tali obbligu. Di fatti, bl-ebda mod l-appellant ma qieghed iqajjem id-difiza ta' *ad impossibilia nemo tentetur* izda sejjer biss igib a konjizzjoni ta' dina l-Onorabbli Qorti numru ta' fatturi li fl-umli fehma tieghu ghandhom jimmilitaw favur il-kominar ta' piena iktar miti

(ii) In primis, l-appellant jaghmel accenn ghal dak ritenut mill-Qorti tal- Appell Kriminali fis-sentenza fl-ismijiet '**Il-Pulizija v. John Debono**' deciza nhar is-27 ta' April 2012, fejn inghad illi: "il-fatt li persuna tisfa bla xoghol ma jiskuzahix mill- obbligu taghha li twettaq id-digriet tas-Sekond Awla tal-Qorti Civili... Ir-rimedju li ghandu u li kellu jiehu l-appellant kien li jadixxi tempestivament u fi zmien utli lill- Qorti Civili kompetenti biex din, wara li tiehu konjizzjoni

tal-provi, tipprovdi billi se mai timmodifika l-ordni tal- manteniment." [sottolinejar tal-appellant).

**'Il-Pulizija v. Publius Said'**, il-Qorti riformat is-sentenza appellata, rrevokata in kwantu kkundannat lill-appellant ghal xahar prigunerija u minflok kkundannatu għall-hlas ta' ammenda fl-ammont ta' €58.23, liema somma tigi kkonvertita f'hamest (5) ijiem detenzjoni jekk ma tithallasx minnufih

### **Ikkunsidrat ulterjorment**

Illi din is-sentenza sejra titratta **unikament** l-eċċezzjoni tal-preskrizzjoni.

Fir-rigward l-eċċezzjoni tal-preskrizzjoni, l-Avukat Ġenerali fir-risposta tal-appell tiegħu aderixxa ruħu mal-argument sollevati mill-appellant. Illi effettivament huwa jinkonkludi r-risposta tal-appell tiegħu fejn jindika *“għal dawn ir-raġunijiet, l-appell għandu jiġi milqugħ fir-rigward tal-ewwel aggravju stante li dan ir-reat huwa preskritt”*.

Illi artikolu 338 (z) tal-Kap 9 jipprovdi kif ġej:

*‘Meta hekk ordnat minn xi qorti jew hekk marbutb’kuntratt jonqos li jagħti lil xi persuna, is-sommaffissata minn dik il-qorti jew stipulata fil- kuntrattbħala manteniment għal dik il-persuna fi żmienhmistax-il jum minn dak il-jum li fih, skont dik l- ordnijew dak il-kuntratt, ikollha tithallas dik is- somma:Iżda, minkejja kull dispożizzjoni ohra ta’ dan il-Kodiċi, l-azzjoni kriminali għal reat taht dan il- paragrafu taqa’ bi preskrizzjoni bl-gheluq ta’ sitt xhur’*

L-artikoli 691 (1) tal-Kap 9 tipprovdi dan li ġej għar-rigward ir-regola tal- preskrizzjoni meta jkun hemm reat kontinwat:

*‘Għar-reati ikkunsmati, iż-żmien tal-preskrizzjoni jibda mill-jum tal- konsumazzjoni; għall-attentati, mill-jum li fih isir l-aħħar att ta’ esekuzzjoni; għar-reati kontinwati, mill-jum li fih isir l-aħħar ksur tal- liġi; u għar-reati permanenti mill-jum li fih ma tibqax il-permanenza tar-reat.’*

Harsa lejn is-sentenza fl-ismijiet **I-Pulizija vs Peter Abdilla** deċiża nhar it-28 ta’ Lulju 2010 mill-Qorti tal-Appell Kriminali nsibu:

*“Il-kuncett ta’ “continuous offence” jincidi primarjament fuq il- komputazzjoni tal-piena filwaqt illi l-“continuing offence” jincidi fuq l-aspett sostantiv tar-reat. Fil-fatt dawn huma zewg koncetti guridikament differenti u separati minn xulxin. Id-diffikolta’ doppja li tinholoq hija li bit-test Malti hafna drabi nirriferu kemm għall- “continuing offence” kif ukoll għall-“continuous offence” bħala reat kontinwat, benche’ li huma zewg kuncetti guridikament differenti minn xulxin. ....Il-fatt jibqa’ wiehed li l-gurisprudenza tindika bl-izjed mod car li l-artikolu 338(z) huwa reat istantaneju u mhux kontinwat (“continuing”)”*



Dan ma jfissirx li numru ta' reati kontravvenzjonali ta' natura istantaneja ma jistghux – anke a beneficcju ta' l-imputat – jingabru flimkien mill-prosekuzzjoni bhala reat kontinwat, kif donnu qed jippretendi l-appellant bl-aggravju sollevat minnu ta' preskrizzjoni. Ghar-reat kontinwat u r-reat permanenti (continuing offence) ir-regoli tal-preskrizzjoni mhumex l-istess. Difatti skond l-artikolu 691(1) tal-Kodici Kriminali, filwaqt li fil-kaz tar-reat kontinwat kontemplat fl-artikolu 18 tal-Kodici Kriminali z- zmien tal-preskrizzjoni jibda mill-jum li fih isir lahhar ksur tal-ligi, fil-kaz ta' reat permanenti dan jibda mill-jum li fih ma tibqax il-permanenza tar-reat.

Illi jirrizulta li hemm qbil bejn l-appellant u l-Avukat Ġenerali li l-imputazzjonijiet imressqa kontra l-appellant huma tabilhaqq preskritti. Pero ciononsotante il-Qorti ma tistax tistrieħ biss fuq dak li jiftieħmu l-partijiet trid tindaga ulterjorment stante li dawn huma proceduri ex-ufficju u kontra l-amministrazzjoni tal-Qorti.

Kif inhu risaput, fil-kamp penali il-preskrizzjoni ta' l-azzjoni hi materja ta' ordni pubbliku u din il-Qorti (cioe' il-Qorti ta' l-Appell Kriminali) hi obbligata li tezamina l- atti biex tara jekk effettivament kinitx irrekorriet tali preskrizzjoni minkejja li jidher li hemm qbil.

Il-perijodu li jikkoncerna din l-akkuza huwa l-manteniment ghax-xhur minn Lulju 2023, Awissu 2023, Settembru 2023, Ottubru 2023, Novembru 2023 u Dicembru 2023.

Illi l-manteniment dovut mill-imputat għall-minuri gie stabbilit permezz ta' l-ewwel digriet tal-Imħallef Dottor Jacqueline Padovani Grima datat it-tlettax (13) ta' Ġunju tas-sena elfejn tlieta u ghoxrin (2023) (fol 12 u fol 13 tal-process) liema digriet stabilixxa r-retta alimentarja fl-ammont ta' erba' mitt Euro (€400) fix-xahar, liema digriet gie varjat permezz ta' digriet iehor tal-Imħallef Dottor Jacqueline Padovani Grima datat it-tmienja u ghoxrin (28) ta' Novembru tas-sena elfejn tlieta u ghoxrin (2023) (fol 19 tal-process) li naqqas is-somma ta' manteniment dovut mill-imputat għal tlett mitt Euro (€300) fix-xahar.

Illi ghalkemm tul dawn il-proceduri irrizulta li l-manteniment ghax-xahar ta' Dicembru tas-sena elfejn tlieta u ghoxrin (2023) kien imħallas, għaladarba dan ix-xahar huwa parti mill-akkuza din il-Qorti xorta għandha tieħu dan ix-xahar in konsiderazzjoni sabiex tistabilixxi jekk l-akkuza hijix wahda preskritta o meno.

Illi l-**artikolu 293 tal-Kap 9** tal-Ligijiet ta' Malta jishaq:

*“Iz-zmien tal-peskrizzjoni jinkiser b'kul att tal-procediment li jigi nnotifikat lill-imputat jew akkuzat dwar il-fatt li għalih ikun imputat jew akkuzat “*

Illi din il-Qorti ma taqbilx ma dak sottomess mill-Abbli Legali tal-appellant illi l- Ewwel Qorti kien żbaljata fil-kalkoli tagħha għar-rigward il-preskrizzjoni. Jekk se mai hemm dubju dwar meta kien dovut il-manteniment ghax-xahar ta' Dicembru tas-sena elfejn tlieta u ghoxrin (2023), id-dati huma:

- dik tat-tmienja u ghoxrin (28) ta' Novembru tas-sena elfejn tlieta u ghoxrin (2023) – fejn l-ahhar gurnata ghal-fini ta' preskrizzjoni kienet tkun dik tat-tnax (12) ta' Gunju tas-sena elfejn erbgħa u ghoxrin (2024)
- dik tat-tlethax (13) ta' Dicembru tas-sena elfejn tlieta u ghoxrin (2023) – fejn l-ahhar gurnata ghal-fini ta' preskrizzjoni kienet tkun dik fit-tmienja u ghoxrin (28) ta' Gunju tas-sena elfejn erbgħa u ghoxrin (2024)

Illi għalhekk ifisser li l-imputat gie notifikat bl-akkuża fiż-żmien il-Ligi u għalhekk dan l-aggravju qiegħed jiġi miċhud.

Għalhekk din il-Qorti tikkonferma is-sentenza mogħtija mill-ewwel Qorti fejn ċaħdet l-eċċezzjoni tal-preskrizzjoni.

### **Il-Pulizija (Spettur Roderick Attard)` (Spettur Charlotte Curmi) Vs Raymond Camilleri Qorti tal-Magistrati (Malta) Bhala Qorti ta' Gudikatura Kriminali, 25 ta' Settembru, 2023**

Rat l-imputazzjonijiet dedotti kontra Raymond Camilleri ta' 64 sena iben Paul u Antonia xebba Vassallo mwieded Rabat, Malta nhar il-hmistax (15) ta' Settembru 1957, residenti gewwa 65, Conway, Triq Pierre Muscat, Rabat u detentur tal-karta tal-identita' numru 653157 M talli

Nhar it-tlieta u ghoxrin (23) ta' April tas-sena elfejn u ghoxrin (2020) għal habta ta' bejn l-hamsa ta' wara nofsinhar (17:00 hrs) u s-sebgha u nofs ta' filghaxija (19:30hrs) gewwa Triq Had-Dingli, ir- Rabat u/ jew fi bnadi ohra fil-gzejjer Maltin:

(1) B' nuqqas ta' hsieb bi traskuragni jew b' nuqqas ta' hila fl-arti jew professjoni tieghu, jew b' nuqqas ta' tharis ta' regolamenti, ikkaguna hruq, jew għamel xi hsara jew hassar jew għarraq xi haga, minhabba f' hekk Matteo Grima bata offiza gravi fuq il-persuna tieghu, liema offiza tkun iggib il-konsegwenzi msemmijin fl-artikolu 218;

(2) U aktar talli fl-istess data, lok, matul il-hin indikat, u cirkostanzi, soqt vettura bil-mutur ta' l-għamla Honda Fit Maxus bin-numri ta' registrazzjoni ECE 893, b' mod perikoluz, bla kont u traskurat.

Rat li fis-seduta tal-28 ta' Settembru, 2022 id-difiza qed tissollecita l-preskrizzjoni skont l-artikolu 688 ( e) tal-Kap. 9 tal-Ligijiet ta' Malta dan kwantu l-imputazzjonijiet adebitati lil imputat huma reati li ma jiskorrux is-sena u l-kawza giet differita' sabiex jiġi trattat il-punt tal-preskrizzjoni.

Wara li semgħet it-trattazzjoni tal-partijiet limitatament dwar l-eccezzjoni tal-preskrizzjoni fis-seduta tal-27 ta' Frar 2023;

Wara li rat ix-xhieda, d-dokument u l-atti kollha tal-kaz;

Ikkunsidrat

Rat l-artikoli m 688€ 328 (b), art. 225, 226 (1)(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta, l-artikolu 15 (1) tal-Kapitolu 65 tal-Ligijiet ta' Malta u l-artikolu 688 ( e) tal-Kapitolu 9 tal-Ligijiet ta' Malta

Illi l-incident *de quo* sehh fit-tlieta u ghoxrin (23) ta' April, tas-sena elfejn u ghoxrin (2020). Mir- riferita ezebita jirrizulta li l-imputat gie notifikat bic-citazzjoni fit-tlettax (13) ta' Lulju, tas-sena elfejn u tnejn u ghoxrin (2022).

Ikkunsidrat

**Doris Serpina Sciberras** xehedet fis-seduta tal-28 ta' Settembru, 2022. Gie ipprezentat il-procè verbal kontra Raymond Camilleri li gie ghandha minghand l-Avukat Generali fis-26 ta' Settembru, 2022 dan il-Process Verbal gie redatt mill-Magistrat Dr Nadine Lia.

**Spt. Roderick Attard** xehed fis-seduta tal-27 ta' Frar, 2023. Jixhed li permezz ta' nota ezebixxa r- referta ta' Sur Camilleri li qed jaghraf fl-awla. Liema avviz gie mqassam minnu stess fl-ghassa tar- Rabat nhar it-13 ta' Lulju, 2022.

Ikkunsidrat

Illi d-difiza qed tinvoka li l-imputazzjonijiet huma preskritti a tenur tal-artikolu 688 (e) tal-Kapitolu 9 li jghid;

“688.Bla hsara ta' fejn il-ligi tiddisponi xort'ohra, l-azzjoni kriminali taqa' bi preskrizzjoni (e) bl-eghluq ta' sentejn ghad-delitti suggetti ghall-pienata' prigunerija ghal zmien ta' anqas minn sena, jew tal-multa jew ghall-pieni tal-kontravvenzjonijiet.”

Illi qed jigi rilevat li fil-kaz in ezami l-imputat kien maghruf mill-pulzija tant li kif jirrizulta mir-rapport tal-pulzija NPS 7/Q/820/2020 datat tlieta u ghoxrin ta' April tas-sena elfejn u ghoxrin (23.04.2020) anness mac-citazzjoni l-pulzija kellmu lil imputat fuq is-sit tal-incident, u fir-rapport hemm imnizzel d-deskrizzjoni tal-incident li taha l- imputat lil pulzija li marru fuq is-sit tal-incident dak innhar stess. Illi dan il-kaz kien ukoll soggett ghall-inkjesta magisterjali li giet konkluzja mill- Onorabbli Magistrat Dr Nadine Lia fit-12 ta' Jannar, 2022, fejn il-vettura tal-imputat giet elevata u inghatat lura wara digriet tal-Magistrat Inkwirenti tas-7 ta' Lulju, 2020. Illi ghalhekk ma hemm ebda' dubju li l-imputat kien maghruf u identifikabbli mil-Pulizija.

L-ewwel imputazzjoni dedotta kontra l-imputat hija skont artikolu 328 (b) tal-Kapitolu 9 tal-Ligijiet ta' Malta li jghid li

“328.Kull min, b'nuqqas ta' hsieb, bi traskuraġni jew b'nuqqas sta' hila fl-arti jew professjoni tiegħu, jew b'nuqqas ta' tharis ta'regolamenti, jikkaguna hruq, jew jagħmel xi hsara jew iħassar jew jgħarraq xi haġa, kif imsemmi f'dan is-Sub-titolu, jehel, metaj insab

b) jekk minhabba f'hekk xi hadd ibati offiża gravi fuq il-persuna, li tkun iggib il-konsegwenzi msemmijin fl-artikolu 218, il-piena ta' prigunerija ghal zmien mhux izjed minn sitt xhur jew multa mhux izjed minn elfejntliet mija u disgha u ghoxrin euro u sebgha u tletincentezmu (€2,329.37).”

Ir-referenza ghall-artikolu 218 fl-artikolu relevanti li huwa l-artikolu 328 (b) tal-Kap. 9 huwa intiz ghad-deskrizzjoni tal-offiża gravi u l-piena massima li tista' tigi imposta taht l-artikolu li bih gie akkkużat l-imputat huwa prigunerija ghal zmien mhux izjed minn sitt xhur jew multa kif hemm

stipulat fl-artikolu li bih gie akkkużat l-imputat.

Illi l-*parte civile* fit-trattazzjoni taghha qed targumenta li l-kaz in ezami jaqa' taht 226 (1) (a) li jrid jinqara flimkien mal-artikolu 225 riprodotti t-tnejn

225.(1) Kull min, b'nuqqas ta' hsieb, bi traskuragni, jew b'nuqqas ta' hila fl-arti jew professjoni tieghu, jew b'nuqqas ta' tharis ta' regolamenti, jikkaguna l-mewt ta' xi hadd, jehel, meta jinsab hati, il-piena ta' prigunerija ghal zmien mhux izjed minnerba' snin jew multa mhux izjed minn hdax-il elf sitt mija u sitta uerbghin euro u sebgha u tmenin centezmu (€11,646.87)

226.(1) Jekk minhabba l-fatti imsemmijin fl-ahhar artikoluqabel dan issir offiza fuq il-persuna, l-akkużat, meta jinsab hati, jehel –

(A) jekk l-offiza tkun gravi u ggib il-konsegwenzi msemmijin fl-artikolu 218, il-piena ta' prigunerija ghal zmien mhux izjed minn sena jew multa mhux izjed minn erbat elef sitt mija u tmienja u hamsin euro u hamsa u sebghin centezmu (€4,658.75).

Illi kif inhi mressqa l-akkuza li giet riprodotta fil-bidu ta' din is-sentenza l-artikolu li gie ikkwotat huwa kelma b' kelma l-artikolu 328 tal-Kap. 9 tal-Ligijiet ta' Malta u mhux l-artikolu 225 tal-Kap. 9 tal-Ligijiet ta' Malta. Il-Qorti hija marbuta li taghti decizjoni skont l-akkuza li ghandha a quddiemha.

Illi huwa inkontestat li l-incident sehh fit-23 ta' April 2020 u l-imputat gie notifikat fit-13 ta' Lulju, 2022 u ghalhekk oltre l-perijodu ta' sentejn u l-akkuza hija ghalhekk preskritta.

Illi t-tieni imputazzjoni hija skont l-artikolu 15 (1) tal-Kapitolu 65 tal-Ligijiet ta' Malta fejn l-piena massima hija ukoll ta' mhux izjed minn sena. Fit-trattazzjoni taghha l-*parte civile* kient ukoll accettat li t-tieni imputazzjoni hija preskritta skont il-ligi.

Decide

Il-Qorti wara li rat l-artikoli 688(e) 328 (b), art. 225, 226 (1)(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta, l-artikolu 15 (1) tal-Kapitolu 65 tal-Ligijiet ta' Malta u l-artikolu 688 (e) tal-Kapitolu 9 tal-Ligijiet ta' Malta qed tilqa' l-eccezzjoni sollevata mill-imsemmi Raymond Camilleri u tiddikjara l-azzjoni preskritta skont il-ligi u kwindi tilliberah minn kull azzjoni migjuba fil-konfront tieghu.

## **Notizie Criminis (cont.) - Kwerela**

Maltese law requires the waiver of the complaint to be expressed, made personally by the complainant in open Court, except where the right of representation is due. There is an exception to this through representatives Article 374B which states that the withdrawal can be carried out by representatives. Article 374D – given that according to this article if the complainant fails to appear, the defendant may request and obtain from the Court his discharge. The Court is accepting that the tacit waiver of the complaint can be upheld in the case where the complainant does not turn up. This is not acceptable if the tacit waiver had been in exchange for goods, as the tacit waiver would then be considered to be given conditionally.

Another scenario where the complaint is lodged with the executive police. There could also be a tacit waiver, but does not really preclude the executive police from proceeding with the exercise of the criminal action ex officio provided that it falls within article 373 proviso (public order, failure to institute proceedings by injured party etc). In this case the tacit waiver cannot have the same effect as an express waiver, thus if the complaint is lodged and waived/withdrawn, it is not possible for a fresh complaint to be lodged for the same fact previously complained.

In certain circumstances, once the complaint is lodged, action can be taken by the executive police. Article 540. In those cases where the prosecution is left in the hands of the private party, as a rule, it is up to that party to proceed with the criminal action. However, the executive police are still obliged to inform a magistrate of the fact that they would have received a notizia criminis. This article shows that when it comes to the assessment of a notizia crimins, the executive police have the obligation to actually investigate the notizia criminis.

The concept of complainant has almost become fused with victim status. In so far as risk assessment, the law provides a mode of assessment that goes beyond the traditional limits of the Courts of Criminal Justice. There are certain circumstances where the law grants some sort of discretionary powers to the police upon the receipt of the notizie criminis. This takes us to article 541. It gives certain remedies to certain circumstances, but it also goes much deeper at a conceptual level. If the police refuses to institute proceedings, it is lawful for the complainant to make an application to the CoM for an order to the police to instate proceedings, and if after hearing the Court is satisfied that the complaint is prima facie justified it shall allow the application and shall order the police accordingly. The applicant is to confirm on oath the complaint and provide any further evidence as so required.

The CoM is being invited to review the description of the police not to institute proceedings.

In conducting this exercise, the CoM would be carrying out what Act 8 of 1909 wanted.

Article 347 – Proceedings ex officio shall be lawful to be taken by the police in case of crimes for which the law does not expressly provide that the complaint is requisite, or in the case of an offence carrying prohibited weapons, or in the case of DV.

## **Court of Criminal Appeal (Superior Jurisdiction)**

Whilst it is true that you only have one CCA, the rules governing the way the CCA operate differ. You cannot take the rules applicable to the CCA in its inferior jurisdiction and apply them to the CCA in its superior jurisdiction. This is because the rules of the game are different. There are some similarities but always keep in mind that here we are dealing with two different institutes and you cannot consider the rules for both CCA.

Another very important distinction between these two Courts is in relation to the composition. In the CCA-Inferior Jurisdiction, you have one judge whilst in the CCA-Superior Jurisdiction, you have three judges (one of whom is always the Chief Justice).

Both CCAs entail a process of review / reassessment of the decision that would have been reached by the first Court. So, as far as the exercise is concerned, is similar but the way this process operates is not identical. The CCA-IJ is a collegial Court and its decision is collegial. In the Maltese system, there is no option given to judges sitting on this Court to issue dissenting judgements or opinions. That is not possible.

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# **THE Court OF CRIMINAL APPEAL**

*497. In this Title, unless the context otherwise requires, -the expression*

*"appellant" includes a person who has been convicted and desires to appeal under this Title; and the expression*

*"sentence" includes any order of the Court made on conviction with reference to the person convicted and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order.*

497 - Appellant includes a person who has been convicted and decides to appeal under this title. The concept of an appeal proper is not something new to Malta since Malta did not have a proper CCA before 1967.

In 1967, there was a lot of controversy when this was introduced - people were debating whether there could even be an appeal from a sentence. So if you had a trial by jury and they reach a verdict, why do you need an appeal where you have judges who may possibly overturn the sentence? Why go all through that hassle?

If this happens, what would the implications be on the whole procedural system?

The appeal was quite restrictive and it was limited to certain instances but as usually happens, legislators introduced new grounds / concepts of appeal.

497 - The special appellant - the expression appellant includes a person who has been convicted and desires to appeal under this title. This was introduced in 1967.

The appeal gives a higher level of legal validation. In Malta, the verdict is delivered by a jury but the sentence is awarded by the Judge and thus, the appeal concerns the award of the judge and not a reassessment of the verdict itself.

The Criminal Court is empowered to deliver judgements by procedural issues - when there are preliminary pleas raised by the accused, admissibility of evidence raised by the AG. These are legal issues and these are determined by the judge - you don't need a jury for this. However, there are certain procedural issues that MAY be referred to the jury.

As a rule, when preliminary pleas are raised, the decision of these is reached by the trial judge sitting alone. In that case, if an appeal is lodged that judgement determining preliminary pleas, that appeal falls in the lap of CCA but it is a technical legal matter for the Court to decide because as a rule, leaving the concept of insanity aside, deal with legal matters and legal matters are decided by legal minds - the judges.

On the other hand matters touching facts and therefore, the determination of factual matters such as whether the accused is guilty or not guilty of having committed the criminal offences with which they stand accused or anyone of them in any form that is allowed by law - that is a matter that is referred to the jury to determine.

Insanity - this is a factual issue and therefore, judgement delivered by the jury not the judge. This is referred to a specific panel of jurors and this is a specific jury, il-gurin, to determine whether he is sane or insane.

In this context, the decision reached by this special panel of jurors.

The jury must be qualified one - minimum 6 to 3. You cannot have 5 to 4 but in a jurin you can have it. Again, issues related to insanity can also fall on the laps of criminal appeal. Be it as it may, the CCA “shall for the purposes of a subject to the provisions of this title, have, full power to determine in accordance with this title, any questions necessary to be determined for the purpose of doing justice in the case before the Court”.

“The provisions contained in this title shall not apply to appeals of judgements from the COM.”

The reason is that the legislator understood that the stakes at play are high here. Remember that back in 1967, technically, this CC could still award capital punishment.

This is why the appellate Court has full power because the stakes are very high. Had there been this provision, the judge questions whether a person like Carmelo Borg Pisani could have been sent to the gallows (this provision was not there back then).

**These provisions do not apply to the CCA-IJ.** This room for manoeuvre is not applicable. The jurisdiction of the COM back in 1967 was not the jurisdiction of the COM in 2025. The complexity of criminal cases ending up before the COM, most of them would have qualified for a trial by jury back in 1967 and therefore, back then, most of them, would have been subject to three judges and not one judge sitting alone.

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We are dealing with the **Court of Criminal Appeals**. As we have said we are going to focus on the **Court of Criminal Appeal in its Inferior Jurisdiction**. It can deal with judgments dealt with by the criminal Court, either with a jury or without. We will see the difference that there is between these two categories and the particular context

- The process before the criminal Court essentially starts after the AG filed the bill of indictment in the registry of the criminal Court. Once the AG makes this decision to formally accuse a person of having committed a serious crime the role of the criminal Court properly kicks in.



- This process entails the service of the bill of indictment on the accused with the accused being given the right to react, to start defending themselves. How? First of all the accused may decide to remain silent and to do nothing, simply because in our system an accused person is presumed to be innocent unless and until proven to be guilty before a criminal jurisdiction proving guilt beyond a reasonable doubt. It is up to the prosecution to prove this.

However they have a right to defend themselves and this can take various forms; for example the accused is given the right to raise preliminary pleas. It is legally possible to raise these pleas. If the case does not present any opportunity to raise pleas, then the accused then cannot raise preliminary pleas.

However in those cases where preliminary pleas may be raised, then the accused have the right to raise such pleas. These pleas are raised before the Criminal Court, they are raised by means of a note in writing, wherein any one or more of the grounds mentioned by Article 449 of the Criminal Code may be brought to the attention and eventual decision of the Court.

## **Pleas to be raised and determined after the reading out of indictment - Article 449**

**449.** (1) The following pleas, that is to say:

- (a) plea to the jurisdiction of the Court;
- (b) plea of nullity of or defect in the indictment;
- (c) plea of extinguishment of action;
- (d) plea of "autrefois convict" or "autrefois acquit";
- (e) plea of insanity of the accused at the time of the trial;
- (f) plea of insanity at the time of the offence or any plea relating to any other point of fact which excludes the imputability of the accused or in consequence of which the trial should not take place at the time, or at any future time; and
- (g) saving the provisions of article 446(1), any preliminary plea, may only be raised if notice thereof has been given as provided in article 438(2):

Provided that the Court may authorise such pleas to be raised for a reason which arises after the time within which the note referred to in article 438(2) is to be filed in the registry of the Court.

(2) Deleted by III.2002.107.

(3) Nevertheless, the pleas mentioned in sub-article (1), with the exception of the plea of challenge of the judge or the plea of defect in the indictment, may be raised after the verdict of the jury and before judgment, if the necessity arises from any fact or circumstance of fact expressly found by the jury.

(4) Any point of fact which, without excluding the imputability of the accused or without excluding his capacity to plead, is a bar to his undergoing punishment, may be raised even after the verdict of the jury.

→ Once the preliminary pleas are raised you will see the Criminal Court kicking its procedure in motion, the criminal Court will hear the accused's pleading in relation to the preliminary pleas. Hears the AG's sides. Then it decides whether the preliminary pleas can be upheld or dismissed, this happens during the preliminary stages of the criminal Court. Mostly preliminary pleas are of legal nature.

The plea relating to the jurisdiction of the criminal Court

The plea of nullity or defect of the bill of indictment

The plea of the extinguishment of the criminal action

The plea of ... whether the person accused would have been found either guilty or acquittal by a Court of criminal jurisdiction

Has to be the same person

And the same juridical fact

→ These grounds are of a legal nature. There are also other preliminary pleas that the Court may be required to decide;

plea of insanity of the accused at the time of the trial or

plea of sanity of the accused at the time of the commission of the fact that is deemed to be a criminal offence or in relation to any other plea relating to a point of fact that would exclude the imputability of the accused in consequence of which the trial of the accused is not take place at that time or any future time.

These two grounds of insanity are also deemed preliminary pleas only that the actual decision in relation to these preliminary pleas are determined by means of a special procedure which we referred to in our previous lecture.

Therefore once the criminal Court makes its assessment in relation to these pleas - which are most of a legal nature - it is up to the judge presiding the criminal Court to decide these pleas. Once the criminal Court arrives at its decision, this decision is also subject to appeal, to the Court of Criminal Appeal in its Superior Jurisdiction.

Any preliminary plea that would have been raised by the accused, it is possible for the AG or the party accused to launch an appeal before the Court of Criminal Appeal (SJ), if they feel aggrieved by that decision.

The procedure before the criminal Court is such that first of all the bill of indictment is read out during the first sitting that is held before the criminal Court. During that first hearing the bill of indictment is read out, but if preliminary pleas would have been raised, one or more, the criminal Court will have to decide and make its decision any one of those preliminary pleas after reading the bill of indictment but before the accused pleads to the general issue of guilty or not guilty. By reading out of the bill of indictment in the presence of the accused, the law here ensures that the accused is pretty much made aware of what they stand accused of.

Once the accused is brought before the criminal Court preliminary pleas would have been read, and the bill of indictment is read out. What is the logic, if preliminary pleas are raised the issue of the preliminary pleas take place before the accused pleads the general issue of guilt or not?

The law wants to ensure that if a person is formally accused of having committed criminal offences, they not only know exactly what the accusations are, but the law wants the accusation and the legal compacts surrounding those accusations as perfect as humanly possible.

If for example it happens that for some reason the accused would have been brought before the criminal Court but that Court happens to lack jurisdiction on the matter, clearly that Court would not be in a position to deal with the accused's case. So the idea is why should an accused person be confronted with a question as to whether he is guilty or not if that Court is not enjoying jurisdiction in the first place. These grounds don't lead to a conviction or acquittal, at most a discharge.

What if there are grounds that would lead to the acquittal of the criminal action? Such as if the action is time barred due to the lapse of the prescriptive period. What happens here? Should the person accused be faced trial by jury if the action is time barred, and so once time barred its death, and thus prosecution should not have taken place in the very first place.

**Extinguishment of the action** and **res judicata** are deemed to be peremptory pleas and not just bilaterally, because if prescription operates, or res judicata then there can be no prosecution of the criminal action. Here you see the logic that the law adopts and therefore whatever decision that the criminal Court makes in relation to these preliminary pleas, mentioned in Article 449(1)(a) - (g).

Decisions from preliminary pleas and decisions from issues regarding admissibility of evidence can therefore be subject to appeal to the Court of Criminal Appeal in the manner that we are going to be exploring during this lecture.

Two particular preliminary pleas relate to the insanity of the accused at the time of the commissions leading to the criminal offence or insanity of the accused at the time of the trial.

The issue of insanity in our jurisdiction is a bit convoluted and when you analyse judgments by the criminal Court and CCOA, you realise that it is a bit confusing. It should be simple but it is not that much. You can have issues of insanity of the accused brought up before the CoM, but not necessarily so and not always. It all depends if and when the issue of insanity is raised, whatever it is once that the issue of insanity is raised as a rule the Court, either CoM or Criminal Court, appoint a panel of experts and if the panel decide that the person charged or accused was in a state of insanity, the AG may either accept that plea or not accept that plea, in the sense that the AG is given the right to make a decision as to whether to accept the findings of the experts.

So much so that the AG may request that at the stage of the inquiry, can request that the inquiry be continued when the issue is raised before the CoM as a Court of criminal inquiry and deal

with the issue subsequently or else even during the CoM as a Court of criminal inquiry if the AG wants to contest the findings of insanity made by the experts, may feel an applicable before the CC. The CC then proceeds with the procedure of a particular specific trial...

An appeal also lies from any decision given by the criminal Court in relation to this plea of insanity when the plea of insanity would have been raised before the criminal Court at this particular stage when preliminary pleas can be raised. The issue of insanity can also be raised at a later stage. So really this issue can be raised almost throughout the whole criminal process. So you have to make an assessment when the issue is raised.

The criminal Court, therefore after hearing the parties pleading on the preliminary pleas, and/or the plea relating to the admissibility of the evidence proposed by the accused that could've been raised by the prosecution. Once the Court delivers its preliminary sentence on these preliminary pleas, therefore the accused and/or the AG has a right to lodge an appeal from that judgment. Here we find a specific procedure that is applicable. Once the Court delivers its judgement determining any preliminary plea, the accused or the AG, they must give notice of their intention to appeal by means of a written note to be filed after the decision of the CC would have been read out. In which case, once this note showing the intention of the accused or the AG to appeal from that judgment is delivered judgment - dak il hin stess, wara li jaqra is sentenza. The role of the Court of Criminal Appeal is very important. Any mistakes or of the interpretation of the law can be appealed.

The accused or the AG are to file a note their intention to appeal from any such judgment and the Court stays further proceedings until the appeal period is exhausted. 5 working days - this is peremptory. Until the determination of the appeal as a rule, proceedings are stayed, on the other hand if the appeal is lodged by the AG, that appeal in itself does not stay the execution of the decision appealed from.

Once the Court of Criminal Appeal takes on board the appeal. It hears the other party what they have to say, sometimes, it is becoming customary to invite the parties to file written submission as well, but typically it is viva voce in front of the CCOA. Once the Court makes assessment, if it allows an appeal, if it sees that it merits to be accepted, then it sets aside the decision appealed from and makes an order for the discharged of the accused or the further prosecution of the proceedings or other order, which could include the re-arrest or custody of the accused or give other directions as it may be.

## Appeals in the Courts of Criminal Appeal in its Superior Jurisdiction

### What happens during the actual process before the Criminal Court?

Appeals entail a process of review of a sentence / decision. When a person is subject to a trial by jury, when the CC delivers its judgement, the person convicted on indictment (following a trial by jury), has the right to appeal to the CC against their conviction. This appeal can be made both by reference to the actual conviction - those parts of the judgement on the basis of which the accused is found guilty, as well as from the sentence that would have been passed by the CC.

### **The finding of guilt entails the award of some sort of punishment.**

This right of appeal in relation to the sentence passed by reference to the punishment imposed can be lodged by the accused unless the sentence is one that is fixed by law - where the law leaves no room for manoeuvre.

Traditionally that was the basic position. The right of appeal was reserved to the accused. However, in time, the legislator noted that there could be instances where the Republic would have an interest in having a decision reached by the CC be subjected to appeal. This was not an easy procedure - it was difficult to legislate and by time, the Attorney General was given a right to appeal. Keep in mind that the appeal is in front of a panel of jurors which would have acquitted the accused or found him **wrongly** guilty.

By enlarge, jury panels do get it right but there are instances where jury panels mess it up. In order to try to limit those instances of legal / factual mistakes being committed by jurors, a practice has been developed over the past decades where before jurors are asked to retire and deliberate their verdict, the criminal Court, in agreement with the prosecution and defence, started to compile a sample verdict, giving the jurors better direction in relation to the possible outcomes that the jury may reach in relation each count in the BOI by reference to the evidence submitted to them. This is an informal practice that developed but it resulted to be quite helpful because although the trial judge during the summing up speech invites the jurors to take the sample verdict in consideration and warns them that they are not bound by it, at the same time, the sample verdict can be used by them by way of guidance as to what a possible verdict they can come up with.

The sample verdict aims to limit crazy verdicts.

On the basis of the wrong finding of guilt, nowadays the AG can appeal.

Mrs Butler case - the AG appealed that the sentence was unduly lenient in the circumstances of the case. The Court argued that although the judgement was lenient, it cannot be considered unduly lenient.

As a rule, the AG has the right to appeal in relation to the actual sentence.

The jury may also ask for mercy.

The basic criteria upon which the CC basis its decision to allow an appeal to stand by the AG if it considered that there would have been a grave irregularity (during the proceedings) or else the judgement results to be in a clear manner, the result of some clear manifest wrong interpretation of the law or as a result of a manifest application of the law.

You can interpret the law in a particular fashion which could be deemed to be wrong by the CC or you can appeal the law in a wrong fashion. The manifest misinterpretation or the manifest wrong application or the grave irregularity of the proceedings must have had a bearing on the verdict of the jury. These are two tests that the Court has to make. On the one hand, it has to see whether the basis of the appeal of the AG would be referring to;

- 1) A grave irregularity during the proceedings.
- 2) The judgement arrived at by the CC was the result of a manifest misinterpretation of the law.
- 3) The manifest wrong application of the law.

If either one of these are satisfied, the AG has to **overcome another hurdle**. It has to be shown that it could have had a bearing on the verdict.

“No one would reach that conclusion if someone looks at the law in the same manner”.

This process has to go through and satisfy another set of criteria. The CCA may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the AG, the CCA may still dismiss the appeal if it considers that no miscarriage of justice had occurred. **This is another test that must be satisfied.**

How does the CCA deal with the decision of the CC which would have been impugned by the Appellate Court? If the CCA decides to uphold the appeal, it has three options.

- 1) CCA may decide to affirm the judgement / sentence.
- 2) To vary that judgement / sentence.
- 3) Reverse the verdict from which an appeal has been filed.
- 4) Or if a sentence of graver severity should have been given, it can quash the sentence and decide to pass any such higher sentence, even of greater severity, that could have been warranted at law by reference to this case in substitution of the sentence that would have been passed by the CC.

If it does not affirm, vary, reverse the sentence, or number 4, then the CCA shall dismiss the appeal.

If the CCA considers that even though for example, the appeal should be dismissed, but it considers that it is more just in the circumstances, the CCA in its superior jurisdiction to quash the sentence and send the case for retrial before the CC.

These provisions here only apply to the CCA in its superior jurisdiction. The CCA in its inferior jurisdiction does not have these powers.

Rights to *parte civile* - The right to be present, to have legal counsel as a victim, right to confer with the AG, the right to make submissions on the quantum of the punishment if the accused is found guilty. These are in front of the CC not in the CCA.

In the case of an appeal against sentence, an injured party may request the CCA by means of an application, for the injured party to be allowed (personally or through legal counsel) to make submissions. If the CCA allows this application, the injured party will be given the opportunity to make submissions after the Court would have heard the submissions made by the appellant.

If the request is upheld, after the CCA would have heard the submissions of the appellant, the CCA hears the AG and the injured party.

If, despite the opportunity given to the injured party, no submissions are made, that no-show doesn't stop the CCA from continuing with the case.

The right to make submissions and the right of the AG to make references to the CCA when enacted by ACT III of 2002, well before the right of appeal was given to the AG in a relatively wider manner in terms of article 500.

500A - The right of the injured party to ask the Court to make submissions in relation to the sentence. This article assumes that the accused will appeal and does not include appeals by the AG. This is because the powers of the AG were given **after** this article was enacted.

## Submissions by injured party to Court of Criminal Appeal - Article 500A

500A. On any appeal against sentence an injured party may, by application, request the Court of Criminal Appeal to be allowed, personally or through legal counsel, to make submissions on the appropriate sentence to be passed on the accused and if the Court allows the application the injured party or his legal counsel shall be given the opportunity to make such submissions after the Court has heard the appellant's submissions in support of the appeal; the person convicted and the Attorney General shall be given the opportunity to respond to the submissions by the injured party or his legal counsel:

Provided that the failure, for any reason, of the injured party or his legal counsel to make submissions on sentence as aforesaid on the appointed day shall not preclude the Court



from proceeding with any hearing or from pronouncing judgement aforesaid on the appointed day shall not preclude the Court from proceeding with any hearing or from pronouncing judgement.

## Article 500B - References by the Attorney General

*500B. (1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Criminal Appeal on a point of law which has arisen in the case and within the time laid down in article 504, refer that point to the Court, and the Court shall, in accordance with this article, consider the point and give their opinion on it.*

*(2) For the purpose of their consideration of a point referred to them under this article the Court of Criminal Appeal shall hear argument -*

*(a) by the Attorney General; and*

*(b) either by counsel for the defence, if the acquitted person desires to present any argument to the Court or, in default, by the Advocate for Legal Aid.*

*(3) A reference under this article shall not affect the trial in relation to which the reference is made or any acquittal in that trial.*

*(4) The Board referred to under article 516(3) may make rules to regulate the form and contents of the reference by the Attorney General under this article and to provide for all other matters connected therewith or ancillary thereto*

500B - Act III of 2002 the AG may make references to the CCA.

The accused has an unfettered right of appeal. Bear in mind that an appeal is against conviction here not against acquittal. The appeal lodged by the convicted has the below criteria:

The CCA allows the appeal if it thinks that he was wrongly convicted on the facts of the case, or there was an irregularity during the proceedings, or the wrong interpretation of the law which could have had a bearing on the verdict. **As you can see, the criteria to appeal for the AG is very difficult. Although the criteria is similar, the degree is different. "Grave / manifest".** Compare article 500(4) with the case of the party convicted. A mere wrong interpretation of the law is enough.

## Court of Criminal Appeal in its Superior Jurisdiction

During the last lecture we were dealing with essentially the ordinary cases which fall in the lap of criminal appeal as well as the way that appeals are determined before the Court of criminal appeal in ordinary instances. And we have examined the process that takes place for an appeal to be successful. Exercise that needs to be carried out by the Court of criminal appeal and the criteria which the Court of criminal appeal adopts when cases are referred to it, by the party convicted or by the AG as the case may be.

Thanks to the fact that locally legal amendments are not always preceded by assessment, certain institutes might not be that polished when compared one with the other. Today, the powers of the criminal appeal in its superior jurisdiction - as we have seen the way the law empowers the Court of criminal appeal, clearly aims at the substance, at the heart of the matter. The law is absolutely more focused on the merits, in the circumstances of the case. So much so that these powers that are conferred to the criminal appeal of superior jurisdiction, acting in its inferior jurisdiction and hence are particular to this specific Court are framed in such a way as to ensure that

The law empowers the Court of criminal appeal - where the Court of criminal appeal considers that the person accused would have been either acquitted or it appears that the person accused could not have been properly convicted on a particular count but on the other hand they would have been properly convicted on some part of the bill of indictment, the Court of criminal appeal could either confirm the sentence or else pass any such sentence in substitution to that which would have been passed by the criminal Court at the trial. When the Court makes this assessment, it has to take into consideration, the nature of the verdict which would have been passed, for that part on the bill of indictment in relation to that count or that part which the Court of the criminal appeal sees as which the accused would have been properly convicted.

There is a caveat to this which is persisting through this whole part as in relation to the Court of the criminal appeal to pass through such any other sentence as it may deem fit, this really depends on who would be lodging the appeal whether the accused or the AG. as in any case, if the appeal against - person convicted is lodged by the person convicted, when the Court of criminal appeal comes to decide its sentence and it decides to change or substitute it as we have seen earlier on, in that case where the appeal is filed by the person convicted, this person can not be --- whether or not that sentence would have been passed by the Court EXPLICIT ON THE PART OF THE INDICTMENT. So in reality, in these circumstances where an appeal is lodged by a party convicted, such party convicted can not be prejudiced in the sense that any punishment that the Court may decide to pass, in any case can not be of a greater severity than the sentence that would have been passed by the criminal Court at the trial by jury.

If it is lodged by the person convicted, when the CCA comes to pass its sentence and it decides not to affirm its sentence but rather to change or substitute it as we have seen earlier on, in that case when the appeal is filed by the person convicted this other sentence cannot be of graver severity than that sentence that would have been passed by at the trials whether or not that

sentence would have been passed by the Court on that bill of indictment. When an appeal is lodged by the party convicted, the party convicted cannot be prejudiced by the sentence of the CCA.

There are instances where the criminal Court can proceed with a

Another scenario which gives the Court of criminal appeal particular powers relates to when the accused would have been convicted of an offence and at the same time, jury could have found him guilty of some other offence, stemming from the same bill of indictment and on the finding of the jury, the Court of criminal appeal finds that the jury must have been satisfied of the facts that the person charged is guilty of this other offence, in that case, therefore, the Court of criminal appeal may instead of allowing or dismissing the appeal, Court of criminal appeal can substitute the verdict found by the jury by a verdict of the other offence and of course if the Court of criminal appeal decides to pass this verdict, as mentioned, it can also pass any such sentence in substitution of the sentence that would have been passed at the trial in relation to what the criminal Court would have passed for this other offence.

Once again if the Court of criminal appeal decides to give another sentence, the other sentence can not be of greater severity than the one that would have been awarded at the trial. The law grants this power to the Court of criminal appeal which in itself exhibits an element of flexibility and here we are dealing with a very delicate situation - as the powers of the criminal Court of appeal entail changing the verdict that the jury would have arrived at , at the indictment. The bone of contention that we find in the late 60s. In reality what is happening is that the Court of criminal appeal is composed of 3 judges, very well versed in the law. The fact is that these powers empower these collegial Courts to change the popular vote that is reflected in the jury verdict. This is at the heart of the trial by jury system.

Here the limit posed by law relates to the scenario where the appeal is lodged by the person accused. The appeal lodged by AG shifts this dynamic as we have seen in Article 500 sub 4, so there again the fact that the Court of criminal appeal is granted these powers shows that the law is very much willing to focus more on the substance than the form.

Now, there again, you might say but the law waits to focus more on avoiding the person found guilty from being let off the hook- at the end of it, as much as it is, a bad thing to have a person who would have been innocent to be declared guilty, it is just as bad to have a guilty person let off the hook, due to a mistake made by the jury. In any case, the punishment would still be - what the bill of incitement is envisaging - not what the ag is asking for in any case.

Another power to the Court of criminal appeal relates to where the jury would have found a verdict based on the provisions of Article 480 sub 3, now to give you a bit of context, as you know the jury is not there to decide issues touching on the law applicable to the case. The jury's role is limited to the determination of the facts of the case. Beyond what the law requires from the jury panel - so any question relating to interpretation and application of the law, is left to the

Court of the trial judge but as you can appreciate, sometimes, legal issues can be so intertwined that splitting one from the other could be - so 480 sub 3 gives us a tool that the jury can use in instances which the - where any doubt on the question of law arises,

Power of jury to refer to court the decision on points of law.

(3) If any doubt arises on any question of law upon the determination of which might depend the finding of the jury as to whether the accused is guilty of the offence stated in the indictment, or of any other offence as provided in article 467, or whether the facts adduced in the defence constitute an excuse according to law, it shall be in the power of the jury, if they so desire, instead of finding the accused guilty or not guilty, or that an excuse has or has not been proved, to find only, upon written questions given to them by the court for the purpose, that the facts or some of the facts adduced either against or in favour of the accused have or have not been proved, and to leave to the court to determine whether the facts found by the jury constitute the offence stated in the indictment or any other offence under the provisions of the said article 467 or an excuse according to law.

(4) The court shall pronounce judgment on any question so referred to it by the jury on the same day or on any other day after hearing the Attorney General and the accused or his advocate in the manner provided in article 490.

May have some doubts in the mind of the jurors who would not be trained on legal matters, the jury have the power of instead of finding the person accused guilty or not guilty, or whether an excuse would be proven or not, the jury may decide to find upon questions given to them that the facts or some of the facts would have been or not have been proven., then it is up to the Court to see whether the facts would constitute the offence in the indictment - this is very interesting and reminiscent of the debate taking place in the 1920s and 1930s, where the project of the criminal code was being started by various provisions. At some stage an experiment was - special provisions - a precursor to the criminal code. The way this particular code was framed to operate gave a sort of jury panel the power to decide whether the facts of the case are proven or not proven. If our law wats the jurors to be only burdened with the decision whether to find the accused guilty or no guilty, should they be the ones to literally marry the legal aspects of the case with the facts of the case, as things stand nowadays, once the jurors are tasked with the decision to find the accused guilty or not guilty, automatically the process they have to go through is also an appreciation of the law as applied to the facts.

To be intellectually honest, by determining whether a set of facts are proven or not, what are we really saying?

Wilful homicide - actus reus and mens rea = when you think about it, actus reus and mens rea, they are legal concepts that are also intertwined by the facts of the case. Determining whether a person's life is taken away are more questions of fact. If a person lies on the ground in a pool of blood, doing nothing, there being no heartbeat or any sign of life, logical conc is the person passed away, that is a question of fact. Determining whether that person is lying in a pool of blood as a consequence to another person, is also a fact. The person who led the series of events to that awful scene is also a question of fact. Is it going into the realm of the factual or more into the realm of the legal of the case?

Not an easy task to decide the facts of the case –

It is possible for the Court to make use of article 480 sub 3 to help the jury by pointing towards by what facts they deal with what have been proven and leave the interpretation of the law up to the trial judge/ this now seems to save the day - this has rarely been used 480 3 but there again it is there.

When a jury would have found a verdict under 480 sub 3, and the Court of criminal appeals considers that the wrong conclusion would have assisted by the criminal Court - the Court of criminal appeal may instead of having an appeal, order that that conclusion be what appears to the Court as required by the verdict that is to be passed and eventually pass a sentence in substitution of the sentence that would have been passed by the criminal Court. The sentence can not be of greater severity and this scenario tries to aim at achieving tangible and concrete justice at a given case.

There is another scenario where the Court of criminal appeal on an appeal against conviction - normally is it dislodged by the party found guilty, so on any such appeal, the Court of criminal appeal is of the opinion that the appellant did commit the act or made the initial on which they would have been accused but the accused would have been insane at the time the act was done and hence if they were insane, criminal responsibility would therefore be excluded in that case the Court of criminal appeal may decide to quash the sentence and order appellant to be kept in St. Mount Carmel hospital. Of course the provisions of the mental health act. When dealing with appeals - on the issue of insanity, insanity is rather complex.

One of the powers of the Court of criminal appeal in special cases is precisely when the Court of criminal appeal sort of becomes of the opinion itself that the person who would have committed the act and are considered the act or omission would have been carried out but when such was carried out, the accused was in a state of insanity and the Court of criminal appeal is convinced of this.

In 503, we do find the scenario where there can be an appeal against conviction - on the ground of insanity.- WHEN a person facing trial would have been subject to a verdict not guilty at the time if the act or omission, may still appeal against the verdict and on any such appeal the cCA enjoys the same powers that we have gone through and assessed when dealing with the powers of the cCA in ordinary cases in terms of article 501 of the criminal code

When in the case of any such appeal, falls to be - and no one of the grounds relating to the question of insanity of the accused, would not really warrant the actual appeal and therefore no one of the grounds for allowing the appeal would not relate to the issue of insanity given that article 501 gives you those criteria that we have mentioned in relation to the actual criminal process itself, the Court of criminal appeal may also dismiss the appeal if it would have been of the opinion that for the insanity of the accused the proper verdict would be that he is guilty other

than that offence which he would have been charged, so there again you see here one other instance as to how complex the law is when dealing with the issue of **insanity**.

**The law even allows any such appeal to be heard even in the absence of the event, on the other hand, where any such appeal lodged by a person who would have a verdict of not guilty on the ground of insanity, if a person is found not guilty on ground of insanity, that would mean that the person could still be deemed to be not responsible for committing the act but also insane which would mean that the provision of the mental health act could be operating against them and that is the logic of this article. If any such appeal is allowed, and the ground for allowing the appeal is that the finding of the jury for insanity of the accused should not stand and the Court of criminal appeal and the -----**

In Article 503 we do find the scenario where there can be an appeal of conviction of not guilty not the ground of insanity. When a person facing trial would have been subject to a verdict not guilty at the time of the act or omission, may still appeal against the verdict and on any such appeal the CCA enjoys the same powers that we have gone through and assessed when dealing with the powers of the CCA in ordinary case in terms of article 501 of the Criminal code.

When in the case of any such appeal and no one of the grounds relating to insanity of the accused, would not really warrant the actual appeal and therefore no one of the grounds for allowing the appeal would not relate to the issue of insanity given that Article 501 gives you those criteria that we mentioned in relation to the actual criminal process itself, the CCA may also dismiss the appeal if it could have been of the option that but for the insanity of the accused the proper verdict would have been guilty of the offence other than the offence with which he could have been charged. So there again, you see here one other instance of how complex the law is when dealing with the issue of insanity. The law even allows any such appeal to be heard even in the absence of the event.

On the other hand, where any such appeal that is lodged by a person who would have a verdict of not guilty on the ground of insanity - if any such an appeal is allowed and the ground for allowing the appeal is that the finding of the accused by the jury should not stand and the CCA considered that in point of fact was guilty of an offence, then the CCA is empowered to substitute a verdict of non guilty, a verdict of guilt for that particular offence and in that contest the CCA imposing a punishment as a criminal Court would have had if the jury would have come to the verdict of guilty, rather not guilty on insanity. If this scenario is not satisfied, then the CCA can also substitute the verdict of the jury, not finding him guilty, with a verdict of not guilty and acquittal.

### **Court of Criminal Appeal in its SJ.**

The powers of the CCA SJ should not be confused with the powers of the CCA IJ. The rules differ. You cannot apply the SJ rules to the IJ.

## The supplemental powers of the CCA.

An appeal entails an exercise of reassessment of a procedure that would have been followed before the Court of First Instance. Therefore, the appellate process, is a process where the CCA engages in a reassessment of the facts of the evidence, of the legal submissions, and the CCA, in relation to the charges / accusations and the CCA tries to understand if and to what extent the Court of First Instance was legally and factually reasonable in its interpretation of the facts of the case and of the legal appreciation made.

It decides whether the COFI could have legally, legitimately, and reasonably arrived at the conclusions portrayed in its judgement. **Marco Zarb case**. As a rule, the CCA **does not** itself substitute the discretion exercised by the COFI unless and until it finds that the COFI on the basis of the evidence, legal facts, and legal arguments, could not have reasonably, legally, and legitimately arrived at that conclusion. If on the other hand, it finds that it could have arrived at the conclusions in that judgment, then it will not substitute its conclusions with those found in the COFI judgement.

The COFI has the role of interpreting the facts and the law in relation to the charges being leveraged. Even if the CCA disagrees with certain aspects but it finds that the COFI could have still achieved the same outcome, it would not change the outcome.

This is not just a question of the accused or the AG trying to have another go - they must show that the judgement reached was based on a wrong interpretation of the law, that the COFI arrived at its conclusions through a mistaken / wrong reasoning / assessment. If you don't prove this, the appeal fails. Even if the appellant proves that there could have been a different application of the law or of the facts - if the CCA finds that the COFI should have still reached the same judgement, then it will not disturb the decision reached by the COFI.

As far as evidence is concerned, as a rule, the CCA makes its assessment on the evidence produced at first instance. There are exceptions.

As a rule, when there is an appeal, the CCA analyses the Court file as is. It reviews the records of the proceedings as they would have been presented before the COFI. For example, when dealing with an appeal before the CCA IJ, article 424 of the CC says that *no new witnesses may be produced before the CCA*. Exceptions: unless when it is proved on oath or through other evidence that the party requesting the production of new witnesses have no knowledge of them, or else that it could not, with the means provided by law, provide them before the COFI. Another exception is where the evidence would have been tendered before the COFI but that Court would have wrongly rejected that evidence - **not just simply rejecting that evidence**. There must be some sort of mistake being made by the COM.

The reason behind the appeal is to have an independent and objective assessment of the factual and legal assessment before the COFI and whether the COFI could have arrived at those

conclusions. Introducing other variables at appeals could change the whole scenario before the CCA.

## Supplemental Powers of the CCA

They only apply to the CCA SJ.

“If it thinks it necessary or expedient in the interest of justice”.

This is not a second try at appeal level. It is a remedy in those scenarios where the CCA deems it necessary or expedient in the interest of justice.

Article 506 - Whilst the law casts a very wide net, then it starts slowly limiting the extent to which these powers can be applied. If the CCA thinks it necessary or expedient in the interest of justice, it can order the production of any document, exhibit...

In order for the powers in 506 to be applied by the CCA, a criteria must be satisfied which are in article 507.

## Article 506 - Supplemental powers of the Court of Criminal Appeal

506. The Court of Criminal Appeal may, if it thinks it necessary or expedient in the interests of justice -

(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; and

(b) if it thinks fit order any witnesses who would have been compellable witnesses at the trial to attend for examination and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in any manner provided by law; and

(c) if it thinks fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of spouse of the appellant, in cases where the evidence of the spouse could not have been given at the trial except on such application, subject to the provisions of article 635.

Even if the provisions of 506 applied through the lens and criteria of article 507 would manage to win the day, it is still not over. You have to adhere to article 508.

## Article 507 of the Criminal Code - Duty to admit evidence

507. Without prejudice to the generality of the last preceding article, where evidence is tendered to the Court under that article, the Court shall, unless it is satisfied that the evidence if received



would not afford any ground for allowing the appeal, exercise its power under that article of receiving it if -

(a) it appears to it that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and

(b) it is satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure to adduce it.

## Article 508 of the Criminal Code - Power of Court of Criminal Appeal to order a new trial

506 of the criminal code - supplementary powers of the Court of criminal appeal - the way that the law is drafted in a wide fashion does not mean that these powers can be applied in a wide manner and whilst 506 focuses on these specific wide powers that you do not normally find at appellate stage before other Courts, in this context, you do find this way of dealing with the appeal proceeding. So, as we have said, it is possible for the code of criminal code of appeal not to rely on the - the reason of having appeal system is to have a review - by a panel of judges - in relation to the decision making process before the Court of first instance, a process of review would entail the analysis - such that the Court of criminal appeal - could have reasonably and legitimately concluded based on the facts presented to it - when 506 goes beyond that as we have seen last time and hence the Court of criminal appeal - in a factual and legal scenario can order the production of exhibits and proceedings, necessary for the determination of the case in question or it can order any witness to be compelled to testify at first instance to be examined before the Court of criminal appeal irrelevant

While the net set and cast by 506 is indeed wide, 507 then limits the area where this net can be effectively passed and where this can happen we see in 507, which tells us that where that evidence which is allowed in 506, is tendered before the Court of criminal appeal, Court of criminal appeal shall unless it is satisfied that this evidence if received would not award a ground for allowing the appeal, exercise this ground under 506 if it appears that this evidence is inevitable and that it would be admissible at the trial on an issue which is subject to the appeal. On top of that, the Court of criminal appeal has to be satisfied that this evidence that or this new evidence that the Court of criminal appeal could take on board in terms of 506, if it is satisfied that that evidence was not produced at the trial but that there was also a reasonable cause why it was not so produced at first instance. Hence 507 gives us a set of parameters that have to be cumulatively observed in order for the evidence mentioned in 506 to be produced at appellate stage, now,

So essentially you have to read 506 together with 507 in order to understand not only the brain of these powers but also the context when these can be applied.

Thanks to this evidence that we find that could be provided by 506 and 507 does leave its mark on the case, and let us say that it happens that thanks to this process found in 506 and 507, the Court of criminal appeal allows this appeal, by reason only of the evidence received or available to it in terms of 506 and 507. Or else, an appeal before the Court of criminal appeal, would be allowed in terms of article 500 sub 4, that is an appeal made by the AG, which is allowed by the Court of criminal appeal where it considers that there would have been - a judgement which has to reflect a manifest misinterpretation or manifest wrong application of the law which could have had a bearing on the jury.

If an appeal -is allowed when the appellant is the AG in this case or else when the appeal is lodged by the person convicted and the appeal is allowed by the Court of criminal appeal and once the appellant is the party convicted, the Court of criminal appeal can allow their appeal if it thinks there has been an irregularity during proceedings, unlike the case where the appellant is the AG, where they would have to prove a great defect in formality. When appellant is person convicted, appeal can be when there is a wrong interpretation of the law and any such grave or simple irregularity

Wrong interpretation or wrong application of the law or a manifest interpretation - or manifest wrong interpretation of the law, these criteria must also satisfy the test that they must or could have had a bearing on the verdict. When in these scenarios hence, where an appeal would have been allowed, on the basis of anyone of these 3 instances, and in each case, the Court of criminal appeal deems that the interests of justice in that scenario so required and therefore, the point of departure is that on the basis of fresh evidence under 506 or 507 or grave irregularities or manifest misinterpretation or manifest wrong application of the law or when there is irregularity in the proceedings or when there is misinterpretation or wrong application of the law in the case where appellant is party convicted, in these 3 scenarios, the Court of criminal appeal would be considering to allow the appeal but despite that it would be ready to allow the appeal if the Court sees that the interest of justice instead of directing a verdict of acquittal or the entry of the judgment, the Court of criminal appeal; can order that the appellant be re-tried instead.

What the law is telling us is that if a party is convicted who would have been acquitted on appeal, instead of being acquitted on appeal, the Court of criminal appeal can declare and decide that he be retried.

If a Court of criminal appeal orders a retrial, there are STRICT PARAMETERS under which this can be conducted. It is not possible for the accused to be retried, meaning, board of criminal appeals would be willing to order his acquittal, but instead it says no, interest of justice does not allow this appeal to be upheld, instead of acquitting this guy, we'd rather have him retried. This retrial can only take place under certain parameters;

1. Retrial can not take place, only in relation to the offence of which the accused would have been acquitted in respect of retrial in respect of which the appeal would have been allowed

2. Accused can not be retried for any offence other than the offense of which the accused could have been convicted on the original trial for the offence in relation to which the original trial took place
3. The accused can not be retried for any other offense charged in an alternative count of the bill of indictment, in respect of which the jury were discharged of giving a verdict in consequence of convicting accused for the crime originally mentioned in the bill of indictment

So this sets the parameters straight, here the law is telling us, you can not widen the parameters within which the trial can take place. The red lines which can not be breached - so whilst the Court of criminal appeal can order this retrial in the context by 508, it also sets the boundaries that can not be breached within which the retrial occurs. If a retrial is ordered, a fresh indictment is issued against the accused. Again, as a rule, once that a trial by jury would have been concluded and if concluded in a conviction, and a sentence of imprisonment, against the accused, very likely because when we are dealing with offences triable on indictment the rule is as you know that these offenses carry a punishment exceeding 12 years imprisonment. 28A does not allow that

The fact that a person is convicted and found guilty and imprisoned, sentence starts immediately, no question of asking the suspension of the execution of the judgment. No 416 in the Court of criminal appeal in its superior jurisdiction.

#### DIFFERENCES BETWEEN CRIMINAL INFERIOR AND SUPERIOR Appeals

Once a person is convicted and sentenced and an appeal is lodged by him and the criteria in 508 are met and the Court of criminal appeal orders a retrial the party concerned would still be serving the sentence and hence pending determination of the retrial, the Court allows the person to obtain BAIL PENDING THE RETRIAL.

So, once again the provisions relating to trials in general even the retrial would have to be recorded in like fashion as the original trial, so again, witnesses would on oath, testimony recorded. Still refers to a transcript. When it was written back in the late 60s, shorthand was the way to go.

The law does not take note of future technological developments but in reality that is what happens in everyday life. The intention of legislators was to make sure that the records of the proceedings consist also of a registration, recording and transcription of that testimony. Imp to have a written record of their testimony.

In any case during the retrial in order to avoid duplication, the record of the testimony of the witnesses which would have been tendered at the original trial may be read out during the retrial by agreement between prosecution or defense or when the accused became unfit or unable to attend and all reasonable efforts have been made to trace and find him have been unsuccessful so the transcript of the original trial can be used at the retrial to avoid duplications, once retrial, then

a verdict has to be reached and Court has to pass sentence of the party convicted which can not be greater than that passed in the original conviction, so another safeguard to limit prejudice that the person retried could otherwise suffer. Moreover, if person convicted of retrial is sentenced to, a custodial term/care, either to imprisonment or detention, in theory, it is possible for the criminal Court to find him also guilty of a contravention,

AS A RULE if a person is convicted and if those crimes carry a custodial punishment, that is termed as imprisonment not detention, but law also mentions detention here. That is why custodial sentence is mentioned - if a custodial punishment is given terms starts to run, as if the original sentence at the original trial would have begun to run, however when computing the term, any period which the party subject to retrial would not have been in custody pending the retrial, that interval would be disregarded on the computation as to when the custodial sentence starts to run.,

Now, as a rule, it is true that once a sentence is passed by the criminal Court following conviction, there is no automatic stay of execution of the judgment, the rules of the criminal appeal are different from the one mentioned in 146 of the - but the law still allows the possibility of there being staying of the execution of judgment by the criminal Court - those instances where stay of execution or judgment are allowed before or following a sentence by the criminal court are very few and far between, but possibility is there and Court does not close its gates to it.

The Court may on application of appellant may admit appellant to pay, pending the determination of the appeal either from a sentence relating to preliminary pleas or from a sentence affecting the merits of the case. Again, if bail is allowed, by the Court the rules applicable for bail are applicable, if the criminal Court does not allow the request for bail, the appellant can also lodge an application before Court of criminal appeal so that the Court of criminal appeal can determine the request for bail. If a person would have been allowed bail, that bail period does not count as any part of imprisonment for the detention term under his sentence.

Again, in life things happen, people can also die and, first of all during the course of a trial, persons accused may have issues with certain judges sitting on their case, remember there are grounds for recusal RIKUZA OR ABSTENTION by judges, applied not also at first instance but also at the Court of criminal appeal so the law allows an accused person to raise an objection to any judge sitting in the Court of criminal appeal and if any such request is made, the law does not say who can lodge, wherever it is coming from, any one of the judges sitting on the Court of criminal appeal has to be determined before appellant begins to make submissions on the merits of the appeal.

Grounds for challenging or abstention are the same ones which we have seen in 446 and 447 of the criminal code.

If during appeal, any one of the judges dies or becomes ill, another judge would be appointed to surrogate the sick/dead judge, same as happens in relation to the criminal Court as per 498 of the criminal code and if this event happens, all proceedings take place afresh, if a demand to that effect is made, the aim of the law is to ensure that the judges judge who are surrogate are fully immersed in the picture, FULLY IMMERSED.

SO NOW, if it is only 1 judge surrogated, then this can be dispensed with but if judges surrogate are 2 or more then the proceedings have to take place afresh and no option there and understandably so. Now where an objection to a sitting judge which has already been decided or on which the Court has already given judgment, well, in that case no further objection would be allowed by law.

As it happens even the ag CAN FACE health or life issues, if the AG or AG COUNCIL dealing with the cas dies or becomes ill or defence council dies/becomes ill, or even if appellant themselves becomes ill, then up to the Court to see whether to order if proceedings start afresh or not. tHe Court would have to make an assessment, if defence council does especially, the defence would be duly fully assisted by a qualified lawyer in order to ensure that the case would be taken up properly.

What happens when one of the key players during the course of the appeal falls ill or passes away.

In principle, the rules governing the CCA in SJ are not applicable to IJ and vice versa. There are provisions of the criminal code that relate to CC and the CCA. These relate to certain aspects of criminal procedure and that relate to the actual procedure itself.

For example, legal aid is applicable to all parties and at all stages. It is one of the pillars of criminal procedure. The CCA is obliged to inform all parties to a case once an appeal is lodged. The injured party cannot stall or stop the appeal and therefore, if they are not served or do not turn up, the appeal may still be heard.

Another provision that applies at the CCA in its SJ relates to what happens when the appellant fails to turn up for the hearing - the procedure before the CCA-IJ and CCA-SJ such that if appellant fails to appear, the appeal is deemed to be abandoned.

The law is very cautious and understanding of certain situations that may crop up. Appellant may file an application within 8 days from date of which the appeal would have been deemed abandoned. It must be sworn and he must provide a reason.

If R fails to appear, the Court hears the appellant and delivers its judgement nonetheless. There are situations where the appellant is in custody (remember that as a rule, once a judgement is delivered by the CC sentencing the person found guilty to imprisonment - that sentence comes in effect immediately). The appellant would have to be brought before the Court in order for the sitting to take place and for him to be duly heard.

Even though they are in custody, they are placed in Court without restraint. Some jurisdictions such as Russia have cages or the Mafia maxi-trials.

The CCA can hear evidence in the order it deems fit, depending on the circumstances. In order to save time, it would be better to hear one party and not the other. In an appeal, the Court is deemed to have read the appeal - the judge would know what the appellant is going to say, yet R would not have filed a reply. Hence, the judge may decide to hear R before the appellant, especially if the Appellant is the party convicted.

Subpoena to summon witnesses.

In certain circumstances, they may also be summoned to appear on a particular date.

Witnesses procedure - important to avoid contamination.

The interpreter - as a rule, proceedings in this jurisdiction are heard in Maltese. The proceedings are done in a language of how the accused understands. There are exceptions where the accused doesn't understand English or Maltese.

A judge may recommend to the President of Malta for a reduction in punishment or amnesty.

The prerogative of mercy in 515 relates to the situation where the PM on an application made to him by the convict following a trial by jury or the PM even without any such application - if he thinks so, he may refer the whole case back to the Court of Criminal appeal. He may also refer to a particular point during the whole trial. The CCA refers back to its answer to the PM.

### **Repubblika ta' Malta vs. Marco Zarb, 15th December 2005, QORTI TA' L-APPELL KRIMINALI**

Dan hu appell minn sentenza moghtija mill-Qorti Kriminali fis-7 ta' Ottubru 2004. Marco Zarb kien akkuzat mill-Avukat Generali talli fl-24 ta' Gunju 2001 ipprova joqtol lill-habiba tieghu, Gorgina Borg, billi tefaghha mill-gallerija ta' l-appartament fejn kienu qed joqoghdu ghal isfel fit-triq – gholi ta' erba' sulari (garaxxijiet fil-pjan terran u tlett appartamenti fuqhom). Il- gurati, b'verdett maggoritarju ta' sitta bi tlieta, sabu lill- imsemmi Zarb hati skond l-att ta' akkuza – cioe' ta' tentattiv ta' omicidju volontarju – izda bl-iskuzanti li hu agixxa taht l-influenza immedjata ta' passjoni istantanja jew agitazzjoni tal-mohh illi minhabba fiha, fil-waqt tad- delitt, ma setax iqis l-eghmil tieghu. Fiz-zmien meta l- imsemmi Zarb ikkommetta dan id-delitt huwa kellu dsatax- il sena.

“Rat l-Att tal-Akkuza numru 19 tas-sena 2002 kontra l- akkuzat Marco Zarb, kif emendat bid-Digriet ta' din il-Qorti tat-23 ta' Settembru, 2004, li bih huwa gie akkuzat talli :

“wara li l-Avukat Generali f'isem ir-Repubblika ta' Malta, ppremetta illi f'Gunju tas-sena elfejn u wiehed (2001) Marco Zarb u l-habiba tieghu Gorgina Borg telghu Ghawdex u krew flat fil-Qbajjar limiti taz- Zebbug, Ghawdex. Illi huma kellhom xi argument bejniethom u dawn

eskalaw fl-erbgha w ghoxrin (24) ta' Gunju, 2001 ghall-habta tal-hdax ta' bil-lejl (11 pm) meta Marco Zarb iddecieda li joqtol lil Gorgina Borg. Illi infatti, hu beda jahseb kif se joqtolha w iddecieda li jiftaghha mill-gallarija tal-flat. Illi hu dolożament, bil-hsieb li joqtol lil Gorgina Borg jew li jqieghed il-hajja taghha f'periklu car, qabadha w imbottaha l-isfel tlett sulari mill-gallarija, izda fortunatament l-istess Gorgina Borg ma mietitx minkejja li kienet fil-periklu tal-mewt u sofriet feriti gravi b'debulizza permanenti f'gismha.

“Illi b'ghemilu l-imsemmi Marco Zarb sar hati ta' tentattiv ta' omicidju volontarju u cioe' talli dolożament, bil-hsieb li joqtol persuna jew li jqieghed il-hajja taghha f'periklu car, wera dan il-hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt, liema delitt ma giex esegwit minhabba xi haga accidentali w indipendenti mill-volonta' tieghu.

“Ghaldaqstant l-Avukat Generali fl-isem fuq imsemmi, akkuza lill-imsemmi Marco Zarb hati ta' tentattiv ta' omicidju volontarju, u cioe' talli dolożament, bil-hsieb li joqtol persuna jew li jqieghed il-hajja taghha f'periklu car wera dan il-hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt liema delitt ma giex esegwit minhabba xi haga accidentali w indipendenti mill-volonta' tieghu; talab li jinghamel skond il-ligi kontra l-imsemmi akkuzat u li huwa jigi kkundannat ghal piena ta' prigunerija ghal zmien minn seba snin sa tletin sena skond dak li hemm u jintqal fl-artikoli 41(1)(a), 211(1)(2), 31(1)(a)(b)(i)(ii) u 533 tal-Kodici Kriminali jew ghal kull piena ohra li tista skond il-Ligi tinghata ghall-htija tal-imsemmi akkuzat.

“Qieset ukoll il-gravita' tar-reat li ghalkemm ma wassalx ghar-reat ikkunsmat li kellu l-hsieb li jikkommetti l-hati, wassal biex il-vittma Gorgina Borg sofriet korriment tant gravi li ser ihalliha paraplegika, go wheelchair u dipendenti minn haddiehor ghal hajjitha kollha;

“Ghal dawn il-motivi, l-Qorti wara li rat l-artikoli 31(1)(b), 41, 211, 227 (c) 228 (2) u 533 tal-Kap. 9, tikkundanna lill- hati Marco Zarb ghall-piena ta' tmin (8) snin prigunerija, li minnhom ghandu jitnaqqas il-perjodu kollu li l-hati qatta' taht arrest preventiv in konnessjoni ma' dan il-kaz u tikkundannah ukoll ihallas lir-Registratur tal-Qrati s- somma ta' mitejn u tlieta u tmenin lira Maltin u sebgha w hamsin centezmi (LM283.57c) rapprezentanti l-ispejjes kollha tal-perizji inkorsi tul il-kumpilazzjoni, u dana bl- applikazzjoni tal-Art. 533 tal-Kodici Kriminali.”

Marco Zarb appella minn din is-sentenza limitatament dwar il-piena fuqu inflitta. Huwa jillanja bazikament li l- piena kienet, fic-cirkostanzi tal-kaz, wahda eccessiva. Aktar specifikatament l-appellant jghid li l-ewwel Qorti ma “ddecidietx jekk l-istqarrija moghtija u iffirmata [minnu]...tikkostitwix kooperazzjoni mal-pulizija o meno, u allura...jekk ghandhiex tinghata piz fil-valutazzjoni tal- piena.” Skond l-appellant is-sentenza timmanifesta t-tezi tal-prosekuzzjoni li l-appellant ma ikkoperax. Jilmenta wkoll l-appellant li l-ewwel Qorti skartat id-deposizzjoni tal-psikjatra Dott. Joseph Spiteri. Skond l-appellant l-ewwel Qorti ma tatx piz bizzejjed, ankorke' fil-kuntest ta' tentattiv ta' omicidju volontarju bl-iskuzanti tal-provokazzjoni kif misjuba

mill-gurati, għall-provokazzjonijiet u “l-agir abuziv” ta’ Gorgina Borg<sup>1</sup> (ez. il-fatt li kienet qed tiffrekwenta ragel iehor, li għalkemm kienet qed iggorr it-tarbija tieghu, cioè` ta’ l-appellant, riedet titlaq lill-istess appellant). Fi kliem iehor, l-appellant jilmenta in generali li l-ewwel Qorti ma evalwatx bizzżejied il-grad u l-intensita` tal-“provokazzjoni” f’dan il-kaz, kif ukoll il-grad u l-intensita` ta’ l-imhabba li kien hemm bejn l-appellant u l-imsemmija Borg (l- appellant, fir-rikors ta’ appell tieghu, jelenka seba’ fatturi li, skond hu, iddeterminaw l-incident de quo). Skond l- appellant, piena karcerarja (jew piena karcerarja ta’ tmien snin) f’dan il-kaz ma tilhaq ebda wiehed mill-ghanijiet principali tas-sanzjoni kriminali.

Issa, kif diga` din il-Qorti kellha l- opportunita` li tosserva fis-sentenza taghha fl-ismijiet *The Republic of Malta v. Kandemir Meryem Nilgum and Kucuk Melek* tal-25 ta’ Awissu 2005, meta l-Qorti Kriminali tigi biex taghti s-sentenza taghha wara l-verdett tal-gurija, ma hux mehtieg li din toqghod taghti ragunijiet dettaljati għal kif waslet għax xi piena partikolari jew għall-quantum ta’ dik il-piena (sia jekk din tkun ta’ prigionerija u sia jekk tkun wahda pekunjarja). Anqas ma hemm xi htiega li kull sottomissjoni maghmula min-naha jew minn ohra tigi ripetuta fis-sentenza, jew li jsir xi kumment partikolari dwarha, b’mod li tigi espressament akkolta jew skartata. Inoltre kien gie osservat f’dik l-istess sentenza li fuq appell mill-piena din il-Qorti bħala regola ma tirrimpjazzax il-piena moghtija mill-ewwel Qorti b’dik li kieku hija – cioè` din il-Qorti – kienet taghti f’dawk ic- cirkostanzi kemm-il darba ma jkunx jirrizulta li l-piena moghtija mill-ewwel Qorti kienet b’xi mod “wrong in principle” jew “manifestly excessive”. F’dik is-sentenza, in fatti kien inghad testwalment hekk:

“...the Criminal Court is not obliged to give detailed reasons explaining either the nature or the quantum of the punishment being meted out, or to spell out any mathematical calculations that it may have made in arriving at that quantum. Although the determination of the nature and the quantum of the punishment is, of its nature, the determination of a question of law – see Sections 436(2) and 662(2) of the Criminal Code – all that is required is that the Court state the facts of which the accused has been found guilty (or, as in the present case, the facts to which he/she has pleaded guilty), quote the relevant provision or provisions of the law creating the offence (which provisions generally also determine the punishment applicable), and state the punishment or other form of disposal of the case. Unless expressly required by law to spell out in detail something else – as for instance is required by Section 21 of the Criminal Code or by the first proviso to subsection (2) of Section 7 of the Probation Act, Cap. 446 – the above would suffice for all intents and purposes of law. The principle *nulla poena sine lege* does not mean or imply that a Court of Criminal Justice has to go into any particular detail as to the nature and quantum of the punishment meted out, or, where the Court has a wide margin of discretion with various degrees and latitudes of punishment, that it has to spell out in mathematical or other form, the logical process leading to the quantum of punishment. This is also the position in English Law. As stated in Blackstone’s Criminal Practice 2004 2:



““Save where the statutory provisions mentioned below apply, there is no obligation on the judge to explain the reasons for his sentence. However, the Court of Appeal has encouraged the giving of reasons, and has indicated that that should certainly be done if the sentence might seem unduly severe in the absence of explanation...It has been held that failure by the sentencing Court to give reasons when required to do so does not invalidate the sentence...although the failure may no doubt be taken into account by the appellate Court should the offender appeal. Where the sentencer does give reasons and what he says indicates an error of principle in the way he approached his task, the Court of Appeal sometimes reduces the sentence even though the penalty was not in itself excessive. Similarly a failure by the judge to state expressly that he is taking into account any guilty plea, although contrary to [statutory provision], does not oblige the Court of Appeal to interfere with what is otherwise an appropriate sentence...”

“This Court is in full agreement with the principles stated above. Indeed, it is highly recommendable that, when the law provides for a wide margin of discretion in the application of the punishment, reasons, possibly even detailed reasons, be given explaining how and why the Court came to a particular conclusion.”

U f’ dik is-sentenza din il-Qorti kompliet hekk:

“This Court can find no valid reason why the Criminal Court should necessarily have applied the reduction by two degrees, as opposed to a reduction by one degree, which appears to have been the case. It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is neither wrong in principle nor manifestly excessive, even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in Blackstone’s Criminal Practice 2004 (supra):

““The phrase ‘wrong in principle or manifestly excessive’ has traditionally been accepted as encapsulating the Court of Appeal’s general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, ‘This Court will...be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges’ (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: ‘...that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence; for this Court to revise a sentence there must be some error in principle.’ Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase ‘wrong in principle’. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to ‘wrong in principle’) words to the effect that the sentence was ‘excessive’ or ‘manifestly excessive’. This does not, however, cast any doubt on Channell J’s dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the

sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed.”

“This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.”

Wara li din il-Qorti ezaminat, kif inghad, il-provi kollha hija sodisfatta li l-piena erogata mill-ewwel Qorti kienet wahda gusta. Hawn ghandna kaz fejn il-hati ghamel il-hsieb li jivvendika ruhu u joqtol lill-persuna li maghha kien qed ighix semplicement ghax din ma riditx tibqa’ tghix mieghu (minkejja li kienet qed iggorr it-tarbija tieghu, li eventwalment tilfet). Il-fatt li huwa hassu urtat, anke jekk urtat hafna, bl-agir taghha – inkluz il-fatt li bdiet tkellem ragel iehor – b’ebda mod ma jista’ jiggustifika jew jiskuza dak li ghamel l-appellant. Huwa veru li l-gurati sabu l- iskuzanti li l-appellant agixxa taht l-influwenza immedjata ta’ passjoni istantanja jew agitazzjoni tal-mohh fit-termini tal-paragrafu (c), izda dan ma jnaqqas xejn mill-gravita’ oggettiva ta’ l-akkadut: il-legislatur f’kazijiet simili semplicement jirridimensjona l-piena biex jittiehed kont ta’ l-istat ta’ fatt partikolari konsistenti fil-furia di sangue tal- hati. Huma ghal kollox barra minn lokhom is- sottomissjonijiet ta’ l-appellant fejn jipprova jinvoka dawk li huwa jsejjah bhala “l-imhabba qawwija hafna” li huwa kellu ghal Borg u “l-intensita’ tar-relazzjoni” taghhom bhala ragunijiet ghala ghandha titnaqqas il-piena.

Fil- fehma tal-Qorti l-appellant qed jikkonfondi s-sens ta’ dominazzjoni li huwa ried li jkollu fuq l-imsemmija Borg ma’ l-imhabba. Kif tajjeb isottomettiet il-prosekuzzjoni, l- ewwel versjoni jew ahjar versjonijiet li l-appellant ta lill- pulizija kienu fis-sens li Borg kienet jew waqghet jew qabzet mill-gallerija, u kien biss b’rizzultat tal-pacenzja u l- persistenza tal-ufficjal li kien qed jinterroga lill-appellant – l-Ispettur Antonello Grech – li l-appellant wasal biex ammetta u qal kif verament graw l-affarijiet. Din il-Qorti anqas ma tista’ tinjora l-fatt importanti li, kif jidher mill-atti, Gorgina Borg, ser ikollha tghaddi l-kumplament ta’ hajjitha f’wheelchair b’rizzultat ta’ l-agir doluz ta’ l-appellant.

Ghall-motivi premissi, tichad l-appell u tikkonferma s- sentenza appellata.

# The Law of Evidence

## *OF THE POWERS AND DUTIES OF THE ATTORNEY GENERAL AND THE EXECUTIVE POLICE IN RESPECT OF CRIMINAL PROSECUTIONS*

### **Police and Law of Evidence**

Police; enforcement, investigation: for the common good, justice - arraign people in Court. In Court and I want to present your case, how do you present your case in Court? Through evidence. Investigation. Direct link with what police do and the work the police carry out. If police make their work, that could render the evidence inadmissible - hence direct correlation of law of evidence and the police work.

### **Powers of the police:**

*First section is article 346: wide and often cited powers of the police, it is the duty of the police to... preserve public order and peace*

### GENERAL - Article 346 - Duties of the Police.

346.(1) It is the **duty of the Police** to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.

(2) Notwithstanding the generality of sub-article (1), where authorised by law and in the manner so provided, the Police may delay its immediate intervention for the prevention of the commission of an offence.

**Example:** I would let the drugs pass, not because I am not preventing, but my aim is - I don't want to catch the mule but the trafficker. As the mule will take me to the trafficker and that is where the law allows you to catch it

(3) In the carrying out of their duties, the Police shall take all measures necessary for the immediate protection of victims following an assessment as the case may be.

(4) Any minor, or victim of a sexual offence, or vulnerable victim or witness shall have the said interview and any statement made by him recorded by audio-visual means when interviewed by the police in the course of an investigation:

Provided that for the purposes of this sub-article, any audio-visually recorded interview or statement shall be admissible as evidence in any trial before a Court of criminal judicature concerning the offence to which it relates.

## **Introduction**

*“This power of investigation is ongoing and is not in any way related to any previous arraignments. Indeed, in the event that a person is discharged, the executive police are fully competent to continue investigating the offence and to collect evidence. In the event that a person is discharged from Court is suspected to have committed that offence and fresh evidence is uncovered such person may be rearraigned in Court and this without any breach to the cardinal rule of ne bis in idem.*

*Furthermore, in terms of article 346, the executive police are duty bound to bring forward all evidence in favour or against the accused. The main scope of the work of the police is not to convict but rather to ensure that justice is done.*

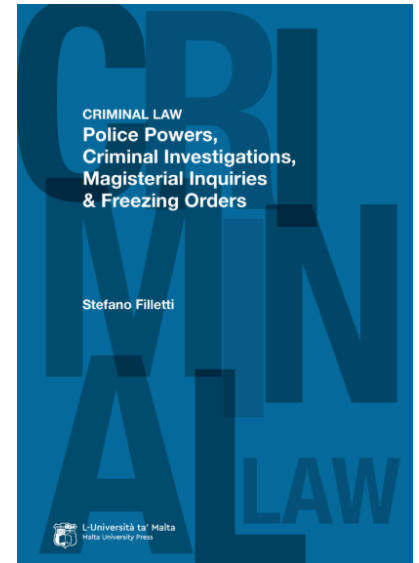
## ***Delayed intervention and controlled delivery***

*The police are to execute their duties promptly, without delay.*

*However in certain circumstances it would be desirable to delay police intervention to secure evidence of a crime or to establish all the offenders participating in a crime. This delay is permissible in terms of law.*

*In fact, article 346(2) provides that where authorized by law, and in accordance with law, the police may delay their immediate intervention to prevent the commission of a crime. This would obviously be done with intent to secure that all offenders are brought to justice (and not offer some form of impunity).*

*A classic example of delayed intervention is controlled delivery. This would apply in drug trafficking or importation of drugs. The police would delay their intervention to track the persons involved in the crime and collect all necessary evidence.”*



## **Powers of the Attorney General - Article 347A**

**347A.** Without prejudice to the provisions of sub-articles (1), (2) and (3) of article 346, the Attorney General shall have the following functions and powers:

*(a) to delegate to the Commissioner of Police Prosecutorial functions vested in the Attorney General; and*

*(b) notwithstanding anything provided in any other law, and in his discretion, to prosecute any offence, alone or together with the Executive Police or together with any other authority having prosecution powers."*

### **Article 347 - Complaint by the injured party**

**347.** *The Police shall not institute criminal proceedings, except on the complaint of the injured party, in cases where the law does not allow criminal proceedings to be instituted without such complaint.*

#### ***Powers to prosecute***

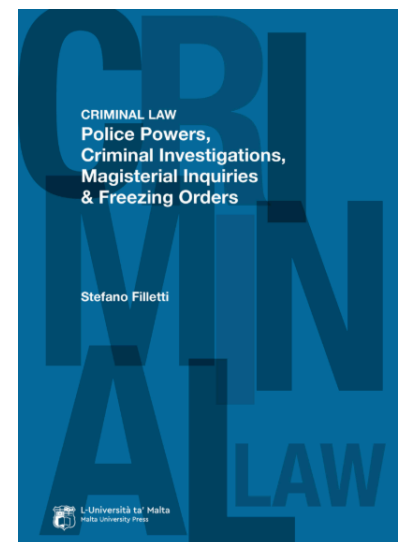
*Article 347 provides that the police shall not institute criminal proceedings, except on the complaint of the injured party, in cases where the law does not allow criminal proceedings to be instituted without such complaint.*

*In terms of article 346, the police have the general duty to bring offenders before judicial authority. The power to prosecute, depending on the offence, is divided between the executive police and the office of the attorney general.*

*In fact the executive police can initiate prosecution both for offences for which they are competent to prosecute ex officio as well as other offences where delegation has been authorized.*

*Article 347A provides specifically that the attorney general shall have the powers: to delegate to the commissioner of police prosecutorial functions vested in the office of the attorney general or any other authority in terms of law.*

**Article 347** - Who can initiate proceedings in Court? Police can take action except in some scenarios - except where you require the complaint of the injured party.



## **Article 350 of the Criminal Code - Definitions**

350. (1) In this Title, and subject to the provisions of sub-article (2):

**"appropriate consent"** means:

- (a) in relation to a person who has attained the age of eighteen years, the consent of that person;
- (b) in relation to a person who has not attained the age of eighteen years but has attained the age of fourteen years, the consent of that person and the consent of his parent or guardian;
- (c) in relation to a person who has not attained the age of fourteen years, the consent of his parent or guardian;

**"Attorney General"** shall have the same meaning as assigned to it in article 2 of the Attorney General Ordinance and includes the Deputy Attorney General and other officers of the Attorney General.

**"designated police station"** means a police station designated by the Minister responsible for the Police by a notice published in the Gazette;

**"excluded material"** means:

- (a) personal records acquired or created by a person in the course of any trade, business, profession or other occupation, or for purposes of any paid or unpaid office and which he holds in confidence;
- (b) human tissue or tissue fluid which has been taken for the purpose of diagnosis or medical treatment and which a person holds in confidence;
- (c) journalistic material which a person holds in confidence;

**"intimate sample"** means a sample of blood, semen or any other tissue fluid, or pubic hair, and includes a swab taken from a person's body orifice other than the mouth;

**"intimate search"** means a search which consists of the physical examination of a person's body orifices other than the mouth;

**"items subject to legal privilege"** means any communication between a professional legal adviser and his client or any person representing his client and any document or record enclosed with or referred to in such communication and made in connection with the giving of legal advice or in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, but the expression does not include items held with the intention of furthering a criminal purpose;

**"journalistic material"** means material in the possession of a person who acquired or created it for the purposes of journalism and a person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes;

**"non-intimate sample"** *includes -*

- (a) a sample of hair other than pubic hair;
- (b) a sample taken from a nail or from under a nail;
- (c) a swab taken from any part of a person's body including the mouth but not any other body orifice;
- (d) urine or saliva;
- (e) a footprint or a similar impression of any part of a person's body other than a part of his hand;
- (f) a voice sample;

**"personal records"** means documentary and other records concerning an individual (whether living or dead) who can be identified from them and relating

- (a) to his physical or mental health; or
- (b) to spiritual counselling or assistance given or to be given to him; or
- (c) to counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who by reason of his office or occupation has responsibility for his personal welfare or by reason of an order of a Court has responsibilities for his supervision;

**"Schengen Information System"** shall have the same meaning assigned to it by Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System and Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System.

(2) For the purpose of this article:

(a) a person holds journalistic material in confidence if -

(i) he holds it subject to such an undertaking, restriction or obligation; and

(ii) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism;

(b) a person holds material other than journalistic material in confidence if he holds it subject -

(i) to an express or implied undertaking to hold it in confidence; or

(ii) to a restriction on disclosure or an obligation of secrecy contained in this Code or in any other law.

## *Sui generis legal definitions*

*Article 350 of the Criminal Code is **sui generis** article of the law creating specific legal definitions to certain terms which Book Second Part 1, Title 1 of the Criminal Code employs. The more relevant definitions of this article 350 are the following: appropriate consent, designated police station, intimate sample, intimate search...*

## *Taking of Samples*

*The taking of samples is an essential tool in criminal investigations. Exhibiting these samples as evidence in trial however will only be possible if they are taken in a correct and legal manner. The Criminal Code distinguishes between intimate samples and non-intimate samples.*

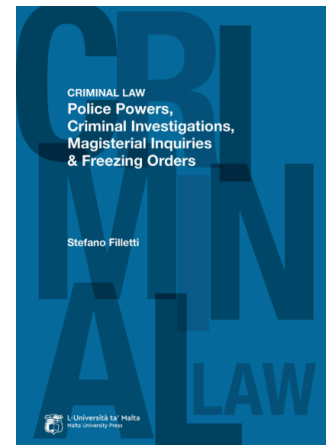
*In a recent judgement, which referred to article 350 of the Maltese Criminal Code, the Court clearly made a distinction between intimate and non-intimate samples when it stated the following:*

### **Police vs Sharon Zahra decided on 29th March 2023 Court of mag.**

*"Fit-tieni lok, fir-rigward tal-istrip search li saret lill- imputata, il-Prosekuzzjoni twiegeb illi c-cirkostanzi tal- kaz fil-kawza citata mid-difiza kienu simili izda mhux identici, u illi f'dan il-kaz is-sejba tad-droga ma kinitx rizzultat ta strip search, la darba din instabet f'chewing gum li kienet f'halq l-imputata.*

*Skont il-Prosekuzzjoni, il- kavità tal-halq mhijiex parti intima tal-gisem, ai termini tal-Artikolu 350 tal-Kodici Kriminali"*

- *You are playing music at a decent level according to you*





You park in a white parking line, and as soon as you park someone tells you to move the car. You stay there and he slaps you. Are you charged with this?

Do you have the right to protest something which is not constitutional ? Can he stop you from protesting?

In this circumstance, his order must be obeyed. First and foremost, as a police officer, he is charged with the duty to preserve public peace and order.

Lawful order in law = lawful does not mean that the order is lawful, our Courts interpreted it as being intrinsically woven with the form not the substance. Who is giving the order - since it is given by the police, it is lawful, it means you must follow the order and seek the redress after.

An officer can give you an order - Courts have done this for one reason. If the police have to do their job, people can not meet people contesting the order, as people won't be able to handle these requests. In most of 1981 police stopped people from protesting, as they knew that another riot from the opposite and a man power of police was not enough hence the police gave an order to disband everything. Hence the Court recognised that. This goes to show that this interplay that the power of the police and your rights is a very delicate one. They can issue all orders necessary, there are contraventions if you disturb that. The police have the power to prevent, detect and investigate crimes.

Police have the opportunity to prevent a crime, there have been instances where this got into play. Detects and investigates crimes.

Luigi is arrested, goes to Court, has a good lawyer and is acquitted but dan mqabbad mieghu, can the police arrest him again on the same crime? No, ne bis in idem - can't be tried twice for the same offence - you can investigate again but cant be charged twice.

“intimate search”- ex strip search.

- Can someone a police official strip search you?
- Have you been to an airport and they asked you for a strip search? That is an exercise of a search. This strip search happens more frequently than you think. Is a search without clothes intimate or non intimate? NOT INTIMATE
- OPEN MOUTH? NOT INTIMATE. IF NOT THE MOUTH AND. A body orifice, then it is an intimate search.

Do you know where most drugs are hidden? Stomach or genitals

Intimate sample - Ampule of saliva - is not intimate

Urine ? Intimate

Taking a sample under your nails?

Photographs of your body?

Hair ? No

Brushing pubic hair? Yes you can not take it. Because you might find either epidermic cells under the nails there or any other evidence there on the pubic hair. This is normal in a search under a suspect

## *Powers of the police*

We were dealing with section 350: special definitions in the criminal code. Now, the powers of the police are quite wide. In the first set of powers are the powers to stop, search and cease and again these 3 powers are very much interrelated. I stop you to be able to teach you and If I find something I can cease any element to use in the charge.

In our criminal code this does not breach the theory of our fundamental human rights. Power to stop and search not automatically a breach of fundamental human rights

231-354

Road checks 355-355D

Powers of search and entry, with a warrant 355E-355G

WITHOUT WARRANT 355K-O

SEIZURE AND RETENTION - 355P-355

HOW MUST I conduct myself? You send him as his superior, go search his house. You knock, he doesn't enter,

How must I conduct myself? How can I physically enter?

What reasonable amount? What is it? How would you define it?

355AB - In performing their powers the police must use minimum force - minimal force to overcome any resistance put or placed by the person on the other end, a search or an arrest.

## **POWER TO STOP AND SEARCH**

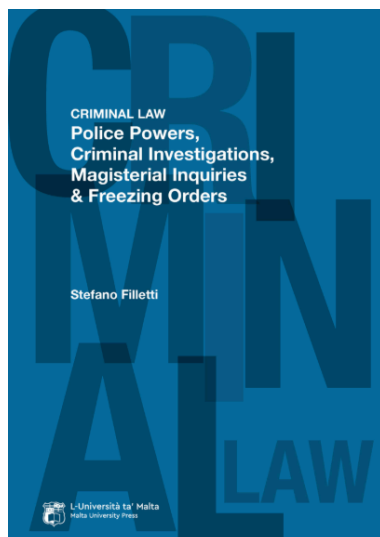
**Article 351** - 351. (1) *A police officer may, in a public place, or in any place to which the public is admitted, even against payment of an entrance fee, search any person or vehicle, if he has a reasonable suspicion that the search will discover the possession of things, which are prohibited, stolen or acquired as the result of any offence whatsoever, or which may be used or may have been used in the commission of an offence or which may serve in the investigation of an offence.*

(2) *For the purposes of sub-article (1), the Police may stop a person or a vehicle until the search is performed and shall seize anything discovered during the search and the possession of which is prohibited or which may be connected with an offence.*

(3) *Pursuant to and for the purposes of the Convention of the 19th June, 1990 implementing the Schengen Agreement of the 14th June, 1985 an offence under this article shall be deemed to be an offence even when committed outside Malta*

– Private residences can still have this element. Possibly with a bit of more circumspection. Even if there are restrictions. Police can enter without a warrant and can stop and search your guests. Wedding, ... - subjected to powers of police to stop and search you and if they find any evidence they can take action

STOP AND SEARCH - not related to an offence - not suspecting of any illegal activity - must have a suspicion



A person ought not to be subjected to arbitrary interference with his personal liberty and be subjected to searches on his person or his property in terms of article 38 of the Constitution of Malta and article 8(2) of the European Convention on Human Rights' except where this is necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Criminal investigations would be one such example.

The Criminal Code creates an exhaustive structure for the powers to stop, search and retain items:

1. Powers to stop and search - vide articles 351-354 of the Criminal Code
- 2 Road checks - vide articles 355 - 355D of the Criminal Code
3. Powers of entry, search and seizure with warrant - vide articles 355E-355J10
4. Powers of entry and search without warrant - vide articles 355K to 355O1

## 5. Seizure and retention - vide articles 355P-355U

### ***Duty of police when exercising power***

The police must always conduct themselves in a proper manner and must refrain from using force. The minimum force necessary to overcome any resistance can be used, and in accordance with article 355AB, the officer shall not use any harshness, bond or other means of restraint unless indispensably required.

### ***The power to stop and search***

Article 351 provides that any police officer may, in a public place, or in any place to which the public is admitted, even against payment of an entrance fee, search any person or vehicle, if he has a reasonable suspicion that the search will discover the possession of things, which are prohibited, stolen or acquired as the result of any offence whatsoever, or which may be used or may have been used in the commission of an offence or which may serve in the investigation of an offence.

In **Charles Paul Muscat vs Kummissarju tal-Pulizija u s-Supretendent Karmelo Bonello**,<sup>15</sup> the Court made reference to the element of reasonable suspicion, and that at the moment of arrest it need not yet be firmly established that an offence has actually been committed or what the precise nature of the offence is, while citing "Theory and Practice of the ECHR", by Van Dijk et. The Court also made reference to *Tonio Vella vs Kummissarju tal-Pulizija*," where the Court held that: It-test li ghandu jigi applikat biex jigi deciz jekk l-ufficjal kellux suspett ragonevoli o meno, mgħandux ikun dak oggettiv, izda dak soggettiv - kif kienet tidher is-sitwazzioni f'hin u post partikolari lill-ufficjal tal-Pulizija ragonevoli.

The power to stop and search applies to any public place, but also to a private place to which the general public is admitted.

This would apply even if entrance to the private place, for example, a nightclub, is restricted, such as by fee or invitation.

In these cases, the police also have the power to stop and perform a search on the person.

In terms of article 351(2) the police may stop a person or a vehicle until the search is performed and shall seize anything discovered during the search and the possession of which is prohibited or which may be connected with an offence.

Anything seized as a result of a search shall be preserved and the police carrying out the search shall draw up a report stating all the particulars of the search and including a detailed list of the things so seized (article 354 of the Criminal Code)

### **Police have rights to enter private property but not under STOP AND SEARCH**

In this power of performing stop and search the police can perform a non intimate search - petting you down or other forms of non intimate searches. It can be done forcefully. That search can be forced upon you - the minimal force required to restrain him - the law speaks of “persons of the same sex” - is it a problem? Most issues are on gender - so far we dodged a bullet, the question is for how long. If gender will mean the same as sex, then this could be a problem. The law can't insist anymore on people of the same sex. Then you'd have to find a police officer of the same gender.

## Article 352 Warrant

352. Where the search to be performed is required in an unattended vehicle and it is not possible to obtain the attendance of its registered owner, then a police officer may only carry out the search if he has a warrant from a superior officer not below the rank of an inspector.

## Article 353 - Limitation as to search, etc

**353.** Except in urgent cases and when a person is apprehended in *flagrante delicto* nothing in this Title authorises the search of a person by a police officer of the opposite sex, or that a search be conducted by a police officer not in uniform unless clearly identified by the production of a police identity card.

- however, LAW SAYS SAME SEX - ARTICLE 353

IN *FRAGRANTE DELICTO* - YOU can dispose of the *corpus delicti*, police need to intervene. Most imp - is that the officer doing it must be a part of the executive police, only members of the police can do a search - armed forces can not!!

*Intimate searches are different and more delicate and the procedure is different*

*The power to search a person - intimate and non-intimate searches*

*The police may perform a non-intimate search on any person, forcibly if necessary. A search on the person is to be performed by an officer of the same sex. However, in urgent cases and where the offender is caught in flagrante delicto, the search may be performed by an officer of the opposite sex in terms of article 353.19*

*The officer must be wearing a uniform or be clearly identifiable as a police officer.*

*Intimate searches are more delicate and require the intervention of experts. Such experts are necessary to ensure that the search is done correctly and in a manner which is safe and lawful for the person being searched. These searches, although they can be forced, have to be authorized by a magistrate. Article 355AP of the Criminal Code? states that where the arresting officer or the custody officer has a reasonable suspicion that the person arrested may have concealed on his person any drug, the unlawful possession of which would constitute a criminal offence, or any other item which a custody officer is authorised by this Code or by any other law to seize from the possession of an arrested person, the said officer may request a magistrate to order an intimate search of the person arrested.*

*When the magistrate receives a request for an intimate search, in accordance with article 355AQ(1) the magistrate shall appoint an expert (for example a medical doctor) to carry out the search under such safeguards as he may consider necessary for the purpose of decency and to report to him on his findings.*

*A copy of the report shall be communicated without delay to the arresting or custody officer as the case may be.*

*The expert appointed must be a person of the same sex unless the expert is a medical practitioner and the person to be searched consents thereto in writing to be searched by a person of the opposite sex.*

*Article 355AR provides that anything found as a result of an intimate search may be temporarily retained by the expert and may subsequently be seized by order of the magistrate, and a receipt therefore shall be given to the detained person.*

**Stop and search** - every event is an exercise of a stop and search - POLICE IS ALWAYS THERE DURING MATCHES OF FOOTBALL SO THAT IF ANYTHING HAPPENS, there is a police officer there ready to search you. Intimate searches are more delicate - ramifications of an intimate search could have delicate consequences.

#### **Article 354 - Report on search**

**354.** *Anything seized as a result of a search under the preceding articles of this title shall be preserved and the Police carrying out the search shall draw up a report stating all the particulars of the search and including a detailed list of the things so seized.*

## **Sub-title VI POWERS OF ARREST AND DETENTION**

*Article 355AB Criminal Code - Conduct towards the person arrested.*

**355AB.** *The officer or any other person authorised by law making an arrest shall not use any harshness, bond or other means of restraint unless indispensably required to secure, or rendered necessary by the insubordination of the person arrested.*

*Intimate searches of the person detained - Article 355AP*

**355AP.** *Where the arresting officer or the custody officer has a reasonable suspicion that the person arrested may have concealed on his person any drug the unlawful possession of which would constitute a criminal offence or any other item which a custody officer is authorised by this Code or by any other law to seize from the possession of an arrested person, the said officer may request a Magistrate to order an intimate search of the person arrested.*

*Article 355AQ - Experts to be appointed*

**355AQ.** (1) *Upon a request for an order under article 355AP the Magistrate shall appoint an expert to carry out the search under such safeguards as he may consider necessary for the purpose of decency and to report to him on his findings. A copy of the report shall be communicated without delay to the arresting or custody officer as the case may be.*

(2) *A person shall not be appointed an expert for the purpose of carrying out an intimate search on a person of the opposite sex unless the expert is a medical practitioner and the person to be searched consents thereto in writing*

- MUST FOLLOW 355AQ - the first thing an officer must do is inform the duty magistrate who must accept the request and must give all orders necessary; to provide an expert, doctor to provide the search and the place, clinic or hospital. Searches may be done by a person of the same sex, the exception is the medical doctor. Anything found in this search will be ceased by the police and the receipt is given to the person being searched.

In 2002, the criminal code transformed itself - a lot - and the area of law which was really pumped up was this part of the criminal code, rights of suspects and the police powers. The issue of the warrant was very relevant. Previously police could search and enter your property upon a police inspector having a reasonable suspicion having committed a crime, or being involved in a crime. The moment of which person has reasonable suspicion, the police could take action.

THEY CAN NOT ENTER UPON REASONABLE SUSPICION THAT WAS BEFORE. The law has done away with it. The law can not act itself solely on the issue of reasonableness. **Reasonableness is not enough.** The fact that an officer has reasonable suspicions and the person was a suspect and was acquitted doesn't mean police did not have reasonable suspicion. This system did create a lot of abuse.

THE LAW said no let's move away from this and a system of warrants was introduced - DEFAULT POSITION IS THAT POLICE ALWAYS WORK WITH A **WARRANT** - when the police can act without a warrant — exception to the rule. The law will tell us when the law can act with a warrant and when you can't.



## **POWERS OF ENTRY, SEARCH AND SEIZURE UNDER WARRANT**

### **Article 355E - Conditions for search of premises, etc**

355E. (1) Saving the cases where the law provides otherwise, no police officer shall, **without a warrant from a Magistrate**, enter any premises, house, building or enclosure for the purpose of effecting any search therein or arresting any person who has committed or is reasonably suspected of having committed or of being about to commit any offence unless -

(a) the offence is a crime and there is imminent danger that the said person may escape or that the corpus delicti or the means of proving the offence will be suppressed; or

(b) the person is detected in the very act of committing a crime; or

(c) the intervention of the Police is necessary in order to prevent the commission of a crime; or

(d) the entry is necessary for the execution of any warrant or order issued by any other competent authority in the cases prescribed by law; or

(e) the arrest is for the purpose of apprehending a person who is unlawfully at large after escaping from lawful arrest or detention; or

(f) the entry is necessary for purposes of:

(i) executing the arrest, or ascertaining the whereabouts, of a person in respect of whom an alert has been entered in the Schengen Information System and there is an imminent danger that the said person may escape; or

(ii) discovering any property in respect of which an alert has been entered in the Schengen Information System and there is an imminent danger that the property may be concealed, lost, damaged, altered or destroyed; or

(g) the entry is necessary for the protection of any person.

(2) The expression "enclosure" does not include any plot of land enclosed by rubble walls.

(3) A warrant may also be issued by a Magistrate as mentioned in sub-article (1) for the purpose of:

(a) effecting the arrest of ascertaining the whereabouts of a person in respect of whom an alert has been entered in the Schengen Information System; or

(b) discovering and seizing any property in respect of which an alert has been entered in the Schengen Information System.

❖ 355E - Police can only enter premises with a warrant except in the following cases;

1. Where there is imminent damage person can escape
2. Corpus delicti will be destroyed
3. Person caught in the crime

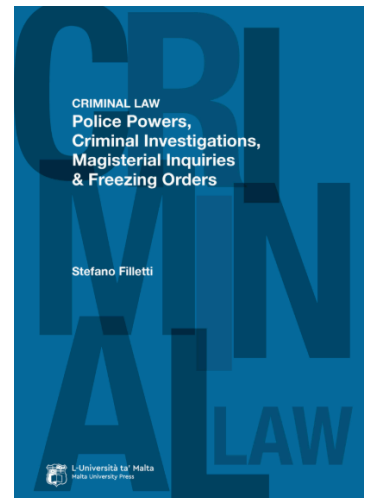
So when the police are faced with a situation when there is a wanted person to escape they can barge in and enter the property. Respect of a crime which happened last month - I would need a warrant to go in and search equally. If I need to search, I would seek permission from the magistrate and go and search. They can use force, break walls and windows 355F - always referring to 355AB on the powers they can use.

### **Power of entry, search and seizure with a warrant**

In principle, the police have to conduct a search in a premises with a warrant signed by a magistrate. The warrant will contain the address of the place where the search has to be carried out together with a description of the search to be performed.

Article 355E(1) provides that all searches performed by the police have to be executed pursuant to a warrant issued by a magistrate. The search warrant empowers the police to enter any premises, house, building or enclosure for the purpose of effecting any search as well as arresting any person who has committed or is reasonably suspected of having committed or of being about to commit any offence.

There are notable exceptions to this rule. In fact, the police would be empowered to enter a premises without a warrant where: (Article 355E (a)-(i))



## **Article 355F - Subsidiary powers of Police in execution of warrants**

355F. *In cases where a police officer is empowered to enter into any of the places mentioned in the last preceding article, it shall be lawful for such officer to open or break any door or window, if, after giving notice of his office and object, he cannot otherwise obtain entry.*

In conducting a search, police must respect your right to privacy. LORRY SANT. They performed a search for the police before sunrise - ON A SUNDAY, NONNO AND all underwear found was on the press. The hour which it conducted did not — the law says any such warrant to perform a search must be done between sunset and sunrise.

If in an office - can you go through lawyer's stuff?

Even name of lawyer can be problematic

## **Article 355G - Scope of search and of search warrant.**

355G. (1) Any entry and search warrant issued under this Sub-title and any search or seizure made under the provisions of this Sub-title shall not extend to legal privilege or to any excluded material.

(2) An **entry and search warrant** issued under this Subtitle Shall be deemed to have been granted to the police officer or officers executing it.

(3) Without prejudice to the right of obtaining a new warrant for the same purpose, an entry and search warrant may not be executed after the lapse of one (1) month from the date of issue.

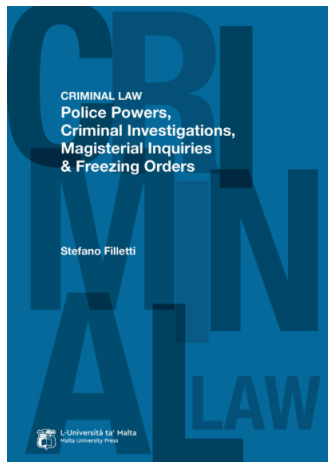
355G - law is privilege - how do we determine this privilege ? We need to see I but if I see it I breach the privilege

*Searches with warrant - done*

*Police conduct - right to privacy - done*

General rule is when a search is performed, during search police will execute a warrant from the duty magistrate in duty - and ask for the issuance of a warrant. The law does not say what a warrant should contain but what should it contain? Permission from duty magistrate, reason why you have to perform the search, why? I ask for issuance of a warrant. It should contain a description of the things you are searching for, and what else, the address, some form of address.

Together with a general description - so this raises another issue. So you are a police constable and have been served a warrant as this is a drugs related investigation and hence you are looking for drugs. You enter and smash the door and you find nothing related to drugs but you find a flamingo stuffed, which is illegal.



## **Police Conduct**

In obtaining access, the police are, in terms of article 355F,<sup>23</sup> empowered to open or break any door or window, if, after giving notice of his office and object, the officer cannot otherwise obtain entry. This article allows the use of force to gain entry.

The amount of force to be used has to be proportionate and, in all cases, the minimum required to overcome resistance and gain entry.

Any warrant issued by a magistrate will not extend to legal privilege or excluded materials (article 355G).<sup>24</sup>

A search ought to respect the right to privacy. It should be conducted in a professional manner, discreetly and within reasonable hours. With respect to the time of execution, if a delay will frustrate the search, the magistrate may exceptionally order a search after sunset (article 355H).

When executing a warrant, the officer shall hand a copy of the warrant to the person occupying and present in the place being searched (article 355I).<sup>26</sup> The person occupying or present does not have to be the owner, but simply the person there at the time of the search.

If during a search, evidence of other crimes not covered by the original warrant are discovered, *opere legis*, the original warrant will extend to cover the new items discovered (article 355J).

Power of search and entry without a warrant

The police may enter a premises without a warrant (article 355K) where the law allows immediate entry due to the existence of particular, urgent circumstances (article 355E(1)

(a) to (e)).

In addition, in terms of article 355L (1), where the police have arrested a person, and the police believe that in the premises of the person arrested evidence of a crime exists, the police would be empowered to conduct a search in those premises. Furthermore, if during the search evidence of another crime is found, the power to search will extend to that evidence too.

## **Seizure and retention**

*The police perform a search on a person or in premises with the aim of securing evidence of a crime. They will, therefore, seize the items found and retain them to use as evidence in an eventual trial. The powers of seizure and detention are a natural consequence of power of search afforded to the police.*

*In terms of article 355P,<sup>31</sup> the police may seize anything which is found in a premises during a search, if they have reasonable grounds for believing that it has been obtained in consequence of the commission of an offence and that it is necessary to seize it to prevent it being concealed, lost, damaged, altered or destroyed.*

*Where the item to be seized is computer data, in terms of article 355Q,<sup>2</sup> the police may export the data or require the data to be delivered to them in a form which can be taken away and which is visible and legible. This would include print outs as well as soft copy of data on any storage medium.*

*A receipt of all items seized is given to the person present in the premises, or to the person who held the items seized (article 355R),<sup>33</sup> Anything which has been lawfully seized by the police may be retained so long as it is necessary in all the circumstances (article 355(1)).*

*If an item seized during a search is the property of a third party, and is not related to the crime, the rightful owner may file an application to the duty magistrate requesting its release (article 355T).<sup>35</sup> The magistrate before releasing may request information of the item and also hear the owner before deciding whether to release the item seized. This would apply where items of a bona fide third party would have been seized during a police search. A typical example would be a search conducted in a garage or store of a person suspect and the seizure would have included third party property unrelated to any crime.*

Flamingo illegal - no drugs but only it - you search for the purposes of cease and hold - can the police seize items of any other offense? Yes or no? Does the warrant extend?

Another ex - search for the computers and find child pornography - can i cease that computer? For computer misuse? YES YOU CAN, THE LAW SAYS THAT if in the performance of a search, the warrant given to you can extend to any other offense, so yes you are entitled to take it.

## Article 355H - Times for execution of warrant.

355H. No warrant of entry and search may be executed after sunset unless the Magistrate has otherwise authorised the warrant, or unless the executing Police officer has reasonable cause to believe that the purpose of the entry and search will be frustrated if the execution of the warrant is delayed.

## Article 355 I - Copy of warrant to person.

*355I. The executing officer shall hand over a copy of the warrant to the person occupying and present at the place searched or to any other person who appears to the said officer to be in charge of the same place and who happens to be present during the search. If There is no person present who appears to the executing officer to be in charge of the premises the copy of the warrant shall be left in an easily visible place on the premises.*

## Article 355J - Limitations to a Warrant

*355J. A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued:*

*Provided that if, in the course of the search, offences other than the offence or offences mentioned in the warrant are discovered, the search may extend to the extent required for the purposes of such other offences.*

—> When you search you have a right to arrest - the reason you search with/without a warrant is for evidence you want to use in trial – THE POWER TO CEASE AND TO RETAIN - i need to see it, take it and hold it until i can hold and exhibit in Court. The next logical powers are to cease and retain and this might seem quite straightforward. Is it? The power of seizure - the police ought to take items which can be taken and of course items which are not perishable - as perishables will deteriorate and have no use.

The poisoned apple - also you must preserve the evidence. Now when you seize and retain you also have the necessary. With respect to computers, the police are also authorized to seize computer data. One obsession we have is the chain of custody. We are becoming more obsessive on it. The process of taking a document to Court is a process which - basically you have to explain to a Court that X picked it up, and is now here - so i can see that the chain of custody has not been settled, item taken, seized and taken in the hands of the Court. But ideally if i have a problem.

If I want to prove Diane is an international human trafficker - part of the investigation is that I need to establish her credit card, purchases and - the law provides that in case of data, you can take what you need instead of taking all the physical data. They can enter into your server and download the data that they need from Go, HSBC, etc. The chain of custody here operates a bit differently.

Find the Dreambox case of the Maltese cracking codes.

Other than that police can seize absolutely anything- a receipt of items seized is given to the person searched - this is creating massive problems. Conventionally, seizing things was easy because it was tangible. It was also easier for the defense to compare evidence. This is because each and every document, you have vital information. Also, information subject to privilege cannot be taken and hence, how can you know that information cannot be seized?

## Article 355T - Restitution to owner

355T. A person who is the rightful owner of a thing seized and detained may, unless criminal proceedings in the course of which the thing seized has been exhibited or is to be exhibited are pending before any Court, **make an application to a Magistrate for its restitution**, and the Magistrate may, after hearing the Police, by a decree order its release either unconditionally, or under such conditions as may be necessary to preserve the evidential aspects of the thing.

355T - When the police swoop in and search, they can seize anything. This article is used where you are a bona fide third-party owner i.e., you lend an item to your friend and they search and seize your friend and they seize it.

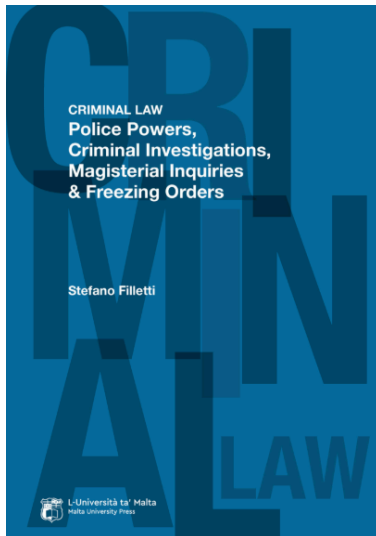
2024 AML rule - new law: solved this disproportion - did not last - now they don't only freeze what you have but also what you don't have.

One of the most central powers police have is the power to arrest - what does an arrest mean? When did you read that the police proceeded to arrest? The process of arresting - You have to tell them why, the reason for arrest.

→ When an arrest happens, what is the process of an arrest? It goes beyond the handcuffs, whenever you are not free to do what you want. THAT PROCESS WHERE YOU ARE NOT FREE TO DO OR GO WHERE YOU WANT. if you understand them, then anything else would make sense. Any process as a result of which you are not free to do what you want or go where you want. I have physically restricted your movement. Arrest is so much more than that, any process wherein I restrict your movement.

So the next question is if you meet a police officer and the officer says - you come with me right now and you do. Are you in a state of arrest? Or if they say stop you are under a state of arrest?

There are many forms of arrest. You have physical and verbal - **Anderson vs Booth**. What is important in the verbal arrest is that the person who is arrested understands that he is under compulsion to obey. When the command and the order is clear, the person subject to that command is acting under the order of the Officer - that is a form of arrest just as if it was a physical arrest.



## The power of arrest

### *Definition of arrest*

An arrest deprives the arrested person of free movement. There is no need for force. Simple orders, which result in the arrested person not being free to do what they want, are enough.

In *R. v. Whitfield*,<sup>36</sup> (dissenting), it was held that:

"I do not see that it should be necessary to touch or hold the person being arrested. He must, of course, be informed that he is being arrested. If he does not submit or tries to flee, the arresting officer may use such force as may be reasonably necessary to detain his man having regard to the nature of the offence for which the person is wanted. If the man flees and is not in fact detained he cannot be said to have been in lawful custody, but that does not mean he has not committed an

offence."

On the other hand **Dr Mario De Marco (Master's Dissertation 1988)**

defines arrest as:

"... the total restraint of the liberty of another, whether by containing him or compelling him to go to a particular place, or by confining him in a particular place, or by detaining him in a public place."

It is generally agreed that an arrest can take a verbal or a physical form. In the UK case *Alderson vs Booth*<sup>38</sup> - Lord Parker commented that there could be a number of cases of arrest. There can be an arrest by saying the words "I arrest you", without any physical contact and the defendant submits and goes with the officer. Equally, an arrest occurs when any form of words is used to bring to the defendant's notice that they are under compulsion, and therefore they submit to that compulsion.

Knowing the moment in which you are arrested is crucial because you have rights that kick in.

**Voluntary attendance** - When you are requested to go to a Police station. This is not arrest and our Courts state that in performing an arrest, the order must be clear and unequivocal - the physical arrest does not require this so we can avoid misrepresentation. Hence the rights one is afforded when under arrest do not apply.



**Search on person arrested Article 355AF** - Upon arrest, Police can perform a search in your premises.

**355AF.** (1) A police officer may immediately search the person arrested:

(a) if the police officer has reasonable grounds for believing that the arrested person may present a danger to himself or others; or

(b) for anything which the arrested person might use to assist him to escape from custody; or

(c) for anything which might be evidence related to an offence.

(2) The provisions of article 353 of this Code shall apply to searches under this article.

**355W - Private citizen's arrest.** Only the offenses detailed in this article may perform a citizen's arrest.

*355W. (1) Any person not being a police officer may arrest without a warrant anyone who is in the act of committing or has just committed any crime concerning **sexual offences**, any crime of **wilful homicide** or **bodily harm**, or any crime of **theft** or of **wilful unlawful entry** or **damage to property**.*

*(2) The person making any arrest under sub-article (1) shall without delay inform the Police of the fact of the arrest and shall exercise such power only until it is strictly necessary for the Police To take over the person arrested.*

## **Article 355X - Arrest by police without warrant**

355X.(1) Any police officer may arrest without warrant anyone who is in the act of committing or has just committed a crime punishable with imprisonment, or whom he reasonably suspects to **be about to commit or of having just committed such a crime.**

(2) Any police officer may also proceed to the arrest of a person in respect of whom an alert for his arrest has been entered in the Schengen Information System.

(3) Any police officer may also proceed to the arrest of a person who knowingly, or after due warning, **obstructs or disturbs him in the execution of his duties, or disobeys his lawful orders.**

(4) The powers mentioned in sub-articles (1), (2) and (3) shall only be exercised until it is strictly necessary for the police officer to convey the person arrested to a police station and deliver him to a superior officer not below the rank of sergeant.

Article 355XX - Detention without warrant under Schengen Information System.

355X - Arrest by officers without a warrant. Compare 355X and 355Y. X speaks of an arrest by a police officer without a warrant if he suspects that you are going to commit it, if he catches you, or if he suspects you did it. Y is different. Y is a contravention. They cannot arrest you after you commit a contravention but they can ask you for your details to arraign you in Court. The idea is that why should I arrest you if for a contravention you do not go to jail?

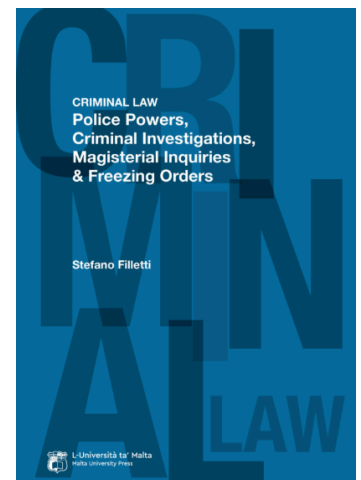
## **Voluntary attendance vs arrest**

Furthermore it is essential to distinguish between voluntary attendance as opposed to arrest. Where a person voluntarily attends a police station or follows the police that person cannot be said to be in a state of arrest. This is also reflected in article 355AD of the Criminal Code:

*"(1) Where, in the course of an investigation, a person attends voluntarily at, or accompanies a police officer to, a police station or office, that person shall be free to leave at any time, unless and until he is informed that he is under arrest."*

However in cases where persons are forced to stay or go to any place against their will, that person is in a clear state of arrest.

In *Il-Pulizija vs Dimech*, the person first voluntarily tendered to follow the police to the police station. The moment in which the suspect refused to follow the police officer, and the officers in



question physically restrained him to follow them to the police station, then from that moment onwards the suspect was deemed to be in a state of arrest.

Similarly article 355AD(2)\*1 provides that:

"Where an inspector of police has a reasonable suspicion that the person who attended voluntarily at the police station or office may have committed an offence subject to imprisonment, he may arrest such person forthwith without warrant and inform him accordingly. The time of arrest shall be immediately recorded, and immediate notice thereof shall be given to a magistrate."

The law clearly mandates that the time of arrest must be noted, as this is essential to determine the precise moment when the arrest begins. This is required in the interest of the habeas corpus rules which will be discussed further below.

## Execution of an arrest

The Criminal Code provides for two modes of arrest being arrest with a warrant and arrest without a warrant.

Arrest with a warrant for an offence

355V. Where there are lawful grounds for the arrest of a person, the Police may request a warrant of arrest from a magistrate, unless in accordance with any provision of law the arrest in question may be made without a warrant.

Therefore the general rule is that an arrest can only be performed pursuant to a warrant issued by the magistrate in favour of the commissioner of the police, which may then be executed by any police officer. In addition, if the duty magistrate decides to not issue a warrant, the police officer may still request the issuance of the warrant from a judge.

In requesting a warrant for an arrest in accordance with

355AH of the Criminal Code a police officer may apply in person to a magistrate requesting the issue of the appropriate warrant stating the grounds for the request and giving the magistrate all such information that will enable him to decide on the request. Before deciding whether to issue the warrant the magistrate may require the police officer to confirm on oath the information supplied by him and the warrant shall only be issued upon the magistrate being satisfied that sufficient grounds for the issue of the warrant exist. In cases of urgency, the request for the issue of the warrant and the warrant may be communicated even by fax.

## **2002 amendments to the Criminal Code**

The 2002 amendments to the Criminal Code ushered in these new provisions which were a radical change. Prior to the amendments in 2002 the police could arrest any person reasonably suspected to be involved in the commission of an offence. A police officer not below the rank of an inspector could order the arrest of a person if he had a reasonable suspicion that that person was involved in an offence. This also resulted in a number of cases where reasonable suspicion was being challenged in trial and if successful would lead to the declaration of an illegal arrest.

Defining a reasonable suspicion was not free from complication even though this term had a subjective element to it which was not easily susceptible to a definition or uniform treatment. The law was therefore amended to require a warrant for an arrest to do away with the discretion exercised by police officers.

Whilst this measure seeks to curb police impropriety or abusive behaviour this article also makes it increasingly difficult to attack the reasons for the arrest or rather the reasons for the issuance of a warrant. The person arrested or his defence counsel will not be made privy to the conversation and information relayed between the police officer and the magistrate thereby making the issuance of the warrant difficult to attack.

However, difficult as this may be, there are still some safeguarding provisions. In certain circumstances the magistrate may, where the magistrate deems it fit to do so, before issuing a warrant may order that the police officer in question confirms on oath the report made and the information relayed. This would mean that in the event that information tendered to the magistrate is incorrect, the reasons for the warrant and arrest can be challenged.

There are circumstances where the police can also perform an arrest without a warrant.

## **Arrest without a warrant for an offence**

In terms of article 355X. Sub-article 3 is interesting. This gives the power to the police to arrest any person who has knowingly, or after due warning, obstructed the officer in the execution of his duties or disobeyed his lawful order. Where a person knowingly obstructs a police officer in the execution of his duty, the power of arrest is clear. It is less clear when dealing with lawful orders.

What is understood by the term "lawful order"? Who determines the lawfulness of an order? Can a person disobey an order which is believed or perceived to be unlawful? What is an unlawful order?

In truth the word "lawful order" has its judicial interpretation.

This term does not refer to the content of the order but rather its form. Therefore, if a member of the executive police issues an order, it is lawful. It is lawful even if the content of the order is wrong or even unlawful. If therefore whilst exercising the right to peaceful protest, the police issue an order to leave, the actual order might be in breach of one's fundamental human right, yet it remains a lawful order which must be obeyed. That is not to say that the person aggrieved cannot subsequently contest and claim a breach of right.

A person cannot however disobey the order, even if he believes that it is wrong. The reason for this judicial interpretation is rooted in principles of public order. There can be no public order if the orders issued by the police are contested and disobeyed on the spot. It may be that for reasons of public order that the police issue an order (civil unrest, public risk and safety) and although that order might breach an individual's right, it might have been necessary. In that case the person aggrieved retains the right to seek legal redress but is not afforded the right to contest or unilaterally disobey the order when issued.

This power of arrest of the police is limited in cases of contraventions.

## **Article 355Y - Arrest for minor offences**

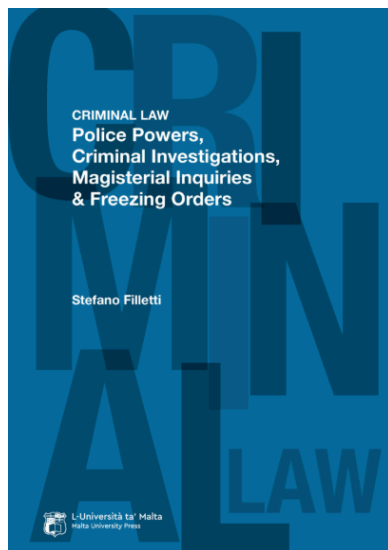
355Y. (1) In the case of contraventions, or of crimes not subject to the punishment of imprisonment, it shall be lawful for the Police To proceed to the arrest of any person without a warrant, provided that -

- (a) the person be detected in the very act of committing the offence; or
- (b) the arrest be necessary to prevent the commission of an offence in respect of which the Police may institute criminal proceedings without the complaint of the injured party; and
- (c) in either of the cases mentioned in paragraphs (a) or (b) one of the conditions mentioned in article 355Z is satisfied.

(2) A person shall be deemed to be detected in the very act of committing an offence, if he is caught, either in the act of committing the offence, or while being pursued by the injured party or by the public hue and cry.

355X(3) - If you fail to obey the Police's lawful order. Lawful order means that the order must come from a member of the executive police. They can arrest you if you fail to comply.

355E - all arrests should be done with a warrant except in cases specified in 355 (which are urgent)



### **Article 355Y**

Apart from the commission of certain offences, and independently of any issue of warrants, there are certain situations in which the members of the executive police are given specific powers of arrest. These are termed "General Arrest Conditions".

Arrest without a warrant in circumstances which are not related to any offence

There exist other situations when the police can arrest without a warrant. These are sui generis circumstances not necessarily related to the commission of a particular offence. Article 355Z provides that the police can proceed with an arrest in the

following circumstances where:

In all cases where an arrest is performed outside of a police station by a police officer below the rank of inspector, the officer shall take the person arrested to the closest police station and inform an officer of a rank of inspector of such an arrest (article 355AE of the Criminal Code).

Additionally, in terms of Article 355AJ of the Criminal Code whenever a person is arrested in consequence of a warrant, or, without a warrant, if that person is detained for a period in excess of six hours, the duty Magistrate is to be informed, giving details as to the time and place where the person is being held. The arrested person will be transferred to a designated police station. Our Courts have had occasion to apply this provision and a police arrest as deemed to be contrary to law when the formality was not observed. The effect of breaching this formality will invalidate the arrest in terms of law meaning that the person arrested will be released, even if arraigned under arrest in Court.

## Conduct during arrest and additional powers

In conducting any arrest, the officer or any other person authorised by law making an arrest shall not use any harshness, bond or other means of restraint unless indispensably required to secure, or rendered necessary by the insubordination of the person arrested. (article 355 AB of the Criminal Code).

Furthermore, upon an arrest the police can perform a search on the person (article 355AF of the Criminal Code):

### Private citizen's arrest

The Criminal Code also provides for situations where a private citizen in certain limited circumstances can effect an arrest.

*355W. (1) Any person not being a police officer may arrest without warrant anyone who is in the act of committing or has just committed any crime concerning the peace and honour of families and morals, any crime of willful homicide or bodily harm, or any crime of theft or of willful unlawful entry or damage to property.*

*(2) The person making any arrest under sub article (1) shall without delay inform the Police of the fact of the arrest and shall exercise such power only until it is strictly necessary for the Police to take over the person arrested.*

The power of arrest in this case is limited to the restraining of a suspected person until arrival of a member of the executive police. The suspected person must be surrendered to the police upon their arrival.

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**Keep in mind that 355X and 355Y are all linked to a crime or contravention.**



It might be that the police need to perform an arrest but in truth, that arrest would not be linked to a particular offense. Our law speaks of **general conditions of an arrest**. They are not general conditions in reality - but are **other** circumstances. They are a group of situations in which the police may perform an arrest. When can the Police perform such an arrest?

355Z - They are sui generis situations which can be used by the police.

## Article 335Z - General arrest conditions.

355Z. The general arrest conditions are -

- (a) that the identity of the person is unknown or cannot be readily ascertained by the police officer; or
- (b) there is a doubt whether the particulars furnished by the person are true; or
- (c) that the person has not furnished a satisfactory address for service, or there are doubts about whether the address provided is satisfactory for service, or that at least some other person may according to law receive service on his behalf at the address given; or
- (d) that the arrest is necessary to prevent the person -
  - (i) causing physical harm to himself or to any other person; or
  - (ii) suffering physical injury; or
  - (iii) causing loss or damage to property; or
  - (iv) committing an offence against public decency; or
  - (v) causing an unlawful obstruction on any public road; or
- (e) that the police officer has reasonable grounds for believing that the arrest is necessary to protect a child or any other vulnerable person.

355Z - If the Police do not believe the particulars that you give them, they can arrest you under this article. They have to ascertain your identity. Even if you don't have a sufficiently good address, they may arrest you. You can be searched with a warrant, with the powers of seizure, on yourself, and your premises, upon your arrest.

**Habeas Corpus rights** - Our law in the marginal notes speaks about remedy and not rights. Jurists always refer to rights. They are the same thing (although rights and remedies are not the same thing).

The rights of the person arrested only apply when you are arrested. If you are there voluntarily, no rights are applicable to you.

What are the rights attached to a person suspect? Right to be informed, right to remain silent, to be assisted by a lawyer / legal aid, the letter of rights, to inform a member of a family, right to medical assistance, the 48-hour rule.

## Article 355AC - Information to be given on arrest

**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:*

*Provided that if an interpreter is necessary and is not readily available or if it is otherwise impracticable to comply with the provisions of this sub-article at the time of the person's arrest or detention, such provisions shall be complied with as soon as practicable:*

*Provided further that, in any case, where the arrest is made by a private person under the provisions of article 355V the giving of the information may be delayed until the person arrested is taken over by the Police.*

## Article 534AB - Right to information and Letter of Rights.

534AB. (1) Saving the provisions of articles 355AC, 355AS, 392 and 445, it shall be the duty of the Police or of the Court, as the case may be, to inform the suspect or the accused without undue delay of the following procedural rights:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed, in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of his rights of defence, of the offence he is suspected or accused of having committed:

Provided that the suspect or accused shall be promptly informed of any changes in the information given in accordance with this article where this is necessary to safeguard the fairness of the proceedings;

- (d) the right to interpretation and translation;
- (e) the right to remain silent;
- (f) the right to have a third party informed of the suspect's or the accused person's deprivation of liberty;
- (g) the right to communicate with third persons and with consular authorities when the suspect or an arrested person is deprived of his liberty;
- (h) the right to be allowed to consult a medical practitioner;
- (i) should the suspect or arrested person be illiterate, the right to have the Letter of Rights read out and explained to him.

(2) The information provided for under sub-article (1) shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspected or accused persons within the meaning of 208AC(2).

(3) It shall be the duty of the Police to provide a person arrested or detained promptly with the Letter of Rights set out in Schedule E and the Police shall give the said person an opportunity to read it and to retain the same in his possession throughout the time that he is detained. The Letter of Rights shall be written in a language that the person understands:

Provided that where the Letter of Rights is not available in the appropriate language, the suspect or the accused shall be informed of his rights orally in a language that he understands and the Letter of Rights shall subsequently, and without undue delay, be provided to him in a language that he understands.

(4) Information provided in accordance with this article shall be recorded by the Police or by the Court, as the case may be.

# RIGHTS OF A PERSON ARRESTED

## Definition of habeas corpus

Every person arrested has rights. These rights are collectively referred to as habeas corpus rights.' These rights are minimum guaranteed rights afforded to every person arrested. A number of these rights will be examined.

The reasons for arrest

In accordance with 355AC when a person is arrested that person has the right to know the reasons for his or her arrest.

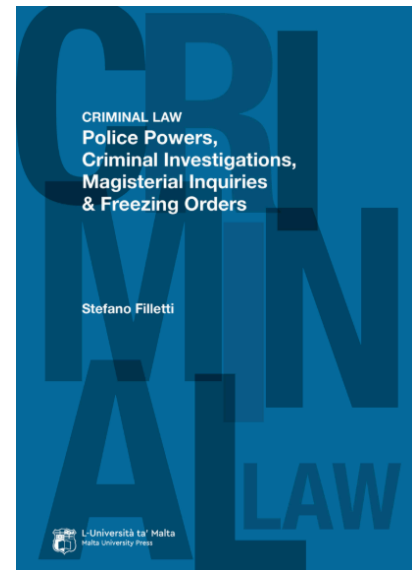
When a person is arrested, the arrest is not lawful unless the person arrested is informed that he is under arrest, even though the arrest may be obvious. In addition, the law provides that the arrest is not lawful unless the person arrested is informed at the time of his arrest or detention, in a language that he understands, of the reasons for his arrest or detention. If an interpreter is necessary and is not readily available, or, if it is otherwise impracticable to comply with the provisions of this sub-article at the time of the person's arrest or detention, such provisions shall be complied with as soon as practicable.

The Constitution in article 34(2) also states that any person who is arrested or detained shall be informed at the time of his arrest or detention, in a language that he understands, of the reasons for his arrest or detention. If an interpreter is necessary and is not readily available or if it is otherwise impracticable to comply with the provisions at the time of the person's arrest or detention, such provisions shall be complied with as soon as practicable.

There are circumstances therefore where it is not possible or practicable to inform a person of the reasons for his/her arrest, such as where the person is heavily drunk or drugged or where no interpreter can be found to explain such reasons in the native language. In these cases, it is therefore possible to give reasons for the arrest on the first available and practical opportunity.

This obligation imposed on the members of the police force is also reflected in article 5(2) of the European Convention of Human Rights.

"everyone who is arrested shall be informed promptly in any language which he understands of the reasons for his arrest and of any charge against him"



Dealing with the rights of the person suspect - Is it okay for the police to release you after 48 hours? The law says you can be retained for as long as necessary and in no case should it exceed 48 hours. By way of a rule, you should not be detained for more than 48 hours. The police used to arrest you for 48 hours, release you, allow you to walk to the front gate and arrest you again. Police have the right to arrest again. What time must lapse before they can be arrested again?

This is the problem with the 48 hour rule. Until 1981 we had a situation whereby the criminal Court, *Republika vs. Attard* - criminal Court this police action, the law says release and re-arrest, so - in 1981 there was an *habeas corpus* remedy - claim you have been illegally detained or arrested. This is how you ventilate the frustration at the possible breach.

Mag. Filletti case - in this case, the Mag. Filletti's dad disagreed. He said this is all wrong, it is one thing indicating it's wrong but you yourself felt it's right. How do we define a re-arrest and also respect the right of the individual to his personal limit? That was the tricky part, so the decrees not found online, but are in the archives; "*ma jidhirx li hemm diskrepanzi fix-xhieda*" - hard for the Court to give a definition of what a release is.

**MANIFESTAMENT U EFFETVAMENT** - the release to be a correct one in terms of law must be effective and manifestly released. Whereas it is hard to impose conditions to rearrest, the conditions must be arrested. It is important to not impinge on one fundamental right to liberty. The right to release has to be respected and hence 2 criteria exist to see if a release is in terms of law or not; must be manifest and must be effective.

By manifest and effective.

- Ex. If I leave you on Filfla, that is neither manifest or effective as I could not go where I wanted to and I could not talk to who you wanted to. Hence not manifest and effective. That is why this judgement has always been upheld and immediately changed interpretation on this section and this ruling still applies to date. To recap - once arrested you are arrested for as long as necessary. Once released you are subject to an arrest, provided your release is both effective and manifest. This year, the 48 hour rule suffered an exception and today with an amendment in the law, the police can arrest you for a period exceeding 48 hours.

## **Article 355AJ - Report of arrest**

355AJ. (1) Where any person is arrested, whether with or without a warrant, the arresting police officer or his superior shall, as soon as practicable and unless the person arrested has been released within six hours from arrest, inform a Magistrate, giving all details as to time and place where the person is being held.

(2) The Magistrate may order that the person arrested be transferred to another place with immediate effect.

(3) Any person arrested in pursuance of any provision of this Code and who has not been brought before a Court within forty-eight hours of his arrest shall be released.

(4) Notwithstanding the provisions of sub-article (3) where the arresting police officer has sufficient reasons for believing that the person arrested has committed a crime liable to a maximum punishment exceeding twelve (12) years imprisonment and that the continuation of the arrest of the person beyond forty-eight (48) hours is necessary to obtain relevant evidence or to preserve relevant evidence, the arresting officer may by means of an application confirmed on oath and supported by information request a Magistrate to issue a warrant authorising the keeping of the person arrested under further detention:

Provided that for the purposes of this sub-article:

"arresting police officer" and "arresting officer" mean a police officer in the grade of Inspector or higher who is in charge of the investigation of the person arrested;

"a crime liable to a maximum punishment exceeding twelve (12) years imprisonment" means a crime liable to a maximum punishment exceeding twelve (12) years imprisonment without considering any increase in punishment due to concurrent crimes and punishments, aggravating circumstances, aggravation of the punishment, any previous conviction or the continuous nature of the crime;

"information" means information about:

- (a) the time of arrest and the nature of the crime for which the person under arrest has been arrested;
- (b) the evidence on which that person was arrested; and
- (c) the special reasons for believing the continued detention of that person to be necessary.

(5) A Magistrate shall not accede to a request filed in accordance with sub-article (4) unless:

(a) the person arrested has been furnished with the information and has been brought before the Magistrate for a hearing; and

(b) the Magistrate is satisfied that the investigation is being conducted diligently and expeditiously.

(6) An application for a warrant in accordance with sub-article(4) may be made at any time before the expiry of the first thirty-six(36) hours from the time of arrest if the person is still under arrest.

(7) Where upon an application in accordance with sub-article(4) the Magistrate is not satisfied that there are sufficient reasons to believe that the further detention of the person arrested beyond forty-eight (48) hours is justified he may refuse the application or adjourn the hearing until a time not later than forty-eight (48) hours from the time of the arrest.

(8) Where the Magistrate is satisfied that there are sufficient reasons to believe that the further detention of the person arrested is justified he shall issue a warrant of further detention for such period not exceeding a further forty-eight (48) hours as theMagistrate deems fit.

(9) A person released after a warrant for further detention is issued or has expired in his respect, shall not be re-arrested without a warrant to be issued by a Magistrate for the offence for which he was previously arrested unless, since the person's release, fresh evidence has been discovered or an examination or analysis of existing evidence has been made which could not reasonably have been made before his release.

(10) (a) At the hearing held for the purposes of sub-article (4), the person under arrest shall have the right to be assisted by an advocate or by a legal procurator and that hearing shall:

(i) be held with closed doors;

(ii) be subject to such orders as the Magistrate may give to all persons present at the said hearing for the purpose of protecting the confidentiality of information on the investigation;

(iii) be held summarily in such manner that, in all,the period of the first forty-eight (48) hours provided in sub-article (3) is not exceeded;

(iv) end with the decree of the Magistrate which shall be delivered at the end of the hearing.

(b) The decision of the Magistrate given in accordance with this sub-article shall not be subject to appeal and shall be executable forthwith

- 355AJ - introduced as the police had faced more complex investigations - Legislator felt there was a need for an amendment for the 48 Hr rule
- 355AJ sub 4 - 12 years imprisonment, exceeds the competence of the inferior Courts, so it is under the superior Courts. So the - an offence for 12 years.

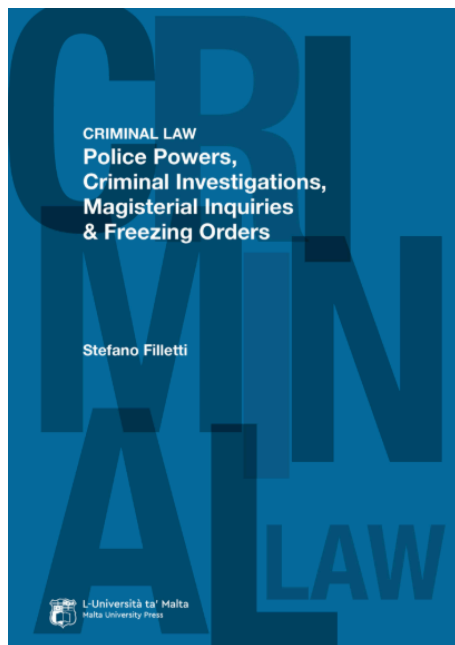
CAN EXTEND TO a further period from the 48 hours.

Subarticle 9 - once this procedure has been followed - if you extend the 48 hrs by another 48hr you can not then just arrest the person without any evidence, without a warrant, unless you have fresh evidence. "person released after a warrant for further detention is issued or has expired in his respect, shall not be re-arrested without a warrant to be issued by a Magistrate for the offence for which he was previously arrested unless, since the person's release, fresh evidence has been discovered or an examination or analysis of existing evidence has been made which could not reasonably have been made before his release"

Article 137 Criminal Code - remedy - for accused - of something goes wrong - applies in many circumstances - ex of 137, there was once the case of - Court imposed bail of 100k and I can not bring the cash - as I am unable to bring and full this obligation - habeas corpus case as i have the conditions to be released and have the money, then it is a case of HABEAS corpus remedy - used in an illegal detention .

- In a habeas corpus remedy- you file it before the duty magistrate, the magistrate has to decide the matter of the application with urgency. An alleged illegal arrest as if the mag. Fails to deal with this matter or urgency, it is a criminal offence.
- Next right is the right to inform family and friends and the right to medical assistance - first 2, right to inform to 3rd party - are RIGHT NOT TO BE HELD INCOMMUNICADO - not to be held -
- RIGHT TO MEDICAL ASSISTANCE - different rights, the justification to them is similar -
- Why did they introduce these rights? The constant battle - police impropriety - when police act wrongly, it can give rise to the issues you subsequently produce.





## **Place of detention**

A person arrested shall be taken to the nearest police station.

Where the period of detention shall be a lengthy one then such person arrested has to be transferred to a "designated police station".

A person can only be detained for as long as is necessary and otherwise to be released immediately. Article 355AL\* clearly states that it shall be duty of the custody officer to order the immediate release from custody of any person in police detention in the circumstances mentioned in article 355AJ (3)5 or where the custody officer becomes aware that the grounds for the detention of that person have

ceased to apply and there are no other lawful grounds on which the continued detention of that person could be justified.

In addition, the police officer must inform a magistrate as soon as practicable when and where a person is arrested, unless they are released within six hours from their arrest. The magistrate may also order that the person is immediately transferred to another place for any reason which the magistrate may deem necessary.

### *General rights of a person arrested*

Upon arrest, the person arrested is afforded certain rights in accordance with article 534AB. These are to be included in a letter of rights and to be given to a person arrested in a language he or she understands. These rights are:

1. The right of access to a lawyer. This was addressed in *II-Pulizija vs Paul Cutajar*, and the Court ordered the expunging of the police statement because this right was not given to the person arrested:

l-istqarrija giet sfilzata ghax l-appellant ma kienx assistit mill-bidu.

Nevertheless, the accused can always renounce the option to consult with a lawyer, which must be noted down by the police and signed by two officers and the accused.

1. Any entitlement to free legal advice and the conditions
2. for obtaining such advice.
3. The right to be informed, in such detail as is necessary to safeguard the fairness of the proceedings and the exercise of his rights of defence, of the offence he is suspected or accused of having committed. In instances where the arrested person is not sober, the

police must wait until he regains consciousness to communicate such information to the arrested person.

4. The right to interpretation and translation.
5. The right to remain silent.
6. The right to have a third party informed of the suspect's or the accused person's deprivation of liberty.
7. The right to be allowed to consult a medical practitioner.
8. Should the suspect or arrested person be illiterate, the right to have the Letter of Rights read out and explained to him.

## **The 48 hour rule and the habeas corpus remedy**

Arrest for a period not exceeding 48 hours

Article 355AJ(3) of the Criminal Code states that any person arrested in pursuance of any provision of this Code and who has not been brought before a Court within 48 hours of his arrest shall be released.

Additionally, article 34 of the Constitution states as follows:

(3) Any person who is arrested or detained -

- for the purpose of bringing him before a Court in execution of the order of a Court; or
- upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought not later than forty-eight hours before a Court...;

Subject to what the Law provides, article 34(3) is clearly stating that no detention can protract itself longer than 48 hours.

Upon the expiration of the 48 hours (or at any earlier time if detention is not required) the person must be arraigned in Court or must be released.

Where an illegal arrest is alleged, including therefore an arrest in excess of 48 hours, our Criminal Code provides for a remedy against unlawful detention. This right is a fundamental right.

An effective remedy with powerful sanction is given to ensure that this right is properly observed.

### ***Habeas corpus remedy***

The power of the duty magistrate to rule on an illegal arrest, including therefore an arrest which is sustained for a period in excess of 48 hours, is referred to as the habeas corpus remedy in the Criminal Code.

Article 137 of Criminal Code provides that any magistrate who, in a matter within his powers, fails to attend to a lawful complaint touching on an unlawful detention, and any officer of the

executive police, who on a similar complaint made to him fails to prove that he reported the same to his superior within 24 hours, shall on conviction be liable to imprisonment for a term of one to six months.

The matter is considered to be serious and grave in terms of law, to the extent that if the magistrate having cognizance of a request relating to illegal arrest, fails to treat that matter with urgency, shall be guilty of an offence punishable by imprisonment.

## **The issue of rearrest**

As we have seen, no arrest can exceed 48 hours. Upon the expiration of that period of time the person arrested has to be arraigned in Court or released. Upon release, it follows that the police can also rearrest a person for a further period of 48 hours. The question is how can a rearrest be performed yet respect the 48 hour maximum arrest period.

Historically the power of arrest was grossly abused. The members of the executive police had started a practice whereby persons were arrested, detained for 48 hours, then released from the police station (sometimes even for just a few seconds) and rearrested. It was claimed that once released a person could be rearrested even immediately and there was no limit to this repetition.

Repubblika vs Attard (1979) the Criminal Court had held that: Il-Pulizija ghandha d-dritt izzomm bniedem arrestat ghal 48 siegha, titilqu u kif jitbieghed anke sal-kantuniera, terga tigbru.

However a landmark decree was that delivered by (then magistrate), Judge Joseph A. Filletti upon the application filed by Joseph Galea and Lino Borg. (1981)

The Court held that any release had to be manifest and effective, meaning that a person had to be free to go where he/she liked and to communicate with whoever he/she liked following his release. Unless these conditions were satisfied the magistrate held that the rearrest was illegal.

The salient part of this landmark decree is being reproduced:

"Fdan il-kaz ma jidhirx li hemm xi diskrepanzi sostanzjali fix-xhieda dwar il-fatti fir-rigward taz-zewg rikorrenti. Huwa pacifiku anzi li kemm Joseph Galea, kif ukoll Lino Borg gew arestati fighodu kmieni fl-jum tat 2 ta Marzu 1981, Ghall-habta tas-6.00pm jew ftit aktar tal-jum segwenti, dawn ittiedu ghal "search" fid-dar taghhom flimkien ma' arrestati ohra. Dejjem f'dan il-jum segwenti ghall-arrest taghhom u cioe fit-3 ta Marzu 1981, iz- Lewg rikorrenti gew rikondotti fil-Kwartieri Generali tal-Pulizija u dan ghall-habta tat-8.15pm cirka u hemmhekk intgal lilhom minn ufficjal tal-Pulizija li setghu jtilqu. Skont l-Ispettur Psaila, ir-rikorrent Joseph Galea gie ri-arrestat fl- inhawi tal-Kwartieri Generali fit-8.30 filwaqt li Lino Borg xit-8.35pm u fl-istess inhawi. Skont P.S. Mario Mizzi r-rilaxx ta' Galea sehh fit-8.52pm. Ir-rikorrenti Galea xehed li deherlu li lulu qalulu biex jitlaq wara t-8.30pm. Aktar rilevanti f'dan il-kaz huma l-lok tar-ri-arrest. Difatti, skont listess pulizija, iz-zewg rikorrenti gew arrestati mill-gdid fit-triq hekk kif tohrog mill-"gate" tal-Kwartieri Generali. Ir-rikorrenti Joseph Galea

xehed li fil-kaz tieghu hu gie maqbud kif wasal hdejn il-gate, filwaqt li Borg xehed li appena ghamel pass sab pulizija jilgghu u li qallu li kien se jarrestah.

Sal-lum, 4 ta' Marzu, 1980, fil-hin tas-7.30pm, iz-zewg rikorrenti ghadhom mizmuma arrestati u jidher ghalhekk li ghaddew aktar minn 48 siegha minn meta sar l-ewwel arrest taghhom, liema perjodu ta' zmien ghadda wkoll meta gie pprezentat ir-rikors in disamina.

Il-pern tal-kwistjoni huwa jekk fil-hin tat-8.30pm, fil-jum tat-3 ta' Marzu 1981 jistax jinghad li z-zewg rikorrenti gew mehlusin jew le. Wara illi gharblet il-kaz bl-akbar serjeta' u wara li semghet il-partijiet, din il-Qorti hija tal-fehma illi l-agir tal-Pulizija f' dan il-kaz huwa manifestament in konflitt u mur ghalhekk kontra d-dispozizzjonijiet kontemplati fl-Art 365 (2) tal-Kodici Kriminali, kif ukoll l-Art 48 sancit mill-Kostituzzjoni ta' Malta.

Din il-orti, filwaqt li tapprezza x-xoghol iebes tal-Pulizija fil-kors tal- indagini preliminari taghha, ghandha tara, kif del resto hija wkoll marbuta li taghmel mill-istess Kodici Kriminali, li d-drittijiet tac-cittadin ghandhom ukoll jigu mharsa. Huwa ferm diffici li l-Qorti tistipula u tghid fiex ghandu jikkonsisti rilaxx minn arrest bregoli generali. Izda, min-naha l-ohra, rilaxx ghandu jfisser li min jigi mehlus ikollu f'dak il-mument il-fakolta' kollha li mur fejn irid u jkellem ukoll lil min irid - u dan imqar ghal hin limitat u wkoll apparti mid-distanza ta' kemm ikun lahaq allontana ruhu mill-post tal-arrest. Izda f'dan il-kaz il-provi juru bic-car li l-ebda wiehed miz-zewg rikorrenti ma gatt kien f'qaghda li jmur u jaghmel fattieh. Li ssib ufficjal tal-Pulizija jistenniek biex jerga jarrestak appena tohrog mill-"gate" tal-Kwartieri Generali certament ma jammontax ghal rilaxx. Id-dritt inkwistjoni huwa wihed sancit mill-Kostituzzjoni taghna u stante s-sinifikat sagrosant tieghu jimmerita li jigi mhares b'aktar rispettt u serjeta'. B' danakollu l-Pulizija mhumieq prekluzi bl-ebda mod milli jergghu jarrestaw lil kull individwu taht suspett, anke jekk ikun digha nheles, izda r-rilaxx ghandu manifestament u effettivament jidher li sar.

Ghaldaqstant, il-Qorti tilga' t-talba taz-zewg rikorrenti u tordna r-rilaxx immedjat taghhom.

Justification of subsequent rearrest

That is not to say therefore that a subsequent rearrest is not possible. What is essential is that prior to any rearrest there would be a manifest and effective release.

This landmark decree was upheld and reiterated in other cases such as:

1. Application of John Hughes (1982) - 30 seconds release
2. Application of Albert Rizzo (1982) - 3-7 minutes release
3. Application of Maria Bartolo (1982) - 15 minutes release

In **Il-Pulizija vs Spiteril the Court of Criminal Appeal** held that a temporary release of thirty minutes was an effective release and there could subsequently be another arrest of 48 hours.

More recently these dicta were upheld by the Constitution Court in Anthony Mifsud vs Supt. Carmelo Bartolo et!

Din il-Qorti tirriaferma dak li qalet din il-Qorti fil-kawza **Vella v. Kummissarju tal-Pulizija** et deciza fil-5 ta April 1991, fis-sens li fit-termini tal-Artikolu 365 tal-Kodici Kriminali, il-perjodu hemm stabbilit, bhala principju generali, ma ghandu gatt jigi skorrut jew imtawwal, u tgis li dan id-dritt - li persuna arrestata titressaq quadiem Qorti wara 48 siegha - huwa principju li japplika ghall-persuni kollha li jkunu taht il-gurisdizzioni ta pajjizna.

Extending the period of arrest beyond 48 hours

In virtue of Act III of 2024, an amendment to Article 355 AJ was introduced to allow for an extension to the 48 hour period of arrest. When presenting the amendment to Parliament the Minister for Justice stated that this exception in the law will allow police more time to investigate sophisticated and serious organised crime where it may not be appropriate to release a suspect on police bail in order to protect society or safeguard national security:

"Our aim is to provide for a proper balance between the protection of the public and the guarantees of the rights of suspects through the concurrent introduction of procedural safeguards before a judicial authority."

Article 355AJ(4) provides as follows:

*(4) Notwithstanding the provisions of sub-article (3) where the arresting police officer has sufficient reasons for believing that the person arrested has committed a crime liable to a maximum punishment exceeding twelve (12) years imprisonment and that the continuation of the arrest of the person beyond forty-eight (48) hours is necessary to obtain relevant evidence or to preserve relevant evidence, the arresting officer may by means of an application confirmed on oath and supported by information request a Magistrate to issue a warrant authorising the keeping of the person arrested under further detention:"*

In investigations for crimes, the maximum punishment of which exceeds 12 years imprisonment, a police officer being of the rank of an inspector or higher, may request the duty Magistrate to retain a person under arrest for a period in excess of 48 hours.

The reason for this request must be motivated by the fact that the arresting officer has reason to believe that this extended period of arrest is necessary to collect or preserve relevant evidence.

The Magistrate before acceding to the request must ensure that the person arrested has been advised of this request and must appoint a formal hearing. The Magistrate having appointed this request by application for hearing, must be satisfied that the investigation by the police officers involved is being conducted diligently and expeditiously. At the hearing, the person under arrest shall have the right to be assisted by a lawyer.

The hearing shall be held behind closed doors and is to be held summarily with a decree to be delivered at the end of the sitting. The Magistrate may give all those necessary orders to protect the confidentiality of the investigation's.

A request to extend the 48 hour period of arrest can only be made at any time before the expiry of the first thirty-six hours from the time of arrest if the person is still under arrest. Where the Magistrate is satisfied that there are sufficient reasons to justify an extension of the arrest period, the Magistrate will issue a warrant extending the period which will not exceed a further forty eight hours!?.

Where the Magistrate is not satisfied that there are reasons to justify such an extension, the Magistrate may refuse the request or adjourn the hearing provided this adjournment is not later than forty-eight hours from the time of arrest. The decree given by the Magistrate is not subject to an appeal and is executable immediately.

A person released after a warrant for further detention is issued or has expired in his respect, shall not be re-arrested without a warrant issued by a Magistrate for the same offence, unless, the police are in possession of fresh evidence or in possession of facts resulting from an examination of evidence which could not have been made before his release

Right to inform family and friends and right to medical assistance

Any person arrested or detained has the right to inform a member of the family of his or her whereabouts. This is a necessary right to avoid additional anxiety and stress. It also does away with claims of impropriety eliciting a conviction as well as general instances of impropriety by the police.

Article 355AUC OF THE criminal code affords the right to have a 3rd party informed of the arrest

Article 355 AUD establishes the right to communicate with family and friends

If the suspect or accused person is a child (under 18), at least one person having parental authority, tutorship, curatorship or guardianship in respect of the child shall be informed as soon as possible of the deprivation of liberty and of the reasons thereof, unless it would be contrary to the best interests the child to do so. The details of such a person and the day and time at which the information is given to such a person shall be entered in the detention record or in the record of proceedings.

There is also a right to communicate with consular authorities in terms of article 355 AUE.

Article 355AS prescribes the right to medical assistance.

This right serves to ensure the health of a person arrested. It is a vital right to protect officers from claims of abuse and impropriety. It also serves to dispel any issues statements issued involuntarily due to medical issues.

**RIGHT NOT TO BE HELD INCOMMUNICADO** - anxiety of a person not knowing where i am, what i am doing - i needed to inform a family member. Court said, police impropriety if I do not allow you to inform family or friends. You may suffer from a condition which increases the anxiety, and you might want to inform - due to your medical condition. Persons being arrested are drug addicts and suffer from severe withdrawal symptoms. Claimed that what they said to police was influenced by withdrawal symptoms.

Other conditions which are more serious.

Any person arrested is informed of these rights. Right to inform family or friends - is played out if the police reach out to the family and friends and tell them the requirements. Friends and family are informed, not you. No issues on this.

**Article 355AUC - The right to have a third person informed of the deprivation of liberty.**

355AUC. (1) Suspects or accused persons who are deprived of liberty shall be informed, without undue delay, by the ExecutivePolice or by any other enforcement or judicial authority, that they have **the right to have at least one person, such as a relative or an employer or any other person of their choice**, nominated by them, **informed of their deprivation of liberty without undue delay if they so wish, unless such other person is reasonably suspected of being involved in the offence being investigated**. A record shall be kept in the manner in which the Executive Police or other law enforcement or judicial authority concerned has discharged its duty under this article.

(2) If the suspect or accused person is a child, at least one person having parental authority, tutorship, curatorship or guardianship in respect of the child shall be informed as soon as possible of the deprivation of liberty and of the reasons therefor,unless it would be contrary to the best interests of the child to do so, in which case another appropriate adult shall be informed. For the purposes of this article, a person below the age of eighteen years shall be considered to be a child.

(3) In all cases, the details of the person mentioned in sub-article (1) or of the holder of parental authority, tutorship,curatorship or guardianship over the child mentioned in sub-article(2) as well as the day and time at which the information was given to such person or holder of parental or other authority as aforesaid,shall be entered in the detention record of the suspect or in the record of the proceedings of the person accused, as the case maybe.

(4) It shall be permissible to temporarily derogate from the application of the rights set out in sub-articles (1) and (2) where justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

- (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- (b) where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised:

Provided that in any such case, the delay shall not be later than six hours from the time when the arrest was effected.

(5) Where a derogation from the application of the right set out in sub-article (2) is made, the Executive Police or other law enforcement or judicial authority concerned shall ensure that an authority responsible for the protection or welfare of children, as designated from time to time by the Minister responsible for Justice By order in the Gazette, is informed without undue delay of the deprivation of liberty of the child.

## The right to communicate, with third persons, while deprived of liberty - Article 355AUD

355AUD. (1) The suspect or the accused person who is deprived of liberty shall have the right to communicate without undue delay with at least one third person, such as a relative, friend or other person nominated by him.

(2) A Magistrate may, following a written request from the Executive Police or any other law enforcement authority or from another authority other than a Court exercising judicial functions, limit or defer the exercise of the right referred to in sub-article (1) in view of imperative requirements or proportionate operational requirements.

Section 355AUC+D - exceptions - where police believe that in informing your family and friends you are also informing the other suspects, that right can be denied or postponed. As the case may be. Not an absolute right.

## RIGHT TO LEGAL ASSISTANCE AND OTHER RIGHTS DURING DETENTION



## **Article 355AS - Right to consult a medical practitioner.**

355AS. (1) The suspect or accused person shall, at his request, be allowed to consult a medical practitioner of his choice and, if such medical practitioner is not readily available, any other medical practitioner.

(2) Immediately upon arrest and without undue delay, the Executive Police or any other law enforcement or judicial authority shall inform the suspect or an arrested person of such a right.

(3) A record shall be kept that the suspect or accused person has been duly informed of such right by the Executive Police or by any other law enforcement or judicial authority.

(4) The words "the suspect" and "the accused person" in this article have the same meaning assigned to them by article 355AT(2).

355AS - deals with the right to medical assistance - referred to medical practitioner - given that you would have moved to an ordinary police station, they would send you to Floriana health care.

Another very important right is the **right to remain silent**. There is more than meets the eye. Can invoke it only in specific scenarios. A witness testifying in civil proceedings, does not have the right to remain silent. What other circumstances in which you may be a suspect in a criminal offense? When you are in an interrogation room, when you are in a courtroom.

Ex you hit an electricity pole and you crashed your car in it. - Do you reply to the police officer when he asks how much you drink? Do you have the right to remain silent there? Yes as whatever you say can be used against you - you can use and utilise your right to remain silent. Would you be a suspect in a criminal offense? The concept of a suspect is not only confined in a police interrogation, it is much wider than that, a health and safety investigation, administrative law enforcement, if someone asks you if you have a work permit. All these situations where you become a prime suspect and can be charged. In so far as you can be charged with an offence, the right to silence kicks in.

NEMO DEBET PRO DEX INEIBSUM - person can not be forced to admit to a charge. Article 39 sub 10. Page 42.

This right is strong - so strong that even a trial - you have the right not to testify and as was started in **Repubblika Vs Mikiel Vella 1985** - if the trial judge were to comment upon the act that you remain silent, in the face of the gravity of the charges, the accused wished to remain silent. Not an absolute right.

## **The right to legal advice**

This right was introduced in 2002 but the police were very much afraid of this. The Minister of Justice withheld the coming into force of this section of the law until 2012. Matters came to a head in **Sandus vs Turkey case**. He wanted to retract (after admitting) but couldn't and the ECHR said that the right to legal advice renders proceedings null and void. The state was resisting saying that in a trial you have a fair trial as you have your lawyer. Do you have a lawyer in a trial? Yes, so what are you complaining about ? LIKE saying NIKSIRLEK SAQAJK T TNEJN u mur ilghab loghba football, imma hemm ir-referee - this is not fair as from minute 1, things are not fair.

So the notation of fair trial extends to the pre-trial stage and starts the moment you have contact with an Authority, in this case when the police place you under arrest. Lombardi came along, quoting Salduz vs turkey (link):

<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1842&filename=002-1842.pdf>

Said he did not have right to legal advice -> To prove that I have my right breached i have to go to jail, and then i can contest my rights. The Court SFILZAT. At a point, the Constitutional Court and ECtHR said the right to legal advice had to be introduced; Lombardi, turkey case. The legislators incorporated it into our system and it was initially that 1hr before you speak to the police you can talk to a lawyer not during police interrogation. THIS WAS IN THE PAST, NOT NOW. OLD LAW

Last question in the interrogation Filletti story - stupid case - last question: Hadt gost? (INCRIMINATING QUESTION) You need a lawyer as you might be admitting for X but in reality you are admitting to another thing.

**Right to legal advice** can never be taken alone. To defend someone you need to know what happened as early as possible, the charges, and the evidence (the process of disclosure). The lawyer must know why. This works in favor of the police. Not against.

Right to legal advice can not be taken in isolation and has to be taken with the right to disclosure. 1hr before was a mess, was not meeting the requirements, was a farce, not ideal and effective AT ALL. Hence, we got more cons. Cases where this was shot down. Things can go very wrong. Ex; trading in an influence case, did not understand a thing.

Crime of 3 years can not be suspended because for suspension, it is 2 years.

***You need a lawyer to make sure you know for which crime you are admitting guilt to.***

Finally, the new version said that a person has a right to legal advice DURING INTERROGATION. At first the right to legal advice was made subject to certain regulations, and the first regulation limited greatly the intervention of lawyers, who could not take an active participation. That was amended also as now you can have an active participation during an investigation. Rarely are there issues between police and lawyers during interrogations.

As soon as you are informed of your right, right to legal assistance, given prior to the interview and subsequently during the interview - The role of the lawyer should never interrupt interrogations. Should never interrupt an interrogation unnecessarily, or be disrupted. Again, this is well monitored as most of the investigations for the most serious crimes are audio and visual recorded, hence everyone knows what was said during the interrogation.

During trial you will have a transcript and can play the original film. Can play back the video. Audio video recordings are a must now - so we did. Audio and visually recorded on DVDs. Nowadays, the law also provides for access to materials and disclosures, which mirrors a framework decision of the EU, article 355AUA.

## Article 355AUA - The right of access to a lawyer in criminal proceedings

**355AUA.** (1) The suspect or the accused person shall have the right of access to a lawyer in such a time and in such a manner as to allow him to exercise his rights of defence practically and effectively.

(2) The suspect or the accused person shall have access to a lawyer without undue delay. In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:

- (a) before they are questioned by the Executive Police or by another law enforcement or judicial authority in respect of the commission of a criminal offence;
- (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with sub-article(8)(e);
- (c) without undue delay after deprivation of liberty;
- (d) where they have been summoned to appear before a Court having jurisdiction in criminal matters, in due time before they appear before that Court.

(3) A request for legal assistance shall be recorded in the custody record together with the time when it was made unless the request is made at a time when the person who makes it is at Court after being charged with an offence in which case the request needn't be so recorded.

(4) Once a request for legal assistance is made, the suspect or the accused person shall be provided with a list of lawyers drawn up by the Chamber of Advocates and the Chamber of Legal Procurators and submitted on a yearly basis to the Executive Police and to any other law enforcement and judicial authority, from which the suspect or the accused person may select a lawyer of his own choice. Alternatively, the suspect or the accused person may elect to be assisted by the Advocate for Legal Aid in which case the Advocate for Legal Aid shall assign a lawyer for this purpose.

(5) Without prejudice to the provisions of article 355AUI(3), any police officer who indicates or attempts to indicate to a person detained the advocate or legal procurator who should be engaged during the detention of such person, shall be guilty of an offence and shall be punishable with a fine (ammenda) and this without prejudice to any disciplinary proceedings that may be taken against him as a consequence of a finding of guilt in respect of such an offence or in lieu of prosecution for such an offence in accordance with any disciplinary regulations in force from time to time.

(6) Where the person detained chooses not to seek legal assistance the Executive Police, investigating officer or any other law enforcement or judicial investigating authority shall record this fact in writing in the presence of two witnesses and thereupon questioning may proceed immediately. It shall not be admissible for the prosecution to comment during any proceedings before a Court of justice of criminal jurisdiction on the fact that the suspect or the accused person did not avail himself of the right to legal assistance in the course of his detention under arrest.

(7) Where in any proceedings before a Court of justice of criminal jurisdiction against a person for an offence, evidence is given that the suspect or the accused person -

(a) at any time before he was charged with the offence, on being questioned by the Executive Police or by any other law enforcement or judicial authority trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the suspect or the accused person could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, no inference may be drawn from the suspect's or the accused person's failure to mention facts which may be considered as evidence

of guilt or as amounting to corroboration of any evidence of guilt of the suspect or the person accused.

## The right to seek legal assistance

The suspect or the accused person shall have the right of access to a lawyer in such time and in such a manner so as to allow him to exercise his rights of defence practically and effectively (article 355AUA(1)).<sup>28</sup> This right shall be afforded without undue delay (article 355AUA(2)).

In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:

- Before they are questioned by the executive police or another law enforcement or judicial authority in respect of the commission of a criminal offence;
- Upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act;

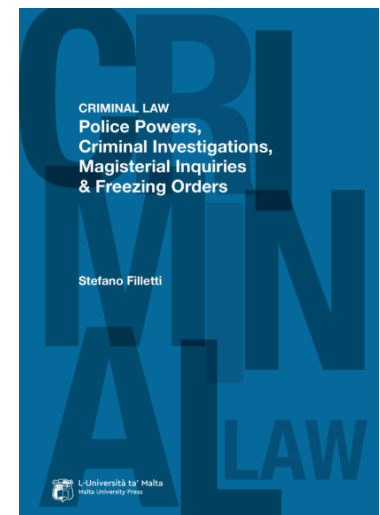
- Without undue delay after deprivation of liberty;
- Where they have been summoned or appear before a Court having jurisdiction in criminal matters.

## **Formalities**

A request for legal assistance shall be recorded in the custody record together with the time when it was made unless the request is made at a time when the person who makes it is at Court after being charged with an offence in which case the request need not be so recorded.

Once a request for legal assistance is made, the suspect or the accused person shall be provided with a list of lawyers drawn up by the Chamber of Advocates and the Chamber of Legal Procurators and submitted on a yearly basis to the executive police and to any other law enforcement and judicial authority, from which the suspect or the accused person may select a lawyer of his own choice. Alternatively, the suspect or the accused person may elect to be assisted by the advocate for legal aid in which case the advocate for legal aid shall assign a lawyer for this purpose.

In this respect, any police officer who indicates or attempts to indicate to a person detained the advocate or legal procurator who should be engaged during the detention of such person, shall be guilty of an offence and shall be punishable with a fine (ammenda) and this without prejudice to any disciplinary proceedings that may be taken against him as a consequence of a finding of guilt



in respect of such an offence or in lieu of prosecution for such an offence in accordance with any disciplinary regulations in force from time to time.

Where the person detained chooses not to seek legal assistance the executive police, investigating officer or any other law enforcement or judicial investigating authority shall record this fact in writing in the presence of two witnesses and there upon questioning may proceed immediately. It shall not be admissible for the prosecution to comment during any proceedings before a Court of justice of criminal jurisdiction on the fact that the suspect or the accused person did not avail himself of the right to legal assistance in the course of his detention under arrest.

What does this right constitute?

In terms of article 355AUA(8)30 the right to access a lawyer shall entitle -

(a) The suspect or the accused person, if he has elected to exercise his right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall be no less than one hour before questioning starts;

(b) The suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing

....

All communication between accused and lawyer is privileged (article 355AUB). 32

The right to legal advice can be renounced to.

This renunciation however must be noted down by the police and signed by two officers and the accused.

## **Conduct during interrogations**

Regulations were issued pursuant to article 355 AUA (8)(c)33 of the Criminal Code regulating the way suspects' and accused persons interviews should be carried out. Police officers may not do or say anything to discourage a suspect or accused person who is entitled to legal assistance from exercising such right. It also provides that when a suspect is to be legally assisted by a lawyer, no interviews can commence before a lawyer is present unless there are authorised delays for the presence of the lawyer. To this end, it provides a time frame of two hours within which the lawyer who has accepted the brief must make himself or herself available.

Should the lawyer fail to be present within this timeframe such delay would be deemed unreasonable and it would be the duty of the legal aid lawyer to attend instead to give such assistance so that the interview may commence.

During the interview the lawyer has the right to question the suspect and/or the accused person, subject to the provisions of the Criminal Code, only once the prosecution has concluded its line of questioning and that any replies and any observations made will be recorded by the interviewer in writing or by audiovisual means. Lawyers have an active role in this investigation by means of intervention and questioning of the accused.

In the event that the lawyer assisting does not conduct himself correctly the interviewer has the authority to excuse or remove the lawyer, if need be, by force.\* In this situation the interview is suspended and another lawyer or the duty advocate for legal aid shall be called into replace the said lawyer.

The interview shall then continue in the presence of the other lawyer or of the duty advocate for legal aid. However, this can only take place with the consent of a police officer not below the rank of superintendent or of the duty magistrate.

The magistrate shall then carry out an investigation and, should he/she reach the conclusion that there was misbehaviour on the part of the lawyer, the incident will be reported to the Committee for Advocates and Legal Procurators of the Commission for the Administration for Justice for any disciplinary action it might wish to take against the said lawyer.

These regulations also cater for the scenario where there is an irregularity in the interview, such as misconduct by the interviewer. In this case, the lawyer would need to submit a report in writing to the duty magistrate within forty-eight hours from the conclusion of the interview or from when he/ she was asked or decided to leave the interview.

## **Access to materials and disclosure**

To ensure a proper defence and also informed legal advice, access to the case material and information on the investigation has to be given to the person being interviewed and his or her legal advisor. Without this information no adequate advice can be properly dispensed.

Article 355AUA(9) provides that general information to facilitate the briefing of a lawyer by suspects or accused persons shall be made available.

In addition, article 534AF stipulates that where a person is arrested and detained at any stage of the criminal proceedings, any documents in the possession of the police which are related to the specific case and which are essential to challenge effectively the lawfulness of the arrest or detention, shall be made available to the arrested person or to his lawyer.

The person suspected or accused shall have access free of charge, to all material evidence in the possession of the police, whether for or against the said suspect or the accused, or to his lawyers in order to safeguard the fairness of the proceedings and to prepare his defence.

### **Article 534AF - Rights of access to the materials of the case.**

*534AF. (1) Where a person is arrested and detained at any stage of the criminal proceedings, any documents in the possession of the Police which are related to the specific case and which are essential to challenge effectively the lawfulness of the arrest or detention, shall be made available to the arrested person or to his lawyer.*

*(2) The person suspected or accused shall have access, which shall be free of charge, to all material evidence in the possession of the Police, whether for or against the said suspect or the accused, or to his lawyers in order to safeguard the fairness of the proceedings and to prepare his defence.*

*(3) Without prejudice to sub-article (1), access to the material evidence referred to in sub-article (2) shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission on the merits of the accusation. Where further material evidence comes into the possession of the Police, access shall be granted to it in due time to allow for it to be considered by the suspect or the accused or by his lawyer.*

*(4) Notwithstanding the provisions of sub-article (2) and (3) and provided that this does not prejudice the right to a fair trial, after hearing the prosecution, a Court or magistrate may refuse access to certain materials if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest or where it could prejudice an ongoing investigation or national security.*

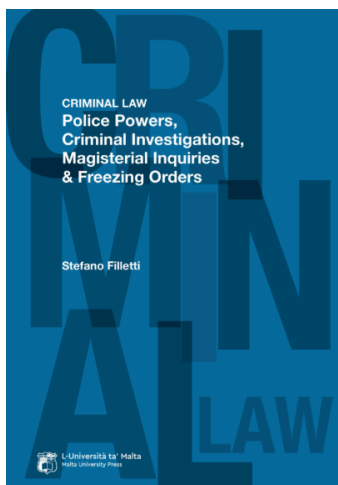


Article 534AF (rights to the material relevant to the case - any evidence by police should be handed to the suspect). Law says you can be given info to challenge your arrest. Pilatus. Law speaks of "police" - an error in the law. 78 boxes example. 78 boxes but 50 pages only were handed to the lawyer. One can not distinguish between the Police and the AG if both are prosecutors, can not play the not me but him game when both of them are prosecuting the case. Without this info, you cannot raise a proper defense, do not have all the info at hand.

To recap, right to legal advice is important in maintaining a fair trial - linked to access to case materials (wide right - extends to eu investigation orders and even info not on criminal trials).

Marwani/Bharwani case on AW - no copies made in those time limits. Denied basic access to documents to defend his right, breach to one's right to disclosure in criminal proceedings.

Taking of samples - intimate vs non intimate - 350. Intimate governed by 355AV.



## **The Taking of Intimate and Non-intimate Samples**

### Intimate samples

Article 355AV of the Criminal Code specifies the method in which the intimate samples should be taken and article 335BA delves into the method of taking non-intimate samples.

In the taking of intimate samples, the investigating officer may in person, by application or fax request a magistrate to authorise the necessary procedure for the taking of an intimate sample in the scenarios provided for in article 355AV of the Criminal Code.

It is interesting to note that the law refers to "facsimile" at a time when this method of transmission of documents was outdated.

Reference to requests dispatched by "electronic means" would have been recommendable to ensure that this section would allow for quick and efficient means of transmission which would withstand advances in technology and would today include, for example, encrypted or secure email transmissions.

Upon such request from the investigating officer, the duty magistrate shall obtain all the necessary information to decide whether the request is justified or not. Where justified, the magistrate shall visit the person arrested to request his/her consent because, as stated in the proviso to article 335AV of the Criminal Code, an intimate sample may only be taken from a

person arrested if their appropriate consent is given by the person arrested. Before such consent is requested, the Magistrate shall explain the following to the person arrested:

1. The reasons as to why the intimate sample is required;
2. The consequences of giving his consent and of refusing consent as provided for in article 355AZZ of the Criminal Code;
3. That the suspect is entitled to legal advice

If the suspect wishes to consult a lawyer / legal procurator, the magistrate shall make a record of the facts, date and time of such request and shall allow the request for such time as the magistrate may deem appropriate in the circumstances of the case.

Furthermore, the Magistrate may, on a justified objection by the Police, delay any communication with an advocate or legal procurator if the interests of justice so require or when any of the events mentioned in article 355AT (5) of the Criminal Code, are likely to occur if such communication is allowed immediately.

In taking intimate samples in terms of article 355AY of the Criminal Code, the procedures dictated under article 355AP are to apply. Article 355 AP of the Criminal Code deals with intimate searches of a person detained, as seen below:

In authorising the taking of intimate samples the magistrate may pursuant to Article 355AQ appoint experts and impose any conditions necessary. Article 355AQ is essential to ensure that samples are taken by professionals as well as to ensure that the samples are taken safely and in respect of the person arrested's decency. The First Hall of the Civil Court confirmed this point when stating;

**Marouska Azzopardi vs Avukati tal istat 28th april 2022** ... kwalunkwe tfittija intima trid issir bl-awtorizzazzioni tal- Magistrat... fittija intima fug persuna suspettata ghandha tirikjedi l-awtorizzazzioni tal-Magistrat, u ghalhekk dan l-artikolu wahdu juri kemm tfittija intima hija azzioni u decizion li trid tiched bee ta sensitivita u prekazvzioni, ghall-kuntrarju ta dak li sehha fl-kaz odjern"s

Of particular interest is what happens in the event that consent for the taking of the sample is refused by the person arrested.

In that case, the sample cannot be taken. However, the law provides for inferences to be drawn from such a refusal.

Article 355AZ of the Criminal Code provides as follows:

The law is clearly stating that if the person accused refuses consent for the taking of a sample, then it would be possible for judge or jury to draw an inference of fact. The inference drawn

could include that the person accused is trying to avoid a particular result - for instance in a charge for driving under the influence, the refusal can trigger an inference that driver might have been under the influence of drugs or alcohol.

This inference will act as circumstantial evidence which may corroborate other evidence in trial to this effect.\*

### **Non-Intimate samples**

The taking of non-intimate samples is regulated by Article 355BA of the Criminal Code:

The police have the power to take these non- intimate samples with the consent of the person suspected. The question is what happens where the suspect does not give his/her consent.

Would the police be hampered in their investigation?

In these cases, section 355AV(c) is applicable and the sample will be taken if a Magistrates approves a request made by an investigating officer to this effect. In other words, the magistrates authority can override the arrested person's consent and in terms of the proviso of Article 355BB of the Criminal Code, the sample can even be forcibly taken. Article 355BB provides that:

The taking of non-intimate samples has already been tackled by our Courts. In Alfred Degiorgio Et Vs Avukat Generali Et, the Court delved into the distinction of the taking of intimate and non-intimate samples:

Illi ghal kull buon fini gieghed jigi rilevat illi s-saliva swabs huma kkunsidrati bhala kampjuni mhux intimi u dana ai termini tal-artikolu 350 tal-Kap.9 tal-Ligijiet ta' Malta u ghaldaqstant it-tehid ta' dan it-tip ta' kampjuni fuq awtorizzazzjoni ta' Magistrat, il-Kodici Kriminali ma jitlobx il-kunsens ghat-tehid tal-istess kampjuni minghand min ikunu geghdin jintalbu (kuntrarjament ghal kif inhu l-kaz ghal kampjuni intimi).

Ai termini tal-artikolu 355BA, f'kaz li kampjun mhux intimu jintalab mill-Pulizija u mhux minn Magistrat, ikun hemm bzonn il-kunsens tal-persuna koncernata.

II-Kap. 9 tal-Ligijiet ta' Malta f'artikolu 355AV, jipprovdi illi fic-cirkustanzi hawn fug imsemmija, jekk il-persuna koncernata ma taghtix il-kunsens taghha, l-ufficjal investigattiv jista' personalment jitlob lill-Magistrat tawtorizza t-tehid ta' tali kampjuni, minghajr ma jirrikjedi l-kunsens tal-persuni koncernati.

Illi kif jidher car mid-disposizzjonijiet tal-Ligi hawn fug imsemmija, la darba l-Magistrat jawtorizza t-tehid ta' kampjun mhux intimi, ma jkunx hemm bzonn tal-kunsens tal-persuna minghand min tali kampjuni huma mehtiega. In oltre ghal kull buon fini jigi ddikjarat illi l-artikolu 366 tal-Kap. 9 tal-Ligijiet ta' Malta, jipprovdi li l-esekuzzjoni tas-sentenzi u ta

l-ordinijiet tal-Qorti tal-Magistrati... hija mir tal-Pulizija Ezekuttiva u l-artikolu 96 tal-Att dwar il-Pulizija jipprovdi illi -ufficali tal-pulizija jistghu juzaw dik il-forza moderata u proporzjonata li tista tkun mehtiega sabiex tigi zgurata l-osservanza tal-Ligijiet. Illi jrid jinghad ukoll li m'hemm ebda obbligu legali li r-rikorrenti jigu nfurmati dwar x'inhu dak is-suspett ragonevoli li minhabba fih geghdin jissejhu biex jixhu jew biex jittiehdu l-imsemmija kampjuni waqt l-inkjesta. Dan l-obbligu jezisti biss sabiex il-Pulizija jiggustifikaw it-talba taghhom ghall-hrug ta' mandat t'arrest lill- Magistrat."

Law says - made by application - wanted to introduce an electric mode to transferring documents to the magistrate. Mag shall authorize - you need to ask the magistrate if you want to take photos/film of any bodily part. When magistrate receives this request, if convinced there are grounds for it, he must go and explain it to him personally, must give the suspect advice and must say yes or no. if accused says yes, the magistrate will give orders on how intimate samples will be taken, in 355AQ, on appointment of experts and where it could be done. Equally, the same procedure will apply in 355AB if something is concealed in someone's body. If suspect says yes, an intimate sample is taken.

BUT What if the suspect doesn't agree? Article 355AZ In this case, acc. To 355AZ, the suspect's refusal will be taken into consideration to the case at hand. This means that your refusal (if it is without good cause) can draw an inference, which does not breach your fundamental human rights, on the refusal in the sense that they can draw a conclusion (which has to be one of fact) in relation to the material aspect which the refusal was given. For example, if you are under the influence and you reject a breathalyzer test / blood test, that refusal will draw that conclusion. **However, by itself, it cannot convict** but it is corroborative evidence. You can only draw the inference if you advise him of the consequences and you advise him of his legal rights.

Raymond Grech case. "Sibnieh jistahba go white bay" - intent of police to incriminate him. If the suspect chose to refuse this was not the case as the suspect could not decide and understand . the coa said it was clear he was completely and utterly drunk, at least the police say that if it is true, the influence doesn't apply as he could not understand what was going on.

Are you obliged to give the password of the phone? No, because you have the right to remain silent. Can you forcibly put his finger on the phone? In theory no but the EU Court in the Netherlands said that yes, the putting of a finger on my phone is not breaking my right to remain silent.

Can I put the phone to my face to open my phone ? AG reasoning was that it was like taking a photo. So my question is this, is this an acceptable taking of your data, or is it data which falls foul of this? Law does not speak on biometric data at all. LAW IS SILENT.

So if you say yes you can be doomed, if no - .

Non-intimate samples - 355 BA AND BB - can be taken forcibly and they can also use force and on intimate samples, they can be taken forcibly when necessary. Police can also take samples from 3rd parties of the requests.

## **Samples with the consent or at the request of the person arrested - Article 355BA**

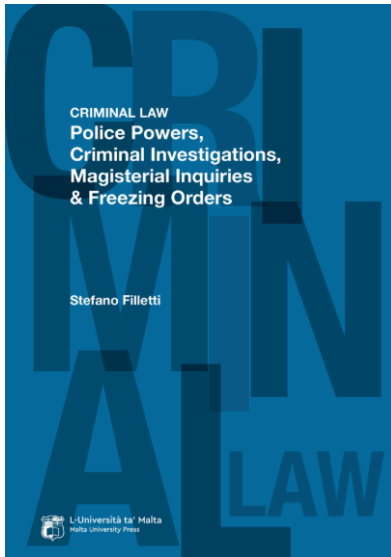
*355BA. (1) The investigating officer may, with the appropriate consent in writing of the person arrested, cause to be taken:*

- (a) fingerprints, palm-prints, other prints or hand-writing samples from the person arrested;*
- (b) photographs of the person arrested or of non-intimate parts of his body*
- (c) non-intimate samples from the person arrested.*
- (2) The person arrested may request in writing that:*
  - (a) his fingerprints, palm-prints, other prints or hand-writing samples,*
  - (b) photographs of his person or of non-intimate parts of his body,*
  - (c) non-intimate samples from his person,*

*be taken and any such request shall be complied with by the investigating officer with the assistance of any competent person as may be necessary.*

*(3) The person arrested may also request in writing the investigating officer to carry out any of the procedures mentioned in article 355AV(a) and (b), and any such request shall be referred without delay to a Magistrate. The Magistrate shall authorise the procedure requested after verifying the request made by the person arrested and the provisions of article 355AP shall apply where appropriate.*

Forcible taking of non-intimate samples can breach someone's right for private family life? NO said the EU CourtS. IF done within legal parameters, this does not breach the rights.



## **Taking of Samples of Third Parties**

Apart from the taking of samples of the suspected person, the law also provides for the taking of samples of third parties in articles 355BB and 355BC of the Criminal Code;

### **Article 355BB**

(Samples from persons other than arrested persons)

"Samples from a person other than a person arrested may only be taken with that person's prior consent in writing:

Provided that in the event that the person, other than the person arrested, withholds his consent to the taking of a sample, whether intimate or non-intimate, a Magistrate's authorisation may also be obtained upon an application and, saving the provisions of article 355AZ, such

authorization shall also cover the taking of any proportionate and necessary measures, including the use of force, by the Executive Police to give effect to such authorization."

## **Article 355BC**

(Samples at the request of persons other than arrested persons)

"The provisions of article 355BA shall mutatis mutandis apply to any person, not being an arrested person, who makes a request for the carrying out in his respect of any procedure referred to in that article provided the request is made in writing and contains a declaration that the person making the request has reason to believe that there is the likelihood that the failure to carry out the requested procedure is likely to result in his being arrested or detained."

These provisions of the law provide that any sample can be taken from any third party other than the arrested individual, however only with their prior consent, which must be given in writing. In the case where no consent is given, the investigating officer can apply to the Court of Magistrates to get authorisation.

The taking of third party samples was discussed in *Republic of Malta Vs Stephen Caruana*. In this judgement, the Court explained the process:

"Kampjuni minn persuna li ma tuxx persuna arrestata jistghu is jitehdu bil-kunsens moghti bil-quddiem u bi.

miktub ta dik il-persuna:

Izda il-kaz fejn persuna, li ma tunx il- persuna arrestata, tirrifuta li taghti Ikunsens taghha ghat-tehid ta' kampjun, kemm jekk ikun kampjun intimu kif ukoll jekk ikun kampjun mhux intimu, tista' wkoll tinkiseb l-awtorizzazzjoni ta' Magistrat wara li jsir rikors u, minghajr hsara ghad-dispozizzjonijiet tal-artikolu 355AZ, dik l-awtorizzazzjoni ghandha tkopri wkoll it-tehid tadawk il-mizuri proporzjonati u necessarji inkluz l-użu tal-forza mill-Pulizija Ezekuttiva biex jinghata l-effett għal dik l-awtorizzazzjoni.

Illi allura t-tehid tal-kampjun orali minn fuq mart l-appellat ittiehed skont il-ligi penali, bil-Qorti Istruttorja mogħnija bis-setgħa li tordna it-tehid ta' kampjun, anke jekk ma jkunx hemm il-kunsens tal-persuna li trid tissottometti tali kampjun."

### *Use of Specimens*

Article 355BD of the Criminal Code states that:

## Article 355BD

(Use of Specimens)

"The Commissioner of Police may make use of specimens which would have been taken in criminal proceedings, for the purposes of subsequent criminal proceedings."

It is lawful for the Commissioner of Police to use samples taken in connection with one investigation and use these in other subsequent criminal proceedings.

Does the forcible taking of non-intimate samples breach one's fundamental human rights?

It has been argued that the taking of a non-intimate or intimate sample of an individual can constitute a breach of Article 8 of the Convention of European Fundamental Human Rights.

In a European Court judgement delivered in 2018, the European Courts delved into this matter and examined whether there is a breach of one's fundamental human rights. In this case, "the applicant complained that the taking of buccal swabs was an interference which was not in accordance with the law and was not justified under article 8 of the Convention"® Article 8 of the European Convention on Human Rights' states the following:

Article 8(Right to respect for private and family life)

- 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights in Strasbourg declared that "the Court has previously held that the taking of cellular materials and its retention as well as the determination and retention of

DNA profiles extracted from cellular samples constitute an interference with the right to respect for private life within the meaning of Article 8 & 1 of the Convention...

In particular, the respect for private life as protected by Article 8 involves respect for a person's physical integrity and the taking of blood and saliva constitute a compulsory medical intervention, which, even if it is of minor importance, must consequently be considered as an interference with the right to privacy...

Such interference will be in breach of Article 8 of the Convention unless it can be justified under its paragraph 2 as being in accordance with the law, as pursuing one or more of the legitimate aims listed therein, and as being 'necessary in a democratic society in order to achieve the aim or as concerned'

Later on in the judgement, the Court dealt with the explanation of what constitutes in accordance with the law. The Court practically stated that the phrase in accordance with the law' means that the procedure of taking a sample must have some basis in domestic law.

As a matter of fact, in the case in question, the European Court ruled and concluded that "the application must be rejected as manifestly ill-founded" since the impugned measure was in accordance with the law, in line with the meaning given in Article 8 of the Convention.

The Court therefore ruled that the process of taking of samples, both intimate and non-intimate, is not a violation of a person's fundamental human rights.



# **Law of Evidence**

- Abstract

Evidence is inadmissible if it is presented incorrectly.

Law of evidence imp bec it's the only way in which you can present your case – evidence makes your case – ties in with power of police to investigate [way evidence is collected and crystallised – way In which prosecution builds its case]

1<sup>st</sup> notion we'll deal with is definition of 2 terms:

**Anything relevant is admissible in trial.** This principle introduces two intriguing legal terms:

1. **Relevance** - This is determined by the impact it would have on the case outcome, or rather whether it affects the determination of the accused's guilt or innocence. If a piece of evidence is impact neutral and does not lean toward proving the accused's guilt or innocence, it is likely irrelevant. We ask: *Is the piece of information relevant to determining the guilt or innocence of the person?*

In a trial by jury, the burden of proof shifts, and there are numerous "facts in issue" that frequently change—each dependent on the specific facts of the case AND what's being discussed at a given time.

- Example: Weather conditions—flooding caused this.
- One fact of the case is the charge itself, and then there are the **facts in issue** (i.e., the specific issues being discussed during trial).
- For example, something may be relevant but should have been raised when the statement was presented.

2. **Admissibility** - If the Court deems a piece of evidence irrelevant, it becomes inadmissible.

The Criminal Code cross-references sections of the COCP, which are applicable to the Criminal Code, as per Article 520.

- **Article 558 COCP**
- **560(1)**
- **562** - The Court can question why a piece of evidence is being presented if its purpose is unclear – why you want to exhibit it

**Anything relevant becomes admissible.** Admissibility is the rule or principle by which evidence can be admitted or introduced into a trial. The first hurdle for evidence to become admissible is relevance—anything relevant is admissible in trial.

Evidence is admissible insofar as it is relevant (the whole principle of relevance must be applied), provided it is not **positively excluded** by law. This presupposes that our Criminal Code includes an exclusionary rule i.e. what cannot be presented in trial.

In the Code, you will find what cannot be included—if it is not covered by the exclusionary rule, it may be included in the trial.

## **Illegally obtained evidence**

We need to see what should be excluded from trial. Depends what trial is about and what we try to achieve from trial.

Scope of trial by jury is the discovery of truth. A prosecutor's role is to establish the role for justice to be made with the party and public in general. All evidence should point towards finding the truth.

In the UK the presiding judge has a discretion to rule on whether evidence can/cannot be admitted in terms of another test. can identify various degrees of truth i.e. whether you believe someone/document presented. Test of **probativeness** (strong) v. **prejudiciality** (weak and possibly untruthful)

- Probative evidence is strong bec its true
- Weak evidence is prejudicial [not to the accused – prejudicial to the whole process of finding truth] witness who lies is fantastic to the accused by prejudicial to trial bec its impacting the Court in its quest to find the truth.

Judges under UK law can strike down evidence because it's more of a lie and hence prejudicial than the truth.

e.g. bribed police officer

Lawyers don't rely solely on what the judge says.

Professors Tapper and Monaghan asked, "How can one conclude something is more prejudicial than probative?" One cannot. It requires a thought process, shifting as things are compared with one another. The notions are different. Critics of judicial discretion argue that it leads to subjective results. However, the doctrine of binding precedent provides some guidance

US system, UK system

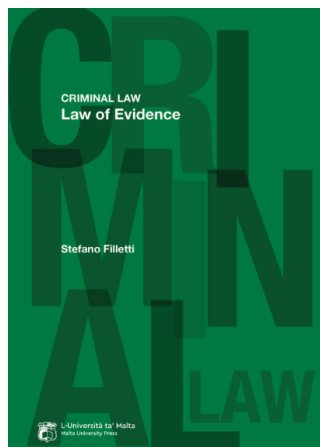
**UK;**

- People were beaten during interrogations, and people of color were subjected to prejudice—instances of police brutality. In the *Miranda v. Arizona* case in the U.S., the Miranda rights were established as a result.
- The judgment states that in any case where there is any form of procedural irregularity in how the procedure is conducted, all evidence becomes inadmissible.
- Additionally, not only is the evidence obtained directly inadmissible, but any evidence derived from that brutality is equally inadmissible.
- The principle is that if the "tree" (original evidence) is inadmissible, then the "fruit" (evidence derived from it) is also inadmissible.
- Evidence collected as a result of an interview in which the police were brutal and failed to follow regulations is inadmissible. Both the initial evidence and any subsequent findings are equally inadmissible.
- There is also residual power in the judge to determine whether a piece of evidence should be admissible in a trial by jury.

**Article 349(2) of the Criminal Code** suggests that the mere fact that any precaution or formality under this title was not followed will render the piece of evidence inadmissible.

The judge does not have the authority to exclude it.

Illegally obtained evidence may still be admissible in a trial in Malta, with the judge having no power to prevent it. BUT... [exception next lecture]



### **Law of Evidence under Maltese Law**

The Maltese criminal law system is adversarial meaning it is prosecution and the accused, through their counsel, who **must produce evidence in trial before a Magistrate, Judge or jury.**

In *Repubblika ta Malta vs Degiorgio*, the Court declared that "*the right to a fair hearing also incorporates the right to adversarial proceedings, which means in principle, the opportunity for parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed.*"

- The purpose of every criminal trial is to ascertain whether the defendant is guilty or innocent of the offence charged as a principle or accomplice. Both the prosecution and defence counsel can present their case through evidence. Knowledge of the law of evidence is crucial to ensure that the evidence produced is admissible in judicial proceedings.

- According to **Phipson** 'evidence' means the **testimony, whether oral, documentary or real which may be legally received in order to prove or disprove some facts in dispute**. The rules regulating evidence in Malta are found in the Criminal Code and in the case of a lacuna our Courts have traditionally referred to UK law:

**Il-Puillizija vs Ramirez Vella, 27th October 2023:** *"Hu risaput li in tema ta' law of evidence, kemm-il darba ma jkunx hemm xi dispozizzioni kuntrarja fil-Kodici taghna, il-gurisprudenza taghna ssegwi hafna dik Ingliza, u ma hemm certament xejn x'wiehed jiccensura fil-fatt li l-Ewwel Qorti ccitat gurisprudenza u awturi Inglizi. Din il-Qorti ukoll ser tikkwota mill-ahhar edizzjoni ta' Archbold peress li hi tal-fehma li l-bran li gej jittratta bl-aktar mod konciz u preciz il-kwistjoni kollha marbuta ma din it-teorija..."*

The evidence that may be exhibited in Court is subject to the principles of **admissibility** and **relevance**. The general rule is that whatever is relevant to a case is admissible as evidence in a Court of law, provided this is not expressly prohibited by law. Maltese law of evidence is built on exclusionary rules, meaning that the law, rather than mentioning when evidence is relevant and admissible, provides instances where evidence is prohibited. It is important to remember that when dealing with evidence 'the two operative words to keep in mind are 'relevance' and 'admissibility'.

Our Courts have had occasion to differentiate between these two terms:

*"Il-kuncett ta' ammissibilità ma ghandux jigi konfuz ma dak ta' rilevanza. L-ammissibilità ta' prova propriament tirreferi ghal "le condizioni richieste dalla legge per essere ricevuto in giudizio" jew ghal "le condizioni giuridiche del mezzo di prova in se stesso". Veru li xi drabi l-kwistjoni ta' rilevanza tipprezenta ruhha marbuta ma dik ta' ammissibilità izda meta si tratta ta' mera kwistjoni ta' rilevanza "ut sic" din hija tradizzjonalment imhollija ghall-apprezzament tal-Imhallef fil-kompetenza tieghu". (Repubblika ta' Malta vs. Edwin Cioffi, 1990)*

"Id-distinzjoni bejn dak li huwa ammissibbli bhala prova u dak li huwa inammissibbli kif ukoll dak li mbaghad jolgot ukoll ir-regola tar-rilevanza ta' dik il-prova hija kwistjoni fundamentali fl-ordinament guridiku procedurali Malti. Fl-appell kriminali superjuri **Ir-Repubblika ta' Malta vs Ibrahim Ramandan Ghamber Shnishah** intqal hekk:

*"Kull dokument (u kull prova) li permezz tieghu (jew taghha) parti jew ohra tista' taghmel prova ta' dak li gara jew ma garax riferibbilment ghall-"facts in issue" - jigifieri kull dokument (jew prova) li jaghmel (jew taghmel) "more or less probable a fact in issue" - hu (hi) ammissibbli in kwantu rilevanti, kemm-il darba ma jkunx hemm xi regola tal-ligi, jigifieri "an exclusionary rule of evidence," li jirrendi dak id-dokument (jew dik il-prova) inammissibbli. Dan i-kompli jsahhah l-osservazzjoni maghmula precedentement illi l-legislatur Malti jimpurtah aktar mir-rilevanza ta'*

*l-evidenza u x'ista jkun il-kontribut ta l-istess evidenza għall-kaz, milli l-forma tagħha jew kif l-evidenza tigi akkwistata jew ottenuta...*

Fil-kaz Kuruma, **Son of Kaniu v. The Queen, Lord Goddard (1995)**, qal hekk fir-rigward:

“Il-principju jibqa’ li t-test huwa dak tar-relevanza: jekk il-filmat jew ritratti jew registrazzjoni hu jew jista jkun relevanti - jgħidli mhux manifestament irrelevanti - allura fin-nuqqas ta xi exclusionary rule of evidence dak id-dokument hu ammissibbli, salv dejjem kif ingħad il-kwistjoni tal-valur probatorju. Mill-banda l-oħra, jekk ir-relevanza tad-dokument ma tkunx tista tigi stabbilita mill-istess filmat jew ritratt jew registrazzjoni allura fin-nuqqas ta xi xhud li jkun jista jstabbilixxi dik ir- rilevanza, il-qorti tista tasal għall-konkluzjoni li dak l-istess dokument hu manifestament irrelevanti u allura anqas biss tqisu.”

The same notions of admissibility and relevance of evidence are used in the UK. There is however a notable difference. Whereas in the UK members of the judiciary enjoy discretionary powers of exclusion of evidence, where the evidence to be adduced is more prejudicial than probative, under Maltese law, such discretion does not exist.

## **Notion Of Relevance**

The term 'relevance relates to any element, which is relevant to the facts in issue in trial. Relevance refers to a particular fact, and is something which sheds light on the guilt or innocence of the accused. This is taken on a case-by-case approach depending on the facts.

### **Il-Pulizija vs. Alex Galea (2023):**

"Il-provi li huma ta relevanza sabiex din il-Qorti finalment tasal għal konkluzjoni jekk l-imputat għandux jinstab hati ta din l-imputazzjoni huma dawk li jirrelataw man-natura tal-griehi sofferti, kif ukoll dawk li jorbtu l-imputat mal-vittma."

Sir James Fitzgerald holds that relevance denotes evidence which is materially impactful on the fact in issue in trial. It would not be neutral in nature. In simple terms, the evidence ought to point towards the innocence or guilt of the accused.

The concept of relevance in Malta emanates from the following sections of the Code of Organisation and Civil Procedure:

Article 558 (Relevance of Evidence) "All evidence must be relevant to the matter in issue between the parties"

Article 560 Employment of Experts

Article 561 Opinion of Experts

The aforementioned articles are all rendered applicable by means of Article 520 of the Criminal Code.

Evidence as stated previously, is relevant in so far as it is of the intention to point towards the innocence or guilt of the person accused. If the evidence is neutral, to this central issue, then the evidence would probably be irrelevant. When determining relevance, reference must be made to the “fact in issue” being discussed at the time of the trial, as there may be “various facts in issue” in one charge or indictment.

If the evidence is irrelevant it can never be admissible in trial. If the evidence is relevant, then the evidence should be admissible. If not, then it is excluded by law.

## Notion of Admissibility

If evidence is relevant, it ought to be admissible in trial. It will be admissible provided it is not excluded by operation of the law. The Criminal Code adopts an exclusionary rule and therefore lists what is positively excluded. A *contrario sensu*, what is not positively excluded by law is admissible.

## Judicial Notice and Presumptions

All matters which are judicially noticed are automatically admissible before a Court of law and no evidence needs to be presented in such a case. This includes the practice of the Court, the laws of Malta and the contents of the Government Gazette.

However, when dealing with foreign laws, a certificate from the foreign government is required, stating the position of the relevant law. On the other hand, matters which are presumed, also relieve a party from the burden of having to produce evidence. These can be either presumptions of fact and/or presumptions of law.

In the case **Rex v Burdett (1820)**, the Court held that a presumption of fact is properly an inference of that fact from other facts that are known. If no fact could thus be ascertained by inference in a Court of law, few offenders would indeed be brought to punishment:

*"It was incumbent on the prosecutor to establish the fact by calling Mr. Bickersteth. For no presumption ought to be made in a criminal case... But there is no such proof, nor even that any application to that effect was ever made to Mr. Brookes...But it seems to me that as the case at present stands, the jury were desired to make a presumption without having sufficient premises, and that if they did draw that presumption they acted not upon justifiable inference, but upon unwarrantable conjecture... A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all*

*subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a Court of Law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him"*

## **Illegally Obtained Evidence**

Any evidence, which has been discovered or collected in an illegal manner, is still admissible in the Maltese Courts. Malta's stance on this issue differs from that taken by the UK and the US since the former uses the method of excluding evidence by balancing it on a spectrum of 'probativeness vs prejudiciality, whilst the latter follows the 'forbidden fruit theory.

In the UK the presiding Magistrate or Judge at law retains a discretion to determine which evidence is admissible according to whether the evidence is trustworthy (and consequently probative) or untrustworthy (and therefore prejudicial). The exclusion of illegally obtained evidence is not automatic in the UK and this would depend on the level of police impropriety.

In the US, illegally obtained evidence would be inadmissible. It is not only that evidence which would be inadmissible but also any other evidence flowing from the original tainted evidence (hence the fruit" of the "tree. This is a deterrent to ensure strict adherence to rules and procedures in the collection of evidence.

The position obtained in Malta is fundamentally different. The only evidence, which is deemed inadmissible under Maltese law, is evidence which is expressly stated to be inadmissible in the law:

"Illi kif diversi drabi affermat mill-Qrati nostrana fir-rigward tal-principju regolatur dwar l-ammissibbiltà ta' prova fil-process penali, prova ma titqiesx li hija inammissibbli sakemm ma jkunx hemm xi dispozizzioni espressa tal-ligi li tipprekludil-ammissjoni ta' dik il-prova....

Illi l-esponent jagħmel referenza għas-sentenza '***Il-Pulizija vs Moumen Troure***' deciza nhar is-27 t' Ottubru 2016, fejn il-Qorti tal-Appell Kriminali qalet is-segwent:

*"Issa meta il-Qorti tqis illi prova hija inammissibbli u ghalhekk tiskartaha, dik il-prova trid tkun tali illi tippresupponi xi dispozizzioni tal-ligi li teskludieha milli tingieb 'il quddiem fil-process. Illi allura il-Qorti trid timxi b'cirkospezzioni kbira sabiex tqis jekk il-prova lil-akkuzat ged ifittex li jejjien tmurx kontra l-ispirtu tal-ligi li tirregola l-valur probatorju u l-ammissibbiltà taghha."*

Illi 'dan ir-rigward, il-**Professor Sir Anthony Mamo** jghid illi

*"all evidence that is logically probative being admissible, unless excluded, such evidence does not have to seek justification, but is admissible irrespective of the issues raised by the defence"*

### **Pulizija vs. Trevor Borg 31st October 2023**

*"Il-fatt pero li r-recording in kwistioni ittieded bil-mohbi... per se ma jirrendih inammissibbli. Is-sistema legali taghna ma jidhirx li thaddan it-teorija legali Amerikana tal-forbidden fruit fis-sens li jekk prova tkun mehuda illegalment, tali prova ghandha tigi skartata kompletament minkejja li tista tkun rilevanti ghall-kaz" (Pulizia vs. Annebelle Grech, 2020)*

### **Repubblika ta' Malta vs. Meinrad Calleja 3 May 2000**

*"Il-gurisprudenza kostanti tal-grati taghna kienet dejjem li prova hi ammissibbli minkejja li biex wiehed jikseb dik il-prova tkun inkisret xi ligi ohra, u dan konformement mar-regola tal-"common law" Ingliza in materja. Din il-Qorti taghmel referenza in partikolari ghas-sentenza tal-Qorti tal-Appell Ingliza tal-15 ta Marzu, 1968 fejn gie ritenut illi "recordings of conversations obtained through telephone tapping by private individuals are admissible in evidence" (R. v.Senat and Sin, 52 Crim. App. R. 282). Minkejja li f-Ingilterra il-Police and Criminal Evidence Act, 1984' tat espressament il-grati diskrezzjoni li jistghu, f'certi kazi, jeskludu provi "obtained improperly or by trick" (ara l-Artikolu 78 ta dik il-ligi, ir-regola generali ghadha li "evidence obtained unlawfully, improperly or unfairly is admissible as a matter of law" (Blackstone's Criminal Practice, 1991, pagna 1689, para.F.2.6)*

Furthermore, reference can be made to **section 349(2)** of the Criminal Code, which provides:

This section provides that the fact that the Executive Police fails to follow proper procedure or precaution in terms of law, rendering therefore this evidence illegal, would still not constitute a bar for its admissibility in trial. Therefore, this section would allow for the admissibility of evidence illegally collected. This having been said, this section refers to formalities or requirements prescribed under that particular Title of the Criminal Code. It would follow therefore that where there are formalities emanating from other legislation or other Titles of the Criminal Code, section 349(2) would not be applicable, consequently rendering that evidence inadmissible.



## **Direct and Circumstantial Evidence**

The Term 'circumstantial evidence' was defined by Archbold as;

*"Circumstantial evidence is receivable in criminal as well as civil cases; and, indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. 'It must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... It is also necessary before drawing the inference of an accused's guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference; per Lord Normand in Teper v. R[1952] A.C. 480 at 489 P.C."*

"... On the other hand, it has been said that circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by under signed coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial: **R v. Taylor**, Weaver and Donovan, 21 Cr. App. Rep. 20 CCA."

Therefore, although the norm is that direct evidence is more important than circumstantial evidence (provi indizzjarji), circumstantial evidence remains important to any trial. This evidence however is to be examined closely and must be univocal, meaning that it must be uniform and constant, pointing to one conclusion. This was confirmed by Maltese Courts in various judgements:

**Repubbilka ta' Malta vs Omissis, 6th October 2023** - "...provi cirkostanzjali huma bhal katina li tintrabat min taf ghal tart, b'sensiela ta ghogiedi li jagblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni."

**Il-Pulizija vs Rupert Buttigieg 11 July 2019** - It is also necessary before drawing an inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

**Il-Pulizija vs Joseph Gauci , 5 October 1998** - "Circumstantial evidence can be the only available evidence in a trial. It is evidence of surrounding circumstances, which .. is capable of proving a proposition with the accuracy in their complexity. Bhala konkluzjoni dwar x'inhu l-ahjar prova, il-Qorti tissottolinea li huwa ben saput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat u ndividwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem taghhom sabiex wiehed jara x'inferenzi jew interpretazzjoni ragionevoli u legali jista jaghti lil dawk il-provi hekk interpretati. Ma tistax tinstab htija jew nuqqas ta htija semplicement

fuq analizi dividwali jew separata tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kif ukoll komplessivament

## **DIRECT EVIDENCE**

Direct evidence is evidence obtained from witnesses, documents or *reperti*, rather than from surrounding circumstances. Direct evidence is important in any trial although this evidence also needs to be carefully examined to make sure that it is reliable. Witnesses are crucial and should in principle be relied on.

Yet witnesses rely on memory which can at times be patchy, incorrect in detail and can very well lie under oath, perjuring themselves. It follows that even direct evidence has to be tested for its reliability.

In **Repubblika ta' Malta vs Omissis A (6th October 2023)**, the Court accurately explained the importance of evidence and the reliability of evidence, be it direct or indirect evidence. The Court emphasised that the end goal is to ultimately find out the truth and the Court can only do so if it relies partially on the direct evidence presented in Court as well as the circumstantial evidence.

This is because any eyewitnesses could easily lie even though the offence of perjury exists. The Court held that:

*"F'dan il-kuntest, allura, l-akbar sfida li jkollhom il-Qrati fil-kazijiet li jisimghu hija li jiskopru l-verita storika; u dan peress li l-evidenza li tingieb quddiemhom - kemm dik diretta, kif ukoll dik indiretta - mhux dejjem necessarjament twassal ghall-dik il-verita. Xhud jista jkun konsistenti kemmfil-veritajiet li jghid, kif ukoll fil-gideb li jista' jkun qiegħed jghid. U huwa għalhekk li jezistti wkoll ir-reat ta' spergur. Il-Qrati ma għandhomx is-setgħa li jagraw l-imhuh tan tan-nies. Il-Qrati jippruvaw jifhmu xi kollhom f'imohhhom, f'qalbhom u fil-kuxjenza tagħhom in-nies li jidhru quddiemhom biss mil-kliem li jghidu u mill-għemil tagħom. Il-Qrati jridu jistrieħu biss fuq il-provi i jauni ngiebu quddiemhom - cire l-evidenza diretta jew l-evidenza indiretta..."*

*"I-Gudikant għandu jezamina bir-reqqa l-provi rilevanti li Jkollu quddiem u mbagħad jiddeciedi l-kawza abazi tal-ligi applikabbli, tal-gurisprudenza, u tal-provi li fl-opinjoni tiegħu huma konsistenti, konvincenti u korroboranti"*

It is interesting to note that in article 637 of the Criminal Code, the legislator intended that the credibility of witnesses is to be tested against his or her demeanour, conduct, consistency as well as to all the circumstances of the case. This would also include circumstantial evidence.

The Court sums up the *raison d'être* behind Article 637 with - **Repubblika ta' Malta vs. Omissis A, 6th October 2023:**

"Hawnhekk il-legislatur ried li l-gudikant sabiex jaghzel is-sikkrana mill-qamh li jqis certu dettal fir-rigward ta' imgieba, il-manjiera ta kif xhud igib ruhu meta jigi mistoqsi d-domandi u cioe jekk iwegibx, jekk hux reluttanti, jekk hux anzjuż li jwiegeb, jekk jurix dubbju f'dak li qed jghid u jekk jaghmilx eye-contact ma min ged isaqsih. Fir-rigward ta kondotta l-Qorti trid tqies il-mannerisms tieghu u f 'sens ta body language u komportament. Trid tqis ukoll l-karattru ta xhud u cioe jekk hux misthi, riservat jew inkella kif giet deskritta l-vittma stess 'without boundaries. Trid tara jekk dak li qalu x-xhieda u hawnhekk issir referenza kemm lejn ix-xhieda tal-akkuzat, kif ukoll dik tal-vittma jekk dak li qalu hux minnu u jekk hux attendibbli. Il-Qorti trid tqis ukoll in konkluzjoni ma dan l-ezercizzju, kull fattur iehor li jista' b'xi mod jikollabora jew icahhad dak li effettivamente ikun intqal mix-xhieda u dan bil-ghan li jsir tishieh fix-xhieda li hija sejra tabracca bhala veritiera"

In conclusion, both circumstantial evidence (provi indizzjarji) and direct evidence (provi diretti) are important and crucial pieces of evidence in any trial. They complement each other and will assist a magistrate, judge or jury in determining the truth and consequently whether the accused is guilty or innocent of the offences with which he or she is charged.

## **Presumption of Innocence**

Presumption of innocence - every person innocent until proven guilty. Prosecution must prove its case against the accused. Reverse onus provisions are acceptable in any.

If the circumstances justify a reverse onus situation - I can't prove a negative and therefore it is only fair that the burden is on you to have a license, just like if I find you in the possession of certain substances, I can assume you intended the contents. These reverse onus provisions are allowed - they shift the burden of fact not of guilt, so you can assume a fact not guilt. I can assume that unless and until you have a license, you do not have a license. Secondly, that reverse of and shifting of fact is rebuttable.

I will inform the accused to rebut the reversal of that presumption. Hence, the presumption of innocence, a slight exception with reverse onus provisions - accepted by human rights as far as they only have a fact and that fact can be rebutted. Now, we said that prosecution must prove its case, but to what degree must prosecution prove its case? That is different from civil trials. Civil trials are a balance of probabilities whereas beyond reasonable doubt is something more. These are terms we use - you need to prove it on the balance of probabilities? What does that mean? Likelihood has happened more than not. It probably did happen. In life everything is possible but not everything is probable. Difference between the two.

Different between what is possible and vs what is probable - not speaking on what is possible - in balance of probabilities, what is more probable more likely - notwithstanding - more likely that version A has happened than version B. hence i will balance probabilities, what is likely - will decide on what is more likely.

Moral certainty - you have to be morally satisfied that one version was more likely to result than the other. The situation is fundamentally different in Criminal trials - a probability beyond reasonable doubt.

What is beyond reasonable doubt? No other explanation than the one concluded based on the factors in front of you.

When you open any good english textbook you will find there are 3 burdens of proof and not 2!! Imp to note. They also speak on the balance of probabilities, beyond reasonable doubt and also a 3rd burden of proof, and also the persuasive burden of proof. They will say that this persuasive burden of proof, unlike the other 2 burdens, shifts from side to side. Interesting to acknowledge this 3rd burden of proof. Persuasive burden of proof = switches from side to side depending on the witness or evidence against you, which could create an obligation on the opposing party to bring forward evidence against it. This persuasive proof does not absolve the prosecution from proving its case "beyond reasonable doubt". This type of proof does not convict on its own.

Prosecution still needs to establish and prove a case beyond reasonable doubt - reverts the element of burden which one party feels. Ex you put up a very strong witness who is extremely credible - it is objective and scientific and that creates a moral practical burden on the other side. If I am in trial and a witness comes up and testifies really well. The first thing you say is omg, we need to attack the witness and need to neuter the effect of the witness. The dynamics of a trial will be shifting all the time.

Persuasive third party which exists - persuading the jury is shifting but doesn't mean the case is lost. What is this beyond reasonable doubt? The answer is found in the case itself.

Evidence must be presented in such a way that it leaves no doubt in your mind. Not any doubt - not absolute I can still have a doubt and conviction. I must not have a reasonable doubt. Not absoluteness or absolute certainty, you must be convinced up to a degree where you say reasonably you have no doubts - so possible that you can not say they are unreasonable.

The moment that the prosecution convinces you that there is no reasonable doubt as to his guilt, you must convict. You may still harbour certain doubts but they must be not reasonably probable.

NO REASONABLE DOUBT LEFT IN CONVICTING - dubju dettat mir-raguni

The Court said this “TINKOMBI MINN FUQ L-” whereas the prosecution’s case must be proven is beyond reasonable doubt - “*L-ONERU tal prova li - tressaq l-ahjar prova*”

Not speaking of any shadow of doubt but you can not have reasonable doubt - No room for doubt in a reasonable and honest person's mind and this person is not influenced by factors or subdued.

Judgement - what is a reasonable doubt? Judgement - judge Harding - huwa biss meta jkun hemm dubju veru, reasonable doubt ibbazat fuq r-raguni, fuq s-sens komun, common sense, if doubt still persists, is no there hence the Court can not declare he ACCUSED GUILTY OF THE - you could have a reasonable doubt and hence acquitted whenever you have a doubt rooted in common sense, something based on common sense and that this doubt persists even after listening to all evidence in prosecution and defence and if after all you still have this lingering doubt,

Still can not reconcile that doubt with what was presented to you - where you would use a reasonable doubt to acquit.

Another very important principle - which is overlooked but which we use quite frequently, is the **chain of custody**. Or the chain of evidence. Now, this chain of custody/evidence is a process where evidence can be tracked. Its origin, and its immovability is trapped and certified until its ultimate presentation in Court has evidence. If you present evidence in Court, it has to be admissible but more importantly it has to be.

Authenticity and traceability are key. Your evidence becomes admissible - it is there and it is common sense.

That is why traceability is imp - as all the way up it is traced to ensure its authenticity and that it is genuine. This chain of custody refers to a process, from SCENE OF CRIME TO TRIAL and this process is there to confirm the integrity of the evidence produced and that it is not tempered with and not dubious, hence integrity is of essence. A document is a *repertus* - a latin word meaning - but could be any tangible form of evidence, hence *repertus* not only a report of words, but a knife, a gun, a laptop. Any document, *repertus*, has to have this chain of custody confirmed.

This guy was driving, charged with driving under influence. Who took the blood? When was the blood taken? Is the blood human? Breach of custody. Renders evidence inadmissible

Interesting case **Repubblika Ta’ Malta vs. Ray Schembri** - in this case, a sample was taken without the consent of the accused, a family member who took a sample. Facts of the case are not well recounted by Filletti, his house took urine samples from husband to prove something in

a dispute they had. This sample, good or bad, taken without consent of the accused and the prosecution - brought the sample to Court.

The Court said NO WAY - in the case at hand, the SAMPLE was not taken by a Court expert, sample taken by wife without knowledge or consent of the accused, in violation of procedure, the Court then declared the sample to be inadmissible - due to the chain of custody not being adhered to. "GHandu jigi SFILZAT"

All these are ways in how the chain of custody is of essence and when it comes to the admissibility of evidence. Those are the rules of engagement when it comes to evidence. Burden of proof, chain of custody, - general rules governing introduction in evidence in trials. What categories of evidence exist?

**Jurists tend to categorise them in the following rules:**

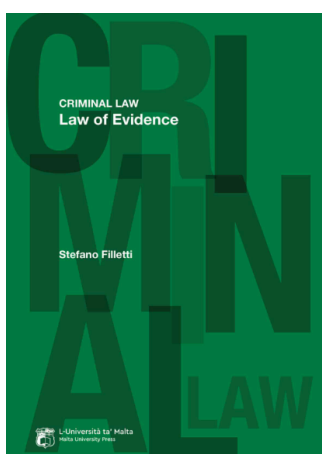
1. Witnesses.
  2. Documents.
  3. Confessions - hold an important place in Filletti's heart.
  4. Hearsay evidence.
  5. Audio and visual recordings - also documents, no doubt about that - separate types of evidence.
- 
1. Witnesses - First and most obvious type of evidence is a witness. Who is a witness? A human and this witness is going to testify on facts. Is there an age? Do witnesses have an age? Child subject of rape, can a child testify, 5 years of age? Yes. 6 months? Why are witnesses used first and foremost? Why? What do they testify on?

If I were to break it down, a witness has to testify on fact and fact alone, can testify on his/her senses - 5 or senses. Now, a witness can not express an opinion, we don't want the opinion of a witness. We are interested in fact, the fact that she saw Maria driving, she saw it happening but the moment she says she was speeding, even if it is logical in a certain sense, there she expresses an opinion - as she can not have a sense of speeding - ZIFFA RIH what she believes - had she been a passenger and saw the speedometer, than sense of sight but sense of speed, it is determined by Magistrate - will make to come to her opinion and decision, his opinion and decision. Witness can give objective facts which he/she has experienced with those 5 senses. She saw the car, sense of sight, that she saw her speeding is not,

Now, this is why you will be called to testify if you are a witness - Article 629 of the criminal code, every person of a sound mind, presumed to be sane unless that person is challenged. Every witness will testify under oath, or solemn declaration (atheists) to ensure that what you say is 2 fold. If you swore falsely under oath, the moment you take an oath, it is perjury.

Age is not of relevance, however and also please note that children can not take an oath on the cross. Hence in children under age, the child will testify regardless of age, provided the child can understand the notion of right and wrong, a truth and a lie. The child can testify as he will be told when the child can not lie.

Every witness presumed to be competent to testify. Competent vs compellable to testify. Compatibility of witnesses is also imp. THERE are witnesses incompetent, hence can not take the witness stand and then there are witnesses who although are competent can not be compelled to take the witness stand, can not be compelled.



### *General Principles of Burden of Proof*

The concept of burden of proof has a number of facets, central to which are: the questions of the incidence of the burden of proof on a given issue; the necessity of adducing evidence on a given issue and the standard of weight required to succeed on a given issue.

Moreover, this concept comprehends both procedural and substantive issues inter alia, movements of the burden of proof during the course of a multi- issue case, the application of the rules to multi-party cases, the rules of absolute or strict liability offences and an increased use of objective elements.

The burden of proof affects several evidentiary and non-evidentiary rules, including the privilege against self-incrimination, the right to silence, the right to not call witnesses, the use of earlier decisions, the risk on non-persuasion to exercise a discretion and the risk not to formulate or apply a rule in a given way.

The burden of proof occurs during the presentation to any Court of evidential matter for enabling it to answer questions. As a matter of fact, in his seminal work? **Thayer** noted that the rules regarding the burden of proof were unrelated to the law of evidence, as they operated entirely pre-trial.

The burden of proof is different under the Roman law system and the Common law system as follows. In a Roman law system, it is intended to give notice to the parties respectively of the facts intended to be proved. In a common law system, it separates law from the facts and renews the facts down to a single issue to determine it in a trial by jury.

## Definition

In legal discussions, the burden of proof may have several meanings. It can refer to the peculiar duty of the person who bears the risk of any given proposition on which the parties are at issue. In particular, it refers to the person who will lose the case if they do not prove this proposition when all is said and done. It can also refer to the duty of going forward in argument and in producing evidence, whether at the beginning of the case or at any later moment throughout the trial or discussion;

It is important to note that there is a difference between the burden of proof and the weight of evidence as seen from the following judgment **(Central Bridge Co. v. Butler):**

*"The burden of proof and weight of evidence are two different things. The former remains on the party affirming a fact in support of his case and does not change in any aspect of the case. A contrario sensu, the latter shifts from one side to the other in the progress of the trial according to the nature and strength of the proofs ordered in support or denial of the main fact to be established"*

Moreover, one must distinguish between two kinds of proof, the **evidential burden of proof** and the **persuasive burden of proof** as explained by the Maltese Courts: **(Repubblika ta' Malta vs. Gregory Robert Eyre, 2004)**

*"It is necessary in the first place to distinguish between the shifting from the prosecution to the accused of what Glanville Williams (The Proof of Guilt 3rd Edition 1963 pg. 185- 186) described as the "evidential burden", or the burden of introducing evidence in support of his case, on the one hand and the "persuasive burden", or the burden of persuading the jury as to his guilt or innocence, on the other."*

*A "persuasive" burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused, An evidential burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt"*



## ***EVIDENTIAL BURDEN***

Evidential burden of proof refers to the burden of adducing evidence. This burden of proof is a matter for the judge and is invoked by:

- Finding that there is no case to answer if the failure is on the part of the prosecution;
- Directing an acquittal;
- Refusing to direct the jury as to the relevant issue if the failure is on the part of the defence though there is no power to direct a conviction;
- Striking out either claims or a defence in civil case;
- Determining the matter without trial of the issue

The idea of evidential burden took a long time to take root and was not believed to even exist or be of use to some academics until the 1960s.

For instance, Nokes had affirmed that "there is no fundamental difference between the burden of proving an issue and the burden of adducing evidence of that issue". However, things took a turn after the landmark cases of *R vs Gill*<sup>o</sup> and *Jayasena vs R*.

In the latter judgment, Lord Devlin emphasised that there is a difference between evidential burden and persuasive burden since he held that the use of the verb "prove" was enough to rebut any suggestions that it meant an evidential burden;

"It is doubtless permissible to describe the requirement as a burden and it may be convenient to describe it as an evidential burden. But it is confusing to call it a burden of proof. Further it is misleading to call it a burden of proof whether described as a legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof" (*Jayasena v R*, 1970)

## **Persuasive Burden**

Persuasive burden of proof refers to the burden of the persuasion of the jury. It is a matter for the trier of fact and in jury trials it has to be expressed in the form of a direction by the judge.

The general provision common to both the criminal and civil proceedings is expressed in the Latin maxim '*ei incumbit probatio qui dicit, non qui negat*' which means the proof lies on him who asserts and not him who denies. *Prima facie*, this maxim seems like a simple rule which should be easily manageable however, this is rarely the case. Behind this legal maxim, lies concealed a sophisticated apparatus for determining what the substance is of a claim and what is required for the claimant to prove it.

In the following judgment, the legal maxim was explained by Lord Nicholls and seems to be very simple and straightforward:

"The general principle is that he who asserts must prove. Generally, although there are exceptions, a plaintiff or applicant must establish the existence of all the preconditions and other facts entitling him to the order he seeks".

A contrario sensu, in the following judgment, the underlying problems of the legal maxim were exposed (**Woolmington vs DPP,1935**):

*"Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the accused killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial is, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

This judgment had the effect of changing the law on the matter. The presumption of innocence is implicitly a strong element in this judgement. In this case, the prosecution not only had to prove the murder, but they also had to prove that it did not occur accidentally. The House held that while the prosecution must prove the guilt of the prisoner, the prisoner is not laid with any burden to prove his innocence and consequently is not bound to satisfy the jury of his innocence, he just needs to raise a doubt as to his guilt.

The only exceptions to the rule established above are the cases of insanity, certain statutory provisions and explicit or implicit impositions. These are exceptions to the rule since they contain the effect of shifting the burden of proof onto the accused. For instance, when looking at the topic of insanity, it is a well-established rule that the defence of insanity is a matter for the defence to prove as laid down in the M'Naghten rules or those in R vs Hay.(1899)

In such cases of exceptions to the rule, the prosecution would either bear the persuasive burden of satisfying the Court on the balance of probabilities of the truth of the matter or else the persuasive burden may fall expressly or impliedly on the accused by way of statute. The latter exception would be a case of *ubi lex voluit dixit, ubi noluit acuit*.

## **Presumption of Innocence**

On the 10th of December in 1994, the General Assembly of the United Nations approved Article 11 in the Universal Declaration of Human Rights secured one's right of presumption of innocence. In this way, this right acquired a formal universal recognition as a human right distinguishing it from other rights.

The presumption of innocence is a fundamental right, which is granted to the defendant of a criminal trial in all countries respecting human rights. It implies that the accused is presumed to be innocent until the Court passes a guilty judgment. The presumption will be violated if a judicial decision, concerning a person charged with a crime, reflects an opinion that he is guilty before he has been proven guilty:

(Ryan Refalo vs. Avukat tal-Istat, 12 July 2023)

"When carrying out their duties, the members of a Court should not start with the preconceived idea that the accused has committed the offence charged;... the burden of proof is on the prosecution, and any doubt should benefit the accused... Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, amongst others, the burden of proof (Telfner v. Austria, 2001, \$ 15); legal presumptions of fact and law (Salabiaku v. France, 1988, \$ 28; Radio France and Others v. France, 2004, \$ 24); the privilege against self-incrimination (Saunders v. the United Kingdom, 1996, 68); pre-trial publicity (G.C.P. v. Romania, 2011, \$ 46); and premature expressions, by the trial Court or by other public officials, of a defendant's guilt (Allenet de Ribemont, 1995, 5g35-36, Nesták v. Slovakia, 2007, \$ 88)"

The presumption of innocence has a leading role in the burden of proof. Generally, the burden of proof is on the prosecution as it is the duty of the prosecution to establish that the defendant is guilty beyond reasonable doubt before such person is convicted. The prosecution therefore bears both the evidential and the persuasive burdens except for the cases that involve exceptions such as the matter of insanity. **Thus, the presumption of innocence demands that:**

1. The prosecutor must establish the guilt of the accused; and
2. The guilt of the accused must be established beyond reasonable doubt.

The presumption of innocence requires the adjudicator to ignore all pre-trial indicators of guilt and to determine guilt or innocence solely on the evidence presented in Court. The presumption of innocence is enshrined in the following conventions and legislation:

- Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms' which states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

This article is an aspect of the defendant's right to a fair trial. Therefore, any infringement of the presumption of innocence would result in rendering the trial to be unfair.

- Article 39(5) of the Constitution which states that "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty".

- Article 11 of the Universal Declaration of Human Rights<sup>40</sup> which states that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

### **Effect of Presumption of Innocence**

The effect of presumption of innocence has mainly been to make it incumbent upon the prosecution to establish the guilt of the accused beyond reasonable doubt. However, the effect of the presumption of innocence has somewhat eroded over the years due to provisions allowing for the making of inferences on the silence of the accused as well as provisions for the compulsory calling of intimate body samples.

Nonetheless, the presumption of innocence serves as the guardian of the freedom of the individual and it is seen by most jurisdictions as an essential key to a fair trial.

## **BURDEN OF PROOF UNDER MALTESE LAW**

Burden of Proof rests with Party Alleging it

Under Maltese law in both civil and criminal cases, allegations have to be proven by the party alleging. This evidence sustaining the allegation must satisfy the level of persuasion assigned by the law in the forum they are proposed. The rule governing the burden of proof is grounded in the maxim *onus probandi incumbit ei qui dicit non qui negat*.

This maxim is reproduced in **article 562 of the Code of Organisation and Civil Procedure**. The Courts explain the position of law of evidence in Malta in the following judgment

**(Leopold Franz Mizzi vs. Joseph Bonnici, 9th October 2023) :**

"Two fundamental rules of procedure under Maltese law are: *onus probandi incumbit ei qui dicit non ei qui negat* (the burden of the proof lies upon him who affirms, not him who denies) and *actore non probante reus absolvitur* (when the plaintiff does not prove his case, the defendant is absolved). These are enshrined in Art 562 of Chapter 12 of the Laws of Malta..”

The burden of proof lies with the person who is alleging it. In criminal matters, this is reflected in the fact that the prosecution is to prove the case as charged and that the accused is deemed to be innocent until proven guilty. The burden of proof rests on the prosecution throughout the course of the whole trial.

In certain cases, the burden of proving certain facts shifts onto the defence, such as when the plea of insanity is raised. If the defendant pleads not guilty, he is not obliged to prove his innocence, though of course he may try to prove that he is innocent or that the prosecution has not presented a strong enough case against him by cross-examination.

**(Leopold Franz Mizzi vs. Joseph Bonnici, 9th October 2023):**

*"...The burden of proof or, as is it is legally known, the "onus probandi" ... is the duty of a party during proceedings (in this case the claimant) to produce the evidence that will substantiate the claims it has made against the opposite party (in this case the defendant company). That burden (onus) is shifted from one party to the other side who must counter produce evidence to rebut the evidence submitted by its adversary (I.e. "reus in excipiens fit actor"). Thus, fulfilling the burden of proof effectively attracts the benefit of assumption , passing the burden of proof onto the opposing party'.*

Moreover, it must also be underlined that the person who is ultimately to decide any issue of a factual nature must, necessarily, base his reasoning, findings and eventual decision, on the evidence formally produced before him and not by means of any ulterior investigations conducted motu proprio or ex officio (i.e., of his/her own initiative). This is all implicitly enshrined in our domestic legal system in the Latin maxims of "quod non est in actis non est in mundo" (what is not kept in records of the case does not exist), "secundum acta et probata non secundum privatam scientiam" (according to the evidence and not according to private knowledge of the deciding authority) and "non refert quid notum sit judici si notum non sit in forma judici?" (it matters not what is known to the judge, if it be not known in a judicial form or manner).

## **Burden of Proof in Civil Cases: Balance of Probabilities**

The level of proof in civil and criminal proceedings is different.

In civil proceedings, the standard of proof that must be reached is the proof of balance of probabilities. In criminal proceedings the level of proof required is that of proof beyond reasonable doubt.

The proof of balance of probabilities, also known as preponderance of the evidence, involves convincing the Court that the facts being ascertained are more likely and probable to have happened rather than not. In the case where the facts being ascertained by the parties are equally probable to have taken place, then the defendant in the case would be acquitted; *actore non probante reus absolvitur*:

**Lorraine Pace Bonello vs. Pauline Sammut, 15 Nov 2023** - "Meta l-kaz ikun hekk, il-Qorti m'ghandhiex taqa' comb fuq l-iskappatoja tad-dubju, imma ghandha tezamina bl-akbar reqqa jekk xi wahda miz-zewg verzjonijiet, fid-dawl tas-soliti kriterji tal-kredibilità u speċjalment dwar il-konsistenza u verosomiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilità u tal-preponderanza tal-provi, ghax dawn, f'kawza civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant"

**Frank Giordimaina vs. William Rizzo, 20th Oct 2023** "il-grad ta prova rikjest fil-kamp civili, b'differenza minn kawzi kriminali fejn il-ligi tesigi li l-prova tal-htija ghandha tirrizulta minghajr dubju ragjonevoli, fil-kamp civili huwa bizzejjed li jkun hemm certezza morali f'mohh il-gudikant. Din c-certezza morali rikjesta f'kawzi civili hija l-effett tal-bilanc tal-probabilitajiet"

## **Burden of Proof in Criminal Trials: Beyond Reasonable Doubt**

The principle rule applicable is that every individual who is charged with a criminal offence shall be presumed to be innocent until he is proven or has pleaded guilty:" It is up to the prosecution to bring forward any evidence to prove to the Court that the accused is guilty as charged beyond reasonable doubt.

As **Manzini** rightly states; "*Il così detto onero della prova, cio il carico di fornire, spetta a chi accusa - onus probandi incumbit qui osservit*",

The prosecution is burdened with the persuasive burden, meaning the prosecution has all the obligations of proving the facts in issue to the required level of proof beyond reasonable doubt. While the evidence could be both relevant and admissible, it may not be enough to prove guilt beyond reasonable doubt. In order to establish the weight of evidence, one must take into account the probative value of the evidence and the degree of proof required by each party. Moreover, the prosecution must also disprove particular facts that are brought in by the accused

who also adduced sufficient evidence for their existence to the required degree. In criminal proceedings the only standard of proof that is acceptable is that of beyond reasonable doubt which is a standard obtained by reason.

The degree of probability is not sufficient to bring about the conviction of the person charged, but it is the degree of proof, which the defence counsel is required to attain. However, in the cases where the burden of proof shifts onto the defendant, the prosecution is still bound to prove its case beyond reasonable doubt.

The jury must be convinced without any doubts that the accused is guilty of what he is being tried for so that the said accused will be duly sentenced.

The notion of proof beyond reasonable doubt is defined by **Lord Denning** as:

*"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence of course it is possible but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice"*

If prosecution fails to bring forward evidence to sustain the charge beyond reasonable doubt, the accused ought to be acquitted. In **Il-Pulizija vs Emad Masoud**, the Court of Criminal Appeal held:

*"Illi jinkombi fuq il-prosekuzzjoni sabiex tressaq l-ahjar prova u sabiex tipprova l-kaz taghha fug bazi ta' minghajr dubju dettat mir-raguni. Filwaqt li d-difiza ma ghandha bzonn tipprova xejn.*

*Dwar l-oneru ta' prova, kif ikunsidrat As sentenza l-ismijiet Il-Pulizija (Supretendent lan Joseph Abdilla et) vs Joseph Baldacchino, Farah Kirpalani, Philip Micallef, (Deciza mil. Qorti tal-Magistrati (Malta) Bhala Qorti ta' Gudikata Kriminali nhar l-24 ta' Mejju, 2017 Numru 809/2009) ghalkemm dwar mertu u imputazzjonijiet differenti min dawk in kwistjoni:*

*Illi huwa l-oneru tal-Prosekuzzjoni li tressaq l-ahjar provi sabiex tikkonvinci lill-Qorti li l-imputazzjonijiet addebitati fl-konfront tal-imputati huma veri...*

*Huwa principju baziku pprattikat mill-Qortj taghna fil-procediment kriminali li, biex l-imputati jigu ddikjarati hatja, l-imputazzjonijiet dedotti ghandhom jigu pruvati oltre kull dubju ragjonevoli, cioe' oltre kull dubju dettat mir-raguni.*

*Hawnhekk il-Qorti taghmel riferenza ghas-sentenza moghtija mill-Qorti tal-Appell Kriminali fis-7 ta' Settembru 1994 fl-ismijiet Il-Pulizija vs Philip Zammit et u tghid pero mhux kull icken dubju huwa bizzzejjed sabiex persuna akkuzata tigi ddikjarata liberata, hemm bzonn li "dubju jkun dak dettat mir-raguni".*

Fil-fatt fis-sentenza moghtija mill-Qorti tal-Appell Kriminali nhar il-5 ta' Dicembru 1997 fl-ismijiet: **II-Pulizija vs Peter Ebejer**, dik il-Qorti fakkret li l-grad ta' prova li trid tilhag il-Prosekuzzioni hu dak il-grad li ma jhalli ebda dubju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubju. Id-dubji ombra ma jistghux jitqiesu bhala dubji dettati mir-raguni. Fi kiem iehor, dak li l-Gudikant irid jasal ghalih hu, li wara li jgis ic-cirkostanzi u l-provi kollha, u b'applikazzioni tal-bon sens tieghu, ikun moralment konvint minn dak il-fatt li trid tipprova l-Prosekuzzioni."

The Criminal Courts has also referred to **Adrian Keane and Paul McKeown's book** entitled **"The Modern Law on Evidence"** to explain the concept of proof beyond reasonable doubt:

*"In the wake of difficulties encountered with the formula of proof beyond reasonable doubt, Majid makes it clear that the direction on the criminal standard must adhere to the formula of proof by being "sure", in accordance with the longstanding advice given to judges by the Judicial Studies Board. That advice currently contained in the Crown Court Bench Book, is simply that the prosecution prove their case if the jury, having considered all the relevant evidence, are sure that the accused is guilty. Further explanation is described as 'unwise. If the jury are not sure then, they must find the accused not guilty."*

In the English case of Majid mentioned above, **Lord Moses** stated that:

*"Judges are advised by the Judicial Studies Board, as they have been for many years, to direct the jury that before they can return a verdict of guilty, they must be sure that the defendant is guilty."*

As seen from the judgments mentioned above, it emanates clearly that the evidence must be such that it leaves no room for doubt in a reasonable and honest person's mind, not influenced by external factors or subdued by fear. However, the standard of proof beyond reasonable doubt is not tantamount to the degree of absolute certainty.

Proof beyond reasonable doubt is a standard, which has been established and reiterated by Maltese Courts in a number of judgments.

In **Repubblika ta' Malta vs Gregory Robert Eyre et**, the Constitutional Court 2005 held as follows.

- "(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt;
- (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities;
- (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted;
- (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether



the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case;

(v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence.

The Court of Criminal Appeal has also ruled on the application of the standard beyond reasonable doubt in criminal trials.

In **II-Pulizija vs Roderick Gerada (2022)**, the Court held:

"Sabiex Qorti ta' Gustizzja Kriminali tkun tista' ssib persuna akkuzata hatja ta reat kriminali jinkombi fuq il-Prosekuzzjoni li ggib il-provi kollha u l-ahjar prova possibbli sabiex dan il-grad tal-prova jintlaħaq b'success.

Issir referenza ukoll għas-sentenza mogħtija mill-Qorti tal-Appell Kriminali fl-ismijiet **II-Pulizija vs Peter Ebejer (5 ta' Dicembru 1997)**, fejn gie riaffermat illi l-grad ta' prova li trid tilħaq il-Prosekuzzjoni hu dak il-grad li ma jhalli ebda dubju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubju, għaliex l-ombra ta' dubju ma jistax jitqies li huwa dubju li huwa dettat mir-raguni. Fi kliem iehor, dak li l-gudikant irid jaasal għalih hu, li wara li jqis ic-cirkostanzi u l-provi kollha, u dejjem bl-applikazzjoni tal-buon sens tiegħu, ikun moralment konvint minn dak il-fatt li trid tipprova l-Prosekuzzjoni"

1. "Huwa principju baziku pprattikat mill-Qrati tagħna fil-procediment kriminali li, biex l-imputati jigu ddikjarati hatja, l-imputazzjonijiet dedotti għandhom jigu pruvati oltre kull dubju ragionevoli, cioè oltre kull dubju dettat mir-raguni."

2. Fil-kawza **Pulizija vs Paolo Farrugia** huwa risaput li "hija regola tal-procedura kriminali li l-prova trid tkun shiha u soddisfacenti u li, bħala principju fundamentali tal-process gudizzjarju fil-kamp penali, il-provi migjuba jridu jwasslu għal sebieen ta' htija mingħajr dubju dettat mir-raguni, "u jekk jeżisti dak id-dubju, dan imur favur l-akkuzat... B'hekk isegwi li jekk il-provi jistgħu iwasslu għal aktar minn konkluzjoni waħda, u ipoggu lill-Qorti f'salib it-torog, tali provi ma jistgħux jitqiesu bizzżej jed fil-kamp kriminali sabiex iwasslu għall-htija lil hinn minn kull dubju dettat mir-raguni."

**Pulizija vs Omissis 2023** - "Dawn il-Qrati dejjem strahu fug il-principju li biex l-evidenza cirkostanzjali tkun is-sies ta' sebieen ta' htija, din trid tkun univoka, jigifieri li tipponta biss u esklussivament lejn direzzjoni u konkluzjoni waħda u xejn hlielha. Altrimenti, jekk ic-cirkostanzi jagħtu lok għal aktar minn konkluzjoni waħda, il-Qorti ma tkunx tista' tistrieħ fughom biss biex tkun tista' ssib htija. Jekk ikun hemm dubju dettat mir-raguni, il-Qorti ma tkunx tista' ssib htija fl-imputat jew akkuzat..."

Mill-banda l-oħra biex persuna tigi misjuba hatja, il-Ligi kriminali ma tehtiegx li din tkun stabbilita b'certezza assoluta. Il-Ligi tal-procedura Maltija hija imnissla mis-sistema Ingliż fejn huwa mehtieg li biex Qorti ta' Gustizzja Kriminali tkun tista' ssi htija fakkuzat, il-Prosekuzzjoni tkun trid jirexxilha tipprova l-kaz tagħha lil hinn minn kull dubju dettat mir-raguni in bazi għall-provi imresqa minnha. Jekk id-Difiza tipprova l-punt tagħha fuq bazi ta' probabbilita, jew tislet argument, inkluz mill-provi tal-Prosekuzzjoni stess, u jirnexxielha ddahhal dubju dettat mir-raguni, allura l-Qorti ma tkunx tista' ssib htija fl-akkuzat...

Il-Qorti tkun tista' tasal għal din il-konkluzjoni biss wara li tkun għarblet il-provi ammissibbli kollha li jkunu tressqu quddiemha, jigifieri kemm l-evidenza ordinarja kif ukoll dik esperta, kemm dik diretta u kif ukoll dik indiretta. Fl-aħhar mill-aħhar dik il-Qorti trid tkun għura moralment, .. li l-kaz sehh skont kif tkun qed tipprospetta l-Prosekuzzjoni lil hinn minn kull dubju dettat mir-raguni. Dan huwa l-ogħla livell ta' prova li l-Ligi tehtieg biex tinstab htija; livell li huwa anqas minn-certezza assoluta, iżda li huwa ogħla mill-bilanc tal-Probabbilitajiet.

In a criminal trial, the prosecution must prove its case beyond reasonable doubt. Otherwise, it would not be possible to convict the accused. Absolute certainty is not required. That, after all, is an impossible standard. What is required is a factual and moral certainty, which is not afflicted by a 'reasonable doubt for conviction. Again, there may be a doubt, but it may not be a reasonable doubt. This ultimately is what distinguishes absolute certainty with a standard beyond reasonable doubt.

**Judge William Harding in his decision defined the term** 'proof beyond reasonable doubt' with the words principle of surety. Such phrase explains the burden of proof needed for criminal law accurately. On the one hand, all reasonable doubts ought to be eliminated by either providing unambiguous evidence to prove the accused's guilt, or else by providing evidence that casts any doubt and uncertainty on the accused's actions:

### **Repubblika ta' Malta vs. Omissis A 2023**

"Huwa biss meta jkun hemm id-dubju veru, bazat fuq ir-raguni, fuq is-sens komun u fuq il-buon sens, cjoè d-dubju li jibqa jippersisti wara li jsir stharrig dettaljat u b'attenzjoni, bdiligenza u b'mod imparzjali tal-provi u l-argumenti kollha li jkunu gew imresqin mill-Prosekuzzjoni u mid-Difiza li mbagħad, jekk jibqa jippersisti dan id-dubju, jkun jista' ingħad li dak il-livell ta' sikurezza, ossija sufficjenza probatorja lil hinn minn kull dubju dettat mir-raguni ma jkunx intlaħaq; u li allura bħala konsegwenza, il-Qorti ma tkunx tista' tiddikkjara lill-hati hati tal-akkuzi misjuba kontrih",

## **The Chain of Custody/Chain of Evidence**

The "chain of evidence" (sometimes referred to also as 'chain of custody of evidence') refers to a process used in the course of an investigation to document the handling of evidence from the scene of a crime to trial. The handling of the evidence, and the record of the handling, are essential to preserve the integrity of the evidence. It is equally essential to ensure that the evidence is not tampered with or tainted, rendering the evidence dubious, untrustworthy or prejudicial. Where the chain of evidence is broken, and consequently the integrity of the evidence cannot be proven, that evidence is deemed to be tainted. The obvious consequence is the expunging of the evidence as being inadmissible.

If evidence is produced as evidence in favour or against the accused, the source or origin of the evidence must be identifiable and authentic. Its handling must be verifiable and properly preserved until such time as they are produced in trial as evidence.

The Criminal Court has had occasion to rule on the principle of chain of custody.

In **Repubblika ta' Malta vs Ray Schembri (5 Sept 2023)** the Court defined the chain of custody as follows:

*"Il-principju ta-chain of custody' daqskemm ic-chain of evidence, jghid li huwa dritt sagrosant tal-akkuzat li jkollu garanzija tal-awtenticita tal-provi pprezentati mill-Prosekuzzjoni kif ukoll tal-origini taghhom, ta' xi movimenti li dawn setghu ghamlu u tal-mod kif dawn gew ipprezervati mill-mument illi tali provi nstabu u/jew gew ikkompilati sal-mument illi listess gew ipprezentati bhala evidenza fil-proceduri quddiem il-Qorti"*

The reason for this principle is that integrity, authenticity and consequently the probative value of the evidence cannot be placed in doubt. The integrity of the evidence produced needs to be protected and preserved. This was reiterated by the Criminal Court of Appeal in the case **Ir-Repubblika ta Malta vs Josef Majri**. The principle of the chain of evidence is reiterated in numerous local judgments as seen below:

*"Ma jrid jithalla ebda dubju ragjonevoli f'mohh minn irid jiggudika l-fatt dwar it-traccjabilita tal-oggetti jew dwar l-awtenticita, l-integrita u l-kontinwita taghha. Il-Prosekuzzjoni jehtiegilha tipprova li dik l-evidenza li giet migbura, mahduma u mizmuma b'mod integratu mill-bidu tal-istharrig sal-fazi fejn tkun ged tigi prezentata bevidenza fil-Qorti"*

This judgment was confirmed by Court of Criminal Appeal in **II-Pulizia vs Andrew Mizzi In Repubblika ta Malta vs FodieKeita (2019)** the Court of Criminal Appeal ruled on chain of custody and held that:

*"I-ghan ewlieni ta kull qorti ta gustizzja penali huwa li tara illi l-akkuzat ikollu smigh xieraq.*

*Meta process penali jwassal ghal dikjarazzioni ta htija msejsa fuq evidenza kontaminata, il-jedd ghal smigh xierag ikun ged jigi volat. Madanakollu sabiex il-Qorti tasal biex tistabilixxi l-validita tal-prova kostitwita b'dik l-evidenza jrid isir ezami tal-iter segwit mill-mument illi dik il-prova ndizzjarja titfacca fil-kors tal-investigazzioni tal-pulizija, kif u minn min tkun giet elevata, kif tkun giet ippreservata u sussegwentement min ghamel l-ezamijiet forensici fughu u b'liema mod, sabiex fl-ahhar issib postha quddiem il-Qorti...*

- Wherever he steps, whatever he touches, whatever he leaves, even unconsciously, will serve as silent evidence against him.
- Not only his fingerprints or his footprints, but his hair, the fibers from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects - all these and more bear mute witness against him.
- This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be wrong; it cannot perjure itself; it cannot be wholly absent.
- Only its interpretation can err. Only human failure to find it, study and understand it, can diminish its value. **(Kirk, Paul, Crime investigation, John Wiley & Sons Canada, Limited, 1953).** However, the value of even the most carefully recovered and preserved evidence can be lost if the chain-of-custody is not properly maintained.
- "Chain-of-custody" is often recognized as the weak link in criminal investigations. It refers to the chronological and careful documentation of evidence to establish its connection to an alleged crime. From the beginning to the end of the forensic process, it is crucial to be able to demonstrate every single step undertaken to ensure "traceability" and "continuity" of the evidence from the crime scene to the Courtroom.

In establishing a chain of custody no extraordinary measures are required. It would suffice if a witness confirmed the manner in which items were taken from the scene of the crime and how these were handled until the time that evidence was produced in Court. When the evidence itself is not patently identifiable or is capable of being replaced or altered, admissibility generally requires that all those who have handled the item identify it and testify to its custody and unchanged condition.

In **II-Pulizija vs Alexis Medhy Robin Meyret** the Court held that:

*"Illi din il-Qorti ma taqbilx mad-difiza li l-katina tal-evidenza ma giet ippreservata sew u skond il-ligi. Sabiex tigi preservata sew l-evidenza ma huwiex mehtieg li xhud jixhed id-dettalji*

*specifiki ta kif kien il-basket u l-affarijiet kontenenti fih. Dan iktar u iktar meta l-kontro-ezami ma jsirx immedjatament izda jsir wara snin mill-akkadut. Li hu mehtiegg huwa li jigi prodott quddiem il-Qorti bhala xhud kull persuna li ghadha minn ideja l-oggett ippreservat b'tali mod li l-Qorti tkun sodisfatta li loggett fil-proceduri huwa l-istess oggett li gie elevat mix-xena tar-reat."*

It is paramount that the authenticity, traceability and integrity of the evidence is preserved. There can be no doubt on the integrity of the evidence adduced in a trial. The Criminal Court has held:

**(Repubblika ta' Malta vs Darren Mizzi 2023)**

*"Il-principju ta-chain of custody' daqskemm ic-chain of evidence, huma fundamentali fi proceduri kriminali in kwantu jservu ta garanzija tal-awtenticità kif ukoll tal-origini tal-provi prezentati mill-Prosekuzzjoni, kif ukoll ta x'movimenti dawn setghu ghamlu u tal-mod kif dawn ikunu gew ipprezervati mill-mument illi tali provi nstabu u/jew gew ikkompilati sal-mument illi listess gew ipprezentati bhala evidenza fil-proceduri quddiem il-Qorti. Tali evidenza tista tiehu x-xejra ta evidenza forensika bhal per ezempju l-gbir ta kampjuni ta demm minn fug ix-xena tar-reat f'kaz ta omicidju jew inkella tkun tat-tip kartaceja bhal fil-kawza in dizamina...."*

*Il-Prosekuzzjoni ma trid thalli dubju f'mohh min irid jiggudika l-fatti dwar it-traccjabbilita, integrità u awtenticità ta dawk il-provi. Il-Prosekuzzjoni trid turi li dik l-evidenza li giet migbura u mahzuna kienet awtentika u mizmuma b'mod integru sa minn meta ngbret sakemm tkun giet prodotta bhala evidenza fil-Qorti.*

The principle of chain of evidence does not only exist in Math but it also exists in various other jurisdictions since it forms an integral requisite to a fair trial. For instance, the US Supreme Court has consistently held that any evidence used is on, permitted if it is shown that it has never been changed for improper purposes or trifled with.

In **Barron v Valdmanis (1978)** was held that:

"In criminal prosecution where it is necessary to establish that material found in the accused's possession is identical with material subsequently analysed, there are, as was pointed out by Brereton J Young v Commissioner for Railways (1962) NSW 647 at 651, two ways of doing so. The first is to trace it from hand to hand and to this end it is usually necessary to call every person who had it in custody from the point of origin to the end of its journey"

In **People v Beran** (2014) it was further held that:

"To be admissible, the prosecution must establish by records or testimony the continuous whereabouts of the exhibit, from the time it came into the possession of the police officers, until

it was tested in the laboratory to determine its composition, and all the way to the time it was offered in evidence."

### **Taking of Samples and Chain of Custody**

The chain of custody' is a principle which applies also to samples taken from the accused or the scene of the crime. These, after all, are also evidence. The Criminal Code distinguishes between an intimate sample and a non-intimate sample.

What happens when samples are not taken correctly, or where the chain of custody is broken?  
What if the sample taken therefore does not possess the level of integrity required?

This matter was decided upon by the Criminal Court in the case of **Ir- Repubblika ta' Malta vs Ray Schembri**

In this case, the central issue was the manner in which a sample was taken, and subsequently taken from the accused. The law distinguishes intimate samples from non-intimate samples, providing for a specific procedure in each case. Non-intimate samples can be taken only with the consent of the accused, and where this is not forthcoming, it must be taken after an order by a Magistrate. Furthermore, the manner in which the sample can be taken is important to preserve the integrity of the sample.

In the case at hand," the sample was not taken by an expert. No authorisation was sought from the Magistrate and no consent obtained by the person accused. The sample was taken by the wife of the accused without the accused's knowledge or consent. The Court concluded that the sample was taken in violation of the procedure and requirements prescribed at law. The Court first established that the sample was taken incorrectly:

"Fil-kaz odjern, zgur ma jistax jinghad illi tali kampjun ittieded bl-awtorizzazzjoni tal-akkuzat u langas ma ttieded bl-awtorizzazzjoni ta xi Magistrat. Il- parti leza langas ma agixxiet bhala Membru tal-Korp tal-Pulizija. Ghaldaqstant, zgur jista jinghad illi tali kampjun ma ttihid skond il-ligi u ghalhekk dan il-kampjun u kwalunkwe referenza ghalih huwa inammissibli u ghandu jigi filzat. Jekk din il-Qorti thalli din it-tip 'evidenza f-atti tkun hi stess li tizgwida l-gurati ghaliex din l-evidenza ttiehdet kontra l-ligi u ghalhekk hemm exclusionary rule of evidence li jirrendi l-kampjun u/jew kwalunkwe referenza ghalih inammissibli. Ghaldaqstant ghandu ragun l-akkuzat fir-rigward tal-eccezzjoni mressqa minnu. Din l-evidenza u cioe l-kampjun in kwistjoni mhux xi bicca evidenza bhal per eżempju xi ritratti li ttiehdu bil-mohbi jew bla permess ta xi Hadd, ghaliex dawn jkunu ammissibli peress li l-Qrati taghna ma jhaddmux il-principju tal-forbidden fruit. F'dan il-kaz pero i-ligi stess ged tipprovdi kif ghandha tigi mehuda din it-tip ta evidenza u johrog b'mod car, kif diga gie ritenut, li l-ligi ma gietx segwita f'dan ir-rigward u oltre minn hekk l-istess kampjun mhux esebit fl-atti."

The Court also held that the fact that the sample was taken incorrectly effected the chain of evidence, or chain of custody:

"Di piu din il-Qorti tixtieg ukoll tesprimi l-fehma taghha fir-rigward tac-chain of evidence. Il-principju tac-chain of custody daqskemm ic-chain of evidence, jghid li huwa dritt sagrosant tal-akkuzat li jkollu garanzija tal-awtenticità tal-provi pprezentati mill-Prosekuzzjoni kif ukoll tal-origini taghhom, ta xi movimenti li dawn setghu ghamlu u tal-mod kif dawn gew ipprezervati mill-mument illi tali provi nstabu u/ jew gew ikkompilati sal-mument illi l-istess gew ipprezentati bhala evidenza fil-proceduri quddiem il-Qorti."\*)

Having established that the chain of custody was breached, the Court held that this would affect the probative value of the evidence in trial. The Court however held that ordinarily, it was up to the trier of fact, the jurors, who would have to decide on whether there was a breach in the chain of custody. It is a matter reserved for jurors to determine also the probative value of the evidence in trial:

"45. Dan il-punt ta dritt igib mieghu allura konsiderazzjoni ta natura probatorja li tistharreg precizament dan l-element ta traccabbilita. Din il-kwistjoni probatorja hija kwistjoni ta fatt li ghandha tigi mhollija fidejn l-imhallfin tal-fatt fl-istadju tal-guri. Huwa intempestiv f'dan l-istadju li tikkunsidra nnuggas ta tracjabilita tal-evidenza kif gieghed jecepixxi l-akkuzat oltre Ghall-fatt li kif intqal, esperti in kwistjoni ghad iridu jixhdu fl-istadju Tal-guri u ghalhek l-evidenza kolha minhom migbura Ghad trid ghadi mill-iskrutinju tal-imhallfin tal-fatt. Ma tkunx fil-kompetenza ta din it-Qorti dan l-istadju li tiddecidi fuq in-. Nuqqas ta valur probatorju ta dokumenti formanti parti mill-ati kumpilatorji minhabba dak li l-akkuzat qieghed igis bhala difett fic -chain of custody u fic-chain of evidence. Dan il-fatt, kemm-il darba huwa minnu, iridu jaslu ghalih il-gurati wara li jkunu segħu -provi kollha migjuba quddiemhom u jridu jkunu huma li jiddeciedu jekk hemmx kontinwita fl-evidenza b'mod tali li jaslu jikkonvincu ruhhom li mhemmx dubju dettat mir-raguni dwar il-fatt li l-espert Gilbert Mercieca gie mghoddi l-esebiti mill-esperti Dr. Marisa Cassar u l-Ispettur Justine Grech.

However in this case there was another overriding consideration, namely the illegal manner in which the sample was taken which also had to be addressed. This illegality meant that the Court had to intervene and rule that the evidence was illegal, and inadmissible. The Court consequently ordered the expunging of the sample from the acts of the proceedings:

*"In vista tas-suespost, u cioe minhabba l-manjiera illegali ta kif ittied il-kampjun in kwistjoni, din il-Qorti gieghda tilga l-ewwel eccezzjoni mressqa mill-akkuzat Ray Schembri u ghalhekk giedgha tiddikjara inammissibbli kwalunkwe referenza għall-kampjun għal ivverifikar ta sustanzi leciti konsegwentament tordna l-isfilz tal-istess."*

## **WITNESSES**

There are bars to competency and compellability. For example, persons of unsound mind and spouses are not competent. In the latter, you cannot force the spouse to testify against its spouse. This law was amended and nowadays there are specific exceptions to the rule, for instance where prostitution is involved, against the person of the spouse, or the spouse's ascendants and descendants.

**What about maintenance?** There is a whole issue in Courts right now in relation to maintenance. This is an offence against the person but if there is a Court decree to pay maintenance, that offence (failure to pay maintenance) is an offence against the administration of justice and not the person. On appeal, the Court said that although this is right, a maintenance decree is directed towards a person and therefore, this is a crime against the person?

Does incompetence also include giving a sample?

Xhieda - witness (the actual person).

Xiehda - testimony.

The co-accused is also incompetent. Accomplices and co-accused. They are different.

Accomplice vs co-accused = Yes can testify.

Accomplice vs accomplice = Yes can testify.

Co-accused vs accomplice = No.

Co-accused vs co-accused = No, especially since he has a vested interest to testify against you.

Co-accused admits and case is *res judicata*. Can he testify? Yes.

What if the co-accused has an interest to condemn you or the other way round - to exculpate you?

The prohibition is total and whatever he says cannot be used in favour or against the co-accused.

What about admittance?

A confession of one co-accused cannot be applied to another co-accused hence he cannot testify against another co-accused. In relation to exculpatory statements, the Court states that this rule also applies. Hence, until a co-accused remains a co-accused, he is **incompetent**.

Persons present in Court - if a person is present in Court whilst the proceedings are taking place. This is because of witnesses.



## **Article 633 - The interests of the witnesses in a case**

633.(1) No objection to the competency of any witness shall be admitted on the ground that he was the party who laid the information or made the complaint, or that he was the party who made the report or the application in consequence of which proceedings were instituted, or that he is, by consanguinity or affinity, or by reason of any contract, employment or otherwise, in any manner related to or connected with the party above referred to, or with the person charged or accused; but in every such case, the witness shall be heard, and those who have to judge of the facts, being fully persuaded and convinced of the veracity of the testimony, shall act upon such testimony in the same full and ample manner, as if such facts had been proved by an extraneous person not related or connected as aforesaid. Reluctance to give evidence on grounds of consanguinity, etc.

(2) Nevertheless, it shall lie in the discretion of the Court, regard being had to the degree of consanguinity, the reluctance to give evidence against the husband or wife, his civil union partner or against his cohabitant, against an ascendant or a descendant, or against a brother, sister, uncle, or nephew, and to other particular circumstances of the case, not to compel a witness to give evidence if he be unwilling to depose against a person related to him in any of the said degrees.

## **Article 636 - Previous conviction is not a bar for a witness to testify.**

636. No objection to the competence of any witness shall be admitted on the ground -

(a) that from his own confession or otherwise it appears that he has been guilty of an offence or that he has been in any manner convicted, sentenced, censured or punished by any Court or other authority; or

(b) that he was charged with the same offence in respect of which his deposition is required, when impunity was promised or granted to him by the Government for the purpose of such deposition; or

(c) that he is interested either in the issue in regard to which his deposition is required or in the event of the suit; or Cap. 164.

(d) that, in the case of a witness who has been admitted to benefit under a witness protection programme set up in terms of Title IV of Part III of the Police Act, the witness was either charged with the same offence in respect of which his deposition is required or that he is liable to be prosecuted in the future in respect of the said offence or of a related offence.

Once you have established who is competent, we must then ascertain who is **compellable** and who is not. If you are a witness to an accident, you may be dragged to Court to testify because it is your obligation to testify. **The accused has the right to not testify against himself.**

The right to not be compelled comes from the right to remain silent and the right from self-incrimination. Once the accused decides to testify, you waive your privileges and you cannot invoke the right to self-incrimination even if you exercise your right during the testifying.

**Article 642** - A lawyer in the course of his profession cannot be compelled. This is privileged information (client-lawyer privilege). What if in the course of an investigation, the police collect information that was exchanged with the lawyers?

*642.(1) Advocates and legal procurators may not be compelled to depose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice.*

*(2) The same rule shall apply in regard to those persons who are by law bound to secrecy respecting circumstances on which evidence is required*

**Article 588 of the COCP** - Confession under the sacrament cannot be compelled. *Loco sacrassionis*. It has to be under sacrament and not just that you told the priest something.

Recap:

Witnesses, elements of competence and compellability, witnesses interested in the case or in its outcome.

Privilege lawyers sustain/hold is not a privilege for the lawyer but a privilege for the client – other professionals who also have confidentiality [not privilege], e.g., **Section 588 COCP**; accountants, doctors, counsellors, etc., and can be extended to banks.

Confidentiality = information is protected, but the Court can lift this protection, i.e., a doctor can ask the Court's permission to testify, and a decree is issued authorizing the witness to testify. In the case of privilege, the Court cannot force the witness to testify.

Family members who aren't the spouse; relatives, in principle, have to testify, but where there's a close relationship with the accused, they may seek the Court's direction to be exempt from testifying. The Court determines if witnesses should testify or not. The Court takes into account several factors, e.g., seriousness of the offense and importance of the witness, e.g., multitude of witnesses vs. one witness. Important family members, including parents, aren't exempt from these provisions – they are compellable but can seek the Court's approval not to testify.

Witnesses are ordinarily heard viva voce in Court. Criminal halls are designed for witnesses to face the prosecution, defense, jurors, judge, and be in the line of vision of the accused.

Viva voce – why? To see the demeanor of the witness, i.e., assessing witness credibility, especially if there's a conflict of evidence.

- How the witness stands cross-examination
- If answering the questions or trying to avoid answers
- If fidgeting

Rule to viva voce testimony of witnesses suffers exceptions – do all witnesses testify in front of the accused?

Vulnerable witnesses specifically exempted– **Section 647A**. The Court determines who vulnerable witnesses are, typically including victims of sexual offenses or minors.

When the Court determines there is a vulnerable witness, the Court hears the witness through an audio-visual link. The prosecution can then see the witness, who would testify before the judge/magistrate in a room segregated from the accused. Questions are not directed to the witness but to the judge/magistrate, who reformulates the question

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When the Court determines there is a vulnerable witness, the Court hears witnesses through an audio-visual link to the hall. The accused can see the witness, and the witness may or may not see the accused (depending on the Court order). The prosecution can see the witness – the witness testifies before the judge/magistrate in a room segregated from the accused. Questions are not directed to the witness but to the judge/magistrate, who reformulates the question for the witness. Not always recorded. By and large, this works.

Most lawyers reserve cross-examination for a later date. However, where the victim is both vulnerable and a minor, cross-examination must be done on the **same day** the witness testifies – the law prohibits the re-summoning of witnesses for the purpose of further questions. Defense lawyers would have no idea of the case so they could object for the witness to testify because they need to have disclosure of statements of what the child has said before cross-examination; faced with testimonies there and then to perform cross-examination.

Older persons and persons who are infirm can testify via viva voce, but if the witness cannot move, the Court can go to their home or appoint a member of the Court to go. Interests, e.g., hating the accused, are irrelevant and not a bar for the witness to testify. Such interests can, however, be used to assess the credibility of the witness.

## Accomplices

*We drew a parallel between co-accused and accomplice.*

The rule of complicity has changed. Accomplices are partners in crimes and could have a vested interest to lie to help the accused or hinder the accused. The potential for an accomplice not telling the truth is high – hence creating prejudice in the trial.

The law previously stood that an accomplice required corroboration of evidence to secure a conviction. The word of an accomplice wasn't sufficient; there needed to be something else to corroborate, sustain, or assist in strengthening what the accomplice was saying.

**Example:** Prosecution tried to bring another accomplice to corroborate another accomplice. So there were 2 accomplices, accomplice 1 corroborating accomplice 2. There might be an agreement between them. So, can 1 corroborate the other?

Requirement of the law satisfied. Issue: category of the witness and type of evidence. The law classifies an accomplice as problematic to the extent that it requires corroboration. Corroborated by other evidence doesn't necessarily mean by any evidence; i.e., it must be evidence of sufficient quality (if defective evidence is corroborated by another piece of defective evidence, it is not valid corroboration). The judge didn't allow corroboration by another piece of evidence afflicted with the same defect as the evidence requiring corroboration.

In a number of cases, there was absolutely no other evidence to convict, e.g., an informer who would have obtained a pardon and wants to testify in the case, with no other evidence other than the accomplice's testimony. This became an issue, so the law changed.

· Today, an accomplice doesn't require corroboration. An accomplice alone can convict, but the law still treats statements from accomplices with caution. The law provides a caution: when the jury is in panel, the presiding judge must explain to the jurors the dangers of using the evidence of an accomplice. The reason we view this evidence with disdain is not because they are incompetent, but because they have a strong interest in the outcome of the case. Therefore, one must act cautiously, and the presiding judge must instruct the jury that they must use great caution because the accomplice might have a very strong interest in the outcome

## ***Credibility of witnesses***

A single witness can lead to conviction on their own, even if what is being stated is denied.

There can be two witnesses who are opposed, e.g., one driver saying the other party drove into him, and the other saying the opposite. Can you convict when there's a conflict of evidence? You have to be morally convinced beyond a reasonable doubt that one witness is credible and the other isn't. You have to be convinced that one witness is credible and the other isn't.

The law provides that a single witness can convict. Article 638 (single witness can convict) and 639 (when a single witness isn't sufficient).

Given that a single witness can convict, the issue of conflicting testimonies arises.

The Court relies on what it has experienced firsthand. The Court can assess demeanor and determines whom to believe and which parts of the testimony to believe. **Joseph Torne case** “*mhux kull kuflitt fil-provi ghandu jwassal biex..*”

**Matthew Borg v. Matthew Borg** “*apprezzament tal-provi ghandu jsir mhux biss b'mod sprezzettat u indiwidwali izda provi ghandhom ikunu anlizzati flimkien sabiex wiehed jara x'interferenzi..*”

Look at the complexity of the case and apply common sense (what is before the Court, how the witness conducted himself/herself, what makes sense, and then determine whom to believe and why).

The order in which to bring a witness dictates what questions to ask. For example, if the witness is your witness, you want to ask questions because, as the prosecution, you want to elicit information from the accused. In cross-examination, you want to discredit the witness. Cross-examination is the only way for the defense to control the credibility of the witness and the context of what the witness said

Rules governing witnesses – it is important to identify who is summoning the witness because the party summoning the witness performs the examination of the witness. As a witness, you can't impose direct or leading questions (leading questions are never allowed, e.g., "Is it true you did this at that time and day when we were at St. Julian's?" – putting words in the witness's mouth, so your facts, not theirs).

**Direct questions:** These should not lead to a yes or no answer. You can't attack your witness.

**Cross-examination:** You can attack a witness and ask direct questions to push the question further and test credibility. Cross-examination can only be on questions on which the witness testified in examination-in-chief

If there's an issue because the witness summoned by the prosecution has summoned A and B, and you as the defense want to bring out C, you have to resummon C as your own witness. Issue: you can't ask direct questions

For example, if the police renounce a witness – if you want the witness, what does the defense counsel do? The prosecution can control a witness who has seen everything by summoning her.

**Section 349:** the police/prosecutor must bring all evidence in favor of or against the accused. This section is repeated for the prosecutor – they must bring all evidence, i.e., they have no choice. The prosecution is after establishing the truth, so if the truth means acquitting the accused, they should work toward an acquittal.

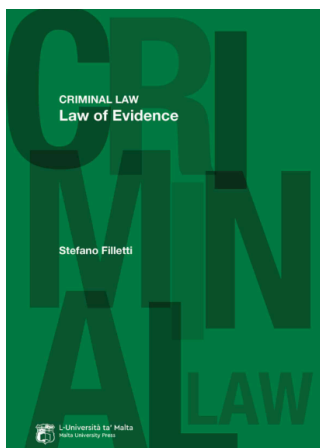
**Section 637:** Evidence to be presented to the full extent possible.

You can never ask incriminating or degrading questions – in the case of degrading questions, the Court has discretion.

## **Ordinary witnesses vs. Expert witnesses**

Expert witnesses are engaged by the Court (can't be ex parte witnesses) and must be appointed because they possess special skills or knowledge that are not within the Court's skill set, requiring an expert opinion. They must be certified to do this – always relating to something the Court doesn't possess knowledge of.

Forensic expert: To determine how an injury was sustained, etc



Who are Witnesses and Why do They Testify?

### **Defining Witnesses**

Witnesses are persons who are called to give evidence on any matter perceived by them with one or more of their five senses.

It is important to note that there is a difference between ordinary witnesses and expert witnesses. The essential difference being that ordinary witnesses cannot give opinions, but must only state objective facts they have experienced. This principle has been repeated by our Courts in various judgments as can be seen below

### **(Il-Pulizija vs John Stagno 2023):**

"Dan ifisser illi l-Qorti ma tistax tistrieħ fuq opinjoni ta esperti li m'huwiex l-espert mahtur minnha u certament illi l-Bombardier Mizzi u s-Surgent Xuereb m'humiex l-esperti li gew

mahtura mill-Magistrat Inkwirenti u sussegwentement ikkonfermati minn din il-Qorti f dawn il-proceduri. Kwindi sa fejn ix-xhieda tal-istess tmur oltre minn dak illi huma setghu jikkonstataw bis-sensi taghhom u fejn ghalhekk Huma wzaw il-hila u s-sengha specjali taghhom biex jghidu f'hiex kienu jikkonsist l-oggetti in kwistioni, il-Qorti jehtiegilha necessarjament illi tiskarta din il-parti tax-xhieda taghhom.

Fil-fehma tal-Qorti ghajr ghall-kejl jew id-daqs, l-ammont u l-kulur tal-oggetti involuti, li jistghu jigu kkonstatati anke minn xhud ordinarju, mill-bqija, inkluz id-deskrizzioni tal-oggetti bhala petards jew beraq u d-deskrizzioni ta materjal partikolari bhala porvli tas-senter huma koll konstatazzjonijiet li jistghu jigu maghmula biss minn espert fil-qasam ossia billi wiehed juza-hila u s-sengha tieghu sabiex jasal ghal din il-konkluzjoni u ghaldaqstant, tali konstatazzjonijiet m'humix ammissibbli bhala prova"

### **Repubblika ta' Malta vs Yorgen Fenech 2022:**

"Hija Prattika sancita mill-ligi, li xhieda ordinarja u cioe mhux persuni matura bhala espert mill-Qorti, ma jistghux jaghtu jew jesprimu opinjoni imma jistghu jiddeponu biss fug dak illi huma kkonstataw bis-sensi taghhom. Meta jkun mehtieg xi hila jew sengha specjali biex jigi ezaminat xi oggett, ghandha tigi ordnata perizja (artikolu 650(1) tal-Kap 9)... Illi allura in linja mal-ispirtu tal-ligi, huwa indubitat u indisputat illi ebda xhud ma huwa ser jithalla jesprimi xi opinjoni fil-kors tal-guri, ghair ghal daww l-esperti nominati mill-Qorti, u l-ebda parti tad-deposizzioni tax-xiehda tax-hud Melvin Theuma moghtija f-Struttorja fejn dan seta esprima xi opinjoni ma ghandha tintwera lil gurati. Ghal dawn il-motivi, salv dak li ged jigi deciz, din l-eccezzioni ged tigi michuda ukoll"

The testimony of any witness is evidence in trial. The Criminal Code stipulates that all evidence must be brought to Court and that no important witnesses ought to be left out.

### **Eligibility to be a Witness**

Every witness who is to testify in any proceedings must satisfy certain basic criteria, therefore not every person can be admitted as a witness. The law primarily makes it clear that every person who is of sound mind is eligible to be a witness whilst any person who is not of sound mind cannot be a witness.

The Criminal Code states the following when it comes to the eligibility of witnesses:

#### **Article 629 Criminal Code**

The rule of being able to testify only if of sound mind is also found in article 563 of the Code of Organisation and Civil Procedure, which states the following:

Although it is the articles from the Criminal Code, which primarily regulate criminal proceedings, certain articles of the Code of Organisation and Civil Procedure are applicable to criminal trials. This is even more pronounced when dealing with witnesses.

Reference is made to article Article 645 of the Criminal Code. It provides:  
Article 645

## Can Minors Testify?

Article 630 of the Criminal Code provides that children are eligible to be witnesses, so long as they are of sound mind and they are able to distinguish right from wrong. The law makes it clear that in order to be eligible to be a witness, it is not the age which is taken into account but rather it is the test of whether a person could distinguish right from wrong. It would be up to the presiding Judge or Magistrate to determine whether the minor has the capacity to distinguish right from wrong. It must be established whether the child understands the concept of truth and can distinguish it from a lies or fiction.

This concept is the same in civil procedure as shown in article 564 of the Code of Organisation and Civil Procedure.

The Magistrate or Judge in question assesses the child and if they believe that the child is capable of distinguishing right from wrong, that capacity would suffice to classify the minor as a competent witness. A minor can be a competent witness even if they are considered otherwise to be doli incapax and consequently incapable at law to generally possess the capacity to be held criminally responsible for his actions.

The test that is administered by the Court in this regard is informal. The assessment is made to ascertain whether the child understands the obligation of telling the truth, the impiety of falsehood as well as the solemnity of the occasion.

Various Maltese judgments and jurisprudence have dealt with the issue of whether minors can testify.

The Criminal Court in **II-Pulizija vs Giuseppe Bonnici (1949) held that:**

*"Skond il-Ligi Maltija (art. 626 Kap. 12 fillum art. 630 Kap.9)), hadd ma jista jigi eskluż milli jaghti x-xhieda tieghu minhabba li ma jollux xi età partikulari. Izda, tkompli tghid il-Ligi ta' Malta, hemm bzonn li l-Qorti tkun sodisfatta illi x-xhud, ghalkemm mhux ta l-età, jaf illi hija haga hazina li wiehed jixhed il-falz. Minbarra dan, hu wkoll ligi (art. 625 (illum 629] illi meta l-Qorti, minhabba l-età tax-xhud, ikollha dubju jekk hu jifhemx l-importanza tal-gurament, anki wara t-tifsir tal-Qorti, u jkun jidhrilha mehtieg illi x-xhud, qabel ma jixhed, ghandu jigi nfurmat*



*ahjar dwar il-konsegwenzi ta xhieda falza, hija tista, jekk fil-fehma taghha x-xhieda ta dak ix-xhud hija rilevanti, thalli l-kawza ghal gurnata ohra."*

The competency of the witness is not determined by age but rather the intelligence of the witnesses. It is the capacity to understand one's obligation to state the truth which is key:

### **MAMO NOTES**

"The essential condition [dwar il-kompetenza tax-xhud] is that the person shall be of sound mind at the time of being tendered as a witness. If this condition is satisfied, the want of any particular age is not a reason for excluding competence, it being sufficient that the Court be satisfied that the witness, though of young age, understands that it is wrong to give false testimony .... Competency thus depends not on the precise age but upon the actual intelligence of the witness.

... If on account of his age or for other reasons it appears doubtful whether a person tendered as a witness understands the obligation of the oath, the Court explains this to the witness; and if, notwithstanding such explanation the Court shall deem it necessary that the witness, before giving evidence, be further instructed as to the consequence of the false testimony, the Court may, if it considers the evidence of such witness to be important for the ends of justice, adjourn the trial to another day and, should the case be before the criminal Court, discharge the jury. If the Court is not satisfied that the proposed witness can understand the obligation of the oath (nor that he can be instructed as aforesaid) the Court is bound to reject that witness as incompetent. It cannot hear him without oath (...);"

These requirements have been repeated by the Criminal Court of Appeal: Pulizija vs Omissis 2018-

"Jekk wiehed jezamina dak li tghid il-ligi fl-imsemmija artikoli 629 u 630 tal-Kodici Kriminali, dak li tghid il-gurisprudenza u dak li jghid Sir Anthony Mamo fir-rigward ta dawn id-disposizzjonijiet u anke dak li jghid il-gurist taljan Luigi Majno citat mill-prosekuzzjoni, jista jigi facilment dedott li ghalkemm ir-regola generali hi li l-età tax-hud ma hijiex ta ostakolu ghal-kompetenza tieghu, sabiex ix-hieda ta dak ix-hud tkun tist tittiehed in kunsiderazzjoni mill-Qorti, in kwantu moghtija minn hud kompetenti, certi kundizzjonijiet fundamentali jridu necessarjament jirrizultaw."

Dawn huma:

1: Il-Qorti trid tkun sodisfatta li nonostante l-età tax-xhud, huwa jifhem li huwa skorrett li tinghata xhieda falza;

2: Ix-xhud ghandu jifhem u jaccetta l-obbligazzjoni tal-gurament. Fl-eventwalità li l-Qorti ma tkunx konvinta li x-hud gieghed jifhem din l-obbligazzjoni u l-Qorti thoss li x-xhieda tax-xhud hija importanti, ghandha tiddifferixxi l-kawza ghal gurnata ohra;

3. Ix-xhud ghandu jinghata l-gurament u ma tista tinghata ebda kunsiderazzioni ghal xhieda moghtija minghajr guramemt

## **Formalities to be Administered to Witnesses**

Every witness must be administered an oath or solemn declaration. Witnesses taking an oath and professing the Roman Catholic faith shall be sworn according to the custom of those who belong to that faith whilst witnesses not belonging to this faith shall be sworn in the manner most binding on his conscience.

This is stated in article 631 of the Criminal Code:

Moreover, the form of oath to be administered to witnesses shall be the following:

Article 632

The oath consists of a form of guarantee to the Court that if the witness is caught lying, this constitutes a breach of oath and may lead to the offence of perjury. (Article 106 criminal code) It is also important to note that the breach of a solemn declaration leads to the same consequences as those of breaching an oath.

The importance of testifying under oath has been highlighted by the Criminal Court, In **Repubbilia ta Malta vs Clayton Azzopardi** the Court held as follows:

"Dan ifisser illi kull xhud irid jigi lilu somministrat il-gurament bil-formola mahsuba fl-artikolu 632. Issa l-ligi mkien ma tiddisponi illi dan il-gurament ghandu jkun rifless verbatim fl-atti tal-kawza, u allura jkun implikat illi jekk fil-verbal tal-kawza hemm imnizzel illi x-hud ikun xehed bil-gurament ifisser illi lil dak ix-hud kien somministrat il-gurament bil-formola stabbilita fil-ligi."

**Prof. Mamo** also highlights the importance of the oath or solemn declaration being administered to witnesses:

*"Our law still makes it essential, however, to the competency of every witness that he should know and accept the obligation of an oath and that he shall in fact be sworn. The principle upon which our law still proceeds is that 'it places no reliance on testimony not given on oath... Consequently no person whatever his age can give testimony upon any trial, civil or criminal, until he has, in the form prescribed by law, given an outward pledge that he considers himself responsible for the truth of what he is about to narrate, and renders himself liable to the temporal penalties of perjury in the event of his wilfully and corruptly giving false evidence'"*

## **Competency of Witnesses**

The term competency refers to the ability of a witness to take the witness stand. The general rule is that generally a witness is competent to testify. The Criminal Code lists down the exceptions adopting an exclusionary method.

### **Circumstances which bar competency**

The bars to competency of witnesses are clearly provided for in the Criminal Code and these include:

#### **1. People who are not of Sound Mind**

The law describes this ground of incompetency as not being 'of sound mind'. This term would include persons deemed to be legally insane in terms of section 33 of the Criminal Code.

The crucial test for witnesses is whether they have the capacity of knowing right from wrong. This capacity is absent from persons being legally insane.

One instance where people are not of sound mind is when they are legally insane. As we had mentioned previously, the important test, which a person must pass in order to be competent to testify, is that of knowing right from wrong.

Our Courts have had opportunity to define legal insanity including the incapacity to distinguish right from wrong:

#### **MAMO Notes**

"The Court however, although is faced with the admission of the accused in relation to what exactly happened is also faced with the medical report issued by the Psychiatrist indicating that when the accused arrived in Malta he was suffering from mental disturbances which made him incapable of his volitional and intellectual powers. The psychiatrist said that the accused was unfit to plead at the moment the charges were brought forward against him and that today he is stable on account of the medication he is being given.

The Court too had the opportunity to examine the accused regard being taken to his demeanour, conduct, character consistency and other features of his statements in the light of what the psychiatrist stated and feels that the accused is a genuine and consistent person and has no reason to doubt what the psychiatrist said about him in that at the time of the offences he was not of sound mind and consequently not capable of having the necessary mens rea...

#### **Pulizija vs Mohammed Makhoulf 2001**

"The Court feels that it should make reference to the address of Judge Vincent Degaetano to the jurors in the case The Republic of Malta v Charles Degiorgio (Bill of indictment No 17/94).

He states that although our law does not define the term insanity, it means that the state of mind which results from a sick mind - a disease of the mind, which has as its nature and grade the faculty of depriving the accused individual either from the capacity of recognizing and knowing the nature and quality of his act or of depriving him of the capacity to know whether the act is wrong or not; in other words depriving him of his freedom of choice - la capacita di intendere e volere.

In his opinion it is not necessary that both elements are absent at the same time. It is enough if one element of the above is lacking. It is not even necessary according to our law to know what type of illness the accused suffering from at the moment of the commission of the act, in other words whether he had a breakdown, subnormality, abnormality, paranoia, psychosis or feeble mindedness. Irrespective of the nomenclature, what is necessary is the effect of such illness, in other words the effect to render one of the above mentioned elements missing..."

It is clear that insane persons cannot be called to testify due to their incapacity to distinguish right from wrong. However, the bar to competency is not described with the legal term "insane" but as 'not of sound mind'. This latter phrase is wider. It would admit states of mind, which would impair a person's capacity to distinguish truth from falsehood whilst not being insane in terms of law.

It would be safe to state therefore that where the Court believes that a person due to a mental illness, ostensibly medically certified, is incapable of distinguishing truth from falsehood or is incapable of understanding the importance of an oath or mind and is consequently incompetent.

## **SPOUSES**

The criminal code states that spouses, civil union partners, or cohabitants are as a general rule incompetent. This rule is not absolute and has notable exceptions:

### **Article 635 Criminal Code**

In terms of article 635, the law states that although in terms of article 633 of the Criminal Code any person who has an interest shall not be barred from testifying, a spouse, civil partner or cohabitant shall for all intents and purposes of law be as a rule considered incompetent to testify.

The rule is there to protect spouses, cohabitants or civil union partners to not be placed in a situation where they may be compelled or even chosen to testify. The difficulty in testifying arises from the close relationship with the accused.

The law therefore seeks to render such witnesses incompetent. The law extends the incompetency to civil union partners and to cohabitants. The law did not always include these persons. Problems arose due to the fact that this incompetence was originally limited to spouses. Persons in similar situations (partners and cohabitants) but who were not also legally married were not deemed to be incompetent rendering them both competent and compellable witnesses. The law was amended to include civil union partners and cohabitants who should after all be afforded the same treatment as spouses in this case.

The rule of incompetence is not absolute, and there are notable exceptions spelled out in the law, particularly three distinct situations where this would occur. The first two exceptions refer to crimes in which the spouse, partner or cohabitant is involved or close family relatives are involved:

a. in the case of offences committed against the witness, or against his or her ascendant or descendants; or in the cases of offences against the provisions of the White Slave Traffic (Suppression) Ordinance, where the spouse, the civil union partner or the cohabitant of the party charged or accused is a person on whom or in respect of whom the offence is committed or is a person on the earnings of whose prostitution the party charged or accused has lived.

The third instance when the witness becomes competent is where it is the accused who actually calls the witness to testify.

In this case, however, it is essential that the accused would have previously also testified in the same proceedings.

An interesting question to answer is when is a witness admitted to 'give evidence. What does this mean? Is it limited only to the spoken word? After all the terminology used in the law is that of 'giving evidence and not that of 'testifying?

In **Repubblika ta' Malta vs. Stephen Caruana**, the Court of Criminal Appeal had occasion to delve into the definition of "evidence" found in article 635 of the Criminal Code. The Court noted that the law did not refer to testimony but to giving evidence. Therefore, the witnesses could be summoned to do more than just testify. It was argued that the term evidence is a broad and general term, which also incorporates the taking of samples as had been decided previously in the Criminal Court.

In this judgment," the Court of Criminal Appeal overturned this decision and opined that:

"Illi l-artikolu 635 tal-Kodici Kriminali jirrendi bhala xhud inkompetenti il mizzewwin, shab funjoni civil u koabitanti fil-konfront ta xulxin, b'dawn il-persuni ghalhekk langas ma jistghu jigu imgieghla jiehdu il-pedana tax-xhieda u jaghtu evidenza kontra l-parti l-ohra, f'dik l-unjoni, mixlija b'reat kriminali, la favur u langas kontra, hlief f'dawk it-tlett istanzi ravvizati fl-imsemmija disposizzioni tal-ligi u li hu pacifiku ma japplikawx ghal kaz in dizamina...

Issa l-Qorti Kriminali wessghat it-terminologija uzata fl-artikolu 635 permezz tal-uzu tal-kelma "xhieda" ghal kull tip ta' evidenza, li allura tinkludi it-tehid ta' kampjuni orali, bhal kif sehha fil-kaz odjern. Dan ghamlitu meta ghamlet traduzzioni ta' din il-kelma adoperata fil-ligi ghal-lingwa Ingliza bhala tissarraf fil-kelma "evidence" fejn allura, fil-fehma taghha, kellha tinkorpora kull tip ta' evidenza kemm dik diretta kif ukoll dik indiretti.

Illi din il-Qorti madanakollu ma tistax tagbel ma din it-tifsira u dan meta it-test Ingliz tal-ligi ma jaghtix din l-interpretazzioni. Minn daqqa t'ghajn lejn dak li jiddisponi l-artikolu 635 fit-test Ingliz tal-Kodici Kriminali, huwa evidenti illi l-kelma "xhieda" hekk tradotta ma tinkorporax it-tifsira wiesgha moghtija mill-Qorti Kriminali u dan meta hemm hekk dispost: Notwithstanding the provisions of article 633, spouse, civil union partner or cohabitant of the party charged or accused cannot be admitted to give evidence either in favour of or against such party. Il-frazi "cannot be admitted to give evidence" ma taghti lok ghal ebda interpretazzioni ohra hief illi tfisser illi dik il-parti fl-unjoni, kemm jekk mizzewwga jew koabitanti, ma tistax tingieb biex tihed fil-gorti, uli allura ma tinkludix, kif starret l-Qorti Kriminali, kull evidenza ohra. Illi la din il-Qorti, u langas il-Qorti Kriminali gabilha, ma ghandhom is-setgha iwessghu ebda disposizzioni tad-dritt penali sabiex tinkludi cirkostanzi ohra mhux ravvizati mill-legislatur u dan meta d-dicitura adoperata fil-ligi hija cara u ma tenhtieg ebda interpretazzioni fl-applikazzjoni taghha."

Following this judgment, it became clear that the term "giving evidence" in terms of article 635 refers to giving testimony in Court.

### **Co-accused**

A person charged for an offence cannot give evidence for or against another co-accused charged with the same offence. A co-accused is incompetent as a witness until such time that his or her proceedings are legally terminated. Proceedings can be terminated due to an acquittal or conviction by a res judicata judgment. Proceedings can also be legally terminated by a Presidential pardon.

Once a co-accused has a final judgment, or a pardon, he does not remain a co-accused and therefore becomes a competent witness. This legal distinction powers Presidential pardons for instance. A pardon to an accomplice would legally be necessary to ensure that the accomplice testifies against others in trial.

Without the pardon, the accomplice would be a co-accused rendering him or her incompetent in terms of law. This legal definition is also used in sentence bargaining.

Prosecution could consider striking a deal on punishment with one accomplice or co-principal to ensure a legal valid testimony against others in trial.

If proceedings are still sub judice and consequently the witness is firmly a co-accused, the testimony of a co-accused is inadmissible because he or she would be an incompetent witness.

### **Article 661**

(Confession not to prejudice third parties)

661. "A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person"

It is interesting to note that the incompetency of a co-accused against another co-accused refers to confessions. It would apply therefore to circumstances where one co-accused may say something which would constitute a partial or total admission of a crime with the direct or indirect involvement of another co-accused. What if the statement that a co-accused tenders is an exculpatory statement?

### **Exculpatory Statements**

In truth there is a clear distinction between statements admitting to guilt or confessions and exculpatory statements. What if the co-accused has an alibi for him and others? Cannot the co-accused declare the facts known to him to exculpate himself? Why is the exculpation equally not applicable to other co-accused - who will benefit rather than be prejudiced by such a statement? The reason for the incompetence is clear enough.

The law does not want one co-accused to save his or her own skin by shifting the blame to other co-accused. Well at least, until they remain co-accused. However, in exculpatory statements there is no such prejudice. Indeed, this might be beneficial to other co-accused. Notwithstanding this, our Courts have resisted such a distinction holding steadfast that a co-accused cannot testify against another.

Another interesting situation has developed in recent years, where larger investigations involving multiple suspects, including professionals, result in them being arraigned and becoming co-accused. What if one co-accused requires the testimony of another co-accused in his or her defence? What if, in a case of financial crime, an accused requires his employee or officer to testify in his favour, but finds that he or she is a co-accused? Our Courts would tend to resist this testimony citing the general blanket incompetency of co-accused even where the statement would be exculpatory. This rule however may be revisited.

## **An exception to the rule of incompetency of co-accused**

A notable exception to the incompetency of co-accused is found in section 30A of the Dangerous Drugs Ordinance. In drug related proceedings there is a notable exception. A co-accused can freely give his or her testimony against another co-accused, provided it be shown to the satisfaction of a Court that this testimony is voluntary. The reason for this exception is the lack of evidence of witnesses surrounding cases relating to drug trafficking and dealings. To ensure that admissible evidence can be tendered in trial, the law created an exemption, rendering competent and consequently admissible the evidence of a co-accused.

This section has been applied and interpreted in a number of judgments.

In **Il-Pulizija vs Trevor Borg**, the Court of Criminal Appeal examined this provision in detail, referring also to differing judgments on the matter:

"Illi fis-sentenza taghha, il-Qorti tal-Magistrati gieset lil Brian Godfrey Bartolo bhala xhud mhux kompetenti u dana minhabba li fl-istadju li xhed fil-proceduri odjerni kien ghadu ko-akkuzat bir-reati mertu tal-kaz odjern.

B'kull dovut rispettt, l-esponent ma jagbilx ma din il- konkluzjoni.

Ili, gabel xejn, l-esponent jaghmel referenza ghas-segwentu dispozizzionijiet tal-ligi:

- Artikolu 636(b) tal-Kapitolu 9 tal-Ligijiet ta Malta
- Artikolu 646 tal-Kapitolu 9 tal-Ligijiet ta' Malta
- Artikolu 661 tal-Kapitolu 9 tal-Ligijiet ta Malta
- Artikolu 30 tal-Kapitolu 101 tal-Ligijiet ta Malta
- Artikolu 30A tal-Kapitolu 101 tal-Ligijiet ta Malta

Illi l-esponent jinnota illi, sfortunatament, l-gurisprudenza nostrana in kwantu l-ammissibbiltà tal-istqarrijiet guramentati skont l-Artikolu 30A tal-Kapitolu 101 tal- Ligijiet ta Malta mhix wahda konsistenti. Bla ebda dubju, hemm diversi aspetti legali differenti li huma rilevanti a rigward u, konsegwentament, matul it snin, din il-materja kienet soggetta ghal diversi interpretazzioniet mill-Qrati Malin.

L-esponent ser issa jaghmel referenza ghal xi sentenzi li dahlufug din il-vertenza:

### **Pulizija vs Pierre Gravina - Appell Kriminali - 26/5/2003**

Ili l-Qorti galet illi l-Artikolu 30A ma jipprovdix eccezzioni ghar-regola tal-Artikolu 646(1) izda ghar-regola kontenuta f-Artikolu 661. Ghaldaqstant, ir-regola hija li min jirrilaxxa dik l-istqarrija ghandu jingieb fil-Qorti biex l-imputat jew akkuzat ikun jista jikkontroezaminah dwarha. S'intendi, dan ma jfissirx li jekk ix-xhud, meta jigi ezaminat jew kontro-ezaminat, ibiddel jew jirritratta minn dak li jkun qal fid-dikjarazzioni guramentata, allura dik id-dikjarazzioni (jew il-parti mibdula jew ritrattata) ma tkunx aktar tista' tittiehed bhala prova kontra l-akkuzat;



il-gudikant jista' xorta wahda, wara li jkun sema lix-xhud, jasal għall-konkluzjoni li il-verità hija dik kontenuta fl-istqarrija guramentata u mhux dak li jkun iddepona fil- Qorti x-xhud. Ifisser biss li, bħala regola, min ikun għamel tali stqarrija guramentata għandu jingieb il-Qorti għall-fini ta kontroll da parti tal-akkuzat jew imputat.<sup>3</sup>

### **Ir-Repubblika ta Malta vs Matthew-John Migneco - Qorti Kriminali - 8/4/2010**

"Ili, f'dan il-kaz, id-difiza eccepiet l-inammissibbiltà tal-istqarrija guramentata ta Joseph Rizzo u dana minhabba li meta għamilha kien ikkunsidrat bħala 'ko-akkuzat, u kkontendiet illi fl-eventwalità li fis-smigh tal-guri Rizzo ikun ammissibli, it-tali xiehda tkun tista tintuza biss bħala mezz ta kontrol.

Illi l-Qorti qalet illi l-Artikolu 30A, bħala forma ta inkjesta dwar l-ingenere, tista tingieb bħala prova, u mhux sempliciment għall-finijiet ta kontroll, basta però, li x-xhud irid jingieb fil-Qorti biex jigi ezaminat viva voce (hlief jekk ikun mejjet, barra minn Malta, jew ma jkunx jista jinstab).

F'kaz illi fil-kors tal-guri kontra l-akkuzat, Rizzo jkun għadu hekk ko-akkuzat, allura ma jkunx ammissibbli bħala xhud u angas l-istqarrija guramentata ma tkun hekk ammissibbli.

### **II-Pulizija vs Dumbaya Almani" - Qorti tal-Appell Kriminali - 31/1/2013**

"Li persuna tiddikjara li hemm procedimenti kriminali pendenti kontra tagħha in konnessioni ma kaz ma jfissirx illi dik il-persuna ma tistax tixhed. Mhix ostakolu a priori għax-xhieda ta dik il-persuna, imma għandha titla fuq il-pedana tax-xhud, tiddikjara l-posizzjoni tagħha u tirrifjuta illi twiegeb domandi jekk bir-risposta li tagħti sejjer tinkrimina lilha nnifisha. Però ma jfissirx illi ma tistax twiegeb għal domandi li jikkoncernaw terzi u li fughom il-persuna tista tixhed direttament...

### **Ir- Republika ta Malta vs Malcolm Joseph Falzon - Qorti Kriminali - 19/5/2022**

"Izda peress li dan huwa kaz ta allegat ksur tal-Ordinanza, japplikaw fil-konfront tal-istess kaz id-dispozizzjonijiet tal-Artikolu 30A tal-Kapitolu 101 tal-Ligijiet ta Malta.

Din hija dispozizzjoni partikolari u specifika, sa certu punt eccezzjonali, in kwantu tidderoga mir-regola generali kontenuta fl-Artikolu 661 tal-Kodici Kriminali in kwantu tirrendi bħala ammissibbli fil-Ligi stgarrija ta ko-akkuzat fil-konfront ta ko-akkuzat iehor.

Fil-kazijiet fejn japplika l-Artikolu 30A tal-Kapitolu 101 tal-Ligijiet ta Malta, il-Ligi stess tirradika l-kompetenza lill-persuna biex tikkonferma dikjarazzjoni bil-gurament anke jekk tkun ko-akkuzata, ko-awtrici jew komplici ma persuna ohra. Bis-sahha tal-istess Ligi, ix-xhieda ta ko-akkuzat, ko-awtrici jew komplici - minkejja li tkun timplika mhux lilu biss izda anki lil

persuna ohra kemm jekk din tkun komplici jew ko-awtrici - hija ammissibbli bhala prova u ma tistax tigi skartata minhabba f li inghatat minn ko-akkuzat...

Illi 1-Qorti, wara li ghamlet referenza ghal diversi sentenzi a rigward, elenkat is-segweni principji:

Bhala regola fi proceduri kriminali mibdija taht il-Kapitolu 101 tal-Ligijiet ta Malta, huwa possibbli li ko-akkuzat, ko-awtur jew komplici jaghmel konfessionijiet bil-gurament quddiem Magistrat Inkwirenti;

Din id-dikjarazzjoni guramentata tista sservi ta prova fi proceduri kriminali in kwantu tali xhieda hija ammissibbli u valida dment li tkun maghmula skont id-dettami tal - Artikolu 30A tal-imsemmi Kapitolu;

L-istess dikjarazzjoni guramentata tista anke tkun ta' pregudizzju ghal ko-akkuzat, ko-awtur jew komplici ichor peress li 1-Artikolu 30A tal-Kapitolu 101 tal-Ligijiet ta Malta huwa eccezzjoni biss ghar-regola msemmija fl-artikolu 661 tal-Kodici Kriminali

Dik ix-xhieda hija ammissibbli allavolja meta ssir id-dikjarant ikun ghadu megjus bhala ko-akkuzat, ko-awtur jew komplici fil-proceduri kriminali kontra tieghu li jkunu ghadhom sub-judice;

Id-dikjarant irid pero imbaghad jixhed fil-proceduri kriminali li ikunu inbdew kontra l-persuna jew persuni involuti f'xi reat kontra d-disposizzjonijiet tal-Kapitolu 101 tal-Ligijiet ta' Malta

Dan id-dikjarant jista jaghzel li ma jixhedx matul il-kors tal-kompilazzjoni tal-provi quddiem il-Qorti tal-Magistrati bhala Qorti Istruttoria dment li l-proceduri li jkunu ttiehdu fil-konfront tieghu jkunu ghadhom pendenti kontra tieghu u dan sabiex ma jinkriminax ruhu;

Izda meta l-proceduri kontra tieghu jkunu gew konkluzi b'mod finali u konklussiv, bhala regola, id-dikjarant ikun irid jingieb biex jixhed fil-proceduri kontra l-ko-akkuzat, ko-awtur jew komplici billi jinstemgħa viva voce fil-proceduri kriminali;

Dawn il-proceduri kriminali jistghu jkunu daww istruttorji jew daww ta' gurdizzjoni. Fejn ma jkunx possibbli għad-dikjaranti xhed quddiem il-Qorti Istruttoria sabiex ma jinkriminax ruhu, huwa jkun irid però jingieb jixhed quddiem il-Qorti li jkollha gurdizzjoni tiddeciedi l-kaz;

Izda fein għal xi raguni, fl-istadju tal-proceduri quddiem il-Qorti ta' gurdizzjoni ma jkunx possibbli li id-dikjarant jingieb biex jixhed viva voce minhabba li jkun evidenti lil Qorti li dik ix-xhieda viva voce tista tikkawza hsara psikologika lix-xhud jew jekk ix-xhud ikun mejjet, jew ikun barra minn Malta jew ma jkunx jista jinsab, ix-xiehda kemm favur kif ukoll kontra l-akkuzat mehuda fl-istadju istruttorju tista tingieb bi prova u dan peress li anke f'dan il-kuntest

gie deciz li japplikaw dawk ic-cirkostanzi li jissemew fis-subartikolu (2) tal-artikolu 646 tal-Kodici Kriminali;

Fil-frattemp però, sakemm ikun għadu ma xehedx fil-proceduri penali kontra t-terzi - kemm fl-istadju istruttorju dagskemm fdawk ta guriisdizzioni - ma jfissirx li d-dikjarazzioni bil-gurament tiegħu mogħtija quddiem il-Magistrat Inkwirenti ai termini tal-Artikolu 30A tal-Kapitolu 101 tal-Ligijiet ta' Malta tkun inammissibbli bħala prova jew li fugħa ma tistax tistrieħ tezi akkuzatorja fejn l-unika xieħda hi ja tal-komplici, hu applikabbli l-artikolu 639(3) tal-Kodici Kriminali fis-sens li l-Qorti għandha tagħti direttiva lill-gurati biex jizhnu b'kawtela x-xieħda li dak ix-xhud jagħti gabel ma jserthu fugħa u jaslu biex isibu hati lill-akkuzat; jekk ma ikunux ġew terminati definitivament il-proceduri kontra d-dikjarant, hu applikabbli a contrario sensu l-artikolu 636 tal-Kodici Kriminali." (Repubblika ta Malta vs Malcolm Joseph Falzon)

## **Persons Present in Court**

Article 641 of the Criminal Code provides that no person who has been present in Court during the proceeding of a case, can be produced as a witness.

This rule and its exceptions were explained in the judgment **Il-Pulizija vs Saviour Balzan and Mark Anthony Vella:**

"Għalhekk, jirrizulta kjarment li xhud li jkun prezenti fl-awla ma hux bħala tali xhud mandatorjament inammissibbli izda l-Qorti għandha diskrezzjoni li tammettih fic-cirkostanzi previsti fil-proviso tal-artikolu msemmi. L-ewwel Qorti, izda, jidher li fehmet li la darba x-hud kien prezenti fl-Awla waqt is-smiegh tal-kawza allura dan kellu jigi dikjarat inammissibli. Tant hu hekk li l-ewwel Qorti, mingħajr ma għamlet l-ebda riferenza għal dak provdut fl-artikolu 642 imsemmi, semplicement lagħet it-talba tad-difiza li l-unika motivazzjoni tagħha kienet li x-hud kienet inammissibbli."

Din il-Qorti, izda, hi tal-fehma li f'dan il-kaz kienu verament jeżistu cirkostanzi speċjali li jintitolaw lill-Qorti ma toqghodx għar-regola msemmija u cioe li x-hud ma tkunx tista tingieb."

Circumstances which do not constitute a bar to the competency of witnesses

No objection to the competency of a witness can be raised simply because a witness has an interest in a case or an interest in the outcome of a case.

## **Article 633 Criminal Code**

It is also apt to note that no objection can be made to the competency of a witness on the ground of his/ her previous convictions

## **Article 636 - No objection to competency of witness on ground of previous conviction**

### **Compellability of Witnesses**

The term compellability refers to the power of the Court to compel a witness to attend Court and force them to testify.

The general rule is that a witness is by default compellable and therefore can be forced to testify in Court under pain of sanction if they refuse to testify. If the witness refuses to give evidence, the Court may sanction the witness, with sanctioning ranging from fines to detention. Testifying in Court when summoned is a duty which cannot be renounced until and unless the law expressly allows it.

Our Courts have had the opportunity to discuss this matter in the case of **Il-Pulizija vs Darren Debono**:

"Fil-kaz li xhud ma jixhedx is-sewwa, il-Kodici Kriminali jikkontempla r-reat ta spergur fil-kaz fejn xhud jixhed il-falz f'kawzi kriminali; jew ir-reat ta gurament falz fejn persuna li tixhed il-falz quddiem imhallef, magistrat jew persuna li jkollha s-setgha bil-Ligi li tamministra l-gurament izda mhux f'kawza kriminali...

Izda fejn shud ma jkunx irid jahlef jew jixhed meta mehtieg mill-Qorti, huwa ritenut li jkun gieghed ukoll jikkommetti dan ir-reat specifiku msemmi fl-artikolu 522(2) tal-Kodici Kriminali, li jagra bdan il-mod:

(2) Kull xhud li ma jkunx irid jahlef jew jixhed meta hekk mehtieg mill-gorti jehel, meta jinsab hati, multa ta mhux inqas minn elfejn u tliet mitt euro (€2,300) izda mhux izjed minn erbatelef u sitt mitt euro (€4,600) jew prigunerija ghal mhux izjed minntliet xhur, jew dik il-multa u prigunerija flimkien.

Sabiex jitqies integrat dan ir-reat, jehtieg li jigi pruvat, lil hinn minn kull dubju dettat mir-raguni li:

L-awtur tar-reat irid ikun 'xhud. Xhud huwa dak li jigi biex jixed minn jeddu jew ghax imgieghel jaghmel dan. Izda ghall-fini ta dan ir-reat ma jistax jitgies li jinkludi dawk il-persuni li l-Ligi stess ittihom id-drift li ma jixhux minhabba li jkunu jigu mill-akkuzat, jew fejn ittihom privileg li ma jihdux biex ma jinkriminawx lilhom infushom, jew minhabba l-istat ta' relazzioni personali ma l-akkuzat (sakemm ma jkunux suggetti ghal eccezzionijiet imsemmija fil-ligi).

Fdan il-kaz allura x-hud irid ikun tali li jkun xhud kompetenti, xhud li jista jixhed skont il-Ligi.

Minbarra li jrid ikun xhud kompetenti, biex ikun jista' jitqies integrat dan ir-reat, il-Ligi tehtieg ukoll li dak ix-xhud ikun irid jirrifjuta li jahlef jew jixhed fuq il-pedana tax-hieda meta huwa jkun mehtieg mill-Qorti sabiex jahlef jew jixhed (jew it-tnejn). Allura r-reat jitqies integrat meta x-xhud, li jkun kemm kompetenti li jixhed kif ukoll jista' jigi mgieghel jixhed mill-Qorti, ma jkunx irid jahlef jew jixhed jew it-tnejn."

### **Exceptions to the Compellibility of Witnesses**

The law provides for a number of exceptions to the rule of compellability of witnesses. These include:

#### **1. The Person Accused**

The accused has the right to choose whether he or she wants to give evidence in a criminal trial and cannot be compelled to testify:

#### **Article 634**

It is interesting to note that the law dearly provides that a witness has the choice to decide whether he wants to testify or not. Once the accused opts to testify, the accused can also be cross-examined.

The accused cannot opt out of answering questions put to him in cross-examination, even if this may lead to self-incrimination of the offence. If the accused wants to shield himself from such questioning, the accused ought to opt out of testifying.

Furthermore, remaining silent should be construed as an admission of guilt and it is not a matter for a Judge to comment on. Where the accused opts to testify, the accused still retains the right not to answer questions which may incriminate him or her of other offences, not being the offences with which he or she is being charged.

In the judgment **Il-Pulizija vs George Degiorgio (2022)** the exception to the rule of compellability of a witness found in the article mentioned above was briefly described as:

"Ili jibda biex jinghad illi l-artikolu 634(1) indikat mid-difiza jirreferi ghad-dritt ghas-silenzju li ghandu persuna li huwa mixi quddiem gorti tal-gustizzja penali, li jista' jaghzel li ma jiehux il-pedana tax-xhieda, u li s-silenzju tieghu ma jistax jittiehed bhala xi ammissjoni ta' htija."

The Maltese Courts repeatedly held that if the accused remains silent and decides against testifying, this does not amount to him or her admitting guilt. For instance, in the judgment 1. Pulizia vs Johan Pace 2019)," the Court referring to the Constitution of Malta opined:

I-Kostituzzjoni ta' Malta, fl-artikolu 39(10) tipprovdi espressament illi ebda persuna li tghaddi proceduri ghal reat kriminali ma ghandha tkun obligata li tixhed fil-proceduri kontra taghha. Anke l-Kodici Kriminali fl-artikolu 634 (proviso) meta jghid illi n-nuggas tal-imputat jew akkuzat li jaghti x-hieda tieghu ma jistax iservi ta' kumment kuntrarju mill-Prosekuzzjoni

jipprovdi għall-istess dritt. Issa, meta bl-Att III tas-sena 2002 kien introdott fis-sistema legali tagħna d-dritt għall-assistenza legali waqt l-arrest, liema Att dahal biss fis-sehh fis-sena 2010, l-artikolu 355AU, illum mibdul, kien jipprovdi għad-dritt li l-Qorti jew il-guri jagħmel inferenzi mis-skiet tal-imputat jew akkuzat f'dawk ic-cirkostanzi fejn, la darba jkun ha parir legali gabel l-interrogatorju, бага' sieket dwar xi provi li setghu ingiebu u dan kien jitqies allura bħala korroborazzioni ta dik ix-xhieda jew prova oħra. Dan id-dritt, iza tehha minnufih u għalhekk mighadux aktar legali, jekk gatt kien, li l-gudikant jagħmel xi inferenzi mill-ghazla tas-suspettat jew imputat li jibga' sieket".

This concept of non-self-incrimination is a widely accepted notion and a fundamental principle integral to the idea of a fair trial. Non-self incrimination is also protected under article 6 of the European Convention on Human Rights.

As stated in John Murray vs the UK:

"Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6."

The right for the accused to remain silent if he or she decides to testify is articulated in article 459A of the Criminal Code:

Therefore, the accused is a competent witness but not a compellable witness. In conclusion, reference may be made to the decision of the Court of Criminal Appeal in the case Il.

### **Pulizija vs Timmy Mifsud:**

"Illi apparti li fdan ir-rigward ma gietx osservata d-dispozizzioni taht l-artikolu 580(1) tal-Kap.12... b'din id-domanda li saret mill-ewwel Qorti gie pregudikat id-dritt u l-privilegg tal-appellant li fl-ebda waqt tal-proceduri ma jinkriminax ruhu. Id-dritt ta' cittadin li ma jinkriminax ruhu jippresupponi li l-prosekuzzioni tipprova l-kaz tagħha kontra l-akuzat minghajr l-użu ta' evidenza miksuba b'koerzjoni jew boppressjoni u kontra l-volont tal-akkużat -

Vide Saunders vs UK decia is-17 ta' Dicembru 1996; Heaney and Mc Guinness vs Ireland App. No. 34720/97 \$51-55; Allan vs UK App. No 48539/59 \$44; JB vs Switzerland App. No. 31827/96 \$64...

Ili fil-fatt il-Qorti Ewropea fil-kaz Jalloh vs Germany App. No. 54810/00 deciza fil-11 ta' Lulju 2006, irriteriet: The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect...

Illi l-fatt lil-imputat ghazel minn jeddu li jiehul-pedana tax-xhieda, kemm il-ligi tal-procedura kif ukoll id-dritt li ma jinkriminax ruhu fuq imputazzionijiet li ma xhedx awarhom kellhom jigu rispettati f' kull waqt... Illi l-prezunzjoni tal-innocenza tfisser li l-akkuzat ma jrid jipprova xejn dwar l-innocenza tieghu - hija l-Prosekuzzjoni li trid tipprova l-htija tieghu. Ghalhekk peress li hija l-Prosekuzzjoni li allegat il-htija tal-imputat, l-onus generali tal-prova, u cioe tal-prova tal-htija, tistrieu fuq il-Prosekuzzjoni biss, u din il-prova l-Prosekuzzjoni ma tistax iggibha b'koerzjoni u minn domandi inkriminanti li taghmel lill-akkuzat in kontro-erami li a hargu bl-ebda mod mill-ejmi tal-imputat.

L-imputat fl-ejmi kien ghazel biss li jixhed dwar l-incident tat-3 ta' Jannar 2021. Kellu d-dritt u l-privilegg li jaghmel dan u li jaghmel li ma jinkriminax ruhu dwar l-incident tat-8 ta' Janar 2021, li huwa incident distint u separat minn dak tat- 3 ta' Jannar 2021. Huwa d-dritt tal-akurat li febda stadiu tal-proceduri ma jigieghed pozizzjoni kompromettenti li jinkrimina ruhu aktar u aktar minn domandi li saru mill-Qorti li geghdha hemm biex tassigura -harsien tad-drittijiet tal-akkuzat f' Kull waqt. L-obligu tal-Prosekuzzjoni li tipprova l-htija tal-akkuzat rid ikun assolut, indipendenti mill-volonta' tal-akkuzat, oltre kull dubju dettat mir-raguni, u kaz li jkun hemm xi dubju ragionevoli, i -Prosekuzzjoni ghandha tigi kunsidrata li ma ppruvax il-kaz taghha ta' htija u ghalhekk il-Qorti hija obbligata li tillibera...

## **Priests in loco confessionis**

A priest is not allowed to testify about information, which he may have received under the seal of confession. In *Il-Pulizija vs Daniel Dalli et* it was stated that:

"Father... xehed illi kien jaf illi fir-raba kienu jinzammu annimali u dana speċjalment meta kien għadu haj ... Mitlub jirrispondi diversi domandi, Father ... xehed li ma setghax jagħmel dan il-ghaliex kien marbut bis-sigriet tal-Qrar'

This exception to the rule of evidence when it comes to the compellability of a witness does not only exist in the Crimina Code but also emanates from the Code of Organisation and Civil Procedure.

### **Article 588.**

A priest may only testify in Court if he or she possesses the consent of the person confessing. If this is not forthcoming, a priest cannot be compelled to testify. A similar principle can be found in civil proceedings:

### **Strickland vs Allied Newspaper**

"Tabbel dak is-sigriet mas-sigriet tal-Qar u tghid li dak li jghodd għas-sigriet tal-Qar irid necessarjament jghodd għas-sigriet professjonali tal-avukat għaliex il-legislatur gegħedhom it-tnejn flistes dispozizzjoni tal-ligi tefagħhom fl- istess keffa"

### **Carmen cachia vs Andreas Kummert - 2020**

"All information granted in this context is given on the basis of trust and an understood confidentiality that goes to the very core of the relationship between priest and the couple which relationship is more profound and intimate than that of a marriage counsellor or social worker. Therefore, in the absence of grave information which makes it legally incumbent on the witness to divulge such information, the Court believes that unless Father Attard is released by Andreas Thomas Kummert himself, to give evidence in these proceedings, it should be unwise and improper for this Court to release the witness or authorize him to give evidence in these proceedings"

"... with regard to the legitimacy of priests' evidence, canon 1550(2)(ii) prohibits priests from testifying in respect to that which has become known to them in the sacramental confession. This means that priests who include confessors are not incapable of being witnesses; they are prohibited from testifying only in matters pertaining to what they came to know in confession...



### **Maria Dolores vs Carmen Polidano 1 dec 2006**

Anke fil-prassi tal-Qati taghna, kemm fil-kamp civili kif ukoll f'dak penali, sacerdot jigi ezentat milli jiddeponi biss jekk hu fistgarr li, fir-rigward ta dak li huwa jkun gie mitlub jiddeponi, huwa vinkolat bis-sigriet tal-grar. Mill-bija ma hemm xej li josta li sacerdot, li jkun konfessur ta parti jew ohra, jigi prodott bhala xhud favur jew kontra dik il-parti wahda jew ohra."

### **Lawyer in the course of his or her profession**

In the same way that priests are prohibited from testifying about confessions, lawyers cannot be compelled to testify regarding matters they have advised upon during the course of their professional duties.

A distinction needs to be drawn between lawyers acting in the course of their profession and lawyers in their personal capacity. Lawyers in the course of their profession cannot be compelled to testify. It would be convenient to prove the guilt of the accused, by compelling his legal advisor to testify what the accused told him or her. In absence of this provision, defence of a person accused can be seriously prejudiced

If, on the other hand, the lawyer becomes aware of certain facts in his personal capacity, then he or she can be compelled to testify just as any ordinary witness.

*Practical difficulties arise however in applying this provision of the law. What if during a search, correspondence with a lawyer is discovered in third premises?*

It is clear that this correspondence is privileged and cannot be accessed by members of the Executive Police. What if the information is stored electronically, or on email? How does one identify privileged information? Ostensibly, these documents are read to be identified. However, in accessing and reading them (even if to discard them), the privileged element of the correspondence is being breached.

A similar problem arises where a lawyer is subject to an investigation. Can a search be performed at a legal office, where confidential client information is held? Accessing the data to discard what is privileged would be in breach of the privilege itself.

One final question to consider is whether the protections afforded to lawyers could also be applied to similar situations involving other professionals. In **Repubblika ta Malta vs Andrea Facchetti (1994)** the Court extended this privilege also to police officers

"Din il-Qorti ma tistax ma tagbilx li l-ufficjal tal-pulizija huwa obligat li ma jizvelax sigriet lilu fat in konnessjoni mal-funzjonijiet tieghu bhala tali. Jekk il-ligi bhala element essenzjali

ghall-amministrazzjoni gudizzjarja, xierga, tal-gustizzja, tipprotegi lill-avukati u l-prokuraturi legali, fl-ewwel sub-inciz ta l-artikolu 642, huwa diffiċli li din l-istess protezzjoni ma tikkomprendi ukoll lill-ufficjal tal-pulizija li waqt l-investigazzjonijiet tad-delitti jigi fdat, taht il-kappa tas-segretezza, b informazzjoni rilevanti għall-investigazzjonijiet li jkun qed jikkonduci, jew biex jibda jinvestiga."

### **Other Professionals and Interpreters**

Other professionals who have a duty of confidentiality are also protected in terms of article 588 of the Code of Organisation

and Civil Procedure:

Article 588

The protection arises from the professional confidentiality that certain professions are privileged to have, for instance in the case of accountants, doctors, psychologists amongst others.

This protection from non-compellability however is not absolute and can be waived by Court order. Once a Court issues a decree to waive this privilege, these professionals would be compelled to testify in Court.

Family members

Although it is a general rule that any person who has an interest in the charged or accused is not a bar to their testimony, certain exceptions exist as seen from the Criminal Code:

### ***Article 633(2)***

A witness, who is related to the accused, would take the witness stand and express his or her reluctance to testify due to consanguinity. The Courts retain a discretion whether to exempt such witnesses from testifying.

In principle however, whereas family members are compellable, they may request the Court to exercise its discretion not to compel them to testify.

In **Il-Pulizija vs Melvin Zahra** the Court exempted the children, who would otherwise be compellable witnesses, from testifying

"Il-Qorti wara li semgħet ix-xhud... li ma jixtieg jixhed kontra l-imputat missieru u semgħet ix-xhieda tal-istess... wara li rat l-Artikolu 633(2) tal-Kodici Kriminali qed tezenta lix-xhud ... milli jixhed..."

## **Testimony of Witnesses**

### *Ordinary Witnesses*

Ordinary witnesses as a rule have to testify in open Court in front of the accused. The criminal code provides as follows:

### **Article 646**

In the judgment **Il-Pulizija vs Joseph Bartolo,** the Court clearly expressed the importance of witnesses being examined in Court viva voce:

"il-Qorti tal-Magistrati bhala gorti ta prim istanza kienet obbligata li tisma "fl-gorti u viva voce" (Art. 646(1) tal-Kap. 9) ix-xhieda mressqa kemm mill-prosekuzzjoni kif ukoll mid-difiza. Dan isir sabiex il-gudikant jaghmel il-valutazzjoni tieghu tal-provi skond l-Artikoli 637, 638 u 639 tal-Kodici Kriminali, u, billi japplika l-ligi ghall-fatti kif jirrisultawlu, jiddeciedi dwar il-htija o meno tal-imputat. Wiehed mill-kriterji l-aktar importanti sabiex il-gudikant jasal ghall-konkluzjoni tieghu dwar x'jemmen jew x'ma jemminx minn dak li jghid xhud hu dak ta "I-imgieba, kondotta u karattru tax-xhud" (Art. 637) minn fuq il-pedana tax-xhieda. Biex dan il-kriterju kun jista jigi applikat hu evidenti li l-magistrat ghandu jisma b'widhejh u jara bghajneh lix-xhud jiddeponi... Però r-regola hi li l-gudikant tal-prim istanza ghandu jisma hu ix-xhieda biex ikun verament f'posizzjoni li jaghti gudizzju skond il-lihi.

The principle of testifying in open Court and viva voce also emanates from article 577 of the Code of Organisation and Civil Procedure. This approach is the norm because such approach allows for the Judge or Magistrate as well as the parties to the case to observe the demeanour of the witness whilst testifying.

This is an essential criterion in assessing credibility.

An exception to the rule occurs where a witness resides abroad.

In terms of article 647A where a witness resides abroad and the Court deems it opportune, the Court may order that the witness testifies by video-conference live during trial. This amendment was introduced to facilitate the evidence of non-residents and avoid unnecessary delays. The other rules applicable to witnesses would apply. Cross-examination would also be done by video-conference. This option to hear witnesses by video-conference is not absolute. Where the Court does not deem this to be an opportune manner to proceed, the witness would be expected to come to Malta to testify in person in Court.

## **Vulnerable Witnesses**

Article 647A

Vulnerable witnesses differ to ordinary witnesses as follows

Vulnerable witnesses may include rape victims, sexual assault victims as well as minors.

Testifying in open Court before the accused may be traumatic. Vulnerable witnesses need to be shielded from the examination-in-chief and cross-examination in trial. These witnesses are instead heard by video link. In these cases, the presiding Magistrate or Judge will moderate the questions or even reformulate the questions not to allow questions being asked directly to the witness.

As was stated in the application of **Il-Pulizija vs Mustafa Abu Seadah**, the Court made it clear that since the witness is a minor, such witness must be heard via video conferencing:

"Illi peress illi ghandu jsir il-kontro ezami ta ..., l-esponent gieghed umilment jitlob lil din l-Onorabbli Qorti biex taghmel L-arrangamenti necessarji ghas-seduta li imiss sabiex dan il-kontro ezami jsir permezz ta video conferencing.

In the case of minors under the age of sixteen years there is a further protection. Once a minor testifies, the witness cannot be brought again in a subsequent hearing. This means that the cross-examination of the witness has to be performed as soon as the examination-in-chief is complete. If cross-examination is renounced, the witness cannot be reproduced. This rule was introduced to ensure minimal trauma on the witness.

No minor shall be produced to be examined viva voce by the Court unless the Court so directs otherwise, for a reason which arises after the date of the said testimony of the minor, and which is considered by the Court to be in the interest of the administration of justice and the discovery of the truth. Article 391(3) of the Criminal Code specifically states that:

Article 391(3)

## **WITNESSES - Infirm or Old Persons**

Apart from testifying viva voce or by means of video and audio recordings, the Criminal Code also provides another method for the testimony of informed or aged witnesses. This method provides that such person would be examined from their place of abode by a judiciary assistant and would be heard and seen in Court by means of audio and visual recordings during the proceeding:

Article 647

Such method was explained clearly in **Il-Pulizija vs Charlton Spiteri**

"Fuq ordni tal-Qorti, maghmula ai termini tal-Artikolu 647 tal-Kodici Kriminali, ittiedet ix-xhieda ta Anthony (Ton) Sant li kien pazjent fl-istess kamra ma' Axiaq, mill-Assistent Gudizzjarju Dr... .. Tenut kont tal-importtanza tat-testimonjanza tal-unika xhud okulari. Il-qorti ma srahiex biss fuq it-transkrizzjoni li ictu ocli, fiha numru ta' siltiet, Fejn ma saritx traskrizzjoni ta dik ix-xhieda U thallew biss puntini (...) iizda semghet wkoll l-audio esebit bhala parti mir-relazzjoni tal-Assistent ...

Ikun ferm opportun li, illum ilguranta meta t-teknologija saret aktar diffuza w utilizzata mill-grati, meta xhud ma jistghax jattendi fizikament i-Qorti, tall xhieda tibda tittiehed permezz. ta video-conferencing ai termini tal-artikolu 647A tal-Kodici Kriminali. Minn tal-ingas issir registrazzjoni (recording) tax-xhieda li tittiehed ai termini tal-Artikolu 647 sabiex jippermetti lill-gorti ssegwi l-espressionijiet u l-karatteristici ta dik il-persuna li taghha tkun ged tittiehed ix-xhieda."

## **Interest of Witnesses is not a bar to their Testimony**

The fact that a witness has an interest in a case or in the outcome of a case does not bar them from testifying. However, then it is up to the prosecution or defence to test the witness' credibility during the cross-examination. In such situations, in other words, the witness will always be heard and those who have to judge the facts shall determine the credibility of the witness and. the probative value of the evidence they offer.

Credibility of witness is also dealt with in 637 of the criminal code

The judgment in the names **Il-Pulizija vs Paul Azzopardi** delves into the concept of credibility of a witness when such witness has an interest in the accused or the outcome of the case:

"Ghandu jinghad li m'humiex infrekwenti dawk il-kazijiet fejn il-fatti li johorgu mill-provi ma jagblux ma xulxin jew ikun hemm xhieda li addirittura jghidu bil-maglub ta xulxin. Ghall-fini tal-evalwazzjoni tal-kredibbilita tax-xhieda f'kazijiet bhal dawn, huma relevanti d-dispozizzjonijiet tal-Artikolu 637 tal-Kodici Kriminali. Dawn jipprovau li ghal dak li

jirrigwarda ix-xhieda ta persuni imsemmija mill- Artikolu 633 u mill-Artikolu 636 tal-istess Kodici, fosthom persuni li jkollhom interess fil- kwistjoni li fugha tkun mehtiega x-xhieda tagghom, jew fir-rizultat tal-kawza, id-decizjoni dwar il-kredibbiltà ta dawn ix-xhieda tithalla fid-diskrezzjoni ta min ghandu jiggudika l-fatti. Dan ghandu jsir billi jittiehed gies mill-gudikant tal-imgieba, kondotta u karattru tax-hud, tal-fatt jekk ix-xhieda ghandhiex mis-sewwa jew hijiex konsistenti, u ta karatteristici ohra tax-xhieda tieghu, u jekk ix-xhieda hijiex korroborata minn xiehda ohra, u tac-cirkostanzi kollha tal-kaz."

This judgment also reaffirms the fact mentioned in the first sub-title whereby the prosecution must bring forward the best evidence, even if such evidence consists only of one witness:

"Inoltre, ghal dak li jirrigwarda l-kredibbiltà tax-xhieda, l-Artikolu 638 tal-Kodici Kriminali jaghmilha car li filwagt li huwa fid-dover tal-Prosekuzzjoni li ggib il-provi kollha u l-ahjar prova possibbli sabiex il-grad tal-prova mehtiega ghas-sejbien ta' htija kriminali, jintlahaq b'success, is-subartikolu (2) tal-istess Artikolu jistipola li xhud wiehed wahdu, jekk emnut, huwa sufficienti biex il-kaz jigi ppruvat skont il-ligi.

Dan il-principju gie ripetutament riaffermat fil-gurisprudenza tal-Qrati taghna in materja"

#### Accomplices as Witnesses

As already discussed, an accomplice can testify in proceedings provided that they are not also co-accused. The admissibility of accomplices as witnesses has changed along the years. Today there is no doubt that the evidence of an accomplice (provided not also a co-accused) is admissible and that the evidence of an accomplice alone can lead to conveying other principles.

This was not always the case, In that, how long a rule applicable for accomplices was that the evidence of an accomplice alone could not lead to a conviction. The evidence of an accomplice had to be corroborated by other evidence. It is interesting to note that the accomplices' position has changed since previously their testimony could not convict unless corroborated by other facts.

Act XVI of 2006 amended section 639 of the Criminal Code, removing the necessity of corroboration for an accomplice's testimony. The law instead introduced a different requirement. The law allows for the evidence of an accomplice provided that in using this evidence, caution must be exercised by the triers of fact. Where a jury is empaneled, the presiding Judge must also explain to the jurors the dangers of using the evidence of an accomplice. This principle has been embraced by our Criminal Courts: (pulizija vs philip borg october 2012)

"Id-difiza wkoll argumentat illi bhala komplici suppost Mizzi kellu jkun korroborat minn xi xhieda ohra. Hawnhekk il-Qorti taghmel referenza ghall-Artiklu 639 tal-Kap 9 kif emmendat fejn tnehhiet il-htiega ta korroborazzjoni izda introduciet il-kuncett li l-verzjoni ta komplici

ghandha tittiehed b'kawtela. L-Artiklu ma jghid kif ghandha tigi kkunsidrata din il-kawtela u thalli fidein il-Magistrat jew min ikun sejjer jiggudika l-fatti. Ghalhekk il-prosekuzzjoni ma kelliex ghalfejn tipproduci korroborazzjoni basta illi l-verzjoni ta Mizzi tittiehed b'kawtela u dan ma jfissir illi ma tistax tigi emmnuta jekk il-Qorti tkun sodisfatta mill-vericita taghha."54

### **II-Pulizija vs. Keith Camilleri, 23 Oct 2023**

"Dan fis-sens li l-korroborazzjoni tax-xhieda tal-komplici mix mehtiega aktar wara l-introduzzjoni tal-emendi li saru bl-Att XVI tal-2006, iza l-gudikant xorta wahda jrid jipprocedi b'dik il-kawtela li l-kaz ikun jirrikjedi gabel ma jigi biex jistrieħ fug xhieda bhal din biex isejjes sejbien ta htija."

The fact that the evidence given by accomplices should be examined carefully is not because they are incompetent but rather because they may have a strong interest in the outcome of the case as explained by the Courts below:

"Il-hsieb tal-legislatur fir-rigward, bla dubju, jintrabat mal-fatt li l-komplici jollu interess aktar minn haddiehor li jfarfar il-htija minn fug spallejh, bil-possibbli tentazzjoni li jesagera jew jiffrabbrika evidenza biex ikabbar il-htija ta haddiehor u jnaqqas tieghu. Dan ma jfissirx li l-Qorti ma ghandhiex temmen lil din ix-hieda fin-nuggas ta' korroborazzjoni minn xhud iehor. Għall-kuntrarju, xejn ma jzomm lill-Qorti milli togghod fugha u temminha kif ukoll li ssib htija fugha u fugha biss anke minghajr provi ohra, purché x-hieda tigi ezaminata b'kawtela. Għalhekk, jekk m'hemm ebda raguni kwalsiasi għaliex ix-xhud komplici ma għandux jitwemmen wara li jkun gie evalwat il-komportament tieghu fuq il-pedana tax xhieda u -konsistenza tal-verzjoni tieghu ma verzonijiet precedenti tieghu u provi ohrajn ft-atti processwal, ix-xhieda tieghu ma tistax titwarab semplicement għaliex hija xhieda ta komplici"

### **II-Pulizija vs Patrick Spiteri, the Court further states that:**

"Din hija xhieda permessa bil-ligi, u sta għall-Qorti li ged tisma l-kaz li tgis din ix-hieda fil-kuntest tal-kaz li tkun ged tittratta. Din il-Qorti ma tarax li, bil-fatt biss, li xhieda ta komplici hija permessa ged jinkiser id-dritt tal-akkuzat għa! smiegh xieraq. Komplici hija persuna li tista titressag bħala xhud bħal kull persuna ohra, basta, ovvjament, li l-akkuzat ikollu listess possibilita' ta kontroll jew kontestazzjoni tal-persuna, kif għandu f'kaz ta' kwalunkwe xhud iehor. Il-ligi trid, fl-artikolu 639(3), li jekk il-kaz kontra akkuzat tkun bazata biss fug xhieda ta komplici, min ikun irid jiddeciedi fug il-htija, iqis dik ix-xhieda berta kawtela .... Ma jistax, pero, jingħad li xhieda ta komplici hija, a priori, mhux permissibbli. Dik hija testimonjanza ta persuna li, minhabba l-istat tagħha ta komplici, tkun, forsi, taf l-aktar fug il-kaz, u ma għandhiex tigi eskluza minhabba f'hekk. Il-principju ta "equality of arms", ma jkunx gie mittiefes bil-fatt li tali xhieda tkun permissibbli, għax dan ix-hud huwa suggett għall-iskrutinju miz-zewg nahat kif isir fil-kaz ta kull xhud iehor. Il-kaz li x-xhieda ta komplici tista tkun "tainted" minhabba varji

cirkostanzi, tista' tinghad fil-konfront ta kull xhud, u l-Qorti li quddiemha jkun ghaddej il-kaz, hija zgur kompetenti biex tevalwa x-xhieda, tqis l-affidabilita tax-xhud, u tikkunsidra dik il-prova fid-dawl tal-provi l-oħra tal-kaz"

## **Witnesses and Credibility of Witnesses**

A single witness can, in principle, offer sufficient evidence to lead to a conviction. As a rule, the prosecution is duty bound to produce the fullest and most satisfactory proof available (best evidence rule), including witnesses. Sometimes the only evidence available could be a single witness. A witness can testify and produce evidence which can convict. This is clearly spelt out in article 639 of the Criminal Code. What is key, is how to determine the credibility of a witness. Articles 638 and 639 of the Criminal Code provide as follows:

Assessing evidence and the credibility of a single witness is a thorny issue. The matter is exacerbated when there is conflict between the testimony of a witness with that of the accused. It would be clear that both versions cannot be correct. The issue remains as to how to determine who is credible. Our Courts have provided an insight on how to tackle these difficult issues in any proceedings:

### **Police vs Joseph Thorne**

"Mhux kull konflitt fil-provi ghandu atomatikament iwassal ghal-liberazzioni tal-persuna akkuzata. Imma l-Qorti, f'kaz ta konflitt fil-provi, trid tevalwa l-provi skond il-kriterji enuncjati fl-artikolu 637 tal-Kodici Kriminali u tasal għall-konkluzjoni dwar lil min trid temmen u f'hiex ser temmnju jew ma temmnux."

### **Police vs Matthew Borg**

"Illi fid-dawl tas-suespost u cioe x'inhu l-ahjar prova, il-Qorti tissottolinea li huwa ben saput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat w individwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem tagħhom sabiex wiehed jara x'inferenzi jew interpretazzioni ragjonevoli u legali jista jagħti lil daww il-provi hekk interpretati. Ma tistax tinstab hija jew nuggas ta htija semplicement fug analizi dividwali jew separate tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kie ukoll komplessivament."

### **Police vs. Kieran Vella**

Issa meta l-Qorti tasal biex tagħzel bejn verzjoni u oħra, naturalment jittieħdu in konsiderazzioni id-diversi parametri fosthom il-komportament tax-hieda biex wiehed jara kemm dak li ged jghidu ghandu mis-sewwa jew le."

### **Police vs Yilmaz Azlan**

The Court has to conduct a certain exercise when assessing a witness to see whether he is saying the truth or otherwise and follows the above guidelines. However, these guidelines are not



exhaustive. The law leaves such matters of discretion in the hands of the Judge who has to analyse such evidence in seeing whether for example a witness is credible or not, sees whether he has an ulterior motive to testify in the manner he did, to examine his behaviour and how he acted whilst on the witness stand and how he answered the questions put forward to him. In carrying out such an examination the Court will be in a position to judge whether such witness is saying the truth, whether such evidence is consistent with what was said by the same witness earlier on if for example he himself makes contradictions in his own testimony or whether there are other facts which disapprove what is being said by the witness.

These are but a few examples because the law does not provide any hard rules on the judge as to how he is to carry out such examinations. But it is imperative that the judge is free to use his own discretion to see where the witness takes him. A judge can believe a witness in whole, in part or not at all."

## **Questioning Witnesses**

Witnesses can be produced by both the prosecution and the defence. The party producing the witnesses will examine the witness. The other party will cross-examine the witness.

The order of examination of a witness is laid out in article 459 of the Criminal Code:

### **Examination in Chief**

The party summoning witnesses may conduct the examination in chief. During this examination, it is not possible to ask the following questions:

- Any leading questions
- Any direct questions
- Any questions which might disrupt the witness
- Any questions attacking the qualification or competency of the witness

As a matter of fact, article 578 of the Code of Organisation and Civil Procedure, rendered applicable to the Criminal Code states that:

Leading questions refer to any questions to which the answer is suggested. The reason behind such prohibition is to avoid putting words into the witness' mouth. The general test to determine whether a leading or direct question has been tabled is to check whether a 'yes or no' answer can be given to such a question.

Moreover, a party cannot attack or discredit his or her own witness during the examination.

It is apt to point out that these limitations apply to judicial proceedings. They would not apply to police investigations, including when the police are interviewing witnesses or suspects:

### **Repubblika ta Malta vs Sergii Nyktiuk**

"Ghaliex il-pulizija ghandha dritt meta ged tinvestiga u taghmel id-domandi li tiblaffja, ghandha dritt tigdeb, ghandha dritt tuza messa in scena biex hi ggiegheh lil dak il-persuna indizzjata sabiex jghid il-verita. Fil-fatt hija principju bazilari koll illi fi starrija huma r-risposti li jghoddu mhux id-domandi. Fid-domandi l-pulizija jista jghid li jrid, il-pulizija ma huwiex marbut bir-regoli stretti ta proceduri li ghandna hawnhekk, illi jekk huwa shud tieghek ma tistax taghmel domandi diretti, ma tistax taghmel domandi ipotetici, ma tistax tpoggi kliem f'halq ix-hud - dawn ir-regoli stretti li ghandna bhala procedura quddiem Awla ma jezistux ghal pulizija u jistghu jaghmlu domandi diretti kemm iridu, jistghu jaghmlu suggestive questions kemm iridu u jistghu anka jhajru kemm iridu, basta ma jagbzux certu limiti"

### **Cross-Examination**

Once the examination of the witness is complete, cross-examination may commence. It is imperative to note that cross-examination can only be conducted on matters which the witness may have testified about in the examination. Questions on matters not dealt with in the examination are not permissible. If a party would like the witness to testify on matters different from those mentioned in the examination, that party would have to re-summon the witness as his or her own and conduct an examination of the witness.

Articles 579 and 580 of the Code of Organisation and Civil Procedure, 2 rendered applicable to the Criminal Code regulate how a cross-examination can be conducted:

In *Repubblika ta Malta vs Christopher Polidano*, \* the Courts explained the rules of cross-examination briefly in the following manner:

"Fir-rigward ta' kontro-ezami tax-xhieda, issir referenza ghal Artikolu 645 tal-Kodici Kriminali li jaghmel applikabbli ghall-process kriminali quddiem il-Qorti Kriminali diversi Artikoli mill-Kodici ta' Organizzazzioni u Procedura Civili (Kap 12).

Fost dawn hemm l-Artikoli 578, 579, 580, 583, 584, 586 u 589 tal-imsemmi Kap 12. Dan ifisser li l-istitut tal-kontro-ezami ghandu wkoll l-importanza tieghu fi proceduri penali u huwa regolat kif ghandu isir.

L-Artikoli 578 u 579 ta' Kap 12 jikkellmu dwar x'tip ta' domandi jistghu isiru lix-xhud u cioe li d-domandi suggettivi u diretti jistghu jsiru biss mill-kontro parti fil- kontro ezami.

L-Artikolu 580(1) ta' Kap 12 jippreciza li in kontro-erami, ix-xhud jista jigi mistoqsi biss dwar il-fatti li fughom jkun xehed f-erami, jew fug hwejjeg li jistghu jwagghu l-kredibili tax-xhieda tieghu.

L-Artikolu 583 ta' Kap 12 jisabilixxi li x-xhud jista jifriska l-memorja tieghu b'kitba maghmula minnu nnifsu, jew minn haddiehor taht d-direzzioni tieghu fiz-zmien li fih l-fatt fil-

kwistjoni jkun gara, jew minnufih wara, jew f'kull mien iehor meta l-fatt kien frisk f'mohhu u huwa kien jaf li l-fatt kien gie mfisser sewwa f'dik il-kitba, izda f dak il-kaz il-kitba ghandha tigi esibita u tista taraha l-parti kuntrarja.

L-Artikolu 584 ta Kap 12 jistabbilixxi l-parti li ggib ix-xhud ma tistax tattakka l-kredibbilità tieghu bi provi kuntrarji, kemm bi provi li x-xhud ghandu generalment fama li ma jghidx s-sewwa

L-Artikolu 586(1) ta Kap 12 jipprovdi li gabel ma tigi attakkata l-kredibbilità ta xhud bi provi u f'okkazzjoni ohra huwa kien ghamel dikjarazzionijiet li ma jaqblux max-xhieda tieghu, ghandhom jinghadu lilu dawk id- dikjarazzionijiet li fic-cirkostanzi taz-zmien, tal-lok u tal-persuni prezenti, u huwa ghandu jigi mistoqsi jekk kienx ghamel jew le dawk id-dikjarazzionijiet; u ghandu jigi lilu moghti imien biex jispjiegħom. Fis-sub-artikolu 2, l-istess Artikolu jipprovdi li jekk dawk id-dikjarazzionijiet kienu saru bil-miktub, ghandhom jigu murija lix-xhud gabel ma ssirlu ebda mistoqsija fughom

Din hija l-procedura generali li ghandha tigi segwita fir-rigward ta kontro-ezami ta xhud u dan kollu inghad fir-rigward ta l-ewwel aggravju sollevat mir-rikorrenti intitolat l-importanza tal-kontro-ezami fi procedura kriminali."

## **Incriminating or Degrading Questions**

No witness should be compelled to answer any question which may incriminate him or her of a crime or expose him or her to any criminal prosecution. When being requested to answer degrading questions, the Court retains a discretion to allow or disallow the question or line of questioning.

### **Article 643 + 644**

At the end of the day, it is always left to the discretion of the Courts to determine whether a witness is bound or not to answer a particular question, especially in light of the fact that certain questions may indeed lead to the witness' own degradation.

Degradation is different to incrimination for this does not necessarily expose the witness to criminal proceedings. The Code of Organisation and Civil Procedure states that:

### **Article 590**

#### **Privileged Documents**

Witnesses cannot be compelled to disclose privileged documents or privileged information flowing from official privileged documents.

### **Article 590 sub 2**

'Privileged' is defined in article 637(3) of the Code of Organisation and Civil Procedure as:

In every case, the Court must determine the relevance of the evidence and if the Court decides that it is not in the public interest to disclose the information produced, however it is necessary and essential in figuring out the truth, the Court may take precautionary measure which include:

- a) Ordering that the evidence will be given behind closed doors;
- b) In the case that a document is involved, requesting that the said document will be made available to the Court itself who will then decide whether or not to produce such document after examining the relevance, probative value and extent of the prejudice.

In the case **Repubblika ta' Malta vs Dr Lawrence Pullicino**, the Courts had to determine whether police files ought to be made accessible to the accused since they are considered privileged documents. The Court held that albeit the accused has the right

### Expert Witnesses

Expert witnesses are selected because they possess specialized knowledge or skills that the judge does not have. Their primary role is to provide a professional opinion. Unlike witnesses of fact, experts typically have not observed the events/facts in question; instead, they are called upon to offer their professional perspective on specific matters.

Experts are often appointed in odd numbers to ensure a definitive decision is reached. An expert may also listen to witnesses, but when doing so, it is essential that the witnesses are placed under oath. For example, an accident dynamics expert may take testimony from witnesses, which must then be included in the expert's report. This report must be put in writing, sworn under oath, and the testimony must be transcribed. Subsequently, the report is presented to the judge during a Court session, as this is a legal requirement.

A pertinent question is: what qualifies someone as an expert? Experts are appointed for their special skill or knowledge. Experts may be tasked with determining whether crimes, such as money laundering, have been committed. However, this raises questions about their role—if an expert is needed to define what constitutes money laundering, what is the judge's role in this regard? Further concerns include the impartiality of experts: What makes them truly unbiased? Why is their expertise specifically required in serious crimes? These are crucial considerations when appointing expert witnesses.

You can challenge the appointment of an expert on the same grounds as you would challenge a judge, but this must be done at the outset. These grounds are limited; incompetence is not a valid reason for objection. However, general grounds such as bias apply to both judges and experts. Experts are required to be impartial and objective in their role.

## Documents

The next source of evidence is documents. By this term, the law understands libertus - essentially any piece of evidence. This could include the corpus delicti (which refers to either the instrument used in the commission of a crime or the proceeds of the crime) or any other document. The COCP also cross-refers to material objects. As outlined under our legislation, this concept is very broad, encompassing anything that might furnish information.

The rule of relevance applies here: evidence must be relevant to be admissible. Photographs, for example, must be authenticated. Authorship and authenticity is crucial when it comes to documents—ensuring the document is genuine is essential.

## Expert Witnesses

The criminal code distinguished between ordinary witnesses and expert witnesses. Expert witnesses are appointed to express their professional opinion because of their special skills and knowledge on a particular matter, which a Court would not possess. This principle was clearly established in the judgement *Il-Pulizija vs. Marion Saliba* (28 Nov 2013)

"Issa hija prattika sancita mill-ligi li hieda ordinarji w cio mhux persuni li jigu matura bhala esperti mill-Qorti, ma jistghux jaghtu jew jesprimu opinjoni imma jistghu jiddeponu biss fuq dak li huma jikkonstataw bis-sensi taghhom. Meta tkun mehtiega xi hila jew sengha specjali biex jihi ezaminat xi oggett, ghandha tigi ordnata perizja, (art. 650 (1) tal-Kap.9).

Il-periti skond il-Kodici Kriminali ma jistghux ikunu esperti ex parte imma jridu jkunu gew maghzulin mill-Qorti (art. 650 (1) tal-Kap.9) jew mill-Magistrat Inkwirenti li jkun ged jikkonduci l-in genere (art.548 u 549 tal-Kap.9)."

Article 650

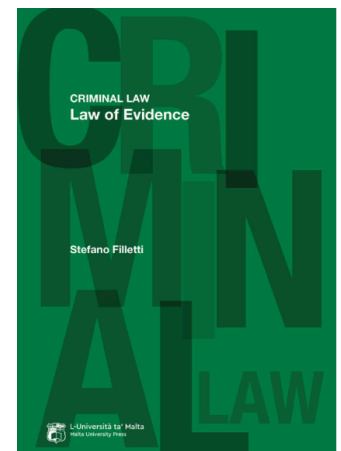
Article 652

Article 653

Article 654

Article 655

Experts can include forensic experts, pathologists, doctors, architects, psychiatrists and more. In any trial in Mata, the only experts which may be allowed to testify are experts appointed by the Court. Ex parte expert witnesses are not admissible.



## **Appointment of Expert Witnesses**

Experts can either be appointed ex officio by the Court or upon the request of the parties. In Malta, there is no possibility to produce ex parte witnesses unlike the UK and the US. In Malta, experts are entrusted by the Court, and while the appointment of an expert is ultimately at the Court's discretion, it is customary for the Court to consult with all parties involved before making this appointment.

Experts must always be appointed in odd numbers to avoid deadlock in opinions.

## **Challenge of Expert Witnesses**

The criminal code states the following with regard to the challenge of experts - 651

It is clear that the appointment of an expert can be challenged for the same reasons at law for the recusal of a Judge or Magistrate. Such grounds of challenge do not call into question the competence, integrity or credibility of the Court-appointed expert. Article 734 of the Code of Organisation and Civil Procedure lists these grounds of challenge which inter alia includes the ground where a Judge is related by consanguinity or affinity in a direct line to any of the parties, if the Judge is the tutor, curator or presumptive heir of any of the parties, if the Judge or the Judge's spouse is directly or indirectly interested in the event of the suit and so on and so forth.

## **Performance of Duties**

Expert witnesses are summoned in the same manner as ordinary witnesses, and they shall swear to perform faithfully and honestly the duties assigned to them. Upon terminating their work, the experts shall make a report, either orally or in writing, as per the directions of the Court.

In the performance of their duties, experts can collect reperti, examine reperti and also hear witnesses. If witnesses are to be heard, they must be given an oath, and their full testimony should be included in the experts report. Moreover, the expert will present conclusions in open Court during the sittings in the presence of the accused, as seen in the judgment IL-Pulizija vs Emanuel Ellul

The Court shall whenever expedient, give to the experts necessary direction, allow time to submit a report, receive documents and examine witnesses on oath. Experts will reduce their work and findings in writing. If the report is made orally, then it will be reduced to writing by the registrar or anyone acting in his stead.

## Use of Expert Opinion

Expert opinion is not binding on the Court, although it ought not to be discarded without valid reason. The Criminal Code clearly expresses that:

Article 656

In **Il-Pulizija vs Joseph Ignatius Fenech**, the Court of Criminal Appeal" decided as follows:

"Issa, il-periti jigu maghzulin mill-Qorti jew mill-Magistrat Inkwirenti fdawk il-kazijiet li fihom ikun jehtieg hila jew sengha specjali. Huma maghzulin minn fost nies li l-Qorti jew il-Magistrat Inkwirenti jidhrilhom li ghandhom il- kompetenza necessarja fil-gasam li fih tkun mehtiega dik il- hila jew sengha specjali. Certu xoghol irid isir flaboratorji attrezzati biex isiru l-esperimenti u l-analizi li jkun hemm bionn. Ghalhekk persuna suspettata jew imputata jew akkuzata ma tistax tippretendi li tkun prezenti wagt li geghdin isiru tali esperimenti jew analizi li normalment jirrikjedu hinijiet twal ta xoghol u koncentrazzjoni u anke ta stennija. Imbaghad id-dritt ta persuna imputata jew akkuzata li tkun prezenti ghall-proceduri kriminali tfisser precizament hekk, il- prezenza taghha wagt il-proceduri kriminali fejn ikollha dritt tikkontrolla kemm lix-xhieda kif ukoll il-periti.

L-artikolu 653(1) tal-Kap. 9 tal-Ligijiet ta Malta fil-fatt jipprovdi li: Il-periti, meta jispiccaw ix-xoghol u l-esperimenti li titlob il-professjoni jew is-sengha taghhom, ghandhom jaghmlu bil-fomm jew bil-miktub ir-rapport taghhom, skond id-direzzjonijiet tal-Qorti. Inoltre s-subartikolu (2) jipprovdi li: Ir-rapport ghandu f'kull kaz isemmi l-fatti u c-cirkostanzi li fughom il-periti jkunu ibbazaw il-fehma taghhom.' Barramin hekk l-artikolu 655 jghid: Kull wahda mill-partijiet, il-gorti, u, fil-kazijiet ta' kompetenza tal-Qorti Kriminali, kull wiehed mill-gurati, jistghu jitolbu mill-periti tifsir ahjar fuq ir-rapport taghhom, kif ukoll fuq dak li jidhrilhom li jista jaghmel aktar cara l-fehma tal-periti. Bdan il-mod l-imputat jew l-akkuzat ghandu l-mod kif jista jikkontrolla x-xoghol li jkun sar mill-periti. Izda l-ligi tmur oltre u tissalvagwardia lill-imputat jew l-akkuzat billi tipprovdi fl-artikolu 656: Min ghandu jiddecidi mhux marbut li jogghod ghall-fehma tal- periti kontra l-perswazjoni tieghu."

Documentary evidence is also governed by the best evidence rule, which requires the presentation of the best available evidence at trial. What does this mean? For instance, if a death occurs next to a statue, it does not mean that one has to present the statue itself in order to be considered as presenting the best evidence possible.

Take, for example, the prosecution claiming that a copy of a bill of exchange which has been forged is the best evidence available. I argue that such copy is not the best evidence available as

it is the original document that must be produced. A replica alone won't suffice. Without the original, you essentially have no case.

It is important to note that the "best evidence" does not simply mean the best evidence in your possession – it must genuinely be the most reliable and original evidence available. However, this is determined on a case-by-case basis. The general rule is that only the original is admissible as the best evidence. But what happens if the original has been destroyed? In such situations, the Court may allow secondary evidence, provided there is proof of the original's destruction. Thus, the rule adapts to allow the best evidence available under the circumstances. In Malta, are still discussing the best evidence rule. Legal copies no longer require authentication because the stamp of a lawyer or notary is considered sufficient. For any other document, authentication is required, meaning the author must confirm its authenticity. In the UK, this rule has been abolished.



## Documentary Evidence

For the purpose of the law of evidence, a document is also known as a repertus. This can include a written document, data or any object related to the commission of a crime. Definition is found in article 632(2) Criminal code. Documents are admissible so long as they are relevant to the facts in issue in a case and are not positively excluded by law.

Written documents are also admissible only under oath, this is essential to guarantee authorship and authenticity of the document as will be discussed.

The best evidence rule applies to both in civil and criminal proceedings. This notion emanates from article 638 of the criminal code. Article 559 of the COCP mirrors such a provision. Article 560 - rejection of irrelevant evidence.

The governing rule is that only an original document is admissible in trial. Secondary evidence could be admissible where the Court believes that it can satisfy the "best evidence rule", namely that it is the best evidence available. The Court needs to be satisfied that there exists no better evidence.

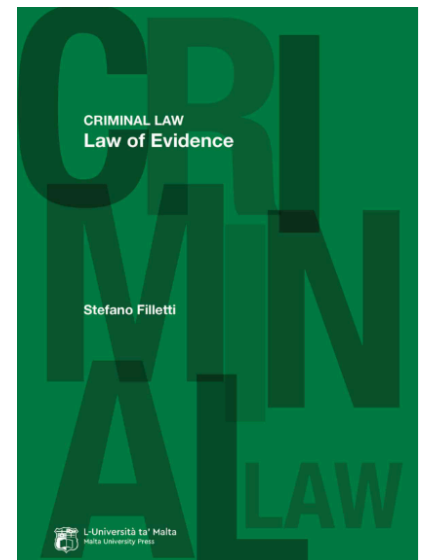
The best evidence rule would allow non-original documents to be admissible if it can be shown inter alia that:

- The document has been destroyed or cannot be found;
- When the nature of the document is such that it is physically impossible to produce it; or
- Where the document is in possession of the opposite party who fails to produce it;

The best evidence rule goes no further than to render certain evidence of a secondary nature admissible only in the case where primary evidence cannot be tendered accordingly, and makes no reference to the degree of weight which secondary evidence carries.

The Court of Criminal Appeal explained the rule of best evidence in *Il-Pulizija vs Julian Cutajar* as follows:

"IL-"best evidence rule" hija riprodotta fil-Ligi taghna A. Artiklu 638 tal-Kap 9 fejn issib Artiklu 1 jghid: "Bhala regola ghandu jitqies li tingieb il-prova l-aktar shiha u sodisfacenti illil-kaz ikun jaghti u li ma tithalla barra ebda xhud li x-xhieda tieghu tkun importanti? Dan - Artiklu jibda bil-kiem, Bhala regola', dana ma jfissirx illi ghandu jsir hekk kull darba ili 1-Prosekuzzioni jkollha xi provi izda jkun desiderabli illi jir hekk. Jekk il-Prosekuzzioni zzom lura xi prova ghal



xi raguni jew ohra dana jista jippregudika biss l-kaz tahghha, però ma jfissirx illi bdagshekk mghandiex taghti kaz il-provi l-ohra li tkunu gabu. Ghalhekk jekk il-Prosekuzzioni jidhrilha illi mill-provi li resqet ghandha bizzzejjed biex ikollha kundanna, allura f'dan il-kaz tista tiegaf hemm u ma togghodx tghabbi lill-Qorti bi pizizjed lejda.

Similarly the Court of Criminal Appeal in Repubblika ta' Malta vs George Spiteri Court held that:

"Meta l-partijiet fi proceduri penali, jaghizlu li jresqu prova, huma jridu jissodisfaw il-best evidence rule, jridu.. jesp l-ahjar prova li tkun tista tigi prezentata fil-kai konkret"

However, the Courts' have on occasion called into question the best evidence rule, stating that it is an antiquated notion which should not remain applicable:

### **Pulizija vs Joseph Fenech 2023**

"Fil-Blackstones Criminal Practice tas-sena 2008

... insibu hekk: 'The best evidence rule, which was used in the 18th and early 19th centuries as an exclusionary principle, i.e. to prevent the admission of certain evidence where better evidence was available, is now all but defunct?

U Lord Denning gal hekk dwar din ir-regola: The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available on one's hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility®  
Minn dawn iz-zewg kwotazzionijiet jirrizulta lil-best evidence rule kif nafuha ilha li spiccat. Ahna nib ghu nippersistu nghidu l-istess haga qisu qatt ma caqlaq xejn ghal tal-angas dawn l-ahhar 44 sena. Basta nghidu bhal dak li galu ta' gabilna"

## **Applying the Best evidence rule**

In applying the best evidence rule, it is accepted that a mental point needs to be addressed: namely, what is the funds evidence available in the absence of the original being found? This matter was discussed in the decision of **Pulizija vS Emmanuel Ellul**

In this case, the prosecution argued that the bills of exchange, which were allegedly falsified, were used by the accused. Prosecution further argued that the original bills of exchange could not be found, but they were in possession of photocopies of the bills of exchange. Relying on the principle of the best evidence, the prosecution claimed that the best evidence available to them were the photocopies of the original bills of exchange and thus these ought to be declared admissible in the proceedings.

The defence countered that the best evidence rule did not mean the best evidence available to the prosecution.

They argued the test which had to be applied could not be a subjective, but rather, an objective one. It could not be the case that simply because a document could not be found, any copy would suffice to satisfy the best evidence rule, rendering that document admissible. If that were to be the case, that would mean that any copy of a document, even those which lack the most basic legal formalities, would become admissible in trial because the original was not found. What if the police failed to investigate the crime properly? Would, therefore, the best evidence rule extend to include unauthenticated copies of originals?

Apart from the requirement that bills of exchange must be original documents *ad validitatem*, and considering that if the prosecution never possessed the original allegedly falsified documents, there would be no case to answer, the best evidence rule could not be used to admit any copies.

The Court ruled that the best evidence rule could allow the admissibility of secondary evidence when the original could not be produced in Court. This however did not mean that the rule would allow any secondary evidence whatsoever to become admissible. This is even more so in the case of written documents, or in this case bills of exchange. Authenticity of these documents is always required and consequently did not allow copies to be exhibited.

In other cases, the rule of best evidence was applied successfully in Court to allow the production of photos of perishables (from the scene of the crime), or of road signage and other fixed immovables which cannot be produced as evidence in Court.

## **Written Documents: Authenticity vs Veracity**

When dealing with written documents, a distinction must be drawn between the authenticity and veracity of a document.

A document is authentic if it is a faithful reproduction of the original and hence it is a true copy and does not refer to the veracity or otherwise of its contents. Professor Caruna Galit holds that:

"Every written document, in order to prove its contents, must be authentic, in the sense that its author must be certain: an authentic document is therefore that whose author is certainly that person who appears to be so from the document itself".

On the other hand, the veracity of a document refers to the truth of a document's contents. It can be surmised that just because a document is authentic, does not mean that its contents are truthful.

Written documents are admissible in so far as they are authentic or authenticated.

## **Admitting Reperti in Trial**

Documents or reperti in trial are admissible provided that their authorship or authenticity can be confirmed. This is confirmed ordinarily by the author of the document or repertus confirming on oath that the document was drawn up, created or collected by him or her. By way of an example, a party or notary public can confirm on oath the authenticity of a writing or contract; an eyewitness can confirm that he or she took a photo or video recording of a crime; or a scene of a crime officer confirming on oath that he took the corpus delicti or sample from the scene of the crime?

Certain documents are authentic and admissible if produced in a particular form and do not require additional proof of authenticity. Reference can be made to article 627 of the Code of Organisation and Civil Procedure:

Article 627 of the Code of Organisation and Civil Procedure<sup>o</sup> gives an exhaustive list of documents that are admissible as evidence without the necessity of any proof of their authenticity other than that which appears on the face of them, until the contrary is proved, as seen from the article above.

In *Il-Pulizija vs Roderick Borg* the Courts embraced this principle wholeheartedly:

"Imiss jigi trattat il-punt sollevata mill-abbli difiza li l-letter to prosecute li nharget mid-direttur tad-Dwana ma giex konfermata bil-gurament u ghalhekk ma tistax titqies bi prova bil-konsegwenza li l-proceduri huma null... Finalment hi l-ligi stess, bl-artikolu 627 tal-Kodici

t'Organizzazzioni w Procedura Civili, li tikkontradixxi dak li jsostnu l-imputati meta jinsistu li l-letter to prosecute tad-dipartiment tad-Dwana kellha tigi awtentikata".

It is apt to note that acts of foreign governments, departments of foreign governments, foreign Courts of justice, or any foreign establishment, as authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate, are also admissible as evidence without needing to be confirmed on oath. This is the legalisation' process also referred to in article 628 of the Code of Organisation and Civil Procedure.

Finally, article 629 of the Code of Organisation and Civil Procedure, 2 gives a list of the acts which require the proof of authenticity, but once complete are deemed to be evidence of their contents (in other words their contents are presumed to be correct and true, until the contrary is proved):

#### Article 629

Authentic copies of documents are admissible as evidence and legal copies are deemed to be authentic when they are made in the form prescribed by law and by the person lawfully authorised for that purpose. Such copies are evidence to the same extent as the originals.

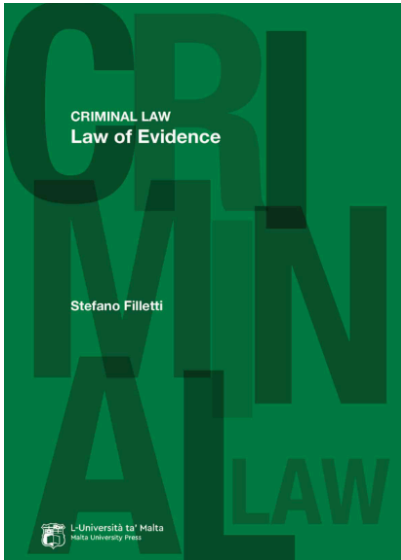
Article 636 of the Code of Organisation and Civil Procedure states that:

Lord Denning had argued that the rule of best evidence is long gone however ought to remain applicable when dealing with documents and their authenticity. In Garton vs Hunter's he opined that:

"That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in one's hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness and badness of it goes only to weight, and not admissibility".

The Court of Criminal Appeal' Repubblika ta malta vs omissis 2023 also had occasion to comment on autenticated documents and their admissibility as evidence in trial:

"Jagħmel referenza ukoll l-Avukat Generali għal dak dispot fl-artikoli 627 sa 636 tal-Kodici tal-Organizzazzioni u Procedura Civili illi il-kopji ta dokument jitqiesu li huma awtentici tal-orginal tagħhom meta huma magħmula fil-forma li trid il-ligi mill-ufficjal li jkun ircieva jew li jkun merfugh għandu l-original, jew mill-persuna awtorizzata legalment għaldaqshekk... Illi allura, għalkemm kif isostni l-Avukat Generali l-artikolu 636 tal-Kap.12, rez applikabbli għal proceduri penali permezz tal-artikolu 520 tal-Kodici Kriminali, il-kopji awtentikati pprezentati mill-ufficjal li jkun irceva dawk id-dokumenti jiswew dagslikienu ikun pprezentat l-original".



## Confessions

We now approach confessions from a modern legal perspective. If someone confesses, you have the *prova regina* (the queen of proofs), which is significant evidence. But what exactly is a confession?

When the accused speaks, does it always constitute a confession? No, it could simply be a statement of facts. However, when the statement contains an admission of guilt, it becomes a confession. This is because it is no longer an ordinary statement but an acknowledgment of guilt, making it a particular and highly significant type of evidence.

The accused may also provide a statement that is the opposite of a confession—an exculpatory statement.

During the interrogation stage, when a person admits guilt, their rights to legal advice and the right to remain silent come into play. Are there any other points in the criminal process where an admission of guilt can occur? Yes, in front of a judge, where a plea of guilt is entered. These two scenarios – confessions and pleas – are fundamentally distinct.

- A confession is formalized into a signed document or a recording (DVD), which then becomes a key piece of evidence.
- A plea, on the other hand, is not reduced to a document

A confession, a statement in which the accused admits his guilt, is considered as the *prova regina*. The important thing is that it must be proven that it was voluntary. Voluntariness cannot be confused with spontaneity. Our law speaks of voluntariness and the bar placed for this is placed rather high. Therefore, in order to defend against a confession, one must show that as a result of a police action, you spoke out in such a way that it cannot be said that what you said was voluntary. Using ordinary police tactics, would not achieve this standard of defence. Therefore, by default, a confession is considered as voluntary

Hearsay evidence is to prove a statement was said but hearsay evidence cannot be used to prove the veracity of the content of the statement. Therefore, people, including the police may testify as to what was said.

→ Confession is when one admits to his own guilt. It is admissible provided that it is voluntary. Voluntariness is not to be confused with spontaneity. A plea of guilty is not a confession. You cannot retract a confession.

Hearsay evidence – it is both admissible and inadmissible. It is admissible to prove that a statement was uttered. Hearsay is inadmissible to prove the veracity of the content of the statement/what was said.

Hearsay takes 2 forms – verbal and documentary. 1 exception is the accused, whereby the accused would be confessing. The fact that I saw a car in the street which belongs to a person is a fact, but stating that the person was because the car was being driven by him is documentary hearsay, because it is the number plate which shows that the car is a person's.

Audio and video recordings – they are documents and what applies to documents applies to them as well, i.e. you have to prove authorship and authenticity. If a camera or recorder is tamper free, it is as if you were there.

## **Confessions**

### *Defining a Confession*

Confessions are voluntary statements made by a person suspect or accused, admitting in whole or in part, to criminal responsibility for an offence. A confession made by the person suspected, charged or accused, whether orally or in writing, is always reduced to writing and will ultimately be produced as evidence in any trial.

Not every statement released by a person suspected or accused is a confession. A confession is a confession because of admission of guilt. The opposite of a confession is an exculpatory statement - a statement released by a suspect or person accused professing one's innocence to a crime or providing an alibi of a crime.

A confession is traditionally considered to be the most important evidence in a trial, also referred to as "la regina della prova" by Carrara! Our Courts have also commonly referred to this evidence as the mother of evidence:

### **Pulizija vs Alex Galea 2023**

"Din il-Qorti għaldaqstant barra x-xhieda ta Josianne Sciberras għandha l-agwa prova, il-prova regina li hija producibbli ai termini tal artikolu 658 tal-Kapitolu 9 tal-Ligijiet ta' Malta, dwar il-fatt li Victor Lofreda inżamm kontra l-volontà tiegħu, cioè l-ammissjoni volontarja tal-imputati"

### **Pulizija vs Joseph Tabone 2022**

"Issa hu accettat li kull dikjarazzjoni tal-akkuzat magħmula gabel, waqt jew wara l-att inkriminat tista tingieb bħala prova kontra tiegħu w l-konfessjoni li tkun saret volontarjament tista tittiehed bħala prova tal-htija tiegħu. Ta spiss jingħad li l-konfessjoni tal-akkuzat hija l-prova regina"3

### **Pulizija vs Noel Ellul 2022**

"Ili fil-kamp penali dejjem gie ritenut li l-konfessjoni - popolarment magħrufa bħala l-istqarrija tal-imputat jew l-akkuzat - hija l-prova regina li tista tressaq il-prosekuzzjoni biex tipprova l-htija tal-persuna akkuzata, dment li din tkun saret volontarjament u ma gietx imgiegħla, jew

mehuda b'theddid, jew b'biza, jew b'weghdiet jew twebbil ta vantaggi (artikolu 658 tal- Kodici Kriminali)"

Confessions must always be voluntary. They cannot be elicited by bribes, violence or threats. However, confessions must not also be spontaneous. Indeed, a confession can be offered by a suspect or accused after some persuasion. This would not be spontaneous. However, it must always be voluntary.

### **Confession vs Plea of Guilt**

A confession is an admission of guilt, but it is different from a judicial plea of guilt. A confession would refer to a statement made by a suspect or accused which in its narrative would include an admission of guilt for one or more offences. This could be extrajudicial (such as a statement released to the police) or judicial (the accused testifying in the witness stand).

A plea of guilt is different.

A plea of guilt is registered in Court after the accused decides to plead guilty in criminal proceedings (both in the Court of Magistrates or in the Criminal Court). Once the accused declares his willingness to plead guilty, the Court needs to warn the accused of the consequences of pleading guilty. The Court will grant time to the accused to reconsider his or her position. If the accused will still insist on the plea of guilt, the Court will proceed to accept that plea and proceed to judgment.

Archbold writes that a plea of guilt can be withdrawn at any stage of the proceedings before final judgment. This having been said this plea of guilt cannot merely be discarded subsequently by a Court or be withdrawn at appellate stage without valid reason. This matter was dealt with by the Court of Appeal in **Repubblika ta Malta v. Carmel Attard**:

Fis-sistema penali taghna hadd m'huwa obbligat illi jammetti l-htija tieghu kemm jekk hu akkuzat quadiem il-Qorti tal-Magistrati, kif ukoll jekk permezz ta' Att ta' Akkuza quddiem l-Onorabbli Qorti Kriminali. Is-sistema legali taghna mhux biss tipprovdi ghal protezzjoni ta' l-akkuzat billi fl-ewwel lok tipprezumih innocenti sakemm misjub hati, imma taghmilha tassattiva li jekk ikun jixtieg ikun difii permezz ta' avukat li jaghzel hu, li jekk mghandux mezzi biex jipprokura avukat dan jigi provaut lilu, u li, anke jekk wara li jingrawlu l-akkuzi migjuba kontribut huwa jiddeciedi li jammetti, il-Qorti li tkun ma tistax tghaddi biex tirregistra l-ammissjoni ta' htija gabel ma twissih serjament dwar il-konsegwenzi li ggorr maghha tali ammissjoni, tispjegaluh dak li hu necessarju li jigi spjegat, u ttiha zmien wara li tistiednu biex jahsibha mill-gdid biex jara jekk iridx isostni l-ammissjoni tieghu jew jekk jippreferix illi jirtira dik l-ammissjoni u jikkontesta l-akkuzi migjuba kontribut, in toto jew in parte.



Dan kollu gieghed fil-Kodici Kriminali ghaliex il-gustizzja hekk tirrikjedi, u certament id-disposizzjonijiet relativi jezistu fil-Kodici Kriminali taghna biex tigi tutelata l-gustizzja fil-process kriminali u anke d-drittijiet ta l-akkuzat.

Kif inghad l-akkuzat li jkun huwa liberu li jirrispondi jekk hux hati jew le ghall-akkuzi migjuba kontri, u anke li ma jirrispondix. Però ma tistax tigi tollerata sistema fejn l-akkuzat li jkun, wara li jammetti u jirribadixxi l-ammissjoni tieghu wara li l-Qorti tkun tatu l-monitu rikjest ta l-artikolu 453(1) tal-Kodici Kriminali jerga' jibdielu u jitlob li jirtira l-ammissioni tieghu bhallikieku qatt ma kien xejn sakemm ma jkunx hemm verament raguni valida li tipprevali.

Wisq u wisq aktar din il-orti ma tistax tittollera sitwazzioni fejn l-appellant jippretendi li jgib il-quddiem pretest li abbazi tieghu jitlob li jkollu l-facilità jew il-fakoltà li jirtira l-ammissjoni tieghu debitament maghmula registrata minghajr ma, almenu, igib prova li dik l-ammissioni hija nfcjata minn xi fattur serju daqstant li legalment il-Qorti tkun obbligata li tiehdu in konsiderazzioni. Aktar milli fil-fatt hu rilevanti dan il-kazjekk l-appellant kienx assistit mill-avukat tieghu fil-kors kollu tal-proceduri, u aktar milli hu importanti l-fatt illi l-ammissjoni saret wara li nghata l-monitu u z-zmien mill-Qorti msemmija fl-artikolu msemmi, huwa determinanti l-fatt illi l-appellanti semplicement ghamel allegazzioni lil-ammissioni tieghu saret fi stat ta agitazzioni tal-mohh meta hu kien ihossu mhedded u mbezza, fairkostanzi fejn ma hemm xejn x'jindika li dan kien hekk, u meta m'huwiex qieghed joffri prova, zghira kemm hi zghira, ta dagshekk, angas ta l-istess xhieda tieghu.

Hu ovvju li tkun ged taghmel zball kbir din il-Qorti, kif kienet tkun ghamlet l-ewwel Onorabbli Qorti, kieku fug is-sempli sottomissjoni ta l-appellant, f' mument fejn kien jaqbillu jghid hekk, cioe', li l-ammissjoni tieghu hu kien ghamilha ghax kien imbezza, il-Qorti tghaddi biex takkolji t-talba tieghu biex tigi cancellata l-ammissjoni debitament maghmuls u registrata skond il ligi bhallikieku din qatt ma saret"

## **Extrajudicial Confessions**

The definition of what constitutes an extra judicial confession was given by the Court of Criminal Appeal in **IL-Pulizia vs Joseph Tabone** as:

*"F'kull kaz, bhala konfessjoni extra-gudizzjarja japplikaw ghalha d-disposizzjonijiet tal-artikolu 658 tal-Kodici Kriminali... extrajudicial confessions are those where the defendant either expressly confesses his guilt or makes admission of facts from which his guilt may be implied, under any circumstances other than those described in respect of judicial confessions. They may be in writing or oral."*

In his notes on Criminal Procedure, Professor Mamo' also defines extra-judicial confessions as:  
...extrajudicial confessions are those where the defendant either expressly confesses his guilt or makes admission of facts from which his guilt may be implied, under any circumstances other than those described in respect of judicial confessions.

They may be in writing or oral. So that a confession may be received in evidence against the person who made it the law (sec.658) requires that it shall appear that such confession was made voluntarily and was not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour. There is no presumption in law that a confession not free and voluntary is false; it is excluded on the ground that improper threats or promises may influence an accused or suspected person to say what is not true, and therefore a confession made in such circumstances cannot be safely acted upon. It is obviously right that a person knowing his guilt should, if he so wishes confesses at the earliest opportunity, and there is no reason why he should be discouraged from doing so. But the law requires that the confession shall have been made voluntarily and, in the practice of our Courts, the prosecution must give affirmative 'prima facie' evidence that it was so made. The law says 'voluntarily' and not 'spontaneously...'

The Court of Criminal Appeal in *Il-Pulizija vs Joseph Tabone*<sup>o</sup> noted that extrajudicial confessions need to be treated carefully and their admissibility properly scrutinised. The Court stressed that:

*"Ghalkemm dawn it-tip ta konfessjonijiet allura huma ammissibbli bhala prova, madanakollu min irid jiggudika jrid jimxi b'kawtela kbira meta jkun hemm ammissjonijiet li ma jirux quddiem xi awtorita investigattiva jew gudizzjarja, fejn allura jrid isir starrig mill-gorti dwar jekk hemmx evidenza ohra li hija kompatibbli o meno ma' tali konfessjonijiet u cioe jekk hemmx provi diretti jew provi indizzjarji univoci li jaghtu is-sahha lill-istgarrijiet extra-gudizzjarji inkriminatorji".*

## **Admissibility of Confessions**

Confessions must be voluntary at all times and confessions which are solicited by the police are still admissible so long as they are voluntary confessions.

If the accused makes a confession after having been subjected to violence, threats, intimation or promise of favour, that statement is not considered to be a voluntary statement and thus is inadmissible. Article 658 of the Criminal Code" provides as follows:

Article 658

(Confession by accused)

It is important to note that evidence of the police issuing a caution to the accused prior to interrogation serves as prima facie evidence that the subsequent confession was voluntary in nature.

The Court has had occasion to explain the ramifications of article 658 as follows:

### **Pulizija vs Wayne Camilleri**

"Bid-dovut rigward, dan l-artikolu (artikolu 658) għadu jinsab fil-Kodici Kriminali Malti u s'issa ma giex dikjarat inkostituzzjonali. Fil-fatt, b'digriet tas-16 ta Frar 2012 fil-kawza fl-ismijiet Ir-Repubblika ta Malta vs. Brian Gialanze l-Imhalled Onorevoli Dr. Lawrence Quinatanano għaraf il-fatt illi s'issa l-ebda Qorti Kostituzzjonali ma ddikjarat li dan l-artikolu u l-artikoli li jsegwu bħala li huma lesivi ta' xi wiehed mid-drittijiet fundamentali tal-bniedem. Dan l-artikolu ma jagħmilx distinzjoni fir- rigward tal-kuntest fejn tali konfessjoni tigi magħmula u minn min tigi magħmula.

Ma jagħmilx distinzjoni bejn sitwazzjoni fejn konfessjoni tkun magħmula minn persuna lill-Pulizija fi stadju t'investigazzjoni jew jekk tkun magħmula ma terzi persuni f'kuntest mhux investigattiv. L-enfazi ta' din il-Ligi semplici u ordinarja hija li konfessjoni, magħmula ma min u fejn magħmula, dment li hija magħmula b'mod hieles, u ament li tkun magħmula skont dan l-artikolu, kif fil-fatt sar, għandu jkollha s-sahha ta' prova favur jew kontra dak li jkun għamilha. Dment li din il-konfessjoni ossija starrija tkun magħmula mill-persuna li tirrilaxxaha volontarjament u ma tkunx giet imgieghla jew meħuda b'theddid jew b'biza jew b'wegħdiet jew bi twebbil ta' vantaggi tista' tingieb bi prova. Il-Ligi ma trid li persuna tkun imgieghla li tagħmel konfessjoni - cioe' biex tkun valida trid tkun konfessjoni magħmula bir-rieda hielsa u konsapevoli tagħha - irrispettivament fejn, ma min u meta tkun saret din il-konfessjoni."

## **Formalities and Effects of Confessions**

The Criminal Code's contains several provisions defining the formalities required ad validitatem for confessions as well as the effects of a confession.

A confession ought to ideally be recorded by audio- visual means. This would dispel notions of inconsistencies or errors in transcribed confessions. Where it is not possible, it ought to be reduced to writing:

### **Article 659**

In *I-Pulizija vs Wayne Camilleri*, the Court of Magistrates held that although an oral confession is admissible, where this is reduced in writing, this must also be presented as evidence in trial for the confession to be admissible:

"Fid-dawl ta dawn id-disposizzionijiet tal-ligi, ghalkemm konfessjoni bil-fomm hija wahda permissibli u ammissibli skond il-ligi Maltija, galadarba in kontro-ezami s-Surgent Theuma kkonferma li huwa nizel il-verzjoni tal-imputat fir-rapport u ghaldagstant bil-miktub, dak ir-rapport ai termini tal-artikolu 659 tal-Kodici Kriminali kellu necessarjament jigi prezentat sabiex jigi kkonfermat is-sustanza ta dak li starr il-qua imputat. Dan ma sarx. Ghaldaqstant dina l-Qorti ma tistax tistrieħ unikament fuq dak li l-imputat gie rraportat li gal lis-Surgent Theuma skond l-affidavit tieghu bhala prova tal-konenut tal-istess dikjarazzjoni u cioe li huwa l-imputat biss li jaghmel uzu mill-vettura BCP941 u cioe l-vettura uzata min-nassab fil-filmat. Fin-nuggas ta dina d-dikjarazzjoni u cio dikjarazzjoni tal-imputat li dik il-vettura juzaha huwa biss, dina l-Qorti hija kompletament sprovista mill-prova tal- identifikazzjoni tal-qua imputat bhala l-persuna indikata fil- filmat bhala n-nassab."

In terms of section 660 of the Criminal Code, except in exceptional circumstances, a confession has to be produced in full.

### **Article 660**

661

This article is mostly discussed in Court in relation to the admissibility of evidence of accomplices and co-accused. In fact, in the judgment *Il-Pulizija vs Adrian Agius*, the Criminal Court stressed that:

"Illi hu principju elementari tad-dritt ta procedura penali li dak li jistgarr ko-akkuzat, sia jekk bil-fomm biss u sia jekk bil-miktub, ma jaghmlx prova la favur u langas kontra ko-akkuzat iehor, anke jekk dan ikun mixli f'proceduri separati bil-kummissjoni ta listess reat. Dan il-principju jitnissel kemm minn dak li jiddisponi l-artikolu 661 tal-Kodici Kriminali kif ukoll l-artikolu 636(b) 44 ta l-imsemmi Kodici.

Infatti l-gurisprudenza tirrikonoxxi ukoll l-inammissibilita tax-xiehda tal-ko-akkuzat kemm-il darba l-kaz tieghu ma jkunx gie definittivament konkluz."biss li jaghmel uzu mill-vettura

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# **INQUIRIES - Article 546-569**

**Main aim** - The main aim of an inquiry is to preserve all the evidence and avoid contamination. Appoint experts to elevate all evidence which is necessary to prove a case in Court.

A Police investigation and a criminal inquiry are two different things. The Police Commissioner of police - whilst the AG will prosecute in the name of the state. Produce evidence against the D. Hence, the aim is to have independent investigation, independent experts which are not biased (unlike the Police since they are considered biased in favor of the State). Inquiry should be like a bridge system on how experts present are unbiased. A police investigation and an AG inquiry may be held in parallel. One does not supersede the other since they have different aims.

**Repubblika ta' Malta vs Jason Calleja (Qorti tal-Appell, 3/7/1997) important case that outlines the difference between the two**

*“il-Magistrat Inkwerenti mhux parti mill-pulizija u wisq anqas mill-prosekuzzjoni, anzi jidher ċar li fis-sistema tagħna huwa previst biex f’numru ta’ każijiet serji li l-ligi stess tispeċifika, l-investigazzjoni ma ssirx biss, u l-provi ma jingabrux biss mill-pulizija, iżda wkoll, anzi essenzjalment, minn persuni indipendenti mill-poter eżekuttiv tal-istat u li jiggarrantixxu li r-riċerka tal-verità ma tkunx inkwinata minn xi interessi hlief dak suprem li kolloxx isir skont il-ħaqq u l-gustizzja. Rwol dan li Lord Tucker fl-appell quddiem il-Privy Council in Regina vs George Terreni iddeskriva bħala a good way of preserving evidence”*

**Recently Amended (2025) - Article 546 Cap. 9**

**Article 546 Cap. 9 Break down:**

**Sub-article 1:**

Article 546(1) regulates when and how a magisterial inquest must be held in relation to serious criminal offences.

In essence, it provides that:

- When a report, information, or complaint is received concerning an offence punishable by imprisonment exceeding three years, and
- The subject-matter of the offence still exists (for example, a crime scene, body, or object connected to the offence),

→ An inquest on the spot must be held to formally document the offence.

However, this can only happen upon a request made by the Attorney General or the Executive Police to a Magistrate.

During this inquest:

- The state of the offence must be described in full detail;
- The instrument used to commit the offence must be identified; and
- The manner in which the instrument produced the effect must be explained.

Proviso - If it later emerges that an offence did fall within this category (punishable by more than three years' imprisonment), But no inquest was held under Article 546(1),

→ This failure does NOT invalidate criminal proceedings,

→ Nor does it make evidence inadmissible solely because the inquest was not conducted.

This means that the inquest is an investigative safeguard, not a mandatory precondition for prosecution.

### **Sub-article 2:**

Article 546(2) creates a specific exception to the general rule in sub-article (1) requiring a magisterial inquest for serious offences.

It provides that:

- The magistrate may dispense with the holding of an inquest where the report or complaint concerns “breaking” as contemplated under Article 263(a), as defined in Article 264(1), and
- The related theft concerns property not exceeding €23.29 in value,

*even if:*

- The breaking is aggravated under Article 261(a), (b), (d), (e), (f) or (g), and
- The facts could otherwise amount to an offence punishable by imprisonment exceeding three years.

In such minor breaking-and-theft cases, the law allows the magistrate to avoid the formal inquest procedure in the interest of proportionality and procedural efficiency

Proviso - dispensing with an inquest does not limit future prosecution if the facts later justify a more serious charge.

### **Sub-article 3**

Where the offence under investigation is theft, excluding theft accompanied by violence against the person,

The magistrate is not obliged to personally hold an inquest on the spot.

Instead, the magistrate may:

→ Appoint a police officer not below the rank of Inspector to investigate and establish the relevant facts.

The appointed police officer:

- Investigates and documents the facts of the offence;
- May be assisted by photographers or other experts.

At the subsequent inquiry:

- The police officer and any assisting experts must give evidence on the facts they established;
- They must produce all photographs, documents, and other material evidence gathered during the investigation.

### **Sub-article 3A**

(a) Participation of the Occupational Health and Safety Authority (OHSA)

Where the offence being investigated concerns:

- Involuntary homicide, or
- Involuntary bodily harm,
- Arising from an incident that occurred at a place of work,

and where the facts are such that they entitle the Occupational Health and Safety Authority (OHSA) to carry out its own investigation under the *Health and Safety at Work Act*,

→ the Magistrate must notify OHSA as soon as practicable of the inquest.

The Magistrate must also:

- Allow OHSA to participate in the inquest by delegating up to two officers;



- Permit their presence during:
  - the inquest on the spot, and
  - the hearing of witnesses, if and as decided by the Magistrate;
- Allow OHSA officers, after the inquest, to access the site if necessary, after informing the Magistrate.

If requested by the Magistrate, OHSA officers must:

- Submit a report, which becomes part of the procès-verbal of the inquest

(b) Any OHSA officer participating in the inquest:

- Acts only under the directions of the Magistrate for the purposes of the inquest;
- Is bound by the same duty of confidentiality as all other persons assisting the Magistrate.

This preserves the judicial character and independence of the inquest.

(c) Definitions

For the purposes of this sub-article:

- “Occupational Health and Safety Authority” refers to the Authority established under Article 4 of the Health and Safety at Work Act (Cap. 646);
- “Work place” and “officer” have the meanings assigned to them under the same Act.

### **Sub-article 3B**

Article 546(3B) regulates access to the site and materials of a magisterial inquest by other public authorities that have their own statutory investigative functions.

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(a) When the Sub-Article Applies

This provision applies where both of the following conditions are met:

1. A public authority, under any law, has functions that require or allow it to investigate the site of an incident which is also the subject of a magisterial inquest under Article 546; and
2. That authority has been formally designated by the Minister responsible for justice, by order published in the Gazette, as a public authority to which this sub-article applies.

In such cases, the designated public authority must:

1. Inform the Magistrate of its need to carry out its functions at the incident site; and
2. Request access to:
  - ◆ the place of the incident,
  - ◆ any exhibits,
  - ◆ documents, orwitnesses involved in the inquest,  
insofar as this is necessary for the lawful execution of its functions.

(b) Discretion of the Magistrate

The Magistrate is required to:

- Grant the requested access, but
- May impose conditions or limitations considered necessary in the circumstances.

In exercising this discretion, the Magistrate must balance:

- The need of the public authority to perform its legal functions, and
- The need to preserve the integrity, efficiency, and proper conduct of:
  - the magisterial inquest, and
  - any parallel investigations being carried out by that authority.

**Sub-article 4**

- The report, information, or complaint referred to in:
  - Article 546(1), and
  - Article 551(1)may initially be made verbally before a Magistrate.

However:

- In all cases, the same report, information, or complaint must be submitted in writing to the Magistrate within two working days from the date on which it was made verbally.

Proviso (Magistrate's Discretion)

The proviso grants the Magistrate discretionary power, stating that:

- Even if the written report is not submitted within the two-day period,
- The Magistrate may still proceed in accordance with the provisions of this Title if he considers it appropriate to do so.

This ensures that procedural delays or formal defects do not obstruct justice, especially in urgent or serious cases.

**Sub-article 4A - (Amended by Act VIII of 2025)**

- *A new mechanism allowing a private party to request the opening of a magisterial inquest against a specific suspected person*

**(a)(i) Right of a Private Party to Request an Inquest**

Any person who makes a report, information, or complaint to the Executive Police concerning an offence punishable by imprisonment exceeding three years, and where the subject-matter of the offence still exists, may request the opening of an inquest on a suspected person.

Such an inquest:

- May be carried out only on the actions of the suspected person;

Is otherwise regulated by the same rules applicable to inquests under Article 546(1), unless stated otherwise.

The requesting person must:

Confirm on oath:

- the identity of the suspected person,
  - the acts allegedly committed,
  - the offences allegedly committed,
  - and the connection between those acts and the alleged offence;
- Produce any evidence on which the request is based

**(b)–(d) Role of the Executive Police and the Attorney General**

- Upon receiving such a request, the Executive Police must investigate and decide whether:
  - to initiate a prosecution,
  - there are no grounds for prosecution,
  - further police investigation is required, or
  - an inquest requested by a private party should be opened.
- If the police conclude either that prosecution should be initiated or that there are no grounds for prosecution, the case must be referred to the Attorney General.
- Where the Attorney General decides that no prosecution should be initiated, he may:
  - order further police investigation; or

- order that the parties be notified of the decision not to prosecute, triggering the application of Article 541(4).

#### (e)–(h) Judicial Remedy After Six Months (Criminal Court Control)

- If six months elapse from the filing of the report and:
  - no prosecution is initiated,
  - no decision not to prosecute is taken, and
  - no inquest is opened,
- → the complainant may apply to the Criminal Court requesting that the police be ordered to transmit the case to a Magistrate for the opening of an inquest.
- The Criminal Court:
  - hears the police, the complainant, the suspect, and any witnesses behind closed doors;
  - considers only evidence admissible in criminal proceedings;
  - may decide to:
    1. grant further time for police investigations,
    2. close the proceedings, or
    3. order the opening of an inquest.
- The Court may order an inquest only if, on a balance of probabilities, it appears that the alleged offences could have been committed by the suspected person.
- If an inquest is ordered, the police must, within three working days, request the assignment of a Magistrate.

#### (i) Validity of the Inquest

- Any inquest opened without satisfying the applicable legal and factual preconditions is null and without effect.

#### (j)–(k) Protection Against Abusive or Vexatious Requests

- After the inquest is closed, the suspected person may request the Magistrate to determine whether the inquest was:

(4B) Decrees delivered by the Court and by the Magistrate in terms of sub-article (4A) shall be notified to the Attorney General.

(4C) In every case where an inquest is to be held under the provisions of sub-article (4A) the Magistrate who conducts the inquest shall be chosen by lot from among the Magistrates mentioned in article 367(3).

(5) A copy of the report, information or complaint referred to in sub-article (1) or article 551(1) shall be transmitted by the magistrate to the Attorney General within the period of three

- unfounded, frivolous, vexatious, or abusive.
- If so, the Magistrate may:
  - order the complainant to pay the costs of the inquest;
  - issue any other appropriate directions.
- This decision is appealable before the Criminal Court within twelve working days.

**Article 547 Criminal Code (amended by Act VIII of 2025))**

Sub-article 1 - Inquest shall be held by a magistrate

Sub-article 2 - Functions of the Magistrate in the inquest:

**(a) Collection and Preservation of Evidence**

The Magistrate must:

- Collect and preserve all proof that is admissible as evidence before a criminal court;
- Personally identify relevant evidence or do so through appointed experts;
- Ensure that such evidence relates directly to the offence under investigation.

**(b) Assessment of Whether an Offence Occurred on a Balance of Probabilities**

**(c) Indicating Doubt About Truthfulness**

Without confronting witnesses, or making credibility judgments as to which evidence should be believed,

the Magistrate may: Indicate that a statement given during the inquest may not be truthful

**(d) Identification of Persons for Further Investigation**

Without: Acting as a criminal court of inquiry or judicature,

The Magistrate may:

Declare whether there is sufficient admissible evidence indicating, on a balance of probabilities, that certain persons:

May be further investigated by the Executive Police or another competent authority, or

Should be considered by the Attorney General for a decision on whether to institute criminal proceedings.

Where the inquest was opened under Article 546(4A), such persons must be among those indicated as suspects in the original report or complaint.

### **Article 548 Criminal Code**

(1) The necessary experts shall be employed for the purposes of the inquest, and a Procès-verbal thereof shall be drawn up:

(1a)(a) An expert appointed by the court must be a natural person, not a legal entity. Before appointment, the Magistrate must ensure the expert has sufficient knowledge of Maltese criminal law to perform the assignment. If the expert is not officially accredited under Article 650(2), a due diligence process, supervised by the Magistrate and conducted by the Department of Justice together with the Court Services Agency, must assess the person's qualifications and suitability. The final decision to appoint the expert remains at the Magistrate's discretion.

(b) The decree appointing an expert must specify the assignment and make clear that the expert's role is limited to determining factual matters relevant to the elements of the offence, without expressing an opinion on whether the offence was committed. The decree may also set other conditions of appointment as the Magistrate deems appropriate.

(2) Experts involved in an inquest who collect and analyze dactyloscopic data or human DNA samples must, within 24 hours of completing the analysis, provide the Executive Police with copies of the dactyloscopic data and DNA profiles, along with any related information and any additional details requested by the Executive Police.

For the purpose of this article:

"dactyloscopic data" means fingerprint images, images of fingerprint latents, palm prints, palm print latents, writers palm prints and writers palm print latents; and

"DNA profile" means a letter or number code which represents a set of identification characteristics of the non-coding part of an analysed human DNA sample, that is the particular molecular structure at the various DNA locations (loci)

### **Article 549 Criminal Code**

**Sub-article 1** - The Magistrate must sign the end of the procès-verbal of the inquest, and a written or printed note must be made on every document produced during the inquest by the Registrar or a court officer acting in their place, as directed by the Magistrate.

(2) If the experts employed shall express their opinion in a written report duly confirmed on oath, such report shall be annexed to the procès-verbal and shall be deemed to form part thereof.

(3) The depositions of witnesses examined at the inquest shall also be annexed to the procès-verbal.

(4) Such depositions shall be taken in the manner provided for the examination of witnesses by the court of criminal inquiry, and shall have the like effect.

### **Article 549A Criminal Code**

Article 549A sets out the rights of suspects and victims when called as witnesses in an inquest, ensuring procedural safeguards in line with criminal investigation law.

#### **1. Rights of a suspect or person who is the subject of an inquest:**

- They must be informed before giving evidence that they are a suspect or subject of the inquest, the offence under consideration, and the reasons for this.
- They have the right to be assisted by an advocate.
- They are entitled to all safeguards under criminal investigation law, including access to case materials as provided in Article 534AF.

#### **2. Rights of the victim:**

- All the rights listed above also apply to the victim of the offence when called as a witness in the inquest.

#### **3. Right to voluntarily give evidence and submit proof:**

- A suspect or person who considers themselves the subject of an inquest may apply to the Magistrate to give evidence and indicate witnesses or other proof.
- If the Magistrate confirms the person's status as a suspect or subject, they must allow the person to give evidence.
- The Magistrate must place relevant evidence at their disposal in advance, on which the person is considered a suspect or subject.
- The Magistrate determines the stage of the inquest at which the person will give evidence and when their indicated witnesses or proof will be considered.

### **Article 550 Criminal Code**

Article 550 governs the **use and evidential value of the procès-verbal of a magisterial inquest** in subsequent criminal proceedings.

**Sub 1** - Evidential value: If the procès-verbal is regularly drawn up, it is admissible as evidence in the trial. Witnesses, experts, or other persons who gave evidence during the inquest do not

normally need to be called again during the compilation stage before the Court of Magistrates as a court of criminal inquiry.

**Sub 2 - Exceptions – Attorney General or police requests:** During the compilation of evidence (Article 401), the Attorney General or police, with special permission from the Court of Magistrates, may call any inquest participants to give evidence on specified matters. After the compilation stage, the Attorney General may still require witnesses or experts from the inquest to appear under Article 405, including for cross-examination if requested. Experts and witnesses from the inquest must be included in the Attorney General’s list of witnesses.

**Sub 3 - Court power:** The court can order the production of any expert or witness recorded in the procès-verbal for examination at trial.

**Sub 4 - Documents and objects:** All documents and material objects for which a procès-verbal has been drawn up, and which can be preserved and conveniently exhibited, must be produced at trial along with the procès-verbal.

**Sub 5 - Regularly drawn up procès-verbal:** A procès-verbal is considered regularly drawn up if it contains:

- a short summary of the report, information, or complaint,
- a list of witnesses heard and evidence collected, and
- a final paragraph containing the findings of the inquiring magistrate.

### **Article 550A Criminal Code**

Article 550A regulates timeframes, reporting, and access related to magisterial inquests, ensuring accountability, victim information, and procedural oversight.

**Sub 1 - Delay Reporting:** If the procès-verbal (or “repertus”) is not drawn up within 60 days from the report, information, or complaint, the Magistrate must prepare a report explaining the delay and transmit it to the Attorney General within three working days.

**Sub 2 - Ongoing Reporting:** Every two months after the first report, the Magistrate must prepare additional reports explaining continued delays, each transmitted to the Attorney General within three working days.

**Sub 3 - Applications by Interested Persons:** After 60 days, any interested person may apply to the Magistrate to give evidence themselves or call witnesses; the application must be served on the Attorney General, who may respond within four days.



**Sub 4 - Attorney General Access:** The Magistrate must provide the Attorney General with requested information about the inquest and grant access to records, documents, exhibits, expert reports, and witness depositions.

**Sub 5 - Access for the Financial Intelligence Analysis Unit (FIAU):** Upon request, and where necessary for money laundering or terrorist financing investigations, the Magistrate may provide the FIAU with access to all inquest materials, to be used only for the intended purpose.

**Sub 6 - Inquest Time Limits:** The inquest should normally conclude within six months. If it is not concluded within two years, the Magistrate must close the inquest based on the acts available and transmit the records to the Attorney General within 30 days. Closure under this provision does not prevent further police investigation or Attorney General action, and if the Attorney General exercises powers under Article 569(2), the time periods restart.

**Sub 7 - Victim Information Rights:** The Attorney General must inform the victim of the stage of the inquest within six months of opening and at every subsequent six-month interval, unless the inquest has ended. The Attorney General must also notify the victim when the inquest is concluded and when a copy of the procès-verbal is available, unless exceptional circumstances prevent disclosure.

**Sub 8 - Decision Not to Prosecute:** The victim has the right to request to be informed if, following the conclusion of the inquest, a decision not to prosecute is taken.

### **Article 551 Criminal Code – Summary**

Article 551 governs **magisterial inquests into deaths**, particularly sudden, violent, suspicious, or unexplained deaths, as well as deaths in custody or under court supervision.

**Sub 1 - Sudden, violent, suspicious, or unknown deaths:** The Executive Police must report such deaths to a Magistrate, who shall hold an inquest on the body to ascertain the cause of death. The Magistrate collects all possible evidence and then draws up and signs a procès-verbal stating the findings regarding the cause of death.

**Sub 2 - Deaths in custody:** Whenever a person dies while imprisoned, detained under the Prisons Act, or in police custody, an inquest must be held, and a procès-verbal must be drawn up as in sub-article (1).

**Sub 3 - Deaths in Mount Carmel Hospital under court orders:** The same procedure applies when a person dies in Mount Carmel Hospital while detained under court orders relating to:

- sub-article (3) of Article 525, or
- Article 623(1), or
- examinations by court-appointed experts regarding a plea of insanity.

**Sub 4 - Delegation of inquest duties:** In cases of sudden or unexplained death, the Magistrate may delegate the inquest instead of attending personally, following the procedure set out in Article 546(3). The provisions of that sub-article apply mutatis mutandis.

**Sub 5 - Application of Article 547(2):** The rules in Article 547(2) regarding inquest procedures also apply to inquests held under this article.

#### **Article 552 of the Criminal Code**

The Magistrate may, when necessary, order the dissection and internal examination of a body to determine the cause of death. For this purpose, the Magistrate can appoint one or more medical experts, who may also be empowered to take evidence on oath to establish the identity of the deceased and ascertain the cause of death.

#### **Article 553 of the Criminal Code**

If a body has already been buried, the Magistrate may order its exhumation, provided that it can be done with proper precautions and without prejudice to public health.

#### **Article 554 - Powers of magistrate holding inquest.**

**554.(1)** It shall be lawful for the magistrate to order the arrest of any person whom, at any inquest, he discovers to be guilty, or against whom there is sufficient circumstantial evidence, as well as to order the seizure of any papers, effects, and other objects generally, which he may think necessary for the discovery of the truth. It shall also be lawful for the magistrate to order any search into any house, building or enclosure, although belonging to another person, if he shall have collected evidence leading him to believe that any of the above objects may be found therein.

(2) It shall also be lawful for the magistrate to order that any suspect be photographed or measured or that his fingerprints be taken or that any part of his body or clothing be examined by experts appointed by him for the purpose:

Provided that where the magistrate is of the opinion that such photographs (negatives and prints), fingerprint impressions, records of measurements and any other thing obtained from the body or clothing as aforesaid are no longer required for the purpose of the inquiry relating to the "in genere", he shall order the destruction or shall order that they be handed over to the person to whom they refer.

(3) In any proceedings under this Title the magistrate shall have the same powers and privileges of a magistrate presiding the Court of Magistrates as court of criminal inquiry.

Mag can also in the inquiry order suspect be photographed, measured, or fingerprints taken - clothes examined by experts, if the mag is of the opinion that such info gathered are no longer needed for inquiry related to the in genre, mag can order such clothes to be destructed or handed over to whom they were taken.

Also, another disposition is with regards to forgery of writings - Article 556 - in that case the document would be exhibited to the mag -

### **Formalities to be observed at inquiry into forgery of writings.**

*556.(1) In every inquiry into cases of forgery of writings, the document averred to be false, shall, as soon as it is produced, be numbered on every page, and there shall be drawn up a procès-verbal of the material state of such document and of its production.*

*(2) The procès-verbal shall describe every cancellation, addition or interlineation contained in any such document, and any other circumstance which may point to the alteration of the document.*

*(3) The document averred to be false as well as the procès-verbal when it has been drawn up, shall be signed, and on every page countersigned by the inquiring magistrate, by the registrar, and also, where practicable, by the witnesses and experts employed at the inquiry.*

*(4) The inquiring magistrate may, instead of drawing up the procès-verbal referred to in this article, order that a photostatic copy of the document averred to be false be made by a person appointed by him for such purpose which copy shall be kept in the custody of the registrar. The registrar shall produce such copy whenever requested by any court of criminal justice.*

### **Article 558 – Discovery and Definition of Documents**

When any document or object related to an offence is discovered, steps must be taken to **secure and preserve it**, and a **procès-verbal called a “repertus”** must be drawn up. The term “document” includes **papers and material objects** that may provide information about the offence or the guilt/innocence of the accused.

### **Articles 559–561 – Use of Experts**

Qualified persons in relevant arts or trades may be summoned to:

- ★ Ascertain traces left by the offence, the condition of permanent facts, probable means, and effects of the offence;
- ★ Examine weapons, documents, or objects useful for establishing facts;
- ★ Conduct observations, experiments, and provide factual statements and expert opinions, which must be confirmed on oath before the Magistrate.

## **Articles 562–564 – Preparation and Appointment of Expert Opinions**

- ★ Experts unable to provide an opinion on the spot may be given time to prepare reports, ensuring identity of objects is maintained.
- ★ Experts are appointed by the inquiring Magistrate, and their statements are made or confirmed under oath.

## **Article 565 – Preservation and Handling of Objects**

Rules for handling objects forming the repertus include:

- ★ Surveying, describing, and preserving perishable items;
- ★ Marking objects with participant names and securing them in appropriate containers;
- ★ Reopening for justice purposes in the presence of participants;
- ★ Always drawing up a procès-verbal.

## **Articles 566–568 – Magistrate’s Powers During Evidence Collection**

- ★ The Magistrate may restrict movement at the investigation site;
- ★ May order doors to be forced open if needed;
- ★ The investigating officer has discretion to take alternative measures if formalities cannot be observed, and omissions do not bar proof at trial

## **Article 569 – Transmission to the Attorney General**

- ★ Investigation records must be transmitted to the Attorney General within three working days if no criminal inquiry has taken place.
- ★ The Attorney General may return the record for further investigation.
- ★ Where the magistrate indicates persons for possible charges, copies of the procès-verbal are sent to the Commissioner of Police, who may act on the direction of the Attorney General regarding charges or the decision not to prosecute.

## **Thesis - The "In Genere" : is it an effective tool for the investigation and prosecution of crime? (2010)**

The Magistrate

It seems appropriate to start off this topic with a quote from a remarkable judgement which clearly designates the very nature and function of the Duty Magistrate:

“Jingħad mill-ewwel illi dan ir-ram ta” l-istruttura tas-sistema penali tagħna mhux wiehed li fuqu hemm xi ġurisprudenza profikwa anzi kwazi ma hemm xejn ... Anqas ma hu sugġett tali li fir-rigward tiegħu wiehed jista” jirreferi għal awturi esteri jew ferm inqas Maltin. Infatti s-sistema tagħna tal-Maġistrat ta” l-Għassa (li fil-fatt il-liġi qatt ma ssemmieh bħala tali)...

ghalkemm ispirata minn sistemi f'ċertu sens eżistenti f'pajjizi oħra, hija partikolari għal Gżiritna.

Wiehed għalhekk irid joqghod attent li japplika biss dawk ir-regoli li mil-liġi tagħna stess huma indikati bħala dawk li għandhom jiggvernaw il-materja... Il-Maġistrat Inkwirenti fil-kors ta' l-inkjesti ma jaġixxix bħala Qorti Istruttoria, iżda bħala Maġistrat ut sic... Fl-inkjesta huwa anqas ma għandu funzjoni ta' Qorti ta' Ġudikatura Kriminali. Il-Maġistrat Inkwirenti hu fdat lil l-inkariku li fil-każijiet previsti mill-istess titolu, jinvestiga r-reat jew il-fatt rapportat lil u/jew iżomm l-aċċess li lliġi tipprevedi u fl-aħħarnett jirredigi proċes verbal li l-liġi stess tirregola u tattribwili valur probatorju. Dan kollu jifforma parti integrali mill-proċess ġenerali tar-riċerka tal-verità u jikkonsisti prinċiplament fil-ġbir u preservazzjoni ta' dawk il-provi kollha, diretti u indiretti, li l-Maġistrat Inkwirenti jinnexxilu jidentifika bħala pertinenti għall-ġrajja jew reat li jkun qed jinvestiga...

### **Expert Evidence - Article 650-657 Criminal Code**

#### ***Article 650 Criminal Code - Experts are called when special knowledge or skill is required***

- They must swear to perform faithfully and honestly the duties assigned to them (Art 652 of the Criminal Code).
- Court can call expert to be present during a hearing to advise the Court. If this is done in a compilation of evidence, it is done in front of the accused (Art 654 of the Criminal Code).
- Experts can be called by the Court, or Jurors to give further elucidations on the report (Art 655 of the Criminal Code).
- Judges or Jury are not bound to abide by the conclusions of the expert against their own convictions (Art 656 of the Criminal Code).

For an expert to be called, an expert is called on a necessity of an expert or skill. Have to take this on oath - Court can call experts to - if the mag. Is going to hear the evidence and he will think - inquiring mag can ask him to be present during the hearing - very practical when you have a fire, and the expert needs to ask very technical questions on machinery etc...

It could be that even though the expert gives the report, the expert is not only asked to give an oath but also - comes to Court and explains his findings. Judges and jurors are not bound by expert evidence. An expert can never conclude that charges - all these could be done by the judge or the jury.

### **Experts report. Article 653 Criminal Code**

- On termination of their work, experts must make their report.
- The report shall state the facts, circumstances on which the conclusion is based.

- If witnesses are heard, they shall be mentioned in the report.
- If witnesses give testimony on oath, it is not necessary to give evidence again in Court.
- However, if witnesses give evidence without oath, they must give evidence again in open Court.

- Has to have effects and circumstances on which the information is based. The accused must know all evidence which is based against him. The report should be in detail. Both the witness testimony itself everything has to be documented, if the witness gave testimony on oath no need to have - if testimony is not given on oath, testimony under oath.

#### **Who can be admitted to give evidence?**

- Everyone of a sound mind, unless there are objections to his competency.
- No particular age is required for competency of a witness.
- The person who filed the report.
- The accused, at his own request, immediately after the close of the prosecution or at a subsequent stage. The prosecution cannot make adverse comments because the accused did not give evidence.

#### **Who can not be admitted to give evidence?**

- Age - any person of any age can be produced as witness, and can give evidence in Court. The accused, from time he is arrested, has the right to not to even say a word, if he is guilty or not, has the right to remain completely silent. The AG or police can never ask an accused to give evidence, completely against his fundamental human rights.
- Who cannot be admitted to give evidence? A lawyer can never be made to give evidence against his client. Spouses, and partners in a civil union, can never give evidence against his partner unless;
- Crime is committed by person accused against spouse
- Ascendants, descendants, brothers and sisters, uncles and nephews are unwilling to give evidence against a person related to them.

## **Witnesses - Articles 629-649 of the Criminal Code**

- Best evidence rules - PROSECUTION ALWAYS HAVE TO BRING THE BEST EVIDENCE. Full and most satisfactory available proof. Not to omit important witnesses - Article 638.
- The second point is that if one witness is believed by the judge, it is enough. You also can not rely on false testimony. However, one can not be convicted of false hearing, perjury solely on the evidence of one witness contradicting him unless corroborated by other evidence.
- Imp - when a person is present in the Courtroom on the witness stand in the same case - he can never give evidence in Court. When a case is in Court, that person can not give evidence.
- **Article 645 cross references to the COCP.**
- Witnesses also can not be asked to give any answer to questions which might incriminate them. If the judge knows the questions will be incriminating, he can not answer them. Witnesses can not be compelled to answer questions which expose him to any criminal prosecution.

Witnesses Articles 629-649 of the Criminal Code - Best evidence rule. One witness, if believed by the Judge, is enough.

Article 645 - the articles that apply to the Criminal Code whilst some articles apply to enquiries only.

570 COCP - *Witness can be asked to bring with him documentary evidence and present it during his testimony.*

574 COCP - *Every person who is physically present in Court can be called to give evidence on oath.*

578 COCP - This is not a criminal enquiry article but equally relevant. Leading or suggestive questions may not, without special permission of the Court, be put on an examination-in-chief. **The same applies in Civil Court.**

### **What is a leading question?**

It is one that suggests the answer. Usually, it suggests a yes or no as an answer. If you lead, the evidence is diminished and can undermine your case. You have to start non-leading questions with **who, what, why, when, where, how, describe (non-leading questions)**. Questions should be focused on what is necessary for the case. Focus on the objective. Examining a witness is not a **general inquiry**.

**It is important that you follow a chronology during a case because the Judge might lose track of the case. Also, you must demonstrate control hence, you cannot let the witness go at a tangent.**

- **Questions should be focused on what is necessary for the case. Focus on the objective.**
- **Examining a witness is not a general inquiry.**

Article 579 COCP - cross examination. **You can ask direct questions.** A leading question suggests and controls the answer. You should know the answer before asking questions. **If you don't know the answer, do not go to cross examination.**

A leading question suggests and controls the answer.

The leading question gives the answer. Usually, the witness answers yes or no.

Ex: It was dark? - Yes

It was nighttime? - Yes

Am I right to say that you looked out of the window? – Yes

Ask only what is necessary.

You should know the answer before asking questions.

**Article 580 COCP** - *Questions in a cross-examination can only refer to the facts the witness had deposited in his examination-in-chief*

It can also be made to impeach his credit while referring to his testimony. If the opposing party wants to ask questions not related to the examination-in-chief, that party must produce the witness as his own witness.

- It can also be made to impeach his credit while referring to his testimony.
- If the opposing party wants to ask questions not related to the examination-in-chief, that party must produce the witness as his own witness.

**Article 581 COCP** - When examination and cross-examination are concluded, no further questions may be put by either of the parties. However, the parties can ask the Court's



permission to ask questions which arise from the examination and cross examination. The Court can also ask questions.

**Article 582 COCP** - The Court can ask questions at any stage of the examination-in-chief and cross-examination and can also ask direct questions if it is necessary or expedient.

**Article 583 COCP** - A witness who is giving testimony on the witness stand may refresh his memory by referring to any writing made by himself or by another person under his direction. Whenever a witness gives evidence on the witness stand and while giving his deposition refers to a document or writing that document or writing must be produced in the acts of that proceedings.

**Article 584 COCP** - You cannot challenge your own witness by evidence of bad character. You can contradict your own witness by other evidence, including evidence or statement he made which is inconsistent with his statement.

**Article 585 COCP** - A witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth is bad.

*(1) Before impeaching the credit of a witness by evidence that he has made at other times statements inconsistent with his present testimony, the alleged statements together with the circumstances of time, place and persons present must be related to him and he must be asked whether he has made such statements and he must be allowed to explain them.*

*(2) If the statements are in writing, they must be shown to the witness before any question concerning such statements is put to him.*

**Article 586 COCP** - Before impeaching the credit of a witness by evidence that he has made at other times statements inconsistent with his present testimony, the alleged statements together with the circumstances of time, place and persons present must be related to him and he must be asked whether he has made such statements and he must be allowed to explain them. Generally, when the Police declares that the witness is stating something different, the party can declare that he is a hostile witness. Once this declaration is made and the Court accepts it, he can be asked **direct questions** by the examination-in-chief.

**Article 590 COCP** - A discretion of the Court in cases where public interest is prejudiced or where the questions are personal to the witness. The Court may allow or disallow if it is necessary to the case. You cannot expose a witness to degrading questions. Additionally, no witness may be compelled to disclose any information derived from or relating to any privileged document. For example, Doctors cannot give evidence against their client unless it is allowed by their patient. The same applies to lawyers.

**Article 592 COCP** - Each witness has to be examined **separately**. Witnesses cannot be in the Courtroom whilst other witnesses are giving evidence.

**Article 598 COCP** - As a rule, the Court cannot consider hearsay evidence when the person who gave the information to the witness can be called to testify in Court. The Court may require the witness to mention the person from whom he had obtained that knowledge. This is quite difficult to uphold during an enquiry because every witness is there and then in front of the police / magistrate but one must still ensure that each witness gives evidence separately. In some cases, the Court may allow witnesses to testify together.

**Article 599 COCP** - The Court may, according to the circumstances, allow and take into consideration any testimony on the relation of third persons, where such relation has of itself a material bearing on the subject-matter in issue or forms part thereof.

**Article 602 COCP** - The witness or interpreter can ask the Court to correct his testimony at any stage of the proceedings giving weight to the corrections according to circumstances. Addition or correction shall be noted down.

**Article 605 COCP** - The Court can order a witness not to communicate with other witnesses who are about to be examined.

# The Attorney General

## **The Constitution of Malta, Article 91**

The AG is appointed by the President on the advice of the Prime-Minister.

Same eligibility criteria as Judges of the Superior Courts (12 years practising as a lawyer in the Courts of the Maltese Islands). Appointed until retirement (age 65) – security of tenure and can be removed only on proven misbehaviour, or inability to perform his duties, voted by 2/3 majority of the House of Parliament. The office of AG is Constitutionally independent and shall not be subject to the direction or control of any other person or authority.

*Read the sections in the Criminal Code regarding the Attorney General Read Chapter 90, S.L. 90.01, and article 430 to 435 of the CC).*

Before, the cases were put forward by the Police but since 2000, the AG is now responsible to prosecute for certain crimes (those found in SL 90.01).

Historically, we had the **Avvocato Fiscale** since the 18th century. It was responsible for investigating all kinds of crimes. However, under British rule, the office had prosecutorial powers and also an advisory role for the Government. After the Venice Commission, this was removed. Now we have the Office of the Attorney General and the Office of the State Advocate (who handles **only** Civil matters). Before, the President on the advice of the PM appointed the AG but nowadays, the LN states that there should be a commission to appoint him / her. The office is constitutionally independent and to remove the AG requires  $\frac{2}{3}$  majority of Parliament.

**Cap. 90 article 2** - The role of the AG in Malta is that of chief prosecutor. He has the power to start or discontinue proceedings at any stage.

**Cap. 90 article 3** - Powers of the AG - The MT AG **cannot** order the Police to order an investigation but he may ask the Police Commissioner to do so. In some instances, the AG requires the approval of other authorities to proceed with a case, for example in taxation issues, he must get the approval of the Tax Commissioner. He can also delegate his powers.

- Can demand that the Commissioner of Police investigate any crime or to give the AG any information about the investigation of any crime.
- Can also demand the CoP to issue any charge for any crime.
- Can prosecute any offence, alone or together with the Executive Police or together with any other authority having prosecution powers, or to assist in the prosecution of any offence, before the Court of Magistrates.

- Prosecutes in certain crimes as listed in S.L. 90.01.
- Decides on whether to commence a prosecution for a crime subject to a punishment exceeding the original jurisdiction of the Court of Magistrates as a Court of criminal judicature.
- Can delegate its prosecutorial powers to the CoP or any other public authority having prosecution powers.

### **The AG as a prosecutor in the Court of magistrates and in the criminal Courts**

This is dealt with in article 430 of the criminal code. The AG's role is that of a prosecutor as established in this article. The AG with the police, can prosecute in the Criminal Courts. prior to 2020, the AG only appeared in criminal Courts – he never prosecuted in the Courts of magistrates.

From 2020, the AG started to take on different crimes from the executive police. In the criminal Court, it is only the AG which prosecutes as well as in a trial by jury or in the CoA. The AG also always prosecutes in the name of the **Republic of Malta**.

*Article 430 – spjega tal-poteri tal-AG.*

*Establishes the role of the AG as a prosecutor, though the AG also has other roles.*

*Before 2020, the AG only appeared in the Criminal Court i.e., trial by jury, the Court of Appeal, both inferior and superior jurisdictions. The AG never prosecuted in the Court of Magistrates (CoM); only the police did. Crimes were handled by the executive police.*

*The police never prosecute in the Criminal Court—only the AG prosecutes there. Executive police can be witnesses but cannot prosecute.*

*In trial by jury and the Court of Appeal, only the AG prosecutes. Since 2020, the AG now prosecutes in both the CoM and the Criminal Court.*

*The AG prosecutes in the name of the Republic of Malta i.e. Repubblika ta' Malta vs Name. Previously, cases were noted as Pulizija v. Repubblika*

### **Article 430 Criminal Code**

The Attorney General may, along with the Executive Police, prosecute before the Court of Magistrates and shall be the prosecutor before the Criminal Court. He shall indict in the name of the Republic of Malta and shall proceed ex officio independently of any complaint of the injured party, except in cases where, according to law, no prosecution may be instituted without the complaint of the injured party.

Sub-article 3(b) of the Attorney General Ordinance (Chapter 90):

*(b) notwithstanding anything provided in any other law, and in his discretion, to prosecute any offence, alone or together with the Executive Police or together with any other authority having prosecution powers, or to assist in the prosecution of any offence, before the Court of Magistrates whether as a Court of criminal judicature or as a Court of criminal inquiry, for which a person shall have been charged before such Court.*

**→ Article 3(b) Chapter 9:**

AG has the power to decide whether to prosecute or not. For the AG to be informed about the case, the police must present their investigation to the AG, or the inquiry magistrate transmits the findings to the AG. The AG then decides whether to prosecute and under which charges.

The AG drafts charges together with the executive police – the crimes – and prosecutes. The AG does not have the power to summon someone by arrest or citation [usually the executive police does; however, either the AG or the police can summon someone biċ-ċitazzjoni e.g. kawza ta prigunerija minima, mhux bl-arrest.

There are other authorities which have prosecutorial powers e.g. awtorita' tal-gvern tat-taxxa, AG jipprosekwixxi xi haga relatata ma taxxa, ghandu bzonn il-permess tal-kummissarju tat-taxxa

This involves 3 stages:

- Decision to prosecute
- Drafting of charges
- Prosecution - either under arrest or by citation I summons (Prezentata ol-arrest / citazzioni)

The AG has no power to decide whether to summon someone by arrest or citation. Under arrest, there would usually be the fear of the fact that the person might not appear voluntarily. Not every case takes place through arrest as this can also take place through summons – tahrika ta' xhud. It depends on the case.

Proviso to this article - any article in the Criminal Code or in any other law which confers a function or power on the conduct of Court proceedings in the prosecution of offences before the Court of Magistrates in the Executive Police or in any other authority having prosecution powers shall be deemed to also confer that function or power in the Attorney General.

**Sub-article (a) to the proviso of sub-article 3(c) of the Ordinance of the AG Chapter 90:**

*The powers and functions of the Attorney General provided for in this article shall only apply to certain crimes and, or only to crimes liable to imprisonment for a term as may be prescribed being a term of imprisonment exceeding the original jurisdiction of the Court of Magistrates as a Court of criminal judicature.*

## **Subsidiary Legislation 90.01**

Article 2(1)(2)(3):

(1) The powers and functions of the Attorney General as provided under article 3 of the Attorney General Ordinance shall insofar as they refer to the power to institute and conduct prosecutions before the CoM either as a Court of criminal judicature or as a Court of criminal inquiry apply in respect. Of the crimes listed in the schedule.

(2) Without prejudice to paragraph (f) of item 1 of the Schedule, the powers and functions referred to in sub-regulation (1) shall also apply to any crime charged together with a crime listed in the Schedule.

(3) The powers and functions referred to in sub-regulation (1) shall be subject to being delegated in full or in part by the AG, by general or special direction, to the commissioner of police or another public authority having prosecution powers.

In the exercise of the said functions in relation to the conduct of prosecutions the Attorney General may also, in the absence of delegation, obtain the assistance of the Commissioner of Police or of such other public authority having prosecution powers.

### **Article 2(4) of S.L. 90.01**

In prosecutions conducted by the Attorney General before the Court of Magistrates, some functions are left to the Executive Police:

- the service of charges
- the execution of warrants and orders of arrest or search
- the service of subpoena of witnesses
- the service of any other acts which the prosecution is required to serve on any person
- the execution of judgments and orders

There is also a schedule in this subsidiary legislation which states:

Powers of the Attorney General to prosecute:

The Attorney General shall have the power to decide whether a prosecution is or is not to be instituted in the following categories of offences when the charges are to be filed in the Court of Magistrates as a Court of criminal judicature or in the Court of Magistrates as a Court of criminal inquiry on or after the 1st October 2020.

## **The AG's role in the Court of Magistrates as a Court of Criminal Inquiry**

Article 431 of the Criminal Code:

*Unless otherwise provided in this Code or in any other law, the functions of the Attorney General commence from the day on which the record of the inquiry made by the Court of Magistrates is transmitted by the Court to the Attorney General by electronic means.*

**However, there are instances when the AG has access to the records of the case or performs other functions prior to receiving the records from the CoM.**

- Magisterial Inquiries (article 569 Criminal Code)
- AG together with Executive Police issues charges before the Court of Magistrates.
- The Consent of the AG for cases to be dealt with summarily in cases within the extended competence of the Court of Magistrate (2-6 years imprisonment) - (Article 370(4)).

### **Court of Magistrates as a Court of Criminal Judicature (Articles 370 - 388 of the Criminal Code)**

Summary proceedings:

- to 2 years imprisonment (original competence Article 370(1)(b)).
- 2 to 6 years imprisonment (extended competence with the consent of the AG and of the accused - Article 370(4)).

### **Court of Magistrates as a Court of Criminal Inquiry (Articles 389 - 409A of the Criminal Code)**

Compilation of evidence:

- 6 to 12 years imprisonment - (extended Competence article 370(3) - the Court can convert into a Court of Criminal Judicature - Article 370(3) of the Criminal Code)
- Over 12 years imprisonment - (Trial by Jury - unless the AG issues a counter-order Drug cases and Money Laundering - Articles 432(1) of the Criminal Code).

**Article 432(1) Criminal Code -** The Attorney General shall be allowed the term of one month for the filing of the indictment, to run from the day the Attorney General is granted access by electronic means to the record referred to in the last preceding article.

The said term shall, on the demand of the Attorney General, be extended by the Court to an additional period of fifteen days, and, on the expiration of this other period, by the President of Malta to a further additional period of fifteen days, and, where the matter is such that the

determination of the true nature of the offence necessarily depends upon the lapse of a longer period of time, to such longer period:

Provided, however, that where such a longer period extends beyond forty days, the accused shall have the right to be released on bail.

## **The Court of Magistrates as a Court of Criminal Inquiry - Article 389-409A)**

**Article 389 of the Criminal Code:** In respect of offences liable to a punishment exceeding the jurisdiction of the Court of Magistrates as Court of criminal judicature, the Court of Magistrates shall proceed to the necessary inquiry.

Article 389;

6 yerars + = kumpilazzjoni

Proceura bl-istruttorja; bl-arrest jew citazzjoni – bl-arrest ikun hemm prezentata quddiem il-mag tal-ghassa u l-imputat iwiegeb hux hati. Imur ghand magistrat iehor u tibda' l-fazi ta' prima facie. Bic-citazzjoni m'hemmx prezentata i.e. jibda mill-ewwel.

### **Article 401 of the Criminal Code:**

(1)The inquiry shall be concluded within the term of one (1) month

It can be extended by the President of Malta for further periods each of one (1) month upon good cause being shown, upon a demand in writing by the Court (Cannot be extended to more than three months)

During this time, unless bail has been granted, the accused shall be brought before the Court at least once every fifteen days in order that the Court may decide whether he should again be remanded in custody.

(2)On the conclusion of the inquiry, the Court shall decide whether there are or not sufficient grounds for committing the accused for trial on indictment.

- In the first case, the Court shall commit the accused for trial by the Criminal Court.
- In the second case, it shall order his discharge.
- Record to be transmitted to Attorney General.

(3)In either case, the Court shall order that the Attorney General be granted access by electronic means to a scanned copy of the record of the inquiry, together with all the exhibits related to the case, within three (3) working days.

→ Article 401;



Prima-facie – digriet fejn mag jghid li hemm kaz [ma jidholx fil-mertu imma jara li hemm ragunijiet bizzejjed biex ikun hemm kaz]. Fi zmien xahar jibghat ghand l-AG. Jekk jaqbez ix-xahar jigi liberat.

1 month can be extended for another month. Kumpilazzjoni generalment tinghalaq f'xahar. F'dak il-perjodu l-imputat jitressaq every 15 days inkella jkun hemm illegal arrest u jkollu jigi liberat.

F' dak iz-zmien

- Jintbaghtu l-atti lill AG ghax hemm kaz

- Jew l-akkuzat jigi discharged i.e. jista' jerga jigi msejjah biex iwiegeb ghall-akkuzi fuq provi ohrajn

**Article 401 (3A):** Where the Court has committed the accused for trial by the Criminal Court, it shall adjourn the case to another date, being a date not earlier than one (1) month but not later than six (6) weeks from the date of the adjournment.

The Court shall also adjourn the case as aforesaid to a date falling after the Court shall have received the note of referral according to sub-article (2) of article 405 from the Attorney General and falling before the date when it shall grant access again by electronic means to the record of the inquiry together with all the exhibits and documents in the case to the Attorney General in terms of any provision of this Code.

### **Article 432(1) of the Criminal Code:**

The Attorney General shall be allowed the term of one month for the filing of the indictment; to run from the day the Attorney General is granted access by electronic means to the record referred to in the last preceding article.

The said term shall, on the demand of the Attorney General, be extended by the Court to an additional period of fifteen days, and, on the expiration of this other period, by the President of Malta to a further additional period of fifteen days, and, where the matter is such that the determination of the true nature of the offence necessarily depends upon the lapse of a longer period of time, to such longer period:

Provided, however, that where such a longer period extends beyond forty days, the accused shall have the right to be released on bail.

### **Article 405 of the Criminal Code:**

(1) The Court shall, after ordering that the Attorney general be granted access by electronic means to the record of the inquiry and to all the



**It-tieni (2) jum mix-xahar ta' Diċembru tas-sena elfejn u hamsa u ghoxrin (2025)**

Lill-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja

L-Avukat Ġenerali fuq l-atti tal-Kompilazzjoni magħmulin kontra:

**ISEM L-IMPUTAT**

jitolb illi l-Qorti hawn fuq imsemmija, taht dak li hemm imsemmi fl-Artikolu 405 tal-Kodici Kriminali, joghegħba:

exhibits in the case, after ordering the committal of the accused for trial, and before the filing of the bill of indictment, upon the demanding writing of the Attorney General, further examine any witness previously heard or examine any new witness

(2) The Attorney General shall, for such purpose, transmit to the Court the demand, stating therein the subject on which the examination or re-examination is to take place

(3) The witnesses shall be examined or re-examined in the presence of the accused in order that he may have the opportunity of cross-examining them, and, for such purpose, the Court shall order the accused, if in custody, to be brought up, and, if not in custody, to be summoned to appear before it.

(8) The Court shall proceed to take any other action or measure relating to the inquiry as may be demanded in writing by the Attorney General.

→ Suppost sedura ssir wara li jghaddi t-terminu tal-AG. Seduta wara li l-magistrat jircievi lura l atti m'ghand l-AG skont 405(2).

Recap:

- Jitressaq xi hadd il-qorti
- Mag inkwerenti ghandu xahar biex johrog l-att tal-akkuza i.e. digriet tal-prima facie
- AG qabel jiskadi x-xahar jista jibghat ir-rinviju

Article 405

(1) AG jara kollox [l-atti kollha] – jiddeciedi johrogx l-att ta' akkuza [fi zmien xahar] jew jilliberahx sa qabel il-guri. F'dak x-xahar jista' jirrinvija l-atti e.z. minhabba iktar provi. Irid jara li l-provi kollha jkunu prezentati.

l-atti jmorru within 3 working days [minn meta tispicca s-seduta] – jekk le hemm proceduri ohra biex issalva l-procedura.

wara johrog id-digriet prima facie qabel johrog l-att ta' akkuza – l-AG jaghmel bil-miktub biex jezamina iktar xhieda/dokumenti biex jigu prezentati (rinviju) -> provi jinghalqu meta jiddeciedi l-AG.

Recap:

- Prezentata
- Xahar ghad-degriet prima facie
- 3 working days ghal ghand l-AG
- Qabel jiskadi x-xahar jidhol il-405.

(3) Xhieda kollha isiru quddiem l-imputat apparti meta jissejjah u ma jidhirx.

(4) akkuzat ghandu d-dritt ghall-kontro-ezami

(8) ez. Ttella d-dokumenti.

Sakemm AG jibqa' johrog ir-rinviju, il-mag irid jibqa' jiddiferixxi.

### **Il-Pulizija vs Josph Lebrun (Qorti Kostituzzionali)- Deciza 9 ta Frar 2007:**

"Issa, jekk il-Qorti Istruttoria tiddeciedi li hemm ragunijiet bizzjejed biex -imputat jitgieghed that att ta akkuza - decisioni li, kif rajna, ma hijiex 'decisive for the determination of the criminal charge' - l-Avukat Generali, li lili l-legislatur afda bir-responsabbilta tal-prosegwiment tal-prosekuzzoni fil-kaz li jkun, jista' jaghmel wahda minn erba' affarijiet".

[-...]

"Jista' wkoll - din hi t-tieni linja li l-Avukat Generali jista' jiehu - jidhirl li ghandu bzonn li l-Qorti Istruttoria tigborlu aktar provi, u ghalhekk jipprocedi skond l-Artikolu 405(1)." (Read Para 12 to 15)

### **The Republic of Malta vs Daniel Muka (Criminal Court) - Deciza 18 ta' Ottubru 2022**

'During the term mentioned by article 432(1) of the Criminal Code, the Attorney General was however not obliged to immediately file the bill of indictment. The Attorney General could - after receiving the records of the inquiry in terms of Article 401(3) of the Criminal Code - re-hear a witness that had already testified or brought further evidence if he considered it necessary to do so. Article 405 of the Criminal Code allowed the Attorney General to make any such request after that the Court of Magistrates as a Court of Criminal Inquiry committed the accused for trial on indictment'.

### **Il-Pulizija vs Joseph Lebrun - Ruling (digriet) of the Criminal Court - 18th January 2006**

"Issa, jekk wiehed jara l-istruttura u l-kontenut tad-diversi disposizzionijiet tal-ligi li b'xi mod jaghtu setgha jew setghat lill-Avukat Generali - u speċjalment jekk wiehed jara l-Artikoli 402(5), 405, 431(2), 432 u 433 tal-Kodici Kriminali - huwa evidenti li l-Avukat Generali, bhala l-prosekutur quddiem din il-Qorti u ghalhekk bhala l-persuna li fuqu taga' responsabbilta\* jassigura li l-attijiet tal-kompilazzjoni kuni istruwiti minn kollox (sa fejn hu desiderabbli u umanament possibbli) gabel ma jichu daecizioni finali biex jigi guadiem din il-Qorti batt ta akkuza, ma hux marbut li, meta jkun ipproceda skond l-Artikolu 433(3), huwa bilfors irid jghaddi dritt ghall-att ta' akkuza.

L-obbligu ta' l-Avukat Generali li jistruwixxi l-process huwa obbligu li necessarjament jipprocedi l-att ta' akkuza, proprju biex huwa jkollu dejjem l-istampa cara u kompleta gabel ma jiddeciedi li jipprocedi b'wiehed mill-modi msemmija fil-paragrafu precedent".

## **Repubblika ta Malta vs George Degiorgio u Alfred Degiorgio (Qorti tal-Appell Kriminali) - Deciza 22 Ta Gunju 2022**

“L-artikolu 405 li ghalih jirreferi l-artikolu 406(4) jidentifika ruhu ma' dak l-istadju istruttorju quddiem il-Qorti tal-Magistrati fejn, meta dik il-Qorti fil-vesti istruttorja taghha, tibghat l-atti lill-Avukat Generali sabiex imputat jitqieghed taht Att ta' Akkuza u jekk l-Avukat Generali ma jkunx ghadu hareg tali Att jista' jerga' jibghat l-atti lura lil dik il-Qorti biex tisma xhieda ohra jew terga' tisma' xhud jew xhieda skond il-kaz. Dan ir-rinviju jista' jsir b'mod ripetut u bla zmien naturalment fil-konfini tad-dritt ta' smiegh xieraq fi zmien ragjonevoli”.

### **Recap: articles 431 and 422**

When AG receives acts of inquiry – process of RINVIJU – when AG before issuing a bill of indictment, AG sends back the acts of inquiry for the Court to hear further evidence.

### **Defects in acts of criminal inquiry**

If AG identifies defects in criminal inquiry, provision enables the Court to amend or rectify the criminal process to be non observance of provisions of the Code (mhux kwalunkwe haga).

e.g. qorti tal-akkuza jkun hemm prezentata u ma jkunx hemm l-ezami tal-imputat (jghid hux hati jew le). Hemm difett u l-kumpilazzjoni terga' tibda mill-bidu. Problema jekk xi hadd jinduna xi 5 snin wara li jkunu bdew il-proceduri u waslu biex jaghlqu l-provi - difiza iridu jezentaw il-prosekuzzjoni milli jipprovdu iktar evidenza. AG jghid li hemm difett – kumpilazzjoni terga' tibda i.e. provi jittellghu mill-gdid. Difiza kapaci ma jezentawx ez jkun ghadda zmien twil.

### **2 options**

1. Court proceeds afresh with the inquiry
2. Recourse be rectified as per circumstances

Mhux blfors tibda mill-bidu, skont ic-cirkostanzi.

Jibghathom lura u x'hemm hazin u liem artikolu ma giexn osservat

RINVIJU tal-hamest ijiem – 5 working days for CoM to act on what the AG demands.

Back to article 431 – AG jircievi atti tal-kumpilazzjoni u ghandu xahar biex johrog att tal-akkuza jew rinviu.

Kif tiddistingwi bejn **options** 1 u 2?

*Article 597(4) Criminal Code - The indictment cannot be impugned on the ground of any defect in the record of inquiry, nor can the accused demand that, on the ground of any such defect, the trial on the said indictment be not proceeded with, unless such defect consists in the total absence of the charges being read or of the examination of the accused or of the order*

*committing the accused for trial, or in the refusal of the Court of criminal inquiry, without just cause, to hear the evidence produced by the accused; saving always the right of the accused and the Attorney General to oppose the production, at the trial, of any act tendered in evidence which is not according to law.*

Jitkellem fuq l-att ta' akkuza u atti.

Kull meta jkun hemm wahda minn dawn li ma gitx osservata il-kaz jerga jibda' ez jsir ezami mill gdid u AG jibghat rinviu biex jerga jinstema l-kaz. Jekk difiza jezentaw provi mill gdid jigi ntifikat bil-verbal u tkompli l-kompilazzjoni jekk le terga tinstema x-xhieda bil-gdid.

Zbalji ohrajn jistghu jigu kkoreguti b' article **520 COCP**.

e.g. inkiteb hazin l-isem tal-imputat -> korrezzjoni. Xi haga li ma ggibx in-nullita tal-atti (ipoggu lill-imputat fi' zvantagg).

Article 175 COCP (Chapter 12) (applicable to the Criminal Code by means of article 520 of the Criminal Code):

The Court may, at any stage of the proceedings, at the request of any of the parties, until judgment is delivered after hearing where necessary the parties, order the substitution of any act or permit any written pleading to be amended, either by adding or striking out the name of any party and substituting another name therefor or by correcting any mistake in the name or in the character of the parties, or by correcting any other mistake or by causing other submission of fact or of law to be added even by separate note, provided that no such substitution or amendment shall affect the substance either of the action or of the defence on the merits of the case.

**Repubblika ta' Malta v. Aleksander Stojanovic, Court of Appeal (Superior Jurisdiction)**  
**Decided 22nd May 2024**

“The Criminal Court decided in the following manner with reference to this plea:

This Court considers that the Attorney General was correct in not resorting to the provisions of Article 432(2) of the Criminal Code when requesting a rectification of the error in the date in figures which did not reflect the date in words which was on the other hand correct and which error was obviously a lapsus calami or komputeris, and in simply proceeding to rectify this lapsus komputeris by requesting a correction in terms of article 175(1) of Chapter 12 of the Laws of Malta which provision of the law was also made applicable to criminal proceedings as per Article 520(1)(c) of the Criminal Code. The record of the inquiry was not defective because of any non-observance of any of the provisions of the Criminal Code or of any other law and therefore Article 432(2) of the Criminal Code was not applicable and the Court of Magistrates (Gozo) as a Court of Criminal inquiry was correct in acceding to the Attorney General's request.

Eccezzjonijiet – nuqqasijiet procedurali/legali fl-att tal-akkuza.

Zball fl-inviu f'dal kaz i.e. AG kiteb data zbaljata u korrezzjoni giet mitluba abbazi ta' dan l-artikolu.

Certu diffetti jistghu jsiru bil-175(1) – korrezzjoni ta' preguzzju għall-imputat u tal-atti nfushom isiru bil-432(2).

Rinviju tal-hamest ijiem;

Spjega ta' x gara bhala difett fir-rinviju u step by step il-qorti tal-mag xi trid tagħmel. Qorti hamest ijiem biex tagħmel dan. Jekk le tibghat l-atti lill-AG

We're talking about CoM as Court of crim inquiry;

- 0-2years original competence
- 2-6 years extended competence – kunsens tal-AG.

Powers of AG to demand which Court

### Article 370(4)(a)



Reat inqas minn 6 snin – Pulizija għandhom bżonn il-kunsens/awtorizzazzjoni tal-AG (avukat għassa dakinhar) u qorti ma tkunx kompetenti tisma' l-kaz.

Waqt li jkun qed isir ezami hux hati jew pero qabel jghid hux hati jew le – sommarily i.e. jibqa fil-kompetenza tal-qorti (extended competence). Imputat irid jagħti l-kunsens.

Imp imputat ikollu l-hin jitkellem mal-avukat biex jistaqsi fuq il-konsegwenti tad-decizjoni – generalment ikun hemm is-sospensjoni tal-kawza. Titnizzel fil-verbal generalment li ingħata hin opportun.

Jekk ma jkunx hemm kunsens = qorti tibqa' struttorja.

AG jestradi l-kwza i.e. liema qorti se tkun.

=

**The powers of the AG to demand which Court should have competence to decide on the merits of the case:**

3 ways:

Skond l-Artikolu 370(4) tal-Kodici Kriminali jien nagħti l-kunsens tiegħi sabiex il-kaz ta' (Isem l-Imputat) fl-ismijiet:

**Il-Pulizija  
(Spettur XXXXX)**

**versus**

**Isem l-Imputat**

jigi trattat bi procedura sommarja.

Għall-Avukat Generali

1. Extended competence of the Court of Magistrates (2 to 6 years imprisonment – Article 370(4))
2. Note of remittance / Rinviju bl-Artikoli – (Article 370(3))
3. Bill of Indictment / Att ta Akkuza – (Article 432(1))

### **TIENI MOD: Note of remittance**

Fl-istuttorja provi jinghalqu meta johorg rinviju tal-artikolu.

Sakemm AG ma johrogx artikolu abbazi ta' 370(3) jibqghu provi tal-prosekuzzjoni – kif johrog il-provi jieqfu u tmur provi difiza.

Imputat jista' jaghzel li jmur guri. Qorti minghajr kunsens tal-imputat ma tistax tkun kompetenti tisma' l-kawza tiddeciedi.

Reasonable time = ikellem l-avukat, sentenza sospiza u jara jridx il-kaz ikun sommarju.

Xahar – jekk AG jara hemm l-atti kollha jekk sa 12 years improsnment johrog ir-rinviju. Jekk hu joggezzjoni li l-kaz jigi trattat bil-procedura sommarja, tkompli ghaddejja bil-kumpilazzjoni normali.

If the accused Objects (Article 370(3)(d)):

- If the accused objects to the case being dealt with summarily, the Court shall order that the record of the case be transmitted to the Attorney General, by electronic means, within the term determined in article 401(3), for the case to be dealt with according to law.
- In such a case the term referred to in article 432 for the filing of the indictment shall run from the day on which the Attorney General shall be granted access by electronic means to the record of the case.

(Article 370(3)(a)(b)(c))

Any person charged with a crime punishable with imprisonment for a term exceeding two years but not exceeding twelve years.

On the demand of the Attorney General.

The Court shall ask the accused whether he objects to his case being dealt with summarily. The Court shall give a reasonable time to the accused to reply to this question.

If the accused replies that there is no objection the Court shall note the reply in the records of the proceedings and thereupon the Court shall become competent to try the accused and shall proceed to give judgment forthwith as provided in article 377.

### **Article 370(3)(E)**

Kaz fejn hemm bosta nies li huma komplici/ ghenu fir-reat = same charge – akkuzi jistghu jkunu differenti. Jekk xi hadd joggezjona li l-kaz ikun bi proceduri sommarja – sturttorja. Min ma joggezzjonax jibqa ghaddej bil-qorti tal-mag bhala qorti tal-gudikatura kriminali.

Problema: Provi jittghellu darbtejn u xhieda jafu jhawdu.

Artikolu tal-ligi li fuqhom il-qorti trid tibbaza; AG ma jistax izid milli jkun hemm akkuzi – jista’ jnaqqas e.z. jzid skuzani biex jitnaqsu l-pieni. Qorti marbuta bl-artikoli – fuqhom tista’ tinsab htija.

Ir-rinviju bl-artikolu jista’ jkun kundizjonat i.e. jaf ikun fadal xi xhieda li qorti trid tisma’ qabel taqra l-AG jara li jkun fadal xi xhieda. Qabel taqra l-artikoli l-qort trid tisma’ x xhieda li jkun hemm fil-qorti tal-mag.

In case there are two or more accused (Article 370(3)(e)):

If there are two or more accused and the only one of them objects the provisions of Article 370(3)(d) shall apply only in respect of any one or more of the accused who makes objection to the case being dealt with summarily.

## PROCESS (STRUTTURA)

1. Presentata (hati/mhux) - ezami
2. Mag jiftah kumpilazzjoni
3. Xahar biex johrog rinviju prima facie
4. F’xahar qorti tibghat atti l-AG
5. L-AG f’xahar jew johrog att ta’ akkuza jew jibghat rinviju bl-artikolu ghall-gudizzju INKELLA jigi liberat.

## Pulizija v. Peter sive Pierre Falzon

Rinviju bl-artikoli – qorti tigi vestita bhala qorti ta’ gudikatura kriminali.

Mhux biss rinviju immja kunsens huma imp biex qorti tinbidel f’ qorti ta’ gudikatura kriminali. Procedura struttoria jekk ma jinghatax il-kunsens.

Qorti tal-Appell (Inferjuri)

Deciza 23 ta’ Frar 2024

*“Minn qari ta’ din id-disposizzjoni tal-ligi jemergu dawn iż-żewġ fatturi determinanti kif spjegat hawn fuq, u cioè’, illi fl-ewwel lok meta l-Avukat Ġenerali jibghat in-nota ta’ rinviju għal gudizzju tiegħu huwa qieghed jadixxi l-Qorti fil-vesti tagħha ta’ Gudikatura Kriminali. Il-Qorti, madanakollu, hekk adita, tista’ tgħaddi għal gudizzju biss jekk l-imputat jagħti l-kunsens tiegħu sabiex hekk isehh. Meta dan il-kunsens ma jinghatax allura il-Qorti ma għandhiex il-kompetenza tisma’ u tiddeciedi l-każ u trid terġa’ tirrinvija l-atti lill-Avukat Ġenerali sabiex tinħareġ l-att*



It-tieni (2) jum mix-xahar ta’ Ġunju tas-sena elfejn u tlieta u għoxrin (2023)

Lill-Qorti tal-Maġistrati (Malta) bhala Qorti Istruttoria:

**L-AVUKAT ĠENERALI**

Wara li ra l-Att tal-Kompilazzjoni magħmula kontra:

**ISEM L-IMPATAT**

u mibgħut lill fl-4 ta’ Mejju tas-sena elfejn u tlieta u għoxrin (2023),

Billi jidherli illi mill-kompilazzjoni hawn fuq imsemmija tista’ tinstab htija (jew htijiet) taht dawk li hemm maħsub:

1. Fl-artikoli 214, 215, 216, 217, 218 tal-Kodiċi Kriminali, Kapitolu 9 tal-Liġijiet ta’ Malta;
2. Fl-artikoli 17, 31, 532A, 533 tal-Kodiċi Kriminali, Kapitolu 9 tal-Liġijiet ta’ Malta;

Iddecieda illi kif hemm maħsub fl-Artikolu 370(3)(a) tal-Kodiċi Kriminali jibghat lill-imputata sabiex tigi ggudikata mill-Qorti hawn fuq imsemmija.

Għalhekk, qed jibghat lura ma dan l-Att, l-Att tal-Kompilazzjoni hawn fuq imsemmija lil din il-Qorti sabiex, f’nuqqas ta’ oġġezzjoni tal-imputat skont dak li hemm maħsub fl-Artikolu 370(3)(b) u (c) tal-Kodiċi Kriminali, tiddeciedi fuq l-akkuza ta’ din il-htija jew htijiet, jew f’każ ta’ oġġezzjoni, tipproċedi skond l-Artikolu 370(3)(d) tal-Kodiċi Kriminali, b’dan però, li qabel ma l-Qorti tistaqsi lill-akkużat jekk għandux oġġezzjoni li l-każ jigi trattat bi procedura ~~summaria~~, il-Qorti għandha, skond kif hemm provdut fl-Artikolu 370(3)(f) tal-imsemmi Kodici;

(a) Tiehu konjizzjoni ta’ kull prova oħra li l-Pulizija jidhrilha xierqa li tressaq f’dan il-każ.



*ta' l- akkuza. Fil-fatt issub-inciz (b) jipprovdi illi meta l-atti jinbagħtu lura lill-qorti sabiex tiġġudika dak id-delitt, il-qorti għandha tistaqsi lill-akkużat jekk għandux oġġezzjoni illi l-każ tiegħu jiġi ittrattat bi proċedura sommarja u taġġtih, fid-diskrezzjoni tagħha, żmien xieraq biex iwieġeb għal din il-mistoqsija. Dan ifisser illi ir-rwol tan-nota ta' rinviu għal gudiżżju jagħti lil Qorti tal- Magistrati is-setgħa li tiddeċiedi l-każ prevja ovvjament l-kunsens tal-imputat”.*

### **Pulizija v. Michael Carter.**

Rinviju hu ekwivalenti għall-att tal-akkuza.

AG jistabilixxi reati li fuqhom qorti trid tistabilixxi. Jista' jnaqqas jew izid l-iskuzanti. L-artikoli qishom att t'akkuza.

AG jaf jagħmel il-kotro-ordni (will be dealt with later on)

*0-6 years → kunsens tal-AG jibgħatu qabel xi hadd jitressaq il-qorti (qabel il-prezentata).*

### **Il-Pulizija vs Michael Carter Qorti tal-Appell (Inferjuri) Deċiża 7/10/21**

*“ir-rinviju għall-gudiżżju jsir skond is-subartikolu (3) tal-Artikolu 370 (u allura wiehed qed jitkellem fuq għall-anqas reat wiehed, fost dawk imputati, li huwa ta' kompetenza tal-Qorti Kriminali), in-nota ta' rinviu għall-gudiżżju tassumi rwol simili għal dak ta' l-att ta' akkuza quddiem il-Qorti Kriminali. Fin-nota ta' rinviu għall-gudiżżju skond l-Artikolu 370(3) ma jistgħux jizdiedu reati li dwarhom ma tkunx saret il-kumpilazzjoni; l-Avukat Generali, naturalment, jista' jnaqqas reat jew reati u anke jzid skuzanti. Bhal fil-każ tal-att ta' akkuza, jekk fin-nota ta' rinviu għall-gudiżżju taht l-imsemmi Artikolu 370(3) l-Avukat Generali jakkuza lil xi hadd bħala awtur ta' reat, il-Qorti tal-Magistrati, wara li tkun akkwistat il-kompetenza bil-kunsens ta' l-akkużat (Art. 370(3)(c)), tista' ssibu hati ta' tentattiv ta' dak ir-reat, jew ta' reat iehor anqas gravi izda kompriz u involut f'dak ir-reat, jew bħala komplici f'dak ir-reat.”*

## **Bill of indictment / Att ta' Akkuza (Article 432(1))**

The Attorney General shall be allowed the term of one month for the filing of the indictment, to run from the day the Attorney General is granted access by electronic means to the record referred to in the last preceding article. The said term shall, on the demand of the Attorney General, be extended by the Court to an additional period of fifteen days, and, on the expiration of this other period, by the President of Malta to a further additional period of fifteen days, and, where the matter is such that the determination of the true nature of the offence necessarily depends upon the lapse of a longer period of time, to such longer period.

Sections 588 – 602 -> kif ghandha ssir l-att tal-akkuza.

Att tal-akkuza jkun miktub.

Pul/AG jaghmlu l-akkuzi meta tinfetah kawza. Kull charge ghandha chapter ghaliha.

Charge tkun maqsuma f' :

1. Fatti fil-qosor = biex imputat jifhem ghala qed jitressaq.

Fl-guri ghalkemm atti tal-akkuza jinqara, li hu mhux determinanti – dak li hu viva voce hu determinanti.

Lista ta' xhieda mal-att tal-akkuza – difiza jistghu jresqu eccezzjoni li xhud mhux permissibbli wara I tohrog il-lista.

AG jekk ma jzid skuzant irid ikun rifless fin-narrattiva tal-att tal-akkuza.

2. Maqsuma fi tnejn

- a. Akkuzi

- b. Piena (generalment il massimu)

Jekk AG jara hemm diversi skuzani piena stabbilita skonthom ukoll.

Lista ta' xhieda mal-att tal-akkuza – lista tax xhieda li telghu jixhdu. Jekk AG jara li ttellghu xhieda li mhux imp jista' ma jtellagghomx. Diiza jistghu jresqu eccezzjoni xhud ma jridx jinstema jew mhux relevanti etc.

### **Article 602;**

Xahar jinqabez = liberatorja.

### **On the bill of indictment Articles 588 to 602 of the Criminal Code**

In the case of offences within the jurisdiction of the Criminal Court, the indictment shall be drawn up in writing by the Attorney General (Article 588).

## **Content of the Bill of Indictment – Article 589**

The indictment shall be made in the name of the Republic of Malta and shall –

- (a) specify the Court before which it is preferred;
- (b) contain a clear indication of the person accused;
- (c) state the facts constituting the offence with such particulars as can be given relating to the time and place in which the facts took place and to the person against whom the offence was committed, together with all such circumstances as, according to law and in the opinion of the Attorney General, may increase or diminish the punishment for the offence; and
- (d) end with a summary in which the accused shall be charged with the offence as specified or described by the law, and with the demand that the accused be proceeded against according to law, and that he be sentenced to the punishment prescribed by law (quoting the article of the law creating the offence) or to any other punishment applicable according to law to the declaration of guilty of the accused.

Article 592(2): With the indictment the Attorney General shall also file a list of the witnesses, documents and other exhibits which he intends to produce at the trial.

Article 601: No person accused may be found guilty of an offence which is not expressly stated in the indictment,

Article 602: Where the indictment is not filed within the prescribed time, the Court may, at the request of the accused, and after hearing the Attorney General, order the discharge of the accused, and the provisions of article 434 shall, mutatis mutandis, apply

## **Repubblika v. Stiano Agius u Eleonor Tracy Agius, Qorti tal-Appell Kriminali (Superjuri) Deciza 09/01/2014**

Reference to Articles 588 & 589;

Fatti = AG jaghmel summary tal-provi li jkun hemm.

Akkuza = imputata jidhem fejn, meta u b' liema akkuzi qed jigi mixli.

Difett fin-narrattiva johrog mill provi i.e. ma jgibx in-nullita.

Li jghodd = kif jigibu ruhhom ix-xhieda quddiem il-gudikanti/guri – iserhu fuq dak li jigri quddiemhom.

“‘Illi skont l-artikolu 588 tal-Kodici Kriminali ‘l-att tal-akkuza ghandu jigi maghmul bil-miktub u ghandu jigi iffirmit mill-Avukat Generali’ u skont l-artikolu 589 tal-istess Kodici ‘L-att tal-akkuza jsir fl- isem tar-Repubblika ta’ Malta’. Ghalhekk, meta fl-artikolu 589 tal-istess Kodici jinghad li l-att tal- akkuza ghandu jfisser il-fatt li jikkostitwixxi r-reat u l-partikolaritajiet l-ohra msemija fl-istess artikolu dan ma jistax ifisser hlief li l-att tal-akkuza ghandu jfisser il-fatt u partikolaritajiet l-ohra msemija skont kif jifhimhom li graw l-Avukat Generali f’isem ir-Repubblika ta’ Malta. Il-provi in sostenn tal-fatt li jikkostitwixxi r-reat u tal-partikolaritajiet

l-oħra skont l-att tal-akkuza, imbagħad, jingiebu mill-Avukat Generali fil-kors tal-process fl-istadju opportun”.

### **Repubblika ta Malta vs Daniel Felice Qorti tal-Appell Kriminali (Superjuri) Deciza 23/3/17**

“Jekk l-Avukat Ġenerali fehem li l-fatti huma dawk kif minnu narrati fl-Ewwel Kap ta’ l-Att ta’ Akkuza, sta għalih biex iġib il-provi biex isostnihom. Da parti tagħha l-Qorti Kriminali, kif tajjeb osservat fis- sentenza tagħha, trid twissi lill-ġurati li l-parti narrativa ta’ l-Att ta’ Akkuza ma tista’ qatt tittiehed bħala prova peress illi huwa biss fuq ix-xhieda u provi dokumentarji li l-ġurati jistgħu jserrġu l-verdett tagħhom. Ċertament mhuwiex il-kompitu tal-Qorti Kriminali u wisq anqas ta’ din il-Qorti fl-istadju ta’ l- eċċezzjonijiet preliminari li jagħmlu apprezzament tal-provi kollha li jkunu ngabu tul il-kompilazzjoni biex jaraw jekk prova partikolari tirriżultax jew le. Hija kwistjoni rimessa f’idejn min fl-aħħar mill-aħħar irid jiddeċiedi dwar il-fatti. Inoltre, salv dak dispost fil-proviso tas-subartikolu (1) ta’ l-artikolu 435 tal- Kodiċi Kriminali u fis-subartikoli l-oħra ta’ dak l-artikolu, is-subartikolu (1) jipprovdi: “L-Avukat Ġenerali jista’ jiġbor u jgħib provi oħra ma’ dawk li jkunu ngiebu filkompilazzjoni”

### **Repubblika v. Mark Brincat, Qorti tal-Appell Kriminali (Inferjuri) Deciza 8/4/10**

“Kwantu għall-ewwel parti ta’ l-ewwel eccezzjoni, din hi msejsa fuq dak li jipprovdi l-Artikolu 449(5)(b) tal-Kap. 9. Issa, kif gie ripetutament imfisser mill-Qorti ta’ l-Appell Kriminali, l-iskop tad-diversi disposizzjonijiet li jghidu kif għandu jkun redatt l-Att ta’ l-Akkuza u x’għandu jkun fih huma intizi mhux għas-sempliċi gost tal-formalizmu izda biex l-akkuzat ikun jaf sew biex qed jiġi akkuzat u għalhekk biex ikun jista’ jipprepara ruhhu sew għall-guri u jgħib provi oħra ma’ dawk li jkunu ngiebu filkompilazzjoni”.

The AG may decide:

To join charges on the same offence against two or more persons (both as principles or as accomplices) together in the same bill of indictment. (Art 591)

Can also join charges of diverse offences connected with each other in the same bill of indictment. (Art 591) When offences are said to be connected: (Art 592(a)(b)(c)(d)):

- (a) if they are committed at the same time by several persons together;
- (b) if they are committed at different times, in different places, and by divers persons, in pursuance of a preconcerted plan;
- (c) if an offence is committed with the object of procuring the means for the commission of another offence;
- d) if an offence is committed with the object of facilitating the commission or completion of another offence, or of ensuring impunity for another offence.

The AG may decide to join in the same indictment several offences committed by the same person although not connected with each other even when one or more offences is of an inferior jurisdiction. (Art 593)

The bill of indictment shall be divided in different counts each count following the procedure in article 589.

The AG may demand the Court to order a separate trial for each accused when two or more are joined in the same indictment. (Art 594).

The AG can demand the Court to order joinder of indictments in cases where two or more indictments have been filed at the same time or at different times. (Art 595).

The AG may include excuses in the bill of indictment (Art 596)

***Article 592(a)(b)(c)(d)***

Kif l-AG jista' jipprepara l-att ta' akkuza

- a) Att ma akkuza wahda ghal zewg persuni jew iktar
- b) Reati konnessi i.e. AG jista' jdahhal diversi reati ta' diversi imputati f'akkuza wahda
- c) ez reati li wiehed ghamel ftit qabel/wara

***Article 594;***

Ez kazijiet ta droga – wiehed lest jikxef lill iehor

Kull imputat ikollu att ta' akkuza ghalih.

***Article 595;***

Hafna nies allura mhux possibli jitla kulhadd f'darba JEW fuq l-istess reat jinqabdu fi zmien differenti.

Att ta' akkuza wahda fl-ahhar – esebiti wiehed, lista' ta' xhieda wahda etc.

**Corrections to the Bill of Indictment**

Article 597(2)(4) - aggravanti jridu jirrivultaw mill-atti/akkuzi

597(2) and 597(4) Corrections to Bills of Indictment. All evidence against the accused must be signed by the Magistrate. If not, they are going to be raised as a defence and removed from the list of evidence. Same for documents with many pages - they have to be numbered and if not, the document will be removed from the evidence list.

Article 597(2): The AG can demand the Court to order the correction of the bill of indictment. The demand has to be made before the accused pleads guilty or not guilty.

Nothing can be added which renders the offence graver.

Article 597(4):

*The indictment cannot be impugned on the ground of any defect in the record of inquiry, nor can the accused demand that, on the ground of any such defect, the trial on the said indictment be not proceeded with, unless such defect consists in the total absence of the charges being read or of the examination of the accused or of the order committing the accused for trial, or in the refusal of the Court of criminal inquiry, without just cause, to hear the evidence produced by the accused; saving always the right of the accused and the Attorney General to oppose the production, at the trial, of any act tendered in evidence which is not according to law.*

### **Article 600 - Withdrawal of the indictment**

*(1) It shall be lawful for the Attorney General to withdraw any indictment which he may have filed, provided this is done before the accused pleads to the general issue of guilty or not guilty, and in any such case all further proceedings shall be stayed, and the accused shall be discharged; but when the accused shall have pleaded to the general issue of guilty or not guilty, the indictment may not be withdrawn without the consent of the accused.*

*(2) In either case, the withdrawal of the indictment shall not operate so as to bar the taking of entirely new proceedings against the accused, on the discovery of fresh evidence.*

→ AG may withdraw the Bill of Indictment **if** he does so before the defendant enters a guilty or not guilty plea. If the accused enters a not guilty plea and the AG wishes to withdraw the indictment, the AG may only do so with the prior consent of the Defendant.

As you can see, the AG is more important than the Court itself because he can decide who to prosecute, when to prosecute, issue nulle prosecui, etc.

**Article 3(2A)(b)(c) of Chapter 373 Cases of Money Laundering** - AG has a big discretion here to decide in which Court to prosecute. For example, if the case exceeds the thresholds of a Court of Magistrates, he may direct the person to be tried there, as long as he does it before drafting the Bill of Indictment. He must do this with the consent of the accused. This is to avoid unnecessary burdens on the Courts. For example, although the sentence carries a maximum of 18 years in prison, the AG would know that the defendant will not get that sentence because the crime is small.

-This gives the authority to the CoM to convert itself to a Court of criminal judicature. Another possibility where this happens is in Drug related Offences - Chapter 101 of the Laws of Malta Article 31 of Chapter 101:

*(b) Notwithstanding that the Attorney General has directed in accordance with the provisions of paragraph (a) that a person be tried in the Criminal Court, he may, at any time before the filing*

*of the bill of indictment or at any time after filing the bill of indictment before the jury is empanelled, and with the consent of the accused, direct that that person be tried before the Court of Magistrates, and upon such direction the Court of Magistrates as a Court of criminal jurisdiction shall become competent to try that person as if no previous direction had been given.*

**Article 31 of Chapter 101 Drug related Offences** - Same discretion as above but here, note that some crimes carry life imprisonment.

*Notwithstanding that the Attorney General has directed in accordance with the provisions of article 22(2), that a person be tried in the Criminal Court, he may, at any time before the filing of the bill of indictment or at any time after filing the bill of indictment before the jury is empanelled, and with the consent of the accused, direct that that person be tried before the Court of Magistrates, and upon such direction the Court of Magistrates as a Court of criminal jurisdiction shall become competent to try that person as if no previous direction had been given. Where the Attorney General has given such new direction after the filing of the bill of indictment, the registrar of the Criminal Court shall cause the record to be transmitted to the Court of Magistrates, and shall cause a copy of the Attorney General's direction to be served on the Commissioner of Police.*

*Notwithstanding that the Attorney General has directed in accordance with the provisions of article 22(2), that a person be tried in the Criminal Court, he may, at any time before the filing of the bill of indictment or at any time after filing the bill of indictment before the jury is empanelled, and with the consent of the accused, direct that that person be tried before the Court of Magistrates, and upon such direction the Court of Magistrates as a Court of criminal jurisdiction shall become competent to try that person as if no previous direction had been given. Where the Attorney General has given such new direction after the filing of the bill of indictment, the registrar of the Criminal Court shall cause the record to be transmitted to the Court of Magistrates, and shall cause a copy of the Attorney General's direction to be served on the Commissioner of Police.*

### **Other Powers of the AG**

433(1) Criminal Code - Powers of the AG to discharge a person accused. This must be done in that month where the Bill of Indictment has to be issued.

433(2) Criminal Code - Power of the AG to withdraw the bill of indictment.

433(3) Criminal Code - Powers of the AG to arrest a person discharged by the Court of Magistrates. Very important. Read 401(2) part 2. Discharged means that the Courts of Magistrates did not find enough prima facie evidence against the accused. The AG has one month to file an appeal to arrest the accused and charge him once again. This article is also used in instances where the Courts of Magistrates finds enough prima facie to prosecute the defendant but releases him on bail with conditions. The AG may appeal to the Court to apply more strict bail conditions.

**Article 401(2)** - (2) *Such terms may also be held in abeyance -in case of illness of witnesses,*

*(a) if any witness is so infirm as to be unable to give evidence even in his place of abode; in case where the accused cannot be found.*

*(b) if the accused cannot be found and there is reason to believe that he has absconded or left Malta*

### **Article 433**

433.\*(1) If the Attorney General is of opinion that there are not sufficient grounds for the filing of an indictment against the accused, he may, within the terms prescribed in the last preceding article, by warrant under his signature, order the discharge of the accused, filing a declaration to that effect in the Criminal Court.

(2) The Attorney General may also withdraw an indictment already filed, by making in Court a declaration to that effect to arrest a person discharged by the Court of Magistrates.

(3) Finally, the Attorney General may, within one month from the day on which he is granted access by electronic means to the record of the inquiry, apply to the Criminal Court for the issue of warrant for the arrest of any person discharged by the Court of Magistrates. The provisions of sub-articles (3A) and (3B) shall apply to an application made under this sub-article.



(3A) The application shall be appointed for hearing and shall be served on the person discharged together with a notice of the date of the hearing.

(3B) Where the Criminal Court is of the opinion that there are sufficient grounds for an indictment to be filed against the person discharged it shall forthwith issue a warrant for the arrest of that person; and in such case the term for filing the indictment shall commence to run from the day of the arrest.

(3C) Where the person discharged fails to make an appearance at the hearing without good cause the Court shall order his arrest in order to appear for the hearing of the application.

(4) In all cases referred to in the preceding sub-articles of this article, the Attorney General shall make a report to the President of Malta stating the reasons for his action. Power of Attorney General, in cases where he is of opinion that the offence is triable by the Court of Magistrates.

#### Article 434 - Liability to further proceedings on fresh evidence.

*434. Every accused person, whose arrest has not been ordered by the Attorney General under the provision of sub-article (3) of the last preceding article, or who has been discharged for want of presentation of an indictment, shall always remain liable to fresh proceedings, to be regularly commenced before the Court of Magistrates, whenever fresh evidence becomes available.*

*Definition of "fresh evidence".*

*The expression "fresh evidence" means evidence which at the time of the discharge of the accused, did not exist, or was not known to those who were entitled to prosecute*

*Any person who has been discharged by means of article 401(2) and the AG does not order his rearrest under article 433(3), shall always remain liable to fresh proceedings whenever fresh evidence becomes available*

**Discharge means that the Magistrate does not find prima facie evidence that the accused may be tried. This is not beyond reasonable doubt but is prima facie.**

#### Investigation Order / Attachment order. Article 435A of the Criminal Code

435A. (1) The provisions of article 4 of the Act shall apply mutatis mutandis where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence and the provisions of the said article 4 shall apply to any investigation order or attachment order applied for or issued by virtue of this sub-article as if it were an investigation order or attachment order

applied for or issued under the same article 4 of the Act and in particular, the provisions of sub-articles (12) and (13) of the said article 4 shall also apply to any investigation for a relevant offence by virtue of this sub-article.

(2) The provisions of article 5 of the Act shall apply *mutatis mutandis* where any person is charged with a relevant offence and the provisions of article 6 of the Act shall apply to any order issued by virtue of this sub-article as if it were an order issued under the said article 5.

→ This is a remedy that the AG can use to order the Police and gather information about the crime. This is important where for example Money Laundering is concerned because gathering evidence against the accused in these types of cases is very difficult, unlike other crimes. See article 4(1) of Cap. 373. It is one thing to gather evidence about a homicide and another thing to gather information where ICTs are involved. See also article 35 of Cap. 621.

#### **435AA - Monitoring Orders.**

435AA. (1) Where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence (hereinafter referred to as "the suspect") he may apply to the Criminal Court for an order (hereinafter referred to as a "monitoring order") requiring a bank to monitor for a specified period the transactions or banking operations being carried out through one or more accounts in the name of the suspect, or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons. The bank shall, on the demand of the Attorney General, communicate to the person or authority indicated by the Attorney General the information resulting from the monitoring.

(2) Where a monitoring order has been made or applied for, whosoever, knowing or suspecting that the monitoring is taking place or has been applied for, discloses that such monitoring is taking place or has been applied for or makes any other disclosures likely to prejudice the monitoring operation shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding twelve thousand euro (€12,000) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment:

Provided that in proceedings for an offence under this sub-article, it shall be a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the monitoring operation.

(3) For the purposes of this article, "relevant offence" means an offence, not being one of an involuntary nature, consisting of any act or omission which if committed in these islands, or

corresponding circumstances, would constitute an offence liable to the punishment of imprisonment or of detention for a term of more than one year.

#### Definition of a relevant offence under article 4 of Chapter 621 (POCA)

A "relevant offence" is any offence under any law, and not being an offence of an involuntary nature, liable to the punishment of imprisonment or detention for a maximum term of at least one (1) year unless otherwise provided for in another Part of this Act.

#### Prevention of a relevant offence under article 4 Cap. 373

Article 4(1) - *Where, upon information received, the Attorney General has reasonable cause to suspect that a person (hereinafter referred to as "the suspect") is guilty of the offence mentioned in article 3, he may apply to the Criminal Court for an order (hereinafter referred to as an "investigation order") that a person (including a body or association of persons, whether corporate or unincorporate) named in the order who appears to be in possession of particular material or material of a particular description which is likely to be of substantial value (whether by itself or together with other material) to the investigation of, or in connection with, the suspect, shall produce or grant access to such material to the person or persons indicated in the order; and the person or persons so indicated shall, by virtue of the investigation order, have the power to enter any house, building or other enclosure for the purpose of searching for such material.*

Article 4(6) - *Together with or separately from an application for an investigation order, the Attorney General may, in the circumstances mentioned in sub-article (1), apply to the Criminal Court for an order (hereinafter referred to as an "attachment order") - (a) attaching in the hands of such persons (hereinafter referred to as "the garnishees") as are mentioned in the application all moneys and other movable property due or pertaining or belonging to the suspect; (b) requiring the garnishee to declare in writing to the Attorney General, not later than twenty-four hours from the time of service of the order, the nature and source of all money and other movable property so attached; and (c) prohibiting the suspect from transferring or otherwise disposing of any movable or immovable property.*

Article 4(6) of Cap. 373 - May apply to the Court of Magistrates to issue a freezing order. This is also available in the Proceeds of Crime Act (article 36). Nowadays, the AG may issue a general freezing order but then has 90 days to come up with a determinate number of assets to freeze. There is an additional extension period of 90 days.

When a person is charged under article 3, the prosecution may apply to the Court of Magistrates for a freezing order and the provisions of article 36 of the Proceeds of Crimes Act shall apply.

Freezing Order —> Article 36, Chapter 621 of the Laws of Malta

Where a person is charged with a relevant offence, the Court shall, at the request of the prosecution, issue an Order, hereinafter referred to as a “Seizing and Freezing Order”, attaching any property in the hands of third parties for which there is reasonable cause to believe that the property is subject to confiscation and restoring and prohibiting, the accused from transferring, pledging, hypothecating or otherwise changing or disposing of any such property and of such other property owned by him or being in his possession.

This is being limited to the amount that the AG indicates in the acts of the accusations.

#### **Article 435A.**

“*Reasonable cause*” refers to suspicion that a person is involved in a criminal offense, such as financial crime, terrorist crimes and financing, or transnational crimes where special measures are required. This does not pertain to the usual traditional crimes such as murder, armed robbery, or drunk offenses

#### **Role of the AG during investigation:**

The AG determines whether there are reasonable grounds to issue an attaching or freezing order and applies to the Criminal Court for its issuance. The AG must have a suspect in a person or a company. The threshold for suspicion is very low, similar to the standard required when the police arrest a person.

“*Act*” = Anti-Money Laundering Act (Chapter 373)

Definition of “relevant offense”: Chapter 621, Article 4. This includes all voluntary offenses with a punishment exceeding one year, encompassing a wide variety of offenses.

If the criteria are met and there is reasonable suspicion, the AG can apply to the Criminal Court to issue an investigation order. Article 4 of Chapter 373 applies in such cases.

#### **What the AG does with regards to an attachment order or investigation order:**

**Article 4** is divided into two parts:

1. AG can issue investigation order/attachment order

**Investigation order** = ag ASKS CRIM Court TO AUTHORISE ppl to have access to docs/property – AG an request Court to authorize police to enter and search houses e.g.

Attachment order = AG through this app, Court can order all property of suspected person

When AG applies, usually AG has to give the Court a brief summary of the facts – of suspected persons and list of the facts AG has gathered until then so the Court will have an idea as to which parameters they can issue an attachment order. the Court can refuse to issue an attachment order. Usually served on each suspected person hence there will be addresses etc.

Application can inc request to authorize police to enter into any house, building, enclosure

When the crime Court ceases to request of the AG, any info = any info company has on 3rd party, docs or info which is usually considered secret information – holder is not obliged to divulge info. Attachment of investigation order – each person is obliged to give all info about the suspected person to exec police. Exceptions: lawyers (info on clients) and priests (info from confessions)

Order can authorise exec police to have access to it data, mobile phones, all info needed. When you investigate such cases, you can't go with arraignment and search so investigation is generally done before a person is addressed e.g. drug case – if police catch someone the evidence is there but e.g. money laundering cases – difficult to identify and be certain. Police with the help of AG investigate these cases.

Obligations e.g. Persons ordered to give info about suspect, can't share info that such order was issued e.g. Money-laundering, as soon as a suspect knows is being investigated, easy to transfer money to other jur/ offshore companies or open new companies.

Penalties for ppl who disclose an investigation is underway: 12 months imprisonment or up to 11k multa or ordered to give info “but fails to do so” jekk tirrifjuta without a just cause, can be liable to this offense.

Same applies to Attachment orders;

**Attachment orders:** usually attached to all property (movable/immovable) of the suspect. Police are investigating and hence cannot identify which property is subject to crime.

AG must have reasonable suspicion and put into application all info they have on the case so Court can sign and the effects are it attaches/freezes all property one has even that property is in the hands of 3rd parties.

Such order usually requires the garnishee to declare in writing to the AG, usually in 24hrs, the nature and source of funds. imp to understand the source of wealth of the suspected person. In that case garnishee obliged to give to the AG/exec police all info on source of wealth

Main aim: prohibit suspects from transferring his assets. All assets are usually frozen – if there are assets in foreign jur, Maltese authorities can ask foreign authorities to attach property in that jur – issue to understand what property/money that they have in another jur.

Attachment order has a term of 6 months and can be extended for another 6 months when the Court is satisfied there are reasonable grounds to extend it. Can be extended further

than 12 months if AG has further info e.g. police didn't have enough time due to new evidence.

No access to accounts etc i.e. of their income for the suspect whilst companies can appoint an administrator.

AG can revoke attachment order at any time i.e. after month/week. Once revoked the Court can issue decree – if Court issues AO generally the Court doesn't issue decree. Once there's a decree, it's notified to all garnishee and should open the account and attach all the property they have to the 3rd party.

When attachment orders are no longer in force (e.g. after 6 or 12 months) Court issues decree notified to all suspected person

Court can refuse to issue an attachment order - does filtering – e.g. insufficient reasons. Qorti tista taghmel seduta.

AO and IO isiru dejjem fil-maghlug.

#### Article 4(6) attachment order

Sub-article 12 (USED); used mainly in drug cases – meta jkun hemm stqarrija guramentata.

Persuni b info u jaghtuha l pulzija, ma tghoddx ghall qorti imma jekk titla quddiem mag inkwerenti u tiehu gurament tista titqies mill qorti bhala prova.

Article similar to chap 101.

Once a person gives info on oath before inquiring mag, considered as proof.

#### **Investigation order article 435B**

AG can receive a request from foreign country to issue an investigation order IN MALTA- AG starts from scratch i.e. apply to criminal Court, make an app, give a list of info given by foreign country. Can also be done for an attachment order. We rely on the info given by the foreign country. Police usually help and assist in the investigation. Chap 373 applies for another jur.

#### **Article 435b establishes monitoring orders**

435B. (1) Where the Attorney General receives a request made by a judicial, prosecuting or administrative authority of any place outside Malta or by an international Court for investigations to take place in Malta in respect of a person (hereinafter in this article and in article 435BA referred to as "the suspect") suspected by that authority or Court of a relevant offence, the Attorney General may apply to the Criminal Court for an investigation order or an attachment order or for both and the provisions of article 24A of the Dangerous Drugs Ordinance, hereinafter in this title referred to as "the Ordinance", shall mutatis mutandis apply to that application and to the suspect and to any investigation order or attachment order made by the Court as a result of that application.

(2) The phrase "investigation order" in sub-articles (2) and (5) of the same article 24A of the Ordinance shall be read and construed as including an investigation order made under the provisions of this article.

(3) The phrase "attachment order" in article 24A(6A) of the Ordinance shall be read and construed as including an attachment order under the provisions of this article

→ Pursuant to and in accordance with any treaty, convention, agreement or understanding to which Malta is a party or which is otherwise applicable to Malta, the Attorney General may, with the concurrence of the Minister responsible for Justice, give his consent to the temporary surrender of a person in custody for the purpose of an investigation to be carried out or being carried out by a judicial, prosecuting or administrative authority of any place outside Malta at the request of a judicial, prosecuting or administering authority in Malta.

→ Kollox għadu għaddj ez transactions and all info about transfer is given from the bank to the investigator so that the latter know what's happening with the funds – mainly used in money laundering.

→ FIAU jibghatu AG jew Pul li hemm transactions suspettuzi – ihalluhom għaddejjin biex ikollhom iktar dettall.

→ Taht l-awtorita tal-qorti. Pul jistaqsu l-AG u l AG jistaqsu lill qorti krim (prim imhallef)

→ FI-application jindika l-Pul se jirceivu l-informazzjoni.

MO can be done on request of foreign jur – foreign jur tistaqsi lill-AG u AG jistaqsi crim Court biex jawtorizza monitoring order for a foreign jur.

### **Article 435AA - Issuing of monitoring order of banking operations**

435AA. (1) Where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence (hereinafter referred to as "the suspect") he may apply to the Criminal Court for an order (hereinafter referred to as a "monitoring order") requiring a bank to monitor for a specified period the transactions or banking operations being carried out through one or more accounts in the name of the suspect, or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons. The bank shall, on the demand of the Attorney General, communicate to the person or authority indicated by the Attorney General the information resulting from the monitoring.

(2) Where a monitoring order has been made or applied for, whosoever, knowing or suspecting that the monitoring is taking place or has been applied for, discloses that such monitoring is taking place or has been applied for or makes any other disclosures likely to prejudice the monitoring operation shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding twelve thousand euro (€12,000) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment: Provided that in proceedings for an offence under this sub-article, it shall be a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the monitoring operation.

(3) For the purposes of this article, "relevant offence" means an offence, not being one of an involuntary nature, consisting of any act or omission which if committed in these islands, or corresponding circumstances, would constitute an offence liable to the punishment of imprisonment or of detention for a term of more than one year.

→ Where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence (hereinafter referred to as "the suspect") he may apply to the Criminal Court for an order (hereinafter referred to as a "monitoring order") requiring a bank to monitor for a specified period the transactions or banking operations being carried out through one or more accounts in the name of the suspect, or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons. The bank shall, on the demand of the Attorney General, communicate to the person or authority indicated by the Attorney General the information resulting from the monitoring.

### **Article 435BA of the Criminal Code**



435BA. (1) Where the request referred to in the preceding article is made for the purpose of monitoring the transactions or banking operations being carried out through one or more accounts of a person suspected of a relevant offence within the meaning of article 435AA(3), or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons the Attorney General may apply to the Criminal Court for a monitoring order and the provisions of article 435AA shall apply *mutatis mutandis*.

(2) Where a person or authority has been indicated by the Attorney General as provided under article 435AA, that person or authority shall transmit the information resulting from the monitoring operation to the Attorney General

→ Where the request referred to in the preceding article is made for the purpose of monitoring the transactions or banking operations being carried out through one or more accounts of a person suspected of a relevant offence within the meaning of article 435AA(3), or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons the Attorney General may apply to the Criminal Court for a monitoring order and the provisions of article 435AA shall apply *mutatis mutandis*.

### **Freezing Orders**

1. L-ewwel hemm Attachment u investigation order
2. Ragunjiet bizzejjed biex persuna tiressaq il qorti, Ag jitlob FO – jekk AO tkun ghadha in operation tinbidel fi FO
3. jkun hemm freezing order

idealiment jitreqsu qabel tinqabez is-sena. Jekk hemm AO u l pulizija/pul jistennew sena ohra, il flus jigi trasferuti f' jur barranija.

Relevant office; prosecutor must ask Court to issue freezing order i.e. not automatic. Can be done by application i.e. AG applies to the mag. to issue freezing orders or is included in the charges.

**Art 4(6), Cap. 373** - "When a person is charged under article 3, the prosecution may apply to the Court of Magistrates for a freezing order and the provisions of article 36 of the Proceeds of Crime Act shall apply."

**Article 36, Cap. 621** - "Where a person is charged with a relevant offence, the Court shall, at the request of the prosecution, issue an Order, hereinafter referred to as a "Seizing and Freezing Order", attaching any property in the hands of third parties for which there is reasonable cause to believe that the property is subject to confiscation, and restraining and prohibiting the accused from transferring, pledging, hypothecating, or otherwise changing or disposing of any such property and of such other property owned by him or being in his possession."

**Article 36 Cap. 621:**

1. request of prosecution to issue order
2. effect: attaches any property in hands 3rd property for which if reasonable to believe is subject to confiscation. Jekk persuna tinsab ha tinsab hatja, il-proceeds of crime jigu kkonfiskati favur il-gvern allura hi sistema kawtolatrorja biex flus/propejta fil pussess tal-accused are freezed until case is finished i.e. there's sentence against accused or confirm a appeals stage. All property confiscated in case of eviction.  
Effect: Accused prohibited to transfer/pledge his money if during investigation results money can be located – prosecution can ask Court to issue equivalent of that amount included in the freezing order i.e. dak li ghandu u l ammont li l-prosecution qed tghid li gie laundered/ in process of crime. Jekk kellu ammont ta flus u ma jihru, iridu jigi capped mal freezing order.

*Amendments;*

Qabel kienet issir fuq wirt ukoll etc.

Prosecution when issue chargers and request Court to issue freezing order, make a list of property which should be freezed and amount of money which should be freezed – amount is usually capped – not capped if prosecution has no idea of amount which should be frozen (general freezing order)- prosecution has 90 to make a list of property that should be frozen. Can be extended for another 90 days.

Jekk AG/Prosecution ma jiddikjarawx l-ammont within 90 days (which can be extended for another 90 days), freezing order taqa i.e. fl-att t akkuzi/prezetata jinghad l-ammont – inkella 90 days biex jiddikjaraw l-ammont li ghandu jkun frizta inkella freezing order taqa’.

Rimedji ghall-akkuzat;

Subsistence – biex wiehed jghaddi. Ammont jigi stabbility fil-bidu tal-kawza ghas-subsistence u jiddependi mil-lifestyle tal-imputat.

**2 metodi tal-appell**

1. AG; can appeal within 7 days when there is a temporary freezing order – m hemmx certezza li tohrog freezing order. AG jista jappella fil-qorti tal-appell kriminali
2. Jekk FO tohrog, imputat jista jappella l-FO – 7 days

direttur tal- asset recovery ghandu d-dritt jaghmel risposta.

KOLLOX IMUR IL-CRIM Court

Kull review li ghandha ssir fuq mag issir fil-crim Court.

**Article 435C - Freezing of property of person accused with offences cognizable by Courts outside Malta**

*435C. (1) Where the Attorney General receives a request made by a judicial, prosecuting or administrative authority of any place outside Malta or by an international Court for the temporary seizure of all or any of the moneys or property, movable or immovable, of a person (hereinafter in this article referred to as "the accused") charged or accused in proceedings before the Courts of that place or before the international Court of a relevant offence, the Attorney General may apply to the Criminal Court for an order (hereinafter in this title referred to as a "freezing order") having the same effect as an order as is referred to in article 22A(1) of the Ordinance, and the provision of the said article 22A shall, subject to the provisions of sub-article (2), apply mutatis mutandis to that order.*

*(2) The provisions of article 24C(2) to (5) of the Ordinance shall apply to an order made under this article as if it were an order made under the said article 24C.*

*(3) Article 22B of the Ordinance shall also apply to any person who acts in contravention of a freezing order under this article*

→ Freezing order for foreign jurisdiction; freezing order fil-pajjiz barra, javzaw l-AG u l-AG javza l-qorti biex tohrog freezing order malta. Bl-Awtorita tal-crim Court.

**Confiscation Orders Article 435D - Enforcement of confiscation orders made by Courts outside Malta following conviction for offences cognizable by those Courts**

*435D. (1) A confiscation order made by a Court outside Malta providing or purporting to provide for the confiscation or forfeiture of any property of or in the possession or under the control of any person described in the order shall be enforceable in Malta in accordance with the provisions of article 24D(2) to (11) of the Ordinance.*

*(2) For the purposes of this article "confiscation order" includes any judgement, decision, declaration, or other order made by a Court whether of criminal or civil jurisdiction providing or purporting to provide for the confiscation or forfeiture of property as is described in sub-article (1).*

(3) For the purposes of this article and of articles 435B and 435C:

"the Act" means the Prevention of Money Laundering Act;

"the Ordinances" means the Medical and Kindred Professions Ordinance and the Dangerous Drugs Ordinance; and

"relevant offence" means an offence consisting of any act or omission which if committed in these Islands, or in corresponding circumstances, would constitute an offence, other than a crime under the Ordinances or under the Act, liable to the punishment of imprisonment or of detention for a term of more than one year

Confiscation barra minn malta – daqslikieku saret malta i.e. ordni ssir malta ukoll (tigi infurzata malta)

SL 9.15; Confiscation Orders

#### **Article 435E - Control Deliveries**

**435E.** (1) Notwithstanding anything contained in any other law it shall be lawful for the Attorney General to authorise the Executive Police and, where appropriate, the Customs authorities to allow a controlled delivery to take place with a view to identifying persons involved in the commission of any criminal offence under the laws of Malta or under the laws of another country.

For the purposes of this sub-article a "controlled delivery" shall mutatis mutandis have the same meaning assigned to it by article 30B(2) of the Dangerous Drugs Ordinance so however that the illicit or suspect consignment referred to in that sub-article may for the purposes of this sub-article consist of anything whatsoever and that the consignment may be intercepted and allowed to continue with the original contents intact or removed or replaced in whole or in part.

(2) With the same objective of identifying persons involved in the commissions of a criminal offence under the laws of Malta or under the laws of another country, it shall also be lawful for the Attorney General to authorise the Executive Police or a person under the supervision or direction of the Executive Police, to acquire or procure an illicit or suspect consignment of anything from any person or place.

(3) Pursuant to any arrangement, including any treaty, convention, agreement or understanding, to which Malta is a party or which is otherwise applicable to Malta, the Attorney General may authorise the competent authorities of another country to conduct in Malta, jointly with or under the supervision or direction of the Executive Police, investigations into criminal offences by

officers acting under covert or false identity, provided that the Attorney General is satisfied of the true identity and official capacity of the officers in question and is fully informed of the nature of any documents which purport to guarantee, certify or authenticate the false identity assumed by any such officers. Notwithstanding the provisions of any other law the making or use of such documents by the said competent authorities or by such officers for the purpose or in the course of such investigations authorised as aforesaid shall be deemed to be lawful and shall not entail any liability, civil, criminal or otherwise, on the part of such authorities or officers.

(4) Any official from another country taking part in any of the operations referred to in sub-articles (1) to (3), both inclusive, shall, for the purpose of any criminal liability incurred under this Code or any other law by that official or by others for conduct against that official, be deemed to be a public officer

(5) The provisions of sub-article (4) shall apply *mutatis mutandis* to any official from another country taking part in any operation in Malta of the kind referred to in sub-article (3) even if none of the officers taking part in the operation is acting under covert or false identity. Cap. 460.

(6) For purposes of this article "competent authorities of another country" and "official from another country" shall be construed as including officials of bodies set up pursuant to the Treaty on European Union as defined in article 2 of the European Union Act.

(7) Where the Attorney General has authorised the setting up of a joint investigation team as provided in sub-article (3), the foreign officials participating in the said investigation shall be entitled to be present when investigative measures are being taken and, if so authorised by the competent officer of the Executive Police, to take investigative measures

→ Generalent fid droga e.g. parcel indirizzat lil xi hadd malta – dwana jinterecettaw li hemm droga u posta tibqa' tmexxih apposta.

→ Awtorizzazzjoni tal-AG jew Mag. Pul generalent jistaqsu l-Mag, u jhareg rikors.

Setgha/poteri għall-control deliveries u ez pul jista' jixtri, ibiegh droga (qisu jagħmel ir-reat hu stess) biex jinqabdu l-kriminali. Ufficjal ikun exempt.

Meaning of "controlled delivery"

## **Article 30B Chapter 101**

(1) Notwithstanding anything contained in any other law, it shall be lawful for the Executive Police and, where appropriate, the Customs Authorities to allow, with the consent of the Attorney General or of a magistrate, a controlled delivery to take place.

(1) For the purposes of this article a controlled delivery means the technique of allowing an illicit or suspect consignment of a dangerous drug (as defined in article 12) or of money, property or proceeds as referred to in article 22(1C)(a) to pass out of, through or into Malta, or from one place or person in Malta to another place or person in Malta, or into the territory of another country, intact, or removed or replaced in whole or in part, with the knowledge and under the supervision of the Executive Police and, where appropriate, of the Customs Authorities and of the competent authorities of such other country, with a view to identifying persons involved in commission of offences under this Ordinance or under the corresponding law in force in the territory of such other country.

Controlled delivery fuq ordni barra minn malta infurzata malta ukoll.

e.g. parcels/containers

jista' jaghti lok e.g. druga, persuna li jkun qed igorr id-droga jinqabad malta u jifthem mal-pul biex jaghti dik id droga u jinqabdu l-ohrajn.

See const cases – fejn kien

hemm ksur u le.



L-ghoxrin (20) jum tax-xahar ta' Jannar tas-sena elfejn u hamsa u ghoxrin (2025)

**Lill-Qorti tal-Maġistrati (Malta) bhala Qorti Istruttoria.**

L-Avukat Generali fuq l-atti tal-Kompilazzjoni magħmulin kontra:

### **ISEM L-IMPUTAT**

Billi fil-verbal tal-31 ta' Mejju 2024 (ara fol 120 tal-proċess) din l-Onorabbli Qorti għogħobha tilqa' t-talba tal-prosekuzzjoni u tawtorizza korrezzjoni fl-akkużi, u billi wara li sar l-eżami tal-imputat u nstemghu x-xhieda, l-atti ġew rinviati lil Avukat Generali mingħajr ma ngħata d-digriet tal-prima facie hekk kif mitlub fl-artikolu 401 tal-Kodiċi Kriminali ta' Malta, u peress li mill-atti tal-kawża fl-ismijiet premissi jidher li ma ġewx osservati id-dispożizzjonijiet tal-Artikoli 401(1)(2)(3) tal-Kodiċi Kriminali, u, per konsegwenza, l-atti tal-kompilazzjoni huma difettużi għat-tenur tal-artikolu 432(2) tal-istess Kodiċi,

Umilment jitlob lil din l-Onorabbli Qorti hawn fuq imsemmija, taht dak li hemm imsemmi fl-Artikolu 432(2)(3) tal-Kodiċi Kriminali, joghħobha tibda mill-ġdid il-kompilazzjoni, u cioe':

- a. tisma' r-rapport bil-gurament tal-uffiċjal prosekutur.
- b. teżamina bla gurament lill-imputat.
- c. tisma' l-provi li jingiebu biex isahhu r-rapport, salv eżenzjoni tad-difiza (liema eżenzjoni tapplika biss għas-smiegħ tal-provi).
- d. tideċċiedi jekk hemmx raġunijiet biżżejjed sabiex l-imputat jitqiegħed taht att ta' akkuża.
- e. u tagħlaqha fi żmien hamest ijiem tax-xogħol.
- f. u tibghat l-atti lill-Avukat Generali kif previst fl-artikolu 432(2)(3) tal-imsemmi Kodiċi.

U għalhekk jibghat dawn l-Atti lill-Qorti fuq imsemmija.

# BAIL

## *Article 574 -587 Criminal Code*

Article 34 of the Constitution of Malta – Protection from arbitrary arrest and detention

Article 5 ECHR – Right to Liberty and Security

### **Article 34 of the Constitution - Protection from arbitrary arrest and detention**

**(1) No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say:**

*(f) Every person's fundamental right to liberty can be limited upon reasonable suspicion he has committed an offense or is about to commit a criminal offense.*

*(3) Any person who is arrested or detained -*

*(a) for the purpose of bringing him before a Court in execution of the order of a Court; or*

*(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,*

*and who is not released, shall be brought not later than forty-eight hours before a Court; and if any person arrested or detained in such a case as is mentioned in paragraph (b) of this sub-article is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial:*

*Provided that Parliament may by law provide for the extension, subject to adequate procedural safeguards and to the authorisation of a Magistrate, of the period of forty-eight (48) hours within which the person arrested or detained shall be brought before a Court, by another period not exceeding a further forty-eight (48) hours if the person who is arrested or detained is reasonably suspected to have committed a crime liable to a maximum punishment exceeding twelve (12) years imprisonment.*

### **Article 6 of the ECHR - Article 39 of the Constitution sub 5**

39. (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.

(2) Any Court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a Court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(3) Except with the agreement of all the parties thereto, all proceedings of every Court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any other adjudicating authority, including the announcement of the decision of the Court or other authority, shall be held in public.

(4) Nothing in sub-article (3) of this article shall prevent any Court or any authority such as is mentioned in that sub-article from

Time is important, especially when someone is detained under arrest.

The right to a fair hearing includes the presumption of innocence, and nobody should be deprived of their personal liberty

#### **Art 366A Criminal Code -Presumption of Innocence (Article 366A-366F)**

366A. (1) Every person suspected or accused of having committed a criminal offence or an alleged criminal offence shall be presumed to be innocent until the decision on the final determination of whether that person has committed the criminal offence has become definitive:

Provided that the provisions of this article shall be without prejudice to the proviso to sub-article (5) of article 39 of the Constitution and to the enforcement, as may be provided by law, of a judgment of the Court of Magistrates or of the Criminal Court pending the hearing of an appeal after the accused has been found guilty of having committed a criminal offence by one of the said Courts

Every person arraigned in Court presumed to be innocent – prosecution can justify his stay in prison only if there are “sufficient grounds”



## **Article 366B - Burden of Proof**

Burden of proof is always on the prosecution

366B. (1) The burden of proof for establishing the guilt of suspects or accused persons shall lie with the prosecution: Provided that the provisions of this article shall be without prejudice to:

- (a) the proviso to sub-article (5) of article 39 of the Constitution;
- (b) any obligation of a judge, magistrate or any Court or tribunal to seek both inculpatory and exculpatory evidence;
- (c) the right of the defence to submit any evidence according to law.

(2) Any reasonable doubt as to the question of guilt shall benefit the suspect or accused person including where the Court assesses whether an accused person should be acquitted

*These provisions are important for bail but the main provisions are in the criminal code.*

General principles of bail;

- reasonable and justified, i.e., all arguments must be based on facts.
- Based on specific features: *jekk akkuzat b'omiciidju involontarju, raguni ma tistax tkun ghax jista' jkun ghandu omru l-habs mela ghandu jibqa' l-habs*. Indications of genuine  
Indications of a genuine requirement for public interest (ref: Section 575, which lists when the Court can deprive a person of personal liberty) – one of the requirements is public interest, i.e., if the accused is released, they might commit another offense. Public interest can justify detention pending trial.  
It is important for the prosecution and Court to balance the right to liberty and security with public interest. For example, ensuring the accused shows up in Court for hearings is an issue of public liberty; otherwise, the case cannot proceed. Similarly, the accused must obey Court orders.
- Arguments of prosecution cannot be general and abstract e.g. *ghandu kondotta hazina i.e. trid tiggustifika b' affarijiet konkreti ez karattru mhux ta min jafdah [kiser l-ordnijiet tal-qorti f'bosta kazijiet u hemm sentenza li turi li vera kiser l-ordni tal-qorti]*  
Arguments have to be based on certain facts and circumstances of the case.  
Persuna ma tistax tintesa u tibqa hemm.
- As soon as the prosecution/Court identifies that the provisional release ceases to be reasonable, the person shouldn't stay in prison. i.e., just because the Court decrees a person should stay in prison doesn't mean they should remain there for a longer period.  
*Kull darba li l-akkuzat jitlob għall-helsien, trid tigi analizzata on that day in those circumstances*

· The accused isn't obliged to justify why they should be released – the prosecution must prove there is sufficient evidence for them to remain under arrest

- Until conviction, the accused must be presumed innocent.
- Detention pending trial must be reasonable and justified.
  - What is reasonable must be assessed on the facts of the case and according to its specific features.
  - Justification requires specific indications of a genuine requirement of public interest which notwithstanding the presumption of innocence outweighs the rule of respect for individual liberty.

Until conviction, the accused must be presumed innocent.

- Detention Pending Trial Must Be Reasonable And Justified.
- What is reasonable must be assessed on the facts of the case and according to its specific features.
  - Justification requires specific indications of a genuine requirement of public interest which notwithstanding the presumption of innocence outweighs the rule of respect for individual liberty.
  - The arguments for and against release must not be general and abstract but contain references to the specific facts and the applicant's personal circumstances justifying his detention.
- It is essential to require the provisional release once his continuing detention ceases to be reasonable.
- Automatic prolongation of detention contravenes the right for individual liberty.
- It falls on the authorities to establish the persistence of reasons justifying pre-trial detention. The burden of proof in these matters should not be reversed by making incumbent on the detained person to demonstrate the existence of reasons warranting his release

### **Beneficju tal-helsien mill-arrest (bail)**

#### **Article 574.**

2 modes to apply bail i.e. when accused can ask the Court to be granted bail.

1. Fil-prezentata (574A)

Avukat jitlob seduta stante li jixtieq jinghata l-helsiesn i.e. m'hemmx bzonn rikors.

2. B'rikors/With an application

Jekk il-Qorti ghandha garanzija bizzejjed li l-imputat jibqa bil-kundizzjonijiet tal-arrest sas-sentenza finali, jekk hemm ragunijiet sufficjiet li hu ha jehel il-qorti, jista' jinghata l-helsien. Problema meta hemm cans jikkontamina x-xhieda etc.

Jekk l-ewwel darba li gie arrestat, ghandu xoghol, karriera, familja etc Malta – m'hemmx raguni li wiehed jibqa that arrest u jigi rilaxxat bil-kundizzjonijiet

*574. (1) Any person charged or accused who is in custody for any crime or contravention may, on application or as provided in article 574A, be granted temporary release from custody, upon giving sufficient security to appear at the proceedings at the appointed time and place under such conditions as the Court may consider proper to impose in the decree granting bail which decree shall in each case be served on the person charged or accused*

*(2) The President can also grant bail.*

When can an accused ask the Court to be granted bail?

**Article 574A:**

When the person charged or accused who is in custody is first brought before the Court of Magistrates, whether as a Court of criminal judicature or as a Court of criminal inquiry, the Court shall:

1. Have the charges read out to the person charged or accused.
2. Examining the person charged.
3. Hear the prosecution officer and hear any evidence on the reasons supporting the charges and on the reasons and circumstances, if any, militating against the release of the person charged or accused.

**Article 574A sub 2**

(2) The Court shall inform the person charged or accused that he may be temporarily released from custody on bail by the Court under conditions.

Shall ask him what he has to say with respect to his arrest and his continued detention and with respect to the reasons and the circumstances militating in favour of his release.

(3) The Court hears the prosecuting officer whether he has any submissions to make on the question of temporary release from custody on bail

**Article 574A: (3)**

(5) At the end of submissions, the Court shall review the circumstances militating for or against detention and based on those circumstances which may result the Court shall:

1. Unconditionally release that person from custody (Art 574(6)).
2. Release that person from custody on bail subject to such conditions as it may deem appropriate (Article 574(7)).
3. Remand that person into custody and give reasons for its decision (Article 574(8)).

574(9):Where the Court orders the release from custody of the person charged or accused, whether unconditionally or on bail subject to conditions, under any of the provisions of this article the decision of the Court to that effect shall be served on the Attorney General by not later than the next working day and the Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates.

#### Article 574A (x'jigri fil-prezentata)

La darba wiehed jaghmel darba ghall-helsien, prosekuzzjoni/pulizija tista' taghmel l-argumenti u tressaq provi favur/kontra l-helsien mill-arrest. Jista' jkun prosekuzzjoni ma' tichadx il-halsien.

(2) tinforma l-imputat – argumenti tad-difiza imp ghall-qorti li trid tisma' z-2 nahat. La darba jkun hemm talba prosekuzzjoni tghid jekk hux ha toggezzjona u jekk iva ghala. L-ahhar kelma dejjem tad-difiza.

Jekk prosekuzzjoni taghmel sottomissjonijiet ulterjuri, l-ahhar kelma hi dejjem tad-difiza. Terga' tmur fuq id-difiza biex jaghmlu l-ahhar sottomissjonijiet taghhom.

(3) Fil-prezentata sakemm prosekuzzjoni tghid m gahndhiex oggezzjoni ghall-helsien difficili jinghata helsien sakemm ma jkunx kaz ta' reat minimu – biza ta' intracc ta provi esp kaz ikun ghadu fil-bidu u l-qorti ftit tkun taf dettall.

(6) ma jibqax taht arrest

(7) kundizzjonijiet ghall-helsien

(8) jinzamm taht arrest- qorti trid tghid ghala mhux taghti helsien.

AG ikollu say ukoll fid-decizjoni tal-qorti.

(9) Jista jkun titlob jerga jigi arrestat, ammont ta' depozitu jinbidel jew jinbidlu l-kundizzjonijiet. Decizjoni dejjem tmur ghand l-AG. 24hrs biex iwiegeb. Jekk l-AG jaqbel, jibghat lura l-kundizzjonijiet tal-helsien, jindika li rahom, u jibghat lill-magistrat. Jekk ha jitlob korrezzjoni fuq dak li gie deciz mill-magistrat, imur ghall-qorti kriminali (taghmel revizjoni tad-decizjoni tal-magistrat.

Rikors irid jiddahhal fil-qorti kriminali, qorti ddahhal seduta u taghti digriet.

**Article 575:**

*(1) Saving the provisions of article 574(2), in the case of –*

*(i) a person accused of any crime against the safety of the Government, or*

*(ii) a person accused of any crime liable to the punishment of imprisonment for life, the Court may grant bail, only if, after taking into consideration*

*1. all the circumstances of the case,*

*2. the nature and seriousness of the offence,*

*3. the character,*

*4. antecedents,*

*5. associations and community ties of the accused,*

*6. Other matters which appear to be relevant.*

**Article 575(2)** - it is satisfied that there is no danger that the accused if released on bail –

a) will not appear when ordered by the authority specified in the bail bond; or

(b) will abscond or leave Malta; or

(c) will not observe any of the conditions which the Court would consider proper to impose in its decree granting bail; or

(d) will interfere or attempt to interfere with witnesses or otherwise obstruct or attempt to obstruct the course of justice in relation to himself or to any other person; or

(e) will commit any other offence.

**Article 574(2):**

At any stage other than that referred to in article 574A, the demand for bail or any demand for the variation of the conditions of bail after bail has been granted, shall be made by an application, a copy whereof shall be communicated to the Attorney General on the same day.

(3) The Attorney General may, within the next working day, by a note, oppose the application, stating the reasons for his opposition.

(4) Bail shall always be granted in the case referred to in the proviso to article 432(1).

### **When can the demand for bail be made? Article 575 sub 2 of the Criminal Code**

Lista ta' sitwazzjonijiet/cirkustanzi li qorti ghandha tara qabel tiddeciedi l-helsien mill-arrest

- Cirkostanzi johorgu mill-kaz
- Seriousness; johrog mill-akkuza stess
- Character of the accused i.e. jekk kellu diversi akkuza jista' jkun juru certu komportament
- Malti iktar difficli jahrab imma jekk ikollu rabtiet u flus barra minn malta iktar facli jahrab.

### **574A**

Prezentata – talba bil-fomm (verbal)

Kull darba persuna tapplika ghall-bail qorti trid tinnotifika l-AG u l-AG jaghmel risposta. AG l-iktar persuna li jkun jaf il-kaz u ghandu komunikazzjoni diretta mal-pul u jista' jaghti l-informazzjoni l-gudikant biex jiddeciedi.

Meta atti jkunu ghand AG, ir rikors abbazi ta' dan l-artikolu jsir quddiem il-qorti kriminali. Jekk rikors isir quddiem il-mag meta l-atti qeghdin ghand l-AG, mag ma jkunx jista jiddeciedi ghax ma jkollux l-atti quddiemu (l-AG ghandu xahar biex johrog l-att tal-akkuza)

Rikors isir quddiem il-Qorti kriminali – titlob l-atti lill-AG.

Quddiem il-magistrat, jekk prosecution tal-AG issir trattazzjoni, jekk le l-AG jaghmel risposta biss. Fil-qorti kriminali jidher l-AG, pul ma jidhurx i.e. AG jaghmel it-trattazzjoni.

**(4) kundizzjonijiet tal-575.**

Hafna mir-ragunijiet johorgu mill-ECHR.

- Arguments can't be based on the severity of the sentence i.e. habba li l-imputat ghandu akkuzi ta omru l-habz hemm cans li jahrab.

“relevant factors” e.g. Karattru johrog minn jekk hux qed jobdi l-ordnijiet tal-qorti jew le.

Ghandux xoghljiet – no work in Malta e.g. Court might not be convinced he won't flee.

Sahha tal-kundizzjonijiet dejjem ha tonqos ghax dejjem hemm id-dritt fundamentali tal-liberta'

Case law:

- Argumenti ma jistghux ikunu astratti i.e. have to refer to specific facts
- Gravity of offense alone cannot be the sole argument for a person to remain in detention.
- Arguments have to be based on other circumstances/facts

(d) ez prosekutur ikun jaf li ghandu akkuzi ta' serq, rawh il girien u hemm cans li jmur jaffacjhom.

Intracc mal-provi/eidenza – iktar ma jitilghu xhied au jkun hem provi dan l-argument jitlef il-validita'.

***San marino case*** concerns organised crime. Raguni ta' intragg tal-provi tista' tkun ikbar jekk hemm hafna evidenza barra ez. Risk of accused tampering with evidence is higher.

***Jeremy james farrugia case:*** droga – qorti konvinta li jekk johrog u jinghata l helsien se jkun ta periklu ghalih innifsu u ghal haddiehor

**575** - The Court will be convinced that the criteria listed in this article will be honored. The aim of bail is to ensure that the accused is present for every hearing of the criminal process.

**575(2)** - How the procedure for bail may be made. During the first hearing, the accused may ask for bail without written submissions. In all other cases, he has to apply in writing.

It can be made at any stage other than that referred to in **article 574A.**

- 1) It must be made by an application.
- 2) The demand may be made to request bail or to vary the conditions of bail.
- 3) The application shall be communicated to the Attorney General on the same day.
- 4) The Attorney General may, within the next working day, by a note, oppose the application, stating the reasons for its opposition.

The accused may also apply to change the bail conditions. By nature, all requests for bail are considered very urgent.

### **Article 580 - When can the accused apply for bail?**

**580.** (1) The person charged or accused shall be admitted to bail by the Court of Magistrates or by the Criminal Court, under the authority of which, as the case may be, he is or is to be detained. When bail may be applied for.

(2) The demand for bail may be made at any stage of the proceedings subsequent to the taking down in writing of the complaint or report and the examination referred to in article 390, and any such demand may be made not only during the inquiry, but also to the judge sitting in the Criminal Court after the accused has been committed for trial or after the filing of the indictment, even though bail had not been granted to him by the Court of Magistrates. Mode of applying for bail before the Criminal Court,

(3) The demand for bail before the Criminal Court shall be made by an application whereupon the Court shall, if the application, is opposed by the Attorney General, appoint a day for hearing the applicant and the Attorney General, causing them to be served with a copy of the decree before Court of Magistrates.

(4) Except as provided in article 575(2), the demand for bail before the Court of Magistrates shall be made orally.

The demand is made at any stage of the proceedings, even after the accused has been committed for trial (Article 580(2) of the Criminal Code).

There is no limit, he may apply every day. The demand is made at any stage of the proceedings, even after the accused has been committed for trial (art. 580(2)).

The Court decree is applicable instantly and if the accused reapplies for bail afterwards, the previous decree is no longer applicable. The Court may then reject the request for bail and cite and apply / uphold the previous decree.

**Article 582** - Bail cannot be granted ex-officio by the Court. The Court cannot decide on its own to grant bail. There must always be an application by the accused.

*582.(1) The Court may not ex officio grant bail, unless it is applied for by the person charged or accused. Court may require previous notice of proposed surety.*

*(2) The Court may require a previous notice of twenty-four hours of the proposed surety. Power of Court to extend time for appearance of accused.*

*(3) It shall be lawful for the Court, on just cause being shown, to extend the time originally appointed for the appearance of the person charged or accused*

**575(11) - When bail is refused. Court to give its reasoning.**

*(11) In refusing to grant bail the Court shall state the reasons for such refusal in its decree refusing bail which decree shall be served on the person accused*



- In refusing to grant bail the Court shall state the reasons for such refusal in its decree refusing bail which decree shall be served on the person accused.
- The Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail. That may have been determined by the Court of Magistrates.
- If the AG wants to rearrest the accused while he is on bail, he must do so in front of the Criminal Court. Same applies if the AG wishes to change the bail conditions.

#### **When bail is granted Article 575(4A) Criminal Code**

(4A) Where the Court of Magistrates, whether as a Court of criminal judicature or as a Court of criminal inquiry, grants bail to the person in custody or subsequently amends the bail conditions, the decision of the Court to that effect shall be served on the Attorney General by not later than the next working day and the Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates

- Where the Court of Magistrates, (whether as a Court of criminal judicature or as a Court of criminal inquiry), grants bail or subsequently amends the bail conditions, the decision is served on the Attorney General by not later than the next working day.
- The Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates.

#### **580(3) - Request for bail in front of the Criminal Court.**

(3) The demand for bail before the Criminal Court shall be made by an application whereupon the Court shall, if the application, is opposed by the Attorney General, appoint a day for hearing the applicant and the Attorney General, causing them to be served with a copy of the decree  
Request for bail in front of the criminal Court is made in writing by application and served to the AG.

- Request for bail in front of the criminal Court is made in writing by application and served to the AG.
- If the AG opposes the request, the Criminal Court shall appoint a date for hearing and both the accused and the AG present their arguments in front of the Judge.

If the AG opposes the request, the Criminal Court shall appoint a date for hearing and both the accused and the AG present their arguments in front of the Judge.

**It is important that when applying for bail, the merits of the case are not entered into.**

**When bail must be granted**

When the AG has not issued the bill of indictment or sent the accused to be tried by the Court of Magistrates within the terms referred to in sub-article 5 or within the terms of sub art 7 of article 575.

575(10):

The provisions of sub-articles (5) and (7) shall not apply if at the time the request for bail is made or within a week thereafter the indictment shall have been filed, or when a warrant of arrest against the person accused has been issued as provided in article 579, whether in the same or in any other cause still pending against him before any Court of criminal justice.

575(5) and 575(10) - A timeframe for the AG to release a bill of indictment.

575(5) - 20 months and apply before issuing the bill of indictment.

575(7) - 7 days for the AG to issue a bill of indictment and if not, the accused is given bail.

575(10) - 30 months and applies after the issuance of the bill of indictment.

**Article 376 of the Criminal Code - Amount of security.**

**376.(1)** The magistrate shall take down or cause the registrar to take down -

(a) any plea to the jurisdiction of the Court, or of inadmissibility or extinguishment of action, or of inadmissibility of any evidence as well as any order rejecting such evidence; and

(b) where the Court shall deem it expedient so to do, or where a request is made by any of the parties and the Court shall see fit to accede to such request, the substance of the evidence given by the witnesses, recording any expression having a direct bearing on the merits of the case. Reading over of deposition to witnesses.

(2) The notes of the depositions taken down as aforesaid, if any, shall in the presence of the parties be read over to the witnesses and a mention of such fact shall be entered in the record. Non-observance of provisions of sub-articles (1) and (2) not to affect validity of proceedings. Production of other evidence. Recalling witnesses.

(3) The non-observance of any of the provisions of sub-articles(1) and (2) shall not affect the validity of the proceedings; nor shall such non-observance be a bar to the production, where necessary, at any part or stage of the proceedings, of evidence to prove, in the manner prescribed by law, the facts to which the said provisions refer, or to the recalling of the said witnesses.

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

*“According to the Court’s case-law, the guarantee provided for by Article 5 § 3 of the Convention is designed to ensure the presence of the accused at the hearing (see Mangouras v. Spain [GC], no. 12050/04, § 78, ECHR 2010). Therefore, the amount of bail must be set by reference to the detainee, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors 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, 27 June 1968, § 14, Series A no. 8).”*

*(Gafa vs Malta (54335/14) decided 8/10/2018)*

Deposit - an amount deposited in Court.

Guaranteed - Not deposited in Court.

The accused must pay the deposit to be granted bail and therefore, there must be an equilibrium in the amount of the deposit that the accused has to pay.

If the accused breaches bail conditions, both are forfeited in favour of the Government.

### **Article 577 of the Criminal Code**

**577** - When a third-guarantor gives surety on behalf of the accused. Sub-articles 3 and 4 are the most important bits.

Different modes of security - Article 577

**577.(1)** Security for bail is given by the production of a sufficient surety who shall enter into a written recognizance in the sum fixed.

(2) It may also be given, whenever the Court deems it proper, by the mere deposit of the sum or of an equivalent pledge, or by the mere recognizance of the person accused.

(3) Nevertheless, in cases of contraventions or of crimes within the jurisdiction of the Court of Magistrates as Court of criminal judicature in terms of article 370(1) and article 371(2), it shall be lawful for the Court, if it deems it expedient so to do, to exempt the accused, while the case is pending, from any of the modes of security mentioned in this article.

(4) Persons accused of any crime outside the jurisdiction of the Court of Magistrates as Court of criminal judicature may, in the absence of opposition on the part of the Attorney General, be exempted from any of the modes of security mentioned in this article, where it appears from a certificate under the hand of the Commissioner of Police that they are poor and of good moral character

In cases of contraventions, the Court may decide to waive from the accused, the binding of a deposit and a guarantee.

#### **Article 578 Criminal Code**

578. The effect of the security for bail shall be the temporary release from custody of the person charged or accused:

Provided that it shall be lawful for the Court, at any subsequent stage of the proceedings, on the demand of the Police or the Attorney General, as the case may be, on good cause being shown, and after hearing the person charged or accused, to deprive him of the benefit of such temporary release, and to order his re-arrest

578 - What happens when one breaches bail conditions.

#### **Article 579 Criminal Code - Breach of bail conditions.**

When a person accused breached the bail conditions, the sum stated in the bail bond shall be forfeited to the government of Malta and moreover a warrant of arrest shall be issued against him.

A person breached his bail conditions when he:

1. Fails to appear when ordered by the Court granting bail.
2. Fails to observe any of the conditions imposed by the Court in its decree.
3. Absconds or leaves Malta.
4. Interfere with witnesses.
5. Obstructs the course of justice whether in relation to himself or to another person.

Proviso to article 579

Provided that the Court may decide not to apply the provisions of this sub-article or not to apply them to their full extent where the Court considers that the infringement of the condition imposed in the decree granting bail is not of serious consequence.

- When a person accused breached the bail conditions, the sum stated in the bail bond shall be forfeited to the government of Malta and moreover a warrant of arrest shall be issued against him. The accused must be found guilty of breaching bail conditions.

The article provides a list of breaches of bail conditions.

579(2) - Penalties for breaching bail conditions.

Fine multa or to a term of imprisonment from from 4 months to 2 years or both and

The sum stated in the bail bond shall be forfeited in full or in part to the government of Malta according to the Court's assessment of the gravity of the offence.

The person charged with breach of bail conditions shall be arraigned in Court under arrest and

It shall be lawful for the police to request in the same proceedings the revocations of the bail and the re-arrest. The Court shall decide with urgency.

The police can arrest without warrant and can enter into any premises.

**Article 585 - When the Court orders the forfeiture of the guarantee / surety.**

585.(1) For the recovery of the sum fixed in the bail bond in the case referred to in article 579, the Court before which the person charged or accused was bound to appear, shall, as the case may be, either issue and enforce a warrant of seizure or of arrest against the surety until payment is effected, or declare the deposit to be forfeited in favour of the Government of Malta, or, in case of pledge, order the sale thereof.

(2) The provisions of sub-article (1) shall also apply to the party charged or accused if such party was bound together with his surety, whether jointly and severally or otherwise, or if the recognizance was entered into by the party charged or accused alone, notwithstanding that such party was arrested, sentenced, or acquitted in respect of the offence for which he had been bailed

- Issue and enforce a warrant of seizure or of arrest against the surety until payment is effected, or
- declare the deposit to be forfeited in favour of the Government of Malta, or,
- in case of pledge, order the sale thereof.

581 - When it is possible to not grant bail to the accused.

### **Article 581:**

In the case referred to in article 579 (default of appearance of person admitted to bail) the party arrested shall not be admitted to bail a second time in the same cause.

“Il-Qorti hi obbligata li, qabel ma tiddeċiedi jekk għandiex terġa’ tagħti jew le l-libertà proviżorja, tikkunsidra jekk il-kondizzjoni, u l-mod kif inkisret, kienitx ta’ konsegwenza serja u l-artikolu impunġat jiġi invoklat jekk il-Qorti tiddeċiedi li dak li ġara kien ta’ konsegwenzi serja u mhux mod ieħor”.

(Alfred Zara vs Onor Prim Ministru, Qorti Kostituzzjonali, deċiża 26/07/1993)

### **Article 586 - Detention for non-payment of deposit.**

Any person who is arrested for non-payment of the sum in which he bound himself, shall be detained for a period not exceeding one day for every eleven euro and sixty-five cents (€11.65) of that sum, whether such person is the person charged or accused or the surety:

Provided that in no case shall detention for non-payment of the sum in which a person has bound himself exceed six months if the amount is not higher than seven thousand euro (€7,000), one year if the amount is not higher than thirty thousand euro (€30,000), eighteen months if the amount is not higher than eighty thousand euro (€80,000) and two years if it is higher than eighty thousand euro (€80,000).

If the person so detained has no means of his own with which to maintain himself, he shall be maintained by the Government, in which case he may be compelled to work like other prisoners subjected to work, and may be kept in any prison

If the accused breaches bail conditions and does not pay the deposit, he spends them in jail. Find the *classes* and maximum amount of time he can spend in jail, which is capped.

**(BAIL= very imp. For your exams questioned in the warrant)**

Presumption of innocence - is a cardinal right of the accused from beginning until a judge of guilt is given and therefore since we do follow the principle of presumption of innocence, one has a right to request bail.

Each and every person has a right to enjoy his personal liberty, freedom to do whatever that person pleases provided that it is done within the parameters of the law and proper social conduct and behavior. You must emphasize that the right to personal liberty is not an absolute right in fact no fundamental human right is absolute apart from prohibition of torture - Jovica Kolakovic vs AG (14/02/2011).

Therefore, to conclude on this introduction, one can say the right to personal liberty can be restricted in specific circumstances, ex. Article 34 of our Maximilian Ciantar vs AG - Constitutional Court (7/01/2011). The Constitution and article 5 of European Convention, amongst which is when a person commits an offense.

**What actually is meant by the term bail? How can we define such a concept?**

It is any person charged or accused with a criminal offense and is in custody for the crime and/or contravention can either verbally or by application presented before the Courts, Court of magistrates and criminal Court, to be granted temporary release upon giving sufficient security under a number of imposed conditions.

You will know that when a person is brought to Court and charged with a criminal offense, he is charged before the Court of magistrates. The police can choose whether to arraign the person under arrest or whether to arraign the person in Court by a writ of summons, the latter case the person would not be under arrest hence in this instance no need for a frequent to be granted bail. But should the person be arraigned in Court under arrest, once arraignment is over, he would need to request bail.

Bail can be asked verbally when it is being asked on the day of the arraignment before the Court of magistrates in which case the mag will see what the prosecution officer will have to say about such a request, analyze the circumstances of the case and should it decide to grant bail, uphold request of the accused, impose a number of conditions and grant bail.

However, bail is not an automatic right. It is something which varies from one individual to another, and from one circumstance to another. You can have a person charged with the same

offense, and in one instance he is granted bail and in another, he is not since the Court takes into consideration a no. of factors before deciding to accede to a request of bail. EX; the antecedent of such 2 persons, may not necessarily be the same, one can have charged the other might not have.

Although the main offense might be the same circumstance of both people will not be the same and this will also be reflected by a decree of the Court. If, however, the Court does not accede to a request, the accused person can make subsequent requests, when he does so, these are made by means of an application to the Court.

When proceedings are heard by mag. Application is made and heard by mag who informs and notifies Attorney General, sees what he has to say and proceed to the decree. If on the other hand the proceedings held before the Court of mag are at that stage where the proceedings are sent to AG, proceedings are still made in writing but instead before the criminal Court. **This is not an application of appeal but a fresh application.**

A person who is kept under arrest and has been denied his bail can make subsequent requests and there is no limit in Malta on how much a person can ask for bail. When you request bail, you give a list of reasons why a person would ask for bail. If bail was not acceded, you need to wait for some time to display an application. There are usually reasons why the Court does not accede to such a request, ex. as it is still early on in the proceedings, complainant has not yet testified, or accused person has no ties with Malta, hence the Court is concerned that should the person be granted bail, he should abscond from island, or ex person does not have means of subsistence, or that the person does not have an income and he may probably commit other offenses, or for example he has no family relations in Malta.

These are all considerations that the Court takes into account when dealing with the request for bail. The less probability that there is with D tampering with evidence, the higher the chances are that he gets bail. Another important thing is that when you make an application before the Criminal Court, this is not an appeal. Therefore, the Judge presiding over the Criminal Court reviews the evidence in the proceedings before the Magistrates and makes a fresh analysis before giving its decree. The Judge is not bound by the decision given by the Magistrate. Also, when the request for bail is rejected before the Magistrate during arraignment and it is assigned to another Magistrate, the second Magistrate is not bound by the decision of the first Magistrate - he has full discretion.

It is important to note that the Court cannot give bail ex. officio - it is only granted by a request by D. The fact that he is granted bail means that he is going to be subject to a number of conditions which reflect on his freedom of movements:



**Conditions which the Court may impose upon condition when granting bail (reflect the seriousness of the offenses)**

The court can impose any or all of these conditions. In certain circumstances the Court may also add the appointment of the probation officer to ensure that conditions imposed are being adhered to, hence the fact that person has been granted bail - just being monitored, freedom being curtailed, until proceedings come to an end. You might ask so whilst the Court sets down some conditions, is he bound by these conditions until the end of proceedings? Ex, 7 years without traveling - the applicant can at any stage make an application in Court for there to be a variation in the decree of the Court, and the more time passes and provided the accused adhered to conditions, Court would be okay with changing conditions.

Ex. There is a father accused of theft or causing voluntary damage, and would like to take his family on holiday, he would make an application to Court and if AG has no objection the Court will proceed to accede to such a request, uphold the request and at times make a no off contentions.

Ex the accused person has to have a phone with him all the time, provides the police with the address where he will be, hence the accused person will have a fresh no of conditions given to him.

**Whenever a change of decree occurs, the Court has the duty to inform the AG of such a change.**

When the AG objects to the granting of bail or to the change of conditions then the Court appoints the application for hearing, hears submissions of both parties and then moves on to give its decree in camera, once decree is given, it notifies the parties concerned.

It is interesting to note that, Article 574(2) of the Criminal Code provides that in special cases, bail can also be granted by the President of Malta. Never has happened in Judge Consuela's 27 years - but the law provides for it. The president enjoys various prerogatives, one of which is the prerogative of mercy, other powers according to her personal judgment, possibility to grant a pardon, and substituting a former punishment formerly awarded by the Court.

Ex Court orders the confiscation of something, a car, a weapon, and the President of the Republic acceded to the confiscation of the object. What is interesting is the fact that the law does not define where and what these special cases are to make an application with the president to be granted bail.

Most probably these special cases are of a deeper nature as although a person can be limitedly granted bail, as no possibility of appeal from a decision of bail, these special cases should not be interpreted as cases where a request has been simply been turned down by Court. It could be that the person's request for bail is turned down over and over again as there is no limit in our law as to how many requests for bail applications one can lodge, unlike other foreign jurisdictions.

The accused has no right of appeal from decree granted on a denial of bail however he can make a fresh application to have his request reviewed. However, the AG has a right according to law within which to file an appeal from a decree granted by the Courts of mag to the criminal Court, asking for a review of the decision given by the Court, either because he is unhappy that the Courts have upheld to the request for bail or because he considers that the conditions imposed by the Court of magistrates were too lenient. In such a circumstance, the criminal Court reviews the evidence brought forward by the Court before it took such a decision and the duty of the judge is to see whether in those circumstances which the Court of Magistrate had before him, the mag gave a wrong decision. Hence not what it would have done but whether the magistrate could have given that decree in those circumstances.

**It is important to note that when a person alleges that he is being kept illegally, and hence asks to be released, this is not a case of bail.** This is not a case of bail as when he is asking for bail, it is presumed that his detention is lawful. In this case, he must file an application of **habeus Corpus**.

Section 575 provides a list of the criteria on the basis of which the Court can assess whether bail is to be granted or not. The law mentions instances when these criteria are to be assessed. Case law has proven that these criteria are applicable to all cases where bail is requested. It makes an analysis of both subjective and objective criteria at arriving at its conclusion. It is very important to note that the law states the Court **MAY GRANT BAIL**. Hence, the wording reflects the salient conclusions reached by various cases decided by the ECtHR on issues touching on the right of bail. Hence, the Court is **NOT OBLIGED TO GRANT BAIL**. The Court is obliged to take into consideration all circumstances of the case, such as the seriousness with which the person is charged. However, they are not a criteria aimed at depriving a person from requesting bail. These have to be assessed by the Court of magistrates and the criminal Court and they must also be taken into account by the AG when deciding whether to exercise its powers of review in regards to the granting of bail. The law provides two subjective criteria that must be taken into account:

- 1) The character of the accused.
- 2) The antecedent of the said person. Although the antecedent can be subjective, its analyses must lead to a subjective appreciation of his present character. It may transpire that the

person was going through a bad phase (such as a drug problem he had) but now he is no longer a criminal.

### **Thesis Herman Mula**

*Although strictly speaking there is no 'right' to bail, when a person is arraigned in Court under arrest, if the Court is satisfied that there are none of the dangers mentioned in paragraphs (a) to (e) of sub-article (1) of Article 575, or when these dangers cease to exist or can be satisfactorily neutralised by appropriate bail conditions, then bail shall be granted.*

### **The Police Vs Andy Calleja et (Application by Mario Borg) Criminal Court Hon. Chief Justice Dr. Vincent A. De Gaetano LL.D. 17th April 2003**

*Wilful Homicide – fear of flight – bill of indictment*

Facts: The defendant was arraigned under arrest alongside three other individuals in October 2001 charged with inter alia the wilful homicide of a police officer in the line of duty. Defence counsel applied for pre-trial release claiming that there was no legally founded reason for keeping her client detained. The AG opposed claiming fear of flight in view of the potential punishment, and fear of tampering with evidence. The AG added that drawing up of the bill of indictment was imminent since inquiry stage was concluded.

Held: The Court, in a concise manner, turned down defendant's request basing its decision upon the fear of flight giving consequence that the accused will not appear to Court hearings. (Article 575(1) (a) and (b)).

### **The Police Vs Omissis, Criminal Court**

**Hon. Chief Justice Dr. Vincent A. De Gaetano LL.D. 10th March 2006**

*Securities – Tampering with evidence – Re-arrest*

Facts: The defendants were arraigned under arrest charged with human trafficking and were granted bail at a subsequent hearing. The bail conditions imposed inter alia 'house arrest' conditions and a LM 15,000 personal security. The AG appealed asking for re-arrest in view of tampering with evidence, as civilian testimonies were pending and also asking for more stringent conditions.

Held: The Court emphasized that imposing exorbitant sums of money as personal guarantee is not a sufficient deterrent. It described the kinds of securities into a three tier approach. With the pledge being the heaviest, deposit less deterring, and personal guarantee being the least of security deterrents. After this concise explanation the Court went on to order the re-arrest of defendants on grounds of fear of tampering with evidence

### The Police Vs James Hughes Criminal Court

Hon. Chief Justice Dr. Vincent A. De Gaetano LL.D. 27st January 2009

#### *House Arrest – Re-arrest*

Facts: The accused was arraigned under arrest on the 23rd January 2009, facing charges of trafficking of heroin, and was granted bail on the same date with ‘house arrest’ conditions. The AG appealed requesting for his re-arrest, claiming the fear of tampering with evidence since this case was resting upon a sworn statement by a drug client of the accused. The AG emphasized also upon the premature stages of proceedings and the accused’s voluminous conviction sheet.

Held: The Court stressed that by ordering ‘house arrest’, the Court of First Instance showed that it was really concerned with the possibility of tampering with evidence by the accused. In addition the Court also stated that ‘house arrest’ can never be a substitute to pre-trial detention when there is present any danger listed in article 575(1) (a) – (e). Finally the Court embraced the AG’s request re-arresting the accused.

### Republic of Malta Vs Carmel Vella

Court of Criminal Appeal S.T.O. Chief Justice Dr. Silvio Camilleri LL.D. Hon. Judge Dr. David Scicluna LL.D. Hon. Judge Dr. Joseph Zammit Mckeon LL.D. 19th October 2011

#### *Pending appeal – Fear of flight – Non trust worthy – Bail denied*

Facts: On the 9th February 2010 the accused was sentenced to 6 years imprisonment by the Criminal Court, finding him guilty of conspiracy to commit voluntary homicide. He filed an application to be granted bail whilst his case was pending appeal.

Held: The Court did not entertain the applicant’s request on the grounds that in view of the gravity of the sentence already delivered, coupled with the penal antecedents of the accused, there existed a factual fear of flight.

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The Court assesses whether the accused is reliable and trustworthy, and takes into consideration the community ties of the accused. *Repubblika ta’ Malta vs AGIR al Muhsan* - better reflection on how the Courts deal with a request for bail.

There is then an umbrella provision whereby the law says that any other matter is to be taken into account - this is when a person is also charged going contrary to a bail condition. This falls under the umbrella condition which the Court takes into consideration.

Once the Court takes into consideration of these, it moves on to see whether it will accede to the request or not, the Court will ensure that the accused will not be in any danger that the accused will leave Malta - common in wealthy and foreign defendants, hence making a mockery of justice system in Malta.

Same considerations apply in Malta, as particularly in EU citizens in the light of European arrest warrants. But as regards EU citizens, problems arise if they are irregular immigrants. The Courts are not prejudiced with the accused person appearing before it, but if an EU citizen escapes Malta, the likelihood of bringing the person back to Malta is common and likely as you issue a European arrest warrant. But if the foreigner comes from a 3rd world country, and they manage to run away, bringing them back to face justice is very hard, hence those countries can refuse to send person's back.

An important case where there was a ship came into our territorial waters and one fine evening the sailors went to PV - one of them got drunk, stabbed a person, Spiteri, was dying, the sailor had run back to the boat and the captain did not want to release this sailor. The boat has the jurisdiction of the flag country, which was in Chile. His aggressor did not face justice. Yorgen fenech has been in jail for the last 5 years made many applications for bail, to every Court and still was not granted bail, as the moment in time when he was apprehended he was found on his yacht leaving the maltese islands hence the Court feels that if it grants him bail, it would facilitate him from leaving Malta. Italian people in Malta - Courts are skeptical in granting bail =- Article 8 italian drug ordinance - IF ONE gives themselves in Italian territory, he could be tried for those offenses in Italy. Trafficking of drugs - life imprisonment - good 12 years minimum - if he escapes Malta and gives himself to Italy, he will get around 2-3 years. Hence many people were asking for bail and then going to Italy.

It is important to note that not all decrees are notified to the AG - there are instances where the Court does not have discretion to grant the granting of bail. And this is when a particular time frame has elapsed and the AG has not as yet issued a bill of indictment or the charges before the Courts of mag. The law provides that if the offense is punishable by 4 years, the max period he can stay under arrest is 12 months. If 4-9 years: 16 months arrested. If the max period is more than 9 years; 20 months under arrest. If the bill of indictment is not yet given by the AG, the accused makes an application to the Court, Court sees that time has elapsed and then it is obliged to grant bail. Still, the granting of bail is upheld.

Another recourse which the applicant can choose - if conditions imposed by Court are too severe he can ask for a revision of those conditions. ex: obligation to deposit 10k and the accused person can prove to Court that he is not in possession of 10, the Court will appoint his application ask accused to bring evidence, bank accounts / social services / see if he has any properties and if it is satisfied that he cannot make good for this money, it will proceed to reduce it. In the cons. The Court case of Mario Pollacca vs Kummissarju tal-Pulizija and Carmel Mifsud vs Kummissarju tal-Pulizija, stated that the amount of money must be commensurate with the means of the accused person.

### **Article 576 CC - Amount of security**

576. 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 quality of the offence, and the term of the punishment to which it is liable

### **Different mode of security - Article 577 CC**

577.(1) Security for bail is given by the production of a sufficient surety who shall enter into a written recognizance in the sum fixed.

(2) It may also be given, whenever the Court shall deem it proper, by the mere deposit of the sum or of an equivalent pledge, or by the mere recognizance of the person accused.

(3) Nevertheless, in cases of contraventions or of crimes within the jurisdiction of the Court of Magistrates as Court of criminal judicature in terms of article 370(1) and article 371(2), it shall be lawful for the Court, if it deems it expedient so to do, to exempt the accused, while the case is pending, from any of the modes of security mentioned in this article.

(4) Persons accused of any crime outside the jurisdiction of the Court of Magistrates as Court of criminal judicature may, in the absence of opposition on the part of the Attorney General, be exempted from any of the modes of security mentioned in this article, where it appears from a certificate under the hand of the Commissioner of Police that they are poor and of good moral character

### **Effect of security - Article 578 CC**

578. The effect of the security for bail shall be the temporary release from custody of the person charged or accused:

Provided that it shall be lawful for the Court, at any subsequent stage of the proceedings, on the demand of the Police or the Attorney General, as the case may be, on good cause being shown, and after hearing the person charged or accused, to deprive him of the benefit of such temporary release, and to order his re-arrest

### **Article 579 CC - Consequences of default of appearance of person admitted to bail, etc.**

Another provision in the CC is article 579 which provides that it is an offence if the person who is granted bail does not abide by the bail conditions. The prosecuting officer has a choice - he

may proceed / make an application in the ongoing proceedings whereby he informs the judge has defaulted. If it results that it is true, then his bail could be revoked, sent back to jail, and forfeits the bail bond.(both personal guarantee and his deposit) Alternatively, the prosecuting officer decides to bring the accused to Court using fresh proceedings, charging him, and if found guilty, he is sentenced up to 6 months in jail and orders the revocation of his arrest. Until recently, once bail is revoked, as a consequence of such revocation, the Court orders the forfeiture of the bail bond.. But recent amendments state that if there is slight nature - disobedience, - there is a variation and bail bond is partially forfeited.

**Article 579 CC** - 579.(1) *If the person charged or accused fails to appear when ordered by the authority specified in the bail bond, or fails to observe any of the conditions imposed by the Court in its decree granting bail, or absconds or leaves Malta, or while on bail commits any crime not being one of an involuntary nature, or interferes or attempts to interfere with witnesses or otherwise obstructs or attempts to obstruct the course of justice whether in relation to himself or any other person, the sum stated in the bail bond shall be forfeited to the Government of Malta, and, moreover, a warrant of arrest shall be issued against him:*

*Provided that the Court may decide not to apply the provisions of this sub-article or not to apply them to their full extent where the Court considers that the infringement of the condition imposed on the decree granting bail is not of serious consequence.*

*(2) Any person who fails to observe any of the conditions imposed by the Court in its decree granting bail shall be guilty of an offence and shall, on conviction, be liable to the punishment of a fine (multa) or to **a term of imprisonment from four months to two years, or to both such fine and imprisonment** and the Court shall order **that the sum stated in the bail bond shall be forfeited in full or in part to the Government of Malta according to the Court's assessment of the gravity of the offence.***

*(3) Notwithstanding the provisions of any law, any person charged with any offence as mentioned in sub-article (2) shall be arraigned in Court under arrest, and it shall be lawful for the Police To request in the same proceedings the revocation of bail and the re-arrest of such person. The proceedings for an offence under sub-article (2) shall be taken by the Police and shall be decided by the Court with urgency.*

*(4) It shall be lawful for the Police to enter into any premises in order to ensure that the conditions imposed by the Court as mentioned in sub-article (1) are being observed. It shall also be lawful for the Police to arrest without warrant any person suspected of an offence under sub-article (2)*

**Article 580 CC - Court by which bail is granted**

580.(1) The person charged or accused shall be admitted to bail by the Court of Magistrates or by the Criminal Court, under the authority of which, as the case may be, he is or is to be detained.

(2) The demand for bail may be made at any stage of the proceedings subsequent to the taking down in writing of the complaint or report and the examination referred to in article 390, and any such demand may be made not only during the inquiry, but also to the judge sitting in the Criminal Court after the accused has been committed for trial or after the filing of the indictment, even though bail had not been granted to him by the Court of Magistrates.

(3) The demand for bail before the Criminal Court shall be made by an application whereupon the Court shall, if the application, is opposed by the Attorney General, appoint a day for hearing the applicant and the Attorney General, causing them to be served with a copy of the decree.

(4) Except as provided in article 575(2), the demand for bail before the Court of Magistrates shall be made orally.

**Article 581 -Party bailed arrested for default, not to be re-admitted to bail**

provides that a party who has lost his bail cannot be admitted to bail for a second time. However, this provision of the law was contested before the Constitution Court in the case of Dr Patrick Spiteri vs AG et. (Judge Micallef, 27/03/2003) that this provision goes against the HR of the individual and decided that the person can be granted bail thereafter. Subsequently, although the law has not been changed, it has been followed by the Criminal Court in Rep. ta' Malta vs Keith Cremona (27/10/2021) and Pulizija vs Christian Said (23/02/2022) and John Aquilina et. vs AG. Therefore, bail can be granted by the Court for a second and subsequent time, despite the prohibition in this article.

If the surety which the accused person has brought forward dies during the proceedings or leaves Malta, even temporarily, or becomes bankrupt, the law provides in article 587 that the person charged or accused must find a new and sufficient surety and in default of which, that person would be arrested.

If a person brings forward the surety so that he is granted bail and the surety decides to withdraw his money, the surety cannot withdraw the money/guarantee given **unless** he confirms that he has reasonable grounds to believe that the person who is out on bail is going to abscond from this island.

**Article 582 CC - Bail not to be granted by the Court ex officio**

582.(1) The Court may not ex officio grant bail, unless it is applied for by the person charged or accused. Court may require previous notice of proposed surety.



(2) The Court may require a previous notice of twenty-four hours of the proposed surety. Power of Court to extend time for appearance of accused.

(3) It shall be lawful for the Court, on just cause being shown, to extend the time originally appointed for the appearance of the person charged or accused

**Article 583 - Right of surety to be released from his recognizance in certain cases.**

583. If a surety has reason to suspect that the person charged or accused is about to escape, he may, on showing to the Executive Police sufficient grounds for his suspicion, cause the person charged or accused to be again arrested, and thereby release himself from his bond:

Provided that the person charged or accused may again be bailed, if he gives new security.

There are various and each condition reflects the seriousness or otherwise of the offense with which the accused is charged. Naturally, the more serious the offense, the more cumbersome the conditions are.

1. The accused may be deprived from speaking to certain people.
2. Ordered not to change residence
3. Not leave the island for any particular reason.
4. Sign the bailbook- at the police station where he resides.
5. Imposed to be home at a certain hour / not to leave home before a particular time.
6. To bind himself with a personal guarantee or deposit a sum of money.
7. Surety to make good for the amount where the Court has to accept the surety - it is not a given.
8. Can impose any, all or some.
9. Can impose drug-related help or to submit urine tests to confirm that he is no longer taking drugs.
10. The appointment of a supervised officer.

These may be imposed until the final stage - i.e., including the appeal.

**Article 584 CC - Mode of regulating amount for bail**

584. The amount of the security shall be regulated as follows:

In the case of contraventions, other than the contravention referred to in article 338(t), the amount of the security shall be from four euro and sixty-six cents (€4.66) to nine euro and thirty-two cents (€9.32); in the case of the contravention referred to in article 338(t) or of any crime punishable with detention, or with less than one year's imprisonment, the amount of the

security shall be from forty-six euro and fifty-nine cents (€46.59) to twenty-three thousand and two hundred and ninety-three euro and seventy-three cents (€23,293.73); and in any other case the amount of the security shall be such sum, being not less than one hundred and sixteen euro and forty-seven cents (€116.47), as the Court shall deem, in the circumstances, sufficient to ensure as far as possible that the person charged or accused will appear as provided by law.

#### **Article 585 - Recovery of bail**

585.(1) For the recovery of the sum fixed in the bail bond in the case referred to in article 579, the Court before which the person charged or accused was bound to appear, shall, as the case may be, either issue and enforce a warrant of seizure or of arrest against the surety until payment is effected, or declare the deposit to be forfeited in favour of the Government of Malta, or, in case of pledge, order the sale thereof.

(2) The provisions of sub-article (1) shall also apply to the party charged or accused if such party was bound together with his surety, whether jointly and severally or otherwise, or if the recognizance was entered into by the party charged or accused alone, notwithstanding that such party was arrested, sentenced, or acquitted in respect of the offence for which he had been bailed.

#### **Article 586 CC**

586.(1) Any person who is arrested for non-payment of the sum in which he bound himself, shall be detained for a period not exceeding one day for every eleven euro and sixty-five cents (€11.65) of that sum, whether such person is the person charged or accused or the surety:

Provided that in no case shall detention for non-payment of the sum in which a person has bound himself exceed six months if the amount is not higher than seven thousand euro (€7,000), one year if the amount is not higher than thirty thousand euro (€30,000), eighteen months if the amount is not higher than eighty thousand euro (€80,000) and two years if it is higher than eighty thousand euro (€80,000).

(2) If the person so detained has no means of his own with which to maintain himself, he shall be maintained by the Government, in which case he may be compelled to work like other prisoners subjected to work, and may be kept in any prison

#### **Article 587 CC**

587. If the surety dies or leaves Malta, even temporarily, or becomes bankrupt, the person charged or accused must find a new and sufficient surety. In default, he shall be arrested.

# **TRIAL BY JURY**

## **Articles 439-496 CRIMINAL CODE**

*“The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford a subject’s freedom in the hands of twelve countrymen. So that trial by jury is more than an instrument and more than one wheel of the constitution: it is the lamp that shows that freedom lives.”*

*“Each jury is a little parliament” (Lord Patrick Devlin, 1956 – Trial by Jury)*

This semester - criminal Court - provisions of the general Court

Criminal Court trial by jury - another call for citizens to decide if a person is guilty or not. There are those who are in favor of this system and those who are not. Crimes are not only committed against the victim but against society at large. The state gives the opportunity for citizens to decide.

### **History of the Trial by Jury in Malta**

1811 - Marquis Testaferrata was sent to London to learn about the jury system.

1812 - Royal Commission was unwilling to introduce the trial by jury system, probably because of the size and population of the island.

1815 - Trial by Jury was introduced for piracy offences.

1829 - Proclamation VI of 1829 – A Court of Special Commission composed of the Chief Justice and 3 or more other Commissioners who were Judges of the Superior Courts was established to try jury crimes punishable by death or life imprisonment.

1845 - Jury was extended to all crimes punishable by 5 years imprisonment and upwards.

1854 – trial by jury was introduced for all criminal cases except those tried by the Courts of Judicial Police.

The jury is not new but started in the beginning of the 19th century, 1811, Marquis Testaferrate sent to London to learn about the jury system. In 1815, jury was introduced only for piracy offences.

*“It is my conscientious opinion that every one of the verdicts in these five cases was as correct, as just and as legal as could have been given by any tribunal in the world [...]*

*Upon the whole, the jurors who served upon these trials have, by their conduct, triumphantly refuted the false notion that the Maltese are unfit for trial by jury: they have shown that Malta is worthy of that great boon conferred on her by the ever memorable proclamation of the 15*

*October 1829; and they have, honourably to themselves and to their country, fulfilled the confidence reposed in them by a liberal and enlightened government, and have fully justified, so far as they are concerned, the wisdom of the law."*

(Sir John Stoddart, Chief Justice of Malta - 1826-1838)

In a jury - all evidence has to be reheard in front of the jury, if the first in a Court of mag. Then everything has to be done twice. The jury must analyse and hear evidence of all the things in front of it. All evidence must be presented to the jury.

Composition and powers of the Court

L-ECCEZZJONIETT - all the procedural issues which the defence brings.

Procedure before the trial by jury -

Verdict - what the jury decides and sentence is the sentence given by the judge in accordance with what the jury stated, and will give a time of imprisonment.

### **Article 436 - Constitution of the Criminal Court**

*436.(1) The Criminal Court shall consist of one of the judges sitting with a jury for the trial of every offence which may be prosecuted according to law in Malta saving the provisions of article 370.*

*(2) The jury shall decide on any matter touching the issue as to whether the accused is guilty or not guilty and on any collateral issue referred to in Title VII of Part II of Book Second of this Code; and the Court shall decide on the application of the law to the fact as declared by the jury, as well as on all other points of law or affect relative to the proceedings. Further powers of Court.*

Presided over by one Judge and a Jury

The Jury decides on whether the accused is guilty or not guilty and on any collateral issue referred to in Title VII of Part II of the Second Book.

The Court shall decide on the application of the law of the fact as declared by the jury and on points of law.

*(3) It shall also appertain to the Court -*

*(a) to maintain good order during the sitting;*

*(b) to conduct the hearing;*

*(c) to do, in matters which are not prohibited or prescribed by law under pain of nullity, whatever it may, in its discretion, deem necessary for the discovery of the truth.*

*(4) The Court shall also be competent to try and determine offences which, although of an inferior jurisdiction, are brought before the Court either because they are connected with a grave offence preferred in the indictment or because they are committed by the same person indicted for such graver offence*

*(5) The Court shall also be competent generally to try and determine any offence of an inferior jurisdiction and to apply the measures referred to in articles 377, 378, 383, 384 and 385 if, upon trial, the accused is convicted of any minor offence whether preferred or comprised or involved in the indictment, or if such measures become necessary.*

The Criminal Court is also competent to try and determine offences of an inferior jurisdiction if the offences are connected with graver offences in the same indictment or because they are committed by the same person indicted for graver offence.

The Court is also competent to try and determine any offence of an inferior jurisdiction if the accused is convicted of any minor offence whether preferred or composed or involved in the indictment, or if such measures become necessary and can apply the measures in articles 377, 378, 383, 384 and 385.

*(6) Notwithstanding any other provision of this Code and subject to the provisions of the following sub-articles of this article, the accused may, not later than ten days after the date of service of the notice referred to in article 438(6) or of the order referred to in article 620(4), file a note in the registry of the Court opting that a jury be not impanelled for the trial or for the decision of any collateral issue under Title VII of Part II of Book Second of this Code, and an official copy of such note shall be served on the Attorney General: Cap. 31. Cap. 101.*

*Provided that this sub-article shall not apply for the trial of the offence where the punishment demanded in the indictment is of imprisonment for life other than an offence against the Medical and Kindred Professions Ordinance or the Dangerous Drugs Ordinance.*

The accused had 10 days from the date of service of the bill of indictment to file a note in the registry of the Court opting for a trial without a jury. This is also allowed in cases of any collateral issues under Title VII of Part II of

Book Second (Allegation of Insanity and other Collateral Issues).

*(7) The provisions of sub-article (6) shall not apply to the accused who has made the objection mentioned in article 370(3)(d).*

*(8) Where charges against two or more persons are joined in the same indictment and not all the accused have filed the note referred to in sub-article (6), the trial of the accused who has opted that a jury be not impanelled for his trial shall take place after that the trial of the cause of the other accused who has not filed such note has become res judicata.*

*(9) Where the option is exercised as provided in sub-article (6) the Court shall consist of one of the judges sitting without a jury, and the provisions of this Title and of Sub-title I of Title II and of Title V of Part I of Book Second of this Code shall mutatis mutandis apply*

Article 436 sub 3 - the Court can also even though there is a list of witnesses, the judge can ask for more witnesses. The judge in the Gallali case can appoint a witness, just like it did an expert witness to ascertain and make sure of the truth.

436 sub 4 and 5 - ex of a wilful homicide and disrupting public peace. In that case, the criminal code can decide on all cases and on all crimes, if 2 offences, it can decide on both.

Bill of indictment - split into KAP - it tieni kap, harti jew mhux hati, it ittelet kap....

**436(6)** - accused has 10 days from date of service of the bill of indictment - ACCUSED can choose to have a jury without GURATI, mhux fej hemm life imprisonment pero. Jista jaghzal li jkollu gurin, gurui zghir. Jsta jaghzal u ghandu 10 days biex jaghzal.

**RIKORS** - dejjem hemm talba

**NOTA** - qed tinforma l qorti

**Article 438 Criminal Code** - Service of Indictment on Accused

AG has 1 month to issue a bill of indictment and once a bill of indictment is issued, it is notified to the accused. Accused has 15 days from the bill of indictment to file a note and - to file a plea – jaghmel l-eccezzjonijiet fuq l-att tal-akkuza u wkoll fuq l-ammissibilita' ta evidenza.

A copy of the bill of indictment and of the list of witnesses and documents and exhibits is served on the accused.

The accused has 15 working days from the date of service of the bill of indictment to present a note in the registry of the Court to give notice of any pleas referred to in article 449 and any plea regarding the admissibility of evidence which he intends to raise.

In the same note the accused shall indicate the witnesses, documents and other exhibits which he intends to use at the trial.

An official copy of the note is served on the AG.

The AG has 5 days from the day of service of the note filed by the accused to file a note in the registry of the Court to give notice of any plea regarding the admissibility of evidence which he intends to raise. A copy of the bill of indictment and of the list of witnesses and documents and exhibits is served on the accused.

The accused has 15 working days from the date of service of the bill of indictment to present a note in the registry of the Court to give notice of any pleas referred to in article 449 and any plea regarding the admissibility of evidence which he intends to raise.

In the same note the accused shall indicate the witnesses, documents and other exhibits which he intends to use at the trial.

An official copy of the note is served on the AG.

The AG has 5 days from the day of service of the note filed by the accused to file a note in the registry of the Court to give notice of any plea regarding the admissibility of evidence which he intends to raise.

Subsequently the Court appoints a day for the hearing of all the pleas.

Proviso to 438(4): the Court may ex officio or on the application of the accused request the proof intended to be established by the witness, documents or exhibits.

When no pleas are raised, or after the determination of the pleas, the Court shall appoint a day for hearing of the trial.

The accused shall be served with the notice of the date of trial and allow him 20 days to prepare his defence. The period can be extended.

With the bill of indictment - he also makes a list of things relevant 0 438 - IN NOTA TIGI NOTIFIKATA LILL AG - l AG andu 5 days biex jitfa N NOTA - fejn l akkuzat ghandu fakulta li jaghamel nota tal-eccezzjonijiet fuq bill of indictment, l AG jista jamel biss nota fuq l-amissibilta' tal-evidenza.

Proviso in 438(4) Court can ask what is the OGGETT TAL-PROVA. The court appoints a date of hearing before a trial. The accused is served with the date and has 20 days to prepare his defence.

**439** skont l att tal akkuza meta dahlet lill ag jidhlu b min imissu - IMMA L QORTI = GENERALMENT TIMXI SKONT DAK LI DAHAL L QORTI ,

Article 439 - Order of hearing of cases

439.Causes shall be tried in rotation, according to the date of the filing of the indictment:

Provided that it shall be lawful for the Court, if it sees good reason for so doing, to postpone the trial of a cause which is next in rotation, and proceed to try another cause.

- Cases are heard in rotation, according to the date of the filing of the indictment.
- It is lawful for the Court if it sees good reason for doing so, to postpone the trial of a cause which is next in rotation and process to try another cause.

### **How a trial by jury works in practice**

1. Usually starts with the selection of the jury - 12 are chosen, many are chosen.
2. Court registrar releases bill of indictment
3. AG reads the offences, gives an overview of evidence he will submit, and aim is to find guilt.
4. Then provi stage starts and witnesses are heard. The defence can make contro ezami fuq x xhieda tal perosekuzzjoni. GURATI jistghu jsaqsu lix-xhieda, u jsaqsuha lill-imhallef, u l-imhallef isaqsiha.
5. The accused also can give evidence and in that event, even though he is not entitled, he may be subject to a kontro-ezami tal ag umbaghad.
6. Imhallef jaghmel INDIRIZZ - jghid lill gurati jiifmu u jaraw hux ha jsibu htija jew le-jaghmel summary ta dak kollu li sema, u jispejega r relevanza taghha u jaghti kull informazzjoni li hemm bzonni.
7. The accused can appeal - either on decision of the jury or on law.



## **Article 589 Criminal Code - Contents of Indictment**

*589. The indictment shall be made in the name of the Republic of Malta and shall -*

*(a) specify the Court before which it is preferred;*

*(b) contain a clear indication of the person accused;*

*(c) state the facts constituting the offence with such particulars as can be given relating to the time and place in which the facts took place and to the person against whom the offence was committed, together with all such circumstances as, according to law and in the opinion of the Attorney General, may increase or diminish the punishment for the offence; and*

*(d) end with a summary in which the accused shall be charged with the offence as specified or described by the law, and with the demand that the accused be proceeded against according to law, and that he be sentenced to the punishment prescribed by law (quoting the article of the law creating the offence) or to any other punishment applicable according to law to the declaration of guilty of the accused*

- The indictment is made in the name of the Republic of Malta.
- Specify the Court – Criminal Court
- Contain a clear indication of the person accused.
- State the facts constituting the offence, (time and place, the person against whom the offence was committed, circumstances which may increase or diminish the punishment for the offence).
- End up with a summary in which the accused shall be charged, and with the demand that the accused be proceeded against according to law, and that he be sentenced to the punishment prescribed by law.

The criminal Court starts with filing with the bill of indictment - what is this? What is the substance of it? Can it be corrected? To what extent? The implications of any mistakes in the bill of indictment.

## **Article 598 - Correction in the name of the accused**

598.(1) It shall be lawful, by leave of the Court, to correct any error in the name of or other particulars relating to the person accused.

(2) If the accused shall not take exception to any such error before pleading to the general issue of guilty or not guilty, the trial shall be proceeded with as if the name and particulars stated in the indictment were truly those of the accused:

Provided that the Court shall have power to make, at any subsequent stage, the addition of the real name or the true particulars, should these become known; in which case, the fact shall be noted down in the proceedings.

The Court can authorise the correction of any error in the name of or other particulars relating to the person accused. This must be done before the accused pleads to the general issue of guilty or not guilty.

However, the Court shall have the power to make at any stage the addition of the real name or the true particulars, should these become known, in which case the fact shall be noted down in the proceedings.

AG files a bill of indictment in the registry of the Court, the Registrar should note down on the foot the day on which it is filed. AG has 1 month to file its bill of indictment, hence date with stamp of registrar is very important.

Article 589 - gives a list of what the bill of indictment should contain;

- A clear indication of the person accused - name can not be changed
- Article 598 - before the accused pleads guilty or not, name can be corrected, after not.

Article 598 - if change is done after the accused pleads guilty or not, then this should be noted in the minutes of the case.

Corrections - aimed at amending the bill of indictment, the law provides that for all these mistakes, could be corrected before the trial, sometimes even during trial. The third thing the indictment should have is the facts of the case. Circumstances which may diminish the punishment. Most times the Court of criminal inquiry takes a no of years. Summary is a very brief summary for the accused to know on which grounds he is being accused upon. The statement of facts is a very short paragraph, half a page. Not a summary of everything.

Article 589(C)

**Oorti tal-Appell Kriminali (Sede Superjuri) - Ir-Repubblika ta' Malta v. Stiano Agius Eleanor Tracy Agius, Deciza 9 ta' Jannar 2014**

*“Skont l-artikolu 588 tal-Kodiċi Kriminali “l-att tal-akkuża għandu jiġi magħmul bil-miktub u għandu jiġi iffirmit mill-Avukat Ġenerali” u skont l-artikolu 589 tal-istess Kodiċi “L-att tal-akkuża jsir fl-isem tar-Repubblika ta' Malta”. Għalhekk, meta fl-artikolu 589 tal-istess Kodiċi jingħad li l-att tal-akkuża għandu jfisser il-fatt li jikkostitwixxi r-reat u l-partikolaritajiet l-oħra msemmija fl-istess artikolu dan ma jistax ifisser hliet li l-att tal-akkuża għandu jfisser il-fatt u partikolaritajiet l-oħra msemmija skont kif jifhimhom li għaw l-Avukat Ġenerali f'isem ir-Repubblika ta' Malta.*

*Il-provi in sostenn tal-fatt li jikkostitwixxi r-reat u tal- partikolaritajiet l-oħra skont l-att tal-akkuża, imbagħad, jingiebu mill-Avukat Ġenerali fil-kors tal-proċess fl-istadju opportune.”*

**Oorti tal-Appell Kriminali (Sede Superjuri) - Ir-Repubblika ta' Malta vs Darren Mizzi, Deciza 24 ta' Jannar 2024**

L-Att tal-Akkuża jinqara lil għurati fil-bidu ta' ċelebrazzjoni tal- għurati sabiex jkun lilhom indikat il-fatti li fuqhom l-Avukat Ġenerali ikun qed jixli lil persuna akkużata bir-reati imbagħad ipprospettati fil-parti akkużatorja tal-imsemmi Att, iżda dan ma għandu ebda valur probatorju. Il-provi in sostenn tal-Kapi tal-Att tal-Akkuża huma dawk li tressaq il-Prosekuzzjoni waqt iċ-ċelebrazzjoni tal- għurati. Infatti l-għurati, bħala mhallfin tal-fatt, isejsu l-verdett tagħhom biss fuq il-provi li jkunu ġew prodotti quddiemhom waqt il- ċelebrazzjoni tal-għurati fejn l-Att tal-Akkuża ma jtgħiesx bħala parti minn dawk il-provi.

**Oorti tal-Appell Kriminali (Sede Superjuri) - Ir-Repubblika ta' Malta vs Joseph Azzopardi Deciza 4 ta' Diċembru 2024**

“Illi għalhekk l-Att tal-Akkuża m'għandu l-ebda valur probatorju. Infatti l- parti narrattiva tal-Att tal-Akkuża bl-ebda mod ma tikkostitwixxi xi stat ta' fatt jew prova favur jew kontra l-akkużat u infatti l-htija o meno tal-akkużat tiġi determinata mill-għurati bħala mhallfin tal-fatt fid-dawl tal-provi favur jew kontra l-akkużat li jingiebu matul iċ-ċelebrazzjoni tal-għurati, u mhux fid- dawl ta' dak kontenut fil-parti narrattiva tal-Att tal-Akkuża.

Dipiu'l-AvukatĠenerali,generalmentwaqtir-Rekwizitorja,jispegjalill- għurati li l-parti narrattiva tal-Att talAkkuża ma torbotx u li ma tikkostitwixxi ebda prova fil-konfront tal-akkużat, u li l-verdett tagħhom irid ikun imsejjes biss fuq il-provi prodotti waqt iċċelebrazzjoni tal-għurati.

Fuq kollox huwa dmir ta' l-Imħallef toġat waqt l-indirizz tiegħu lill-ġurati li jiggwidahom dwar kif għandhom jixtar l-provi miġjuba quddiemhom waqt iċ-ċelebrazzjoni tal-ġuri, fejn ikun lilhom indikat illi nnarrattiva fl-Att ta' l-Akkuza ma għandha ebda valur probatorju.

Jikkonsegwi għalhekk illi jekk l-Avukat Ġenerali, fil-parti narrattiva tal-Att tal-Akkuza, ma semmiex xi dettalji li jkunu favorevoli għall-akkużat, dan ċertament mhuwiex se jirrekka xi forma ta' preġudizzju għalih, u wisq anqas se jiġi ppreġudikat id-dritt tiegħu għal smiġħ xieraq.

In the criminal Court, it is everything a fresh, jury hears everything a fresh joqodux fuq l att tal akkuza, imma fuq l provi migjuba quddiemhom, so l-fatti li jkun hemm fl-att tal akuza, ma jholl u jorbot xejn mill-guri.

**Repubblika vs. Darren Mizzi - 24 Jan 2014** - "*L-att tal-akkuza..provi*" - provi li jtella l AG quddiem l guri - dak li jintqal bhala fatti, m'hemmx valur, is sostenn tal att tal akkuza.

Att tal-akkuza mijiex prova - MA NISTAX NGHID HA NSIBU HATI GHAX FL-ATT TAL AKKUZA HEMM DAWN IL-PROVI - il-provi huma dawk li jittellaw waqt il-guri fil-mori tal-kawza.

**Repubblika ta' Malta vs Joseph Azzopardi, 4 Dec 2024** - "Illi għalhekk.... Smiġħ xieraq" - jekk l AG jinsa xi aff, li ovja ha jinsa, dik ma ggibx 0

L problema tkun jekk l-parti narattiva ma tkunx parti - mill-att tal-akkuza - ma tistax tghid li int qed takkuzah ta ttraffikar tad droga meta dan huwa akkuzat li qatel lil xi hadd.

Article 598 (D) CRIMINAL CODE - accusation.

#### **ACCUSATION:**

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accuses XXXXXXXX of being guilty of having, on the (DATE), and during the preceding months, guilty of conspiracy to trafficking in dangerous drugs (cocaine) in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, or of promoting, constituting, organizing or financing the conspiracy;

#### **PUNISHMENT:**

And demands that the accused be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for life and to a fine of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (€116,468.67) and the forfeiture in favour of the Government of Malta of the entire immovable and movable

property in which the offence took place as described in the bill of indictment, as is stipulated and laid down in articles 9, 10(1), 12, 14, 15A, 20, 22(1)(a)(f)(1A), 22(1B), 22(2)(a)(i), 22(3A)(a)(b)(c)(d) and 26 of the Dangerous Drugs Ordinance Chapter 101 of the Laws of Malta and of regulations 4(a) of the 1939 Regulations on the Internal Control of Dangerous Drugs (G.N. 292/1939) and of articles 17, 23, 23A, 23B, 23C and 533 of the Criminal Code or to any other punishment applicable according to law to the declaration of guilty of the accused.

**Repubblika ta' Malta vs Martin Spiteri - 14 Jan 2010, Qorti tal-Appell Kriminali (Sede Superjuri)**

*“Kif ingħad, l-iskop kollu tal-paragrafu (d) tal-Artikolu 589 hu li l- akkużat ikun jaf eżattament biex qed jiġi akkużat u għal x’hiex irid iwieġeb, u mhux biex wieħed joqgħod juża kliem sagramentali jew ripettittivi li, f’ċerti każijiet, meta jinqraw minn min ma jkollux taħrig legali, aktar iħalluh konfuż u mhawwad dwar x’inhil l- akkuża jew dwar x’inhuma l-elementi tar-reat! B’dana kollu, din il-Qorti mhix qed tgħid li m’għandhomx jiġu segwiti u riprodotti l-kliem tal-liġi, iżda jekk dana ma jsirx ċertament ma jkunx hemm lok ta’ eċċezzjoni ta’ nullita` iżda għandha se mai tintalab korrezzjoni għall-finijiet ta’ kjarifika.”*

**Article 596 Criminal Code** - AG may include excuse in the indictment -

**596.**Where, by reason of any excuse, the decrease of punishment is to be made within a latitude including two or more degrees, it shall be lawful for the Attorney General in the indictment to demand any of the lesser punishments within such latitude, which, according to the evidence before him, he may deem applicable to the offence; and in any such case, the Attorney General shall also specify in the indictment the excuse, and no higher punishment than that demanded in the indictment may be awarded by the Court

- The Attorney General may demand any lesser punishment, which according to the evidence before him, he may deem applicable to the offence. The Attorney General may also specify the excuse in the indictment and no higher punishment than that demanded in the indictment may be awarded by the Court.

**Article 590 - Filing of Indictment**

**590.**(1) The indictment shall be filed in the registry of the Court, and the registrar shall note down at the foot thereof the day on which it is filed.

(2) With the indictment the Attorney General shall also file a list of the witnesses, documents and other exhibits which he intends to produce at the trial

**Article 590(2)** - another important part in the bill of investment is the list of documents. list of documents and list of exhibits (those prepared in the compilation of evidence x; laptop, drugs, car), these are in a list fl-att tal-akkuza.

With the indictment, the attorney general shall also file a list of witnesses, documents and other exhibits which he intends to produce at the trial.

**Article 438 Criminal Code - Service of Indictment on Accused**

438.(1) An official copy of the indictment and of the list referred to in article 590(2) shall be served on the accused.

(2) The accused shall, by means of a note to be filed in the registry of the Court not later than fifteen working days from the date of such service -

(i) give notice of any pleas referred to in article 449 and any plea regarding the admissibility of evidence which he intends to raise, and

(ii) indicate the witnesses and produce the documents and other exhibits which he intends to use at the trial, and an official copy of such note shall be served on the Attorney General.

(3) The Attorney General shall, by means of a note filed in the registry of the Court not later than five days from the date of service of the note filed by the accused, give notice of any plea regarding the admissibility of evidence which he intends to raise.

(4) On the expiration of the time referred to in the preceding sub-article, the Court shall appoint a day for the hearing of all the pleas and shall on that day direct the registrar to read out the indictment, and shall then proceed to determine such pleas before the accused pleads to the general issue of guilty or not guilty:

Provided that the Court may ex officio or on the application of the Attorney General or the accused request that the proof intended to be established by the witnesses, documents or exhibits be stated.

(5) If no pleas have been raised as provided in sub-articles (2) and (3), or after the determination of such pleas, the Court shall appoint a day for the hearing of the trial

(6) The accused shall be served with a notice of such date allowing a term of at least twenty days to prepare his defence. The Court may, on good cause being shown, and after hearing the Attorney General, extend such term to any further period as it may deem fit.

(7) If, on the day appointed for the hearing of the trial according to sub-article (5), or on any other day thereafter appointed for the same purpose, the trial is adjourned to another day on account of the fact that the accused, without just cause, and notwithstanding that he had been given notice according to law of the day appointed, fails to appear, or on account of the fact that although he appears, the trial cannot be heard for some cause attributable to the accused and which the Court determines not to be a just cause, all the expenses incurred shall be charged to the accused, and it shall be lawful for the Court, at the request of the Attorney General, to compel the accused to pay the same.

(8) The accused may waive his right to such term.

#### **Article 438(2) of the Criminal Code** - List of Witnesses and Documents

The accused shall, by means of a note to be filed in the registry of the Court not later than 15 working days from such date.

(i) give notice of any pleas

(ii) indicate the witnesses and procedure the documents and other exhibits which he intends to sue at the trial.

#### **Article 440 Criminal Code**

**440.(1)** The record of the inquiry, documents and exhibits filed in the registry of the Court by the Attorney General or the accused shall be accessible to the Attorney General and to the accused or his advocate or legal procurator. Preservation of documents, etc., by registrar.

**(2)** The registrar shall take the necessary precautions for the preservation of all the documents, exhibits, and records in the state in which they are at the moment in which they are filed. Inadmissibility of witnesses, etc., without leave of Court.

**(3)** No witness, document or exhibit, which is not indicated in the lists or filed as provided in article 438, may be produced at the trial, without special leave of the Court. When leave is granted.

**(4)** Leave shall only be granted if the evidence is considered to be relevant, and the Attorney General or the party accused shall not have been prejudiced by the omission from the said list or by the default of filing within the term specified in article 438. Powers of Court.

**(5)** Nevertheless, if in the course of the trial, the necessity or utility shall arise of examining any witness or of having for actual inspection any document or exhibit not indicated in the list of any of the parties, the Court may ex officio cause such witness to be called and examined, or cause the document or exhibit which was not indicated in the list, to be produce

**Article 440 Criminal Code** Once a list is produced, those only will be exhibited. If you want to add something, you have to make a rikors. Leave of Court is granted if evidence is relevant and the AG or any party accused shall not have been prejudiced. After rikors then the Court decides. This can be dangerous, as when Court accepts ex witnesses to be heard, this can make Court refer docs to Court of mag first then comes up again.

**Qorti tal-Appell Kriminali (Sede Superjuri) Ir-Repubblika ta' Malta vs Omissis, Deciza 26 ta' Frar 2020**

Illi minn qari ta' din id-disposizzjoni tal-ligi huwa evidenti illi r-regola stabbilita bil-ligi hija li ebda dokument ma jista' jigi ipprezentat jekk mhux kif jinghad fl-artikolu 438 tal-Kodici Kriminali, fil-kaz tad-difiza, u fl-artikolu 590(2) fil-kaz tal-Prosekuzzjoni. Jekk id-dokument ma jkunx gie hekk ipprezentat, irid jinghata permess specjali mill-Qorti biex l-istess ikun jista' jigi esebiet fil-guri. Dan il-permess ghandu jigi moghti biss jekk il-prova tkun rilevanti u ukoll jekk il-parti l-ohra ma tkunx ser tbat xi hsara jew pregudizzju ghaliex dan ma jkunx gie prodott jew indikat qabel.

**Article 597 Criminal Code - Amendment of the Bill of Indictment**

597.(1) It shall be in the power of the Court, either ex officio, or upon the plea of the accused, to make an order for the amendment of the indictment, provided this is done before the accused pleads to the general issue of guilty or not guilty: but nothing shall be added which might render the offence of a graver character. or upon demand of Attorney General.

(2) Any such order may also be made upon the demand of the Attorney General in the case of any error or defect in the indictment, even though, on the ground of such error or defect, the accused has set up the plea, or the Court ex officio has raised the question of the nullity of the indictment.

(3) Where an amendment of the indictment has been ordered by the Court either ex officio or upon the demand of the Attorney General, it shall be lawful for the accused to demand the adjournment of the trial in order that he may prepare his defence. Defects in inquiry constituting grounds for impugning indictment.

*(4) The indictment cannot be impugned on the ground of any defect in the record of inquiry, nor can the accused demand that, on the ground of any such defect, the trial on the said indictment be not proceeded with, unless such defect consists in the total absence of the charges being read or of the examination of the accused or of the order committing the accused for trial, or in the*



*refusal of the Court of criminal inquiry, without just cause, to hear the evidence produced by the accused; saving always the right of the accused and the Attorney General to oppose the production, at the trial, of any act tendered in evidence which is not according to law. Want of jurisdiction of Court of inquiry ratione loci not to constitute ground for impugning indictment.*

(5) Nor can an indictment be impugned for want of jurisdiction of the Court which held the inquiry, on the ground that the inquiry should have been held by the Court of Magistrates (Malta) and not by the Court of Magistrates (Gozo) or by the Court of Magistrates (Gozo) and not by the Court of Magistrates (Malta).

*The bill of indictment can be amended before the accused pleads to the general issue of guilty or not guilty:*

*By the Court ex-officio or*

*upon the plea of the accused,*

*By the demand of the Attorney General*

*but nothing shall be added which might render the offence of a graver character.*

**Article 597** - imp that no change, makes the accused more at risk of having a graver case against him - without prejudice to him.

**Article 597(4)** in att tal akkuza ma jistax ikun hemm difett u tghid li dak huwa null - imma hemm siwazzjoni fejn din iggib n-nullita'. il-Qari tal akkuza, kumplament jista jigi koregut -

→ The indictment cannot be impugned on the ground of any defect in the records of inquiry, nor can the accused demand that, on the ground of any such defect, the trial on the said indictment be not proceeded with, unless such defect consists in the total absence of the charges being read or of the examination of the accused or of the order committing the accused for trial, or in the refusal of the Court of criminal inquiry, without just cause, to hear the evidence produced by the accused,

saving always the right to the accused and the attorney general to oppose the production at the trial of any act tendered in evidence which is not according to law.

### **Article 599 Criminal Code - Correction of errors in Indictment resulting from evidence**

**599.(1)** Any error which from the evidence produced at the trial appears to have been made in the indictment as to the circumstances of time, place and person, when, where, and against whom the offence was committed, or as to the indication or description of the things on which the offence was committed, maybe ordered by the Court to be corrected at any stage of the proceedings up to the time of the verdict of the jury:

Provided that, in such case, no account shall be taken of any aggravation of the offence which might result from such correction unless such aggravation was expressly stated in the indictment; and the Court, if it is satisfied that such correction might have prejudiced the accused in his defence, may, upon his demand, discharge the jury, and adjourn the cause to another day, for the purpose of giving him time to prepare his defence on the indictment as amended, provided the accused makes his demand at any stage previous to the summing-up referred to in article 465 or, if the amendment of the indictment is made after the said summing-up before the verdict of the jury.

(2) Any error in the reference to the article of this Code or of any other law prescribing the punishment the application of which is demanded in the indictment, may be corrected at any stage up to the delivery of the judgment

(3) Any defect or error referred to in this article may be pointed out by the Attorney General or by the accused or his advocate or by the Court ex officio

**Qorti tal-Appell Kriminali (Sede Superjuri) Ir-Repubblika ta' Malta vs John Polidano, Vincent sive Censu Spiteri, Christopher Agius u Silvio sive Saviour Pace Deciza 19 ta' April 2001**

Fl-ahhar nett għandu jiġi rilevati li jeżisti l-Artikolu 599 tal-Kodiċi Kriminali li qed jissemma biss in kwantu huwa ndikattiv tal-poteri vasti li għandha din il-Qorti għal dak li hu r-rimedju fl-Att ta' Akkuża minhabba li jkun fih xi żbalji jew difetti, u dan sabiex tiġi senjalata l-intenzjoni u volonta' tal-leġislatur illi, kemm hu possibbli, il-kors tal-gustizzja ma jiġix intralċjat minn ostakoli proċedurali u fl-istess ħin tissalvagwarda d-dritt ta' l-akkużat illi ma jiġiex proċessat fuq akkużi oħra li ma kienux originarjament kontemplati fl-Att ta' Akkuża.

- aim is to not have an accused ex b riskju li għandu ghomru l habs li jiġi liberat fuq cucatta u fuq difett zghit bhal typo - fuq zball bhal dan, mghandux jiġi lberat minn u fuq cucatta. Pero biex ikun hmm bilanc, ma ghandux isir tibdil bi pregudizzkju.

Republika vs Martin Spiteri - Qorti tal-Appell Kriminali (sede Superjuri) 14 Jannar 2010

*“L-istess jista' jingħad għat-tielet u għar-raba' aggravji – dawn ukoll huma infondati għax l-ewwel Qorti kienet perfettament intitolata li twettaq il- korrezzjonijiet li wettqet, u b'dak li sar l-akkużat ma gie b'ebda mod pregudikat fid-difiża tiegħu, anzi gie aġevolat.”*

Article 600 - Withdrawal of indictment

600.(1) It shall be lawful for the Attorney General to withdraw any indictment which he may have filed, provided this is done before the accused pleads to the general issue of guilty or not

guilty, and in any such case all further proceedings shall be stayed, and the accused shall be discharged; but when the accused shall have pleaded to the general issue of guilty or not guilty, the indictment may not be withdrawn without the consent of the accused. not to operate so as to bar new proceedings on fresh evidence.

(2) In either case, the withdrawal of the indictment shall not operate so as to bar the taking of entirely new proceedings against the accused, on the discovery of fresh evidence

- Withdrawal of the bill of indictment - the AG at any stage can withdraw the bill of indictment - can withdraw it in the criminal Court - he can do it until the accused is guilty or not guilty.

- When the accused is guilty or not guilty, ag can withdraw the bill of indictment but the accused must give his consent, otherwise it cannot be withdrawn. If bill of indictment is withdrawn, it does not bar police to start proceedings afresh against the accused.

- The Attorney General can withdraw an indictment which he may have filed, provided this is done before the accused pleads to the general issue of guilty or not guilty. and in any such case all further proceedings shall be stayed, and the accused shall be discharged.

- When the accused shall have pleaded to the generality of guilt or not the indictment shall not be withdrawn without the consent of the accused.

- The withdrawal of the indictment shall not bar the taking of entirely new proceedings against the accused on the discovery of fresh evidence.

Article 601 - Accused shall not be found guilty of offense not charged in the indictment

601. No person accused may be found guilty of an offence which is not expressly stated in the indictment, or which is not comprised or involved in the indictment in terms of article 467

accused can not be found guilty of accusations not in the bill of indictment - can not be found guilty on other crimes. If you add more crimes to his name this will be of prejudice to the accused hence this can not be done.

Article 602 - Default of filing indictment within prescribed time

602. Where the indictment is not filed within the prescribed time, the Court may, at the request of the accused, and after hearing the Attorney General, order the discharge of the accused, and the provisions of article 434 shall, mutatis mutandis, apply:

Provided that this provision shall not apply if at the time the request is made the indictment shall have been filed

→ When indictment is not filed within the prescribed time - if presented late, accused is discharged. never happened qal, sissa qatt ma grat, minjaf x jigri jekk ssir pero.

The pleas to the bill of indictment - who can be a jury, witnesses of the court - how witnesses are presented in court.

# **PLEAS**

## **Article 438 Criminal Code - Service of indictment on accused.**

438.(1) An official copy of the indictment and of the list referred to in article 590(2) shall be served on the accused.

(2) The accused shall, by means of a note to be filed in the registry of the Court not later than fifteen working days from the date of such service -

(i) give notice of any pleas referred to in article 449 and any plea regarding the admissibility of evidence which he intends to raise, and

(ii) indicate the witnesses and produce the documents and other exhibits which he intends to use at the trial, and an official copy of such note shall be served on the Attorney General.

(3) The Attorney General shall, by means of a note filed in the registry of the Court not later than five days from the date of service of the note filed by the accused, give notice of any plea regarding the admissibility of evidence which he intends to raise.

(4) On the expiration of the time referred to in the preceding sub-article, the Court shall appoint a day for the hearing of all the pleas and shall on that day direct the registrar to read out the indictment, and shall then proceed to determine such pleas before the accused pleads to the general issue of guilty or not guilty: Provided that the Court may ex officio or on the application of the Attorney General or the accused request that the proof intended to be established by the witnesses, documents or exhibits be stated.

Last time - today we will cover, last lecture we dealt with the bill of indictment when it is filed, and substance and today we will deal with the pleas.

Article 438(2) CRIMINAL CODE - accused has 15 days to file a note to be filed in the registry of the Court not later than 15 working days

The accused shall, by means of a note to be filed in the registry of the Court not later than fifteen working days from the date of such service –

give notice of any pleas referred to in article 449 and any plea regarding the admissibility of evidence which he intends to raise.

PLEAS = ECCEZZJONIJIET PRELIMINARI - he can present pleas on the admissibility of evidence and also it refers you to 449 of the criminal code.

**Article 449 Criminal Code - Pleas to be raised and determined after the reading out of indictment.**

449. (1) The following pleas, that is to say:

(a) plea to the jurisdiction of the Court;

(b) plea of nullity of or defect in the indictment;

(c) plea of extinguishment of action;

(d) plea of "autrefois convict" or "autrefois acquit";

(e) plea of insanity of the accused at the time of the trial;

(f) plea of insanity at the time of the offence or any plea relating to any other point of fact which excludes the imputability of the accused or in consequence of which the trial should not take place at the time, or at any future time; and

(g) saving the provisions of article 446(1), any other preliminary plea,

may only be raised if notice thereof has been given as provided in article 438(2):

Provided that the Court may authorise such pleas to be raised for a reason which arises after the time within which the notes referred to in article 438(2) is to be filed in the registry of the Court

(2) Deleted by III.2002.107.

(3) Nevertheless, the pleas mentioned in sub-article (1), with the exception of the plea of challenge of the judge or the plea of defect in the indictment, may be raised after the verdict of the jury and before judgment, if the necessity arises from any fact or circumstance of fact expressly found by the jury.

(4) Any point of fact which, without excluding the imputability of the accused or without excluding his capacity to plead, is a bar to his undergoing punishment, may be raised even after the verdict of the jury.

(5) The want of jurisdiction of the Court and the nullity of the indictment may also be raised by the Court ex officio, either before the accused answers to the charge, or after the verdict of the jury:

Provided, however, that, after the verdict of the jury, the indictment may only be annulled in either of the following cases:

(a) if the indictment does not contain, in substance, a statement or description of the offence as stated or described in the law;(

b) if the fact stated in the indictment does not constitute, in substance, the offence stated or described in such indictment.

(6) Where it is decided that the Court has no jurisdiction or that the indictment is null, the accused shall be placed again in the condition in which he stood previously to the filing of the indictment. But where the plea of extinguishment of action or the plea of "autrefois convict" or "autrefois acquit" is allowed, the accused shall be acquitted

Also a plea on the admissibility of evidence which the ag - and SO ANY IN THE LIST OF 449,

Cross reference between 438 2 and 449 - accused has to file a note within 15 days otherwise he can not raise these pleas.

Proviso to 449 - gives discretion to the Court for the expiry after 15 working days.

AG in 483 sub 3 can also file a note, -defence has 15 days to file a note and the AG has only 5 running days (not working days dawn issa jibqu ghaddejjin bil-weekends b'kollox).

Defence have 15 days to file a note and together with all the list of 449, then the AG has only 5 running days to file a note only on the admissibility of evidence. AG has a bill of indictment and will state the facts of the accused and facts of case.,D replies the eccezzjonijit and AG ON THAT NOTE HAS ONLY 5 days on the admissibility of evidence.

**Qorti tal-Appell Kriminali (Sede Superjuri) Repubblika ta' Malta vs Stephen Portelli  
Deciza 5 ta' Marzu 2025**

“sabiex tirnexxi tali eccezzjoni, jehtieg li l-fatti deskritti fil-parti espozittiva tal-Att tal-Akkuza jew inkella f'Kap partikolari tal-Att tal-Akkuza, ma jkunux fis-sustanza jammontaw għar-reat li

jkun qed jiġi addebitat lill- akkużat fil-parti akkużatorja tal-Att tal-Akkuża jew inkella tal-Kap tal-Att tal-Akkuża li jkun qed jiġi attakkat.

Bil-kelma “fis-sustanza” wiehed ma jfissirx li għandhom jintużaw kliem preċiżi biex jiġu deskritti l-fatti tal-każ jew li tinghata deskrizzjoni tal-fatti tal-każ fid-dettall, iżda, li l-fatti hekk kif prospettati mill-Avukat Ġenerali fl- essenza tagħhom jikkostitwixxu r-reat li imbagħad jiġi addebitat lill-akkużat.

Dan għaliex fl-aħħar mill-aħħar irid ikun hemm ness bejn il-parti espożittiva u l-parti akkużatorja tal-Att ta’ Akkuża jew ta’ Kap partikolari tal-Att tal-Akkuża u dan bl-għan aħħari jkun li l-akkużat jifhem dwar xhiex jkun qed jiġi akkużat b’tali mod li jkun jista’ jipprepara d-difiża tiegħu.

Huwa biss in-nuqqas ta’ tali ness li jġib bħala konsegwenza n-nullita’ tal-Att tal-Akkuża jew tal-Kap tal-Att tal-Akkuża li jkun qed jiġi mpunjat”

**449 SUB 6** - accused shall be placed again in the condition in which he stood previously to the filing of the indictment.

Second subarticle of 449 6, is when the action is either PRESKRITTA jew ne bis in idem, imputat, kellu ga kawza ma -2 reati li sehhu fl istess perjodu izda li nstemu flimkien, fatti huma listess allura huma reat 1 u mhux t-tnejn.

**Article 446 Criminal Code - Challenge of judge. Plea to be raised and determined before the reading out of indictment.**

446.(1) Any objection to the judge shall be raised, and the decision of the Court shall be given thereon, before the reading out of the indictment, when the accused has been placed at the bar, on the day appointed for the hearing of the preliminary pleas, or, if no such pleas have been raised, on the day appointed for the trial. Grounds of objection to or of abstention by judge. Cap. 12.

(2) The judge may not be objected to by the Attorney General or by the accused, nor may he abstain from sitting in any case, except for any of the causes referred to in article 734 of the Code of Organization and Civil Procedure, or on the ground that the offence was committed against himself, his spouse, or any person related to him by consanguinity or affinity in any of the degrees referred to in paragraphs (a) and (b) of the said article. Form of declaration of abstention.

(3) The judge who, previously to the reading out of the indictment, is aware of the existence in his respect of any of the causes for which he might be objected to or might abstain from sitting, shall make a declaration of his abstention stating the cause

(4) The said declaration may be made in writing previously to the day appointed for the hearing of the cause, in which case notice thereof shall be given to the Attorney General and to the



accused, and the abstention shall be deemed to be by them accepted, if, within two days from the said notice, neither of them shall make a declaration, by means of a note, to the effect that he intends to oppose the same, or orally on day of hearing.

(5) The said declaration may also be made orally on the day of the hearing, in which case any objection thereto shall be raised immediately after such declaration. Issue to be decided before the reading out of indictment.

(6) Upon any challenge, or objection to abstention, as aforesaid the Court shall decide the issue previously to the reading out of the indictment. No challenge or abstention may be allowed after the reading out of indictment.

(7) After the reading out of the indictment, the judge may not be challenged, nor may he abstain from sitting, except where the cause for objection or abstention becomes known after the reading of the said indictment. Power of judge notwithstanding challenge or abstention.

(8) The judge, notwithstanding the existence in his respect of any cause for objection, or notwithstanding his abstention, shall nevertheless be competent, like the judge surrogated in his stead, to issue and sign any summons or writ, and to give any decree or order which may be required, previously to the reading out of the indictment, or after judgment is delivered

**Article 446 sub 1 and 2** - One of the pleas which the - challenge of the judge - either on the appointed date by defence or if judge raises the issue himself then he can do so in camera before the appointed day. Defence can only bring it forward on that date.

#### 446 sub 3-8 CRIMINAL CODE

- Imhallef jista hu stess jirakuza ruhu, imma basta li qabel ma jibda l guri. irid jghid ghalffejn ha jamilha. imhallef ma jistax jaqbad u jajd manidx aptit, irid jireferi ac copc, u jaghti wahda mir ragunijiet msemija. he can either make it in writing before jury starts or when jury starts, state he will jirikuza ruhu minhabba dik il-parti.

Jekk l imhallef fl-ewwl seduta jghid li ha jirikuza ruhu, l-partijiet jistu jikkellmu hemmehekk fis seduta stess umbaghad jamluha in camera.

In a case extreme li qatt ma grat, li l imhallef kif beda l guri, jirikuza ruhu, jista pero generalment ma ssirx ghax ikunu jafu hemmx kaz ta rikuza u jeew le, l ligi tipprovdi ghaluha. Hemm rimedju. If the judge decides to abstain, the judge can give an order. Procedural things on Court can decide them.

- 438 sub 4 - Court shall then proceed to determine such pleas before the accused pleads to the general issue of guilty or not guilty. The Court decides to determine such pleas whether guilty or not guilty and the AG can appeal in the superior Court sede superjuri.

The Court may ex officio, request that the proof to be established by witness be stated. Both Court and parties can raise eccezzjonii, the object of that PROVA, and in that case whoever presents the nota has to answer the object of that proof in order for the Court to decide if it is relevant for the Court or not.

438 sub 5 - if no pleas have been raised, the Court shall appoint a hearing for the trial.

JURY moves on to who is next, in urgent cases and circumstances, one can be given priority over the other.

The accused was given 20 days to prepare his defence.

20 days - is a bit, minimum which an accused must have to prepare his defense, can not be given less than 20 days. 20 days is the minimum the accused can prepare the jury.

Kawza - MINN XAHAR GHAL IEHOR ITTELLA X XHEDA

#### **Article 443 Criminal Code - Trial, Place of the accused in Court**

**443.(1)** On the day and at the time appointed for the hearing of the cause or of any question incidental thereto, the accused shall be put, without any restraint, in the place appointed for the purpose. Summons to accused when not in custody.

(2) If the accused is not in custody, he shall be required to appear by means of a summons, and, in case of his non-appearance, an order shall be made for his arrest; if he is in custody, he shall be brought to the said place in such manner as may be necessary in order to prevent his escape. Misbehaviour of accused.

(3) If the accused attempts acts of violence, all necessary measures shall be taken to prevent such acts.

443 CC - if he is in custody, he is brought there - if he is not there, johorgu mandat ta arrest

→ On the day and at the time appointed for the hearing of the cause or of any question incidental thereto, the accused shall be put, without any restraint, in the place appointed for the purpose.

→ If the accused is not in custody, he shall be required to appear by means of a summons.

→ In case of his non-appearance, an order shall be made for his arrest.

→ If he is in custody, he shall be brought to the said place in such a manner as may be necessary in order to prevent his escape.

→ If the accused attempts acts of violence, all necessary measures shall be taken to prevent such acts.

### **Right to a lawyer - Article 445 + 458(3) Criminal Code**

445. If the accused appears without counsel, the Court shall inform him that he has the right to be assisted by counsel.

Article 458(3) Criminal Code - (3) It shall also be lawful for the accused either to make his own defence and leave to his advocate the rejoinder, when this is allowed, or to make the rejoinder notwithstanding that his defence was made by his advocate

445 + 458(3) - criminal code - he can defend himself, impossible to do that due to technicalities but the law allows one part the accused one part the lawyer. The imputat can participate also, gives this fakulta l-ligi.

### **Who has access to the records of the inquiry - Article 440(1)(2) + Article 518 Criminal Code**

The Attorney General, the accused or his lawyers or legal procurators, The Registrar shall take the necessary precautions for the preservation of all the documents, exhibits, and records in the state in which they are at the moment in which they are filed.

The acts and documents shall not be open to inspection, nor shall copies thereof be given, without the special permission of the Court, except by or to the Attorney General, by or to the parties concerned or by or to any advocate or legal procurator authorized by such parties;

### **Article 440(1)(2) Criminal Code - Accessibility of record of inquiry**

440.(1) The record of the inquiry, documents and exhibits filed in the registry of the Court by the Attorney General or the accused shall be accessible to the Attorney General and to the accused or his advocate or legal procurator. Preservation of documents, etc., by registrar.

(2) The registrar shall take the necessary precautions for the preservation of all the documents, exhibits, and record in the state in which they are at the moment in which they are filed

**Article 518 Criminal Code- Accessibility of acts and documents of Courts of criminal justice**

518. The acts and documents of the Courts of criminal justice shall not be open to inspection, nor shall copies thereof be given, without the special permission of the Court, except by or to the Attorney General, by or to the parties concerned or by or to any advocate or legal procurator authorized by such parties; but any act, which is pronounced in open Court, shall be open to inspection by any person, and copies thereof may be given on payment of the usual fee:

Provided that a procès-verbal and any depositions and documents filed therewith shall be open to inspection, and copies thereof shall be given, only at the discretion of the Attorney General and on payment of such fees as may be prescribed by the Minister responsible for justice as provided in article 695:

Provided further that where the Attorney General grants his consent that a procès-verbal be open to inspection and that copies thereof may be given, a person who proves to the satisfaction of the Attorney General that he is personally a victim or the heir of the victim of the offence forming the merits of the procès-verbal, shall not be requested any payment to be given an electronic copy of the same procès-verbal:

Provided further that any designated competent national authority designated in terms of any Directive or Regulation of the European Union which has access to the acts and documents of the Courts of criminal justice may, if the requirements established in the Directive or Regulation of the European Union are fulfilled, transmit copies of such acts and documents of the Court of criminal justice to the requesting authority:

Provided further that the European Delegated Prosecutors appointed in accordance with the provisions of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") shall have access to the acts and documents of the Courts of criminal justice and to any procès-verbal and to any depositions and documents filed therewith, when these relate to matters which fall within the competence of the European Public Prosecutor's Office in accordance with the said Regulation

→ Jidderigi min ghandu access ghall-atti, kemm ghall-proces verbal u l-atti - il-parttijiet fil-kawzi biss jistghu jarawhom, mhux bhac-civil fejn jista' jarahom kulhadd. strict hafna -ma jsta jarahom hadd hlief l paritjiet.

Pleas raised by the defence

Article 438(2) CC - L-ECCEZJONIJIET PRELIMINARI + list of documents during trial

Defence can also - AG has to file a bill of indictment within 1 month with a list of documents and exhibits - within 15 days he has to file a note about admissibility of evidence or any of the pleas.

#### **449**

Defence have 5 working days and AG has 5 running days. Ag within 1 month has to present att tal akkuza, tigi notifikata lid D, u man notifika 15 days ghall-eccezzjonijiet preliminari + lista tax-xhieda – minn hemm jigu presentati lill AG, li ghandu 5 running days.

**449(3)(4)** - circumstances where the Court can allow pleas within the 15 days - Court can also allow pleas after 15 days - AG has to file a RIKORS and the Court will see whether to accept such a rikors or not before going to the plea.

**449(5)** - PROCESS TAL GURI JIBQA GHADDEJ. JIBDA jkompli bl eccezzjonijiet, imma jekk jigri xi haga waqt l guri, jekk dak li jindika L AG huwa differenti mill att tal akkuza.

**446 sub** 1 and 2 - when imputat, challenges or asks for RIKUZA TAL IMHALLEF

#### **Article 452 Criminal Code - Right to be assisted by an interpreter**

**452.(1)** Save as otherwise expressly provided, an interpreter shall not be chosen from among the jurors, counsel for the accused, witnesses, referees, or other persons employed in the service of the Court or of the Attorney General, with the exception of the official interpreter. It shall, however, be lawful for any of the parties to take objection against the official interpreter or any other person appointed to act as interpreter, before the same enters upon his duties, and any such objection shall be determined by the Court.

*(2) Nevertheless, it shall be lawful for the Court to appoint any person employed in the service of the Court to act as interpreter, if it appears to its satisfaction that sufficient inquiries have been made and that no other person suitable to act as interpreter could be found*

**452** - right to be assisted by an interpreter - law provides who can be an interpreter - witness - or interpreter both the AG and the defence can say they have no trust in him. Once an interpreter is appointed, he has to stay during the whole JURY - if he is not coming, same applies as though witness did not come for the sitting - same rules apply as if he were a witness.

### **Article 450 Criminal Code - Questions to the accused on the general issue**

*450. When the preliminary pleas have been determined, or if no such pleas have been raised, the accused shall be asked whether he is guilty of the offence charged in the indictment.*

450 - Guri jibda hemm, jekk hux hati jew mhux hati. jgi mistoqsi

All proof in front of him, att tal akkuza, kellu cans jamel leccezjonijiet u l qorti kriminali terga ssaqsih jekk hux hati jew mhux hati.

### **Admission of Guilt by Accused - Article 453 Criminal Code**

453.(1) If the accused, in answer to the question prescribed under article 450, states that he is guilty of the offence, the Court shall in the most solemn manner warn him of the legal consequences of such statement, and shall allow him a short time to retract it; but if the accused persists in his statement, such statement shall be recorded and the Court shall proceed to pass on the accused such sentence as would according to law be passed on an accused convicted of the offence. Duties of the Court.

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

Article 453 - if accused pleads guilty, l qorti tterga tinfirmah u tindirizzah direttament, tghidlu bil konsewgewenzi ta ghomor il habs fil kaz ta qtil u ttih cans jahsibha. If the accused persists in the statement, such a statement shall be recorded. Then Court passes to sentence -

Amissjoni = provi kollha li kellhom jittellu gew pruvatti beyond reasonable doubt

Jekk ammetta, m'ghandek ghalfejn ttella l-ebda provi fuq l-fatti, fuq l-piena mod iehor

If the Court has doubts whether the accused has taken offence or not.

If accused registers amissjoni u jghid jien hati, jekk qed jipprova jammetti biex jghatti lil xi hadd iehro, il-qorti ttista ma taccettax din l-ammissjoni ta' htija. LEEWAY BIEK L-GUSTIZZJA SSIR. IL PIZ LI GHANDU IMHALLEF WAQT L-GURI HUWA KBIR.

### **Article 453A - Plea Bargaining**

453A. (1) Before the accused pleads to the general issue as provided in article 453, the accused and the Attorney General may request the Court, in the eventuality of a plea of guilty, to apply a sanction or measure or, where provided for by law, a combination of sanctions or measures, of the kind and quantity agreed between them and to which the accused can be sentenced upon conviction for the offence or offences with which he is accused.

(2) If the Court is satisfied that the sanction or measure, or combination of sanctions and measures, requested as provided in sub-article (1) is one which it would have been lawful for it to impose upon conviction for the offence to which the accused has pleaded guilty and does not have cause to order the trial of the cause to be proceeded with for a reason referred to in article 453(2) or for any other reason to reject the request, and after explaining to the accused in clear terms the consequences of his request, the Court shall, upon a plea of guilty by the accused, proceed to pass the sentence indicated to it by the parties declaring in its judgement that the sentence being awarded is being so awarded at the request of the parties.

(3) Where the Attorney General and the accused agree that the sentence to be imposed shall consist of a period of imprisonment, which is to be suspended in accordance with the provisions of article 28A and the agreement is not rejected by the Court as provided in sub-article (2) such agreement shall not in any way affect the Court's power to make an order under article 28G or 28H or both. Cap. 446.

(4) Where the Attorney General and the accused agree that a measure provided for under the Probation Act is to be applied and the agreement is not rejected by the Court as provided in sub-article (2) such agreement shall not in any way affect the Court's power to make an order under article 11 of the said Act. Cap. 446.

(5) A sentence imposed at the request of the parties as provided in this article shall not affect any matter referred to in article 25(3)(a) to (h) of the Probation Act

453A - PLEA BARGAINING - meta -AG u difiza jaqblu fuq piena flimkien - homicide u jaqblu li ha jehel 30 sena prigunerija biss - jaghzlu huma. Jiftehm u flimkien qabl l akkuzat jghidx li hati jew le.

F'kazijiet iktar minn 12 years imprisonment, li jigri huwa li jippresentaw n-nota ta' attegjament, jirrapresentaw amissjoni, u l-qorti tibghat l-atti l-qorti kriminali ghax l-qorti tal-Magistrati ma

tkunx kompetenti taghti piena ghax taqbez l-kompetenza - kazijiet fej over 12 years imprisonment allura Court of Mag m'ghandiex kriminali - ssir l-ammissjoni u l-attti jmorru l-qorti kriminali, fej taghti s-sentenza u l-appell imur l-qorti superjuri.

Atteggjament fil qorti kirminali - beda l guri, gurati ghadhom ma dahlux. Jista jghid li hu hati, jipprezenta nota ta' atteggjament u jaghmel ammissjoni u jghaddi is-sentenza fuq l-piena biss, mhux fuq l prova.

F kaz li jkun hemm ammissjoni qabel jibda' l-guri fil-qorit tal-Mag. bhala qorti struttorja u l imputat irid jammetti - f'dak il-kaz, xorta jista' jaghmel l-atteggjament, jipprezentawha, ssir l ammissjoni u l-process kollu imur qorti kriminali biex taghti sentenza fuq il-piena. Qorti mhux obbligata li timxi ma dak l-atteggjament - mhux l-partijiet jikkmandaw il-qorti.

### **Article 454 Criminal Code - Recording of plea of "not guilty"**

454.(1) If the accused pleads not guilty, such a plea shall be recorded. Where proceedings are to be conducted in the English language. Cap. 189.

(2) Where, under the provisions of the Judicial Proceedings(Use of English Language) Act, the proceedings are to be conducted in the English language, the Court shall, if no pleas have been raised as provided in article 438, or after the determination of such pleas, appoint the day on which the cause shall be tried before a special jury impanelled from the persons included in the list of special jurors for the trial of English-speaking persons as provided in article 605. Impanelling of jury.

(3) On the day fixed for the trial the Court shall impanel the jury and shall then proceed with the trial. Accused making answer other than "guilty" or standing mute.

(4) Where the accused does not simply answer that he is guilty, any other answer, or his silence, shall be taken as a plea of not guilty. Accused not to be questioned on facts with which he is charged.

(5) It shall not be lawful for the Court, the Attorney General or the jury, during the trial, to put any other question to the accused with regard to the facts with which he is charged



## **Articles 603-619 — THE JURORS**

### **Article 603 Criminal Code - Qualifications to serve as juror.**

603.(1) Every person of the age of twenty-one years or upwards, residing in Malta and being a citizen of Malta, shall be qualified to serve as a juror provided such person has an adequate knowledge of the Maltese language, is of good character and is competent to serve as a juror. Disqualifications.

(2) Nevertheless no person who has been found guilty by any competent Court in Malta of any crime liable to imprisonment for a term exceeding one year, or of any of the crimes referred to in Sub-title II of Title VII of Part II of Book First of this Code shall be qualified to serve as a juror:

Provided that this provision shall not apply to any such person who has obtained a free pardon or to any person convicted of involuntary homicide or of any other crime against the person, excusable on any of the grounds referred to in article 227, and in article 230(a) and (b).

(3) The provisions of sub-article (2) shall apply to any person who has been found guilty by a competent Court of any other country of any of the crimes mentioned in the said sub-article or of any crime which, however described in the law of that country, falls within the description of any of the said crimes. Disabilities.

(4) The following persons shall not be competent to serve as jurors:

- (a) persons who are interdicted or incapacitated;
- (b) undischarged bankrupts;
- (c) persons who, owing to any notorious physical or mental defect, are reputed to be unfit to serve as jurors;
- (d) persons who are under trial for any crime, until the trial has terminated

TRANSLATOR f guri - imp daqs l avukat jekk l akkuzat huwa barrani

603 sub 4 - not competent - to be jurors

→ Who can be a juror?

21 years of age or older

Citizen and resident of Malta Knowledge of the Maltese Language Of good character and  
Competent to be a juror  
Who cannot be a juror?  
Persons who have been found guilty of a crime exceeding one year

### **Article 604 Criminal Code - Exemptions**

604.(1) The following persons are exempt from serving as jurors:

Members of the House of Representatives, Mayors and Executive Secretaries of Local Councils, judges, honorary consuls, clergymen, members of the Armed Forces of Malta, person holding the office of Head of a Government Department and their deputies, the magistrates, the Registrar of Courts, officers of the Executive Police, professors and full-time teachers of the University, headmasters and teachers of the secondary, primary and technical schools, District Medical Officers, health inspectors, the Principal Probation Officer and Probation Officers and any other persons of such a description as the Minister responsible for justice may, from time to time, prescribe by Order in the Gazette.

(2) Moreover the Court may, on an application to that effect, exempt from serving as a juror, any apothecary of a village and a physician, surgeon or obstetrician actually practising his profession, and, in general, any person who has completed the sixtieth year of his age, unless, in some particular case, the Court deems otherwise for the ends of justice.

(3) A person who has the care of a family or of a person who suffers from any physical or mental infirmity shall also be exempt from serving as a juror.

→ 604 - can be competent but are exempt –

604 sub 2 - 607 - there can be a letter to the magistratur tal-qorti, persons exempted jistghu jagħmlu rikors qabel jibda l-guri.

### **Constitution of Jury - Article 610 Criminal Code**

610.(1) The jury shall be composed of a foreman and eight common jurors. Supplementary jurors.

(2) Nevertheless, if the cause should appear to be of such nature as to require a long hearing, the Court may, before the ballot of the jurors, order the drawing of not more than six other names, and the jurors whose names shall be drawn after the names of the first eight common jurors have been drawn, shall be supplementary jurors, and shall attend at the trial of the cause

(3) All the provisions of the law relating to the jury and to the jurors forming the jury, shall apply to such supplementary jurors, but such supplementary jurors shall not be present at nor take part in any deliberation, save in the case of death or any impediment of any of the other jurors.

(4) The Court shall decide as to the lawfulness of the impediment, and any substitution shall be made in the same order in which the names of the supplementary jurors shall have been drawn. Death or impediment of foreman of jury.

(5) In the case of death or impediment of the foreman, his duties shall be discharged by one of the other jurors to be appointed by the Court.

Article 610 - foreman → Prim-gurat, ikun xi hadd li ga jkollu esperjenza ta guri - jittellgha minn polza ghalih u jittellghu 8 common jurors, u jrid ikun hemm even number. Supplementary jurors - extra 3 - so 9 + 3 extra, supplementary do not deliberate with them but if one of the main are missing then they are filled in instead.

### **Article 611 - Formation of the Jury**

The names of the persons summoned to serve as jurors shall be written on separate ballots of parchment or paper as nearly as may be equal in shape and size.

The registrar shall read aloud in Court first the ballots bearing the names of the foremen and shall put them into a box, then those bearing the names of the common jurors, which he shall put into another box.

Afterwards, having shaken the box containing the ballots with the names of the foremen, he shall draw one ballot and shall read aloud the name written thereon.

The person whose name is so drawn, shall come forward, and the registrar shall ask first the Attorney General and then the party accused whether they intend to challenge such person.

611(2)

611 - Bil-polza - common jurors - same size of paper - AG can challenge that that person can not serve as a juror. Challenges, peremptory challenges and for a cause.

Challenges allowed - The Attorney General and the accused are allowed three peremptory challenges each. If the accused are more than three, two peremptory challenges each. (611(3))

The Court can exempt any juror on good cause being shown (611(5))

Other names shall be drawn until a foreman and eighth common jurors are approved, including supplementary jurors.

### **Article 610**

611 - Peremptory challenge (meta ticchalenagja gurat bla raguni) jew for a cause. ag + d have 3 preliminary challenges - 3 each - gurat ghandu 4 days biex japplika li ma jridx ikun gurat.

#### **Article 614 Criminal Code - Objection to jurors for want of Qualifications**

614. The absence in any person of the necessary qualifications to serve as a juror, must be raised by the Attorney General or by the accused. It may also be submitted by the person himself or, if it is notorious, declared by the Court. If, however, the absence of such qualifications is not so raised, submitted or declared, and the person is approved as fit to be sworn, no opposition can afterwards be made on account of his want of qualifications

614 - OBJECTIONS TO JURORS - once composition is made, then once jury starts, then you can not say you don't want jurors, this must be done before.

→ It could be that they know afterwards that a juror is involved or is related to the imputat wara, pero ssoltu le ma jistawx, la hafdu guramen, jibda l-guri. L-guri jrid jibda u jiipicca - once a jury is selected, then the Court registrar, registrar reads out the bill of indictment. And give them a copy.

#### **Article 455 Criminal Code - Reading out of indictment**

455.(1) As soon as the jury have been sworn, the registrar shall read out the indictment, of which a copy shall be given to the jury; and he shall also read out to the jury whatever shall have been recorded with reference to the question prescribed under article 450. Trial of two or more causes on the same day.

(2) Where the Court deems it expedient that two or more causes be successively tried on the same day by the same jury, the jury shall be sworn in the presence of all the accused whose trial is to take place as aforesaid, previously to the commencement of the trial which is to take place first

→ Once the jury is sworn in, the registrar shall read out the bill of indictment to the jury.

A copy of the bill of indictment is given to the jury.

The registrar shall read out what the accused pleaded on the general issue of guilty or not guilty.

#### **Article 456 Criminal Code - Address by the Prosecution**

456. The Attorney General shall then address the jury on the facts constituting the offence preferred in the indictment; he shall state the evidence which he proposes to produce in support of those facts; and after making such submissions as he may think necessary in order to make the case clear, he shall conclude by demanding a declaration of guilt against the accused.

### **Article 457 Criminal Code - Production of evidence for the prosecution**

457. After making the address referred to in the last preceding article, the Attorney General shall call his witnesses examining viva voce, and shall produce any other evidence he may have to offer.

### **Ir-Repubblika ta' Malta vs. Stiano Agius -9th January 2014**

“Għalhekk, meta fl-artikolu 589 tal-istess Kodiċi jingħad li l-att tal-akkuża għandu jfisser il-fatt li jikkostitwixxi r-reat u l-partikolaritajiet l-oħra msemmija fl-istess artikolu dan ma jistax ifisser hlief li l-att tal-akkuża għandu jfisser il-fatt u partikolaritajiet l-oħra msemmija skont kif jifhimhom li graw l-Avukat Ġenerali f'isem ir-Repubblika ta' Malta.

Il-provi in sostenn tal-fatt li jikkostitwixxi r-reat u tal-partikolaritajiet l-oħra skont l-att tal-akkuża, imbagħad, jingiebu mill-Avukat Ġenerali fil-kors tal-proċess fl-istadju opportun.”

646 - All witnesses must be viva voce - not like civil jista' jkun hem affidavit, criminal le, irid jinstema kull xhud.

### **Summoning of Witnesses - Article 441 Criminal Code**

*441.(1) Witnesses shall be summoned by means of a subpoena which shall be served on each witness not later than the day preceding the trial: Provided that in the case referred to in sub-article (5) of the last preceding article, a witness may be summoned to appear forthwith or at a given time during the same day. Service of subpoena.*

*(2) A subpoena is served by the delivery of a copy thereof to the witness, or if he cannot conveniently be met with, then by leaving such copy at his usual place of abode.*

*(3) If the place of abode of the witness is in the Island of Gozo or of Comino, the Registrar of Courts may send, even by post, the copy of the subpoena to the officer in charge of the Court of Magistrates (Gozo), for service on the witness; and the officer affecting service, shall deliver a certificate of such service, duly sworn, to the officer in charge of the Court of Magistrates (Gozo), who shall transmit it, even by post, to the Registrar of Courts. Non-appearance, etc., of witnesses.*

*(4) Whosoever being duly subpoenaed to give evidence or to give his opinion as an expert shall fail to appear in Court at the time fixed in the subpoena, or, having appeared, shall leave before he is dismissed, shall be liable to be sentenced by the Court to a fine (ammenda) and shall be liable to be compelled to appear to give evidence by means of a warrant of escort or of arrest.*

*(5) If, on account of the non-appearance of a witness, the trial is adjourned to another day, all the expenses incurred shall be charged to the witness, and it shall be lawful for the Court, at the request of the Attorney General or the accused, to compel such witness to pay the same:*

*Provided that it shall be in the power of the Court, at any time, on just cause being shown, to remit the fine (ammenda) and also the expenses. Power of Court to discharge jury.*

*(6) It shall be in the power of the Court, if it is of opinion that the evidence of the witness, who left before he had been dismissed, is important for the ends of justice, to discharge the jury and adjourn the trial to another day*

441 - TAHRIKA TAX-XHIEDA - imp li tinnotifika x-xhieda kollha - jista jkun li article 440 sub 5- results li hemm xi xhud li mhux mnizzel fil-lista tal-AG jew fil-lista tal-akkuza imma fix xhieda - jekk qori tartta li huwa imp, tista' ssejjahlu u t-tahrika ssir dak il-hin, biex il-guri ma jieqafx.

- 441 sub 2 - non appearance - sentenced to a fine - once expert tal qorti huwa nottifikat, irii jidher inkella johrog mandat ta arrest biex jidher.

#### **Article 459 Criminal Code - Order of Examination of Witnesses**

459. The order to be followed in the examination of witnesses shall be as hereunder:

The party calling the witness proceeds to examine him; then the opposite party may, if he so desires, cross-examine him; any juror may then put any question which he may deem necessary; and the Court, besides the questions which it may deem proper to put in the course of the examination or cross-examination, may finally put any other question which it shall deem necessary.

**459** - AG then defence and orders happens this - ezami EXAMINATION IN CHIEF, ag jamel l ezami tieghu tax xhud tieghu u D bbil kontra. KONTRO- EZAMI, ssirt mill-parti lohra imma wara. Gurati jistghu jsaqsu imma wara. Gurat isaqsu lill imhalled u l imhalled jsaqsuha habba li ma jistax jaghmilha diretta l-imhalled jaf kif idawwarha hu.

Waqt ezamijiet tista tticcara certu aff, l-qorti tista tamel mistotqisijiet li trid.

#### **Repubblika ta' Malta vs. Gordon Dimech 3 ta' Dicembru 2015, Qorti tal-Appell Kriminali (Sede Superjuri)**

*Dan kollu seħħ proprju fil-bidu tax-xiehda ta' l-appellant. Għall-bqija ta' l-eżami, l-Imħallef sedenti ma ntrometta fl-ebda stadju ieħor. Meta mbagħad l-appellant kien qieghed jixhed in*

*kontro-eżami, kien hemm ukoll żewġ okkażjonijiet fejn l-Imħallef sedenti talab kjarifiki. Hekk kif gie konkluz il-kontro-eżami, pero`, l-Imħallef li ppresjeda l-ġuri għamel sensiela twila ta' mistoqsijiet lill-appellant kif jirriżulta minn paġni 86 sa 92 tat-traskrizzjonijiet. Naturalment jista' jitqies insolitu illi Imħallef li jippresjedi ġuri jieħu f'idejh xhud, f'dan il-każ l-akkużat, għal daqstant ħin. Izda ma jistax b'daqshekk jitqies li dan sar b'mod irregolari jew kontra l-ligi. L-artikolu 459 tal-Kodiċi Kriminali fil-fatt jipprovdi hekk:”*

**Repubblika ta' Malta vs. Charles Steven Muscat - 8 June 2006 Qorti tal-Appell Kriminali (Sede Superjuri).**

*“Bil-mistoqsijiet li għamel l-Imħallef sedenti fil-ġuri ma jistax jingħad illi huwa seta' gieghel lill-ġurati jaslu għal xi konkluzjonijiet prematuri. Dak li l-appellant jilmenta minnu li kienet interferenza ingustifikata da parti ta' l-ewwel Qorti fil-fehma ta' din il-Qorti ma tistax titqies bhala interferenza li ostakolat lid-difiża milli tagħmel ix-xogħol tagħha. Bosta mill-interventi ta' l-ewwel Qorti kienu intiżi biex jiċċaraw xi xieħda jew biex jiġu spjegati xi punti ta' dritt lill-ġurati. Il-fatt imbagħad illi l- ewwel Qorti qrat xi deposizzjonijiet li kienu taw xi xhieda fl-istruttoria sabiex jgħidu jekk humiex jikkonfermawhom jew le, għalkemm strettament mhux essenzjali għadarba waqt ix-xieħda tagħhom viva voce x-xhieda konċernati b'mod generali ma kinux ikkontradicew dak li kienu qalu fl-Istruttoria ma jistax jitqies bhala irregolarita`.*

**Article 459A - Where the accused takes stand to testify.**

459A. (1) The accused who takes the stand to testify shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than the one with which he is accused, or is of bad character, unless -

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of an offence with which he is accused; or

(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or witnesses for the prosecution, or the deceased victim of the alleged crime; or

(c) he has given evidence which involves in the commission of the offence with which he is being accused, any other person accused in the same proceedings.

(2) In any of the circumstances mentioned in paragraphs (a) to (c) above any record showing any previous convictions of the person charged or accused may be produced in evidence

459A - accused can decide to testify and if he does so, AG can not ask questions which can incriminate him. Kontro ezami jsir fuq dak li qal fix-xhieda tieghu.

A-c - circumstances fejn tista ssaqsi.

Judge can not ask if 10 years ago, the accused committed a homicide.

Accused can challenge credibility of each witness and Court experts - 459A b

### **Repubblika ta' Malta vs Tony Curmi 26 ta' Frar 2020 Qorti tal-Appell Kriminali (Sede Superjuri)**

*Dan il-jedd fil-fatt huwa moghti lilu bil-ligi permezz tal-artikolu 459A(1)(b) tal-Kodici Kriminali fejn l-akkuzat jew id-difensur tieghu jista' jistaqsi mistoqsijiet lix-xhieda tal-prosekuzzjoni, meta l- andament tad-difiża jkun tali li jinvolvi akkużi dwar il-karattru ta' tali xhieda.*

*Dan ifisser illi ma hemm xejn x'josta lid-difiża milli tattakka l-karattru tax-xhieda tal-prosekuzzjoni bil-ghan li dawn jigu skreditati f'dak illi jixhdu f'ghajnejn l-awtorita' gudikanti, jew ai fini ta' kontroll ta' dak li jghid ix-xhud, b'dan madanakollu illi mbaghad terfa' fuq spallejha ir-riskju illi l- prosekuzzjoni tista' tqieghed fl-arena tal-gudizzju l-karattru u antecedenti tal-akkuzat ukoll.*

### **Qorti tal-Appell Kriminali (Sede Superjuri) Repubblika ta' Malta vs Frangisk Fenech 27 ta' Novembru 2008**

Issa, ma jistax ikun hemm dubju li f'kaz fejn si tratta speċjalment ta' akkużi li jirrigwardaw offiżi fuq il-persuna, il-fedina penali tal-vittima mhux biss hi dokument ammissibbli, iżda tista' tkun rilevanti għal-finijiet tar-reputazzjoni ġenerali li dik il-persuna seta' kellha –

Tista' tkun rilevanti għall-finijiet ta' kontroll ta' dak li jghid ix-xhud John Pace. S'intendi dan qed jinghad interament bla pregudizzju għal dak li jipprovdi l-Artikolu 459A tal-Kap. 9, u speċjalment il- paragrafu (b) tas-subartikolu (1) tieghu. Għalhekk ma jistax ikun hemm dubju li l-fedina penali ta' John Pace għandha tigi ammissa bħala prova; u biex ma jkunx hemm sorpriżi għal hadd, għandha anke tintlaqa' it-talba għalbiex il-Kummissarju tal-Pulizija jiġi ordnat jipprovdi kopja ta' din il-fedina penali lid-difensuri tal-appellant qabel il-ġuri.

### **Article 460 - Further questions after cross-examination**

460. After the cross-examination of the witness, it shall not be lawful for the parties to put any question directly to the witness. They may, however, submit to the Court any further question they may desire to put to the witness, and any such question, if considered by the Court to be material to the case, shall be put to the witness by the Court itself



460 - further questions after cross examination - not lawful for parties to put questions directly to the witness. For them to make questions, they need permission from the Court. That is why it is important for exams to take place.

### **Article 462 - Brief notes of depositions to be taken by Court**

Article 462 - Notes of the evidence of the witnesses shall be taken down in brief by the Court.

462 - *JURY HAPPENS IN A WEEK OR 2* - The Court is obliged to take notes small notes - judge also takes small notes as he needs to explain a small summary off what happened - jury have an intro off the AG, then prove then defense make prove and sottomisijonijiet - GUDIKANTT jamel summary ta' kollox li jkun ntqal waqt l guri

### **Article 458 - Defence of the Accused**

458.(1) When the case for the prosecution is concluded, the accused shall be asked what he has to state in his defence. He shall have the right to make his defence, either personally or by an advocate, and to call and examine his witnesses in the manner provided in the last preceding article, and to produce any other evidence he may have to offer. Where accused is assisted by more than one advocate.

(2) If the accused is assisted by more than one advocate, such advocates may divide the duties between them in such a manner that one will make the defence and the other will make their joinder, when this is allowed, or, that one will make the defence and rejoinder and the other will examine the witnesses; but neither of them may address the Court or the jury after the defence or rejoinder has been made by the other; and the provisions of this sub-article shall apply to every other stage of the proceedings in which the accused is assisted by more than one advocate. Accused may make his own defence.

(3) It shall also be lawful for the accused either to make his own defence and leave to his advocate the rejoinder, when this is allowed, or to make the rejoinder notwithstanding that his defence was made by his advocate

### **Article 464 Criminal Code - Reply and Rejoinder**

464. After the close of the defence, the Attorney General shall be allowed to reply, if he so desires; but, in such case, the accused shall have the right to a rejoinder:

Provided that no fresh evidence may be produced, without the special permission of the Court, either in the reply or in the rejoinder

464 - Reply or in the joinder - REPLIKA JEW KONTRO REPLIKA - iwiegeb ghal dak kollu li qed jitella bhala xhieda - jekkk l-ag jagħmel hekk, l-ahhar kelma dejjem tal-akkuzat kemm guri u anke kazijiet normali - dejjem l-ahhar kelma hija tal akkuzat. kif inghalaq l-kaz u r replika u kontra replika ttellghu, ma jistghux jittellu iktar xhieda. biex ttella xhieda trid ssaqsi permezz tal-qorti.

**The Republic of Malta vs. Kingsley Wilox - 13th February 2019 - Court of Criminal Appeal (Superior Jurisdiction)**

Recourse to this provision of the law would again have provided appellant with another opportunity to call as witness a Maltco representative otherwise already know to him since the day of his arrest and which seems to be a key fact

.....

Appellant's failure to request that a Maltco representative be included as a witness at any stage of the proceedings before the Criminal Court was not due to his lack of knowledge of such witness and that failure to include same as a witness was of his volition and cannot, therefore, at this stage of the proceedings be admitted to give evidence.

REPUKA TA MALTA VS KINGSLETT WILOX - ried itella xhudd wara li naqlu x xhieda - l qorti ma accettatx - kien evidenti li dan ix xhud kiene ttaf bih mill bidu nett, imma ma tellatu qatt. Anke f dan l istadju ma saqsietx l qori kien emm l-verdett u wara amlet applikazzjoni - dan ix xhieda qatt ma kien inkluz fil lista tax-xhieda. Qorti ma accettat.

**Qorti tal-Appell Kriminali (Sede Superjuri) Repubblica ta' Malta vs David Zerafa 15 ta' Settembru 2016**

Huwa minnu, bħalma jgħid l-appellant, li huwa “inużwali” li fl-istadju li kull ma jkun jonqos f’guri huwa li jsir l-indirizz ta’ l-Imħallef, issir talba bħal dik in kwistjoni u li tigi milqugha. Huwa inużwali anke in vista tal-proċedura stabbilita mill-Kodiċi Kriminali ta’ kif jitmexxa l-guri. Fil-fatt l-artikolu 464 tal-Kodiċi Kriminali jipprovdi illi ma jistghux jingiebu provi godda, la fir-replika u lanqas fil-kontro- replika mingħajr permess speċjali tal-qorti. Imbagħad l-artikolu 465 jipprovdi illi meta l-akkuża u d-difiża jagħlqu l-parti tagħhom, l- Imħallef jagħmel indirizz lill-guri. Jigifieri huwa mistenni illi wara li jkun ngabu l-provi u saru s-sottomissjonijiet kollha tal-partijiet, il- ġuri jitkompla bl-indirizz ta’ l-Imħallef. Din il-Qorti, pero`, hi tal-fehma li dan ma jfissirx illi ma tistax issir talba simili u li ma tistax tintlaqa’ tali talba jekk l-Imħallef li jkun qiegħed jippresjedi l-ġuri jemmen illi teżisti/jeżistu ċirkostanza/i serja/i fl-interess tar-riċerka tal-verita` li minhabba fiha/fihom it-talba għandha tintlaqa’.

Repubbilka ta malta vs david zerafa - prosekuzzjoni riedet ittella 2 xhieda - spettur qal li ddan xehdu fl istruttoria u ma kienux jafu biha l ag - u l imhallef accetta li tigi prezentata l isqarrija qabel ma jamel l verdett - l qorti tistta tacceta

Jekk l imhallef fjara li biex tohrog l verita jehttieg dawn x xhieda dawn jistu jittellu - mhus dejjem mhuz ha tthallihom l qori

### **Article 465 Criminal Code - Summing Up by Judge**

465. After the conclusion of the case for the prosecution and for the defence, the judge shall address the jury, explaining to them the nature and the ingredients of the offence preferred in the indictment, as well as any other point of law which in the particular case may be connected with the functions of the jury, summing up, in such manner as he may think necessary, the evidence of the witnesses and other concurrent evidence, acquainting them with the powers which the jury may exercise in the particular case, and making all such other remarks as may tend to direct and instruct the jury for the proper discharge of their duties.

465 - Indirizz tal-imhallef - summed up by the Judge - the law says what he should do - explain the elements of the crime. Explaining other points of law - summoning up the evidence of the witness.

### **Oorti tal-Appell Kriminali (Sede Superjuri), Repubblika ta' Malta vs Antonio Falzon, 22 Settembru 2006**

Fit-termini ta' l-artikolu 465 tal-Kodici Kriminali l-funzjoni ta' l-Imhallef fil-guri fl-istadju ta' l-indirizz hija li jfisser lill-guri x-xorta u l-elementi tar-reat miġjub fl-att ta' akkuza, kif ukoll kull punt ieħor tal-liġi li f'dak il-każ partikolari jkollu x'jaqsam mad-dmirijiet tal-guri u li jiġbor fil-qosor, bil-mod li jidhirlu meħtieġ, ix-xiehda tax-xhieda u l-provi li jkunu marbutin magħhom, ifisser lill-guri s-setgħat li għandu fil-każ partikolari, u jagħmel kull osservazzjoni oħra li tiswa biex triġi u turi lill-guri kif għandu jaqdi sewwa d-dmirijiet tiegħu. Huwa evidenti illi dak li huwa l-aktar importanti f'dak li jiddisponi dan l-artikolu f'dan ir-rigward huwa l-prinċipju bażilari ta' ekwita' u ġustizzja li għandu jirregola l-materja ta' l-indirizz u del resto tal-proċess kriminali kollu kemm hu, u cioe' li l-gurati għandhom jitpoġġew fl-aħjar posizzjoni possibbli, kemm għal dik li hi liġi, kif ukoll għal dawk li huma fatti, biex ikunu jistgħu jaslu għal verdett b'serenita' u bl-inqas komplikazzjonijiet u konfuzjoni possibbli, u fuq kollox li l-istess indirizz ikun bilanċjat b'mod li l-gurati jkunu konxji l-ewwel u qabel kollox, illi huwa l-istess Imhallef li huwa imparzjali fir-rigward tal-htija o meno ta' l-akkużat u li ma jkunx wera preferenza jew ta aktar importanza lejn naħa jew oħra.

### **Oorti tal-Appell Kriminali (Sede Superjuri), Repubblika ta' Malta vs Lawrence Axiak sive Axiak, 23 Jannar 2003**

Fl-ewwel lok l-appellant jissottometti li dwar il-grad ta' prova neċessarja biex il-prosekuzzjoni tipprova l-każ tagħha mingħajr dubju raġonevoli l-Ewwel Qorti fl-indirizz tagħha kienet skjetta. Ukoll jissottometti li l-Ewwel Qorti ma spjegatx b'mod ċar il-grad ta' prova li tappartjeni lid-difiża meta din tiddeċiedi li tressaq provi u l-grad neċessarju biex l-evidenza tagħha tkun emnuta. Ighid li peress li dan huwa punt diffiċli biex wiehed japprezza, cioè` d-differenza tal-grad rispettivi tal-prova tal- prosekuzzjoni u tad-difiża, għandha tiġi indirizzata bl-aktar mod ċar. Din l-allegazzjoni kieku tirrizulta sostanzjata, hija tali illi potenzjalment tista' tinfetta l-proċess kollu u timmenomah serjament jekk mhux fatalment. Din il-Qorti għalhekk eżaminat l-indirizz kollu in kwistjoni u tista' tafferma, mingħajr l- iċken eżitazzjoni, li l-appellant assolutament m'għandux ragun. Difatti jirrizulta li fl-ewwel parti ta' lindirizz tiegħu fit-2 ta' Gunju 2000, l-Imhallet li ppresjeda l-ġuri ddedika hin konsiderevoli biex jispjega lill-ġurati kemm il-grad ta' prova li kellha tagħmel il-prosekuzzjoni u kif ukoll il-grad li seta' jasal għalih l-akkużat. L-Imhallet hekk indirizza lill-ġurati:

### **Outline**

- Reading bill of indictment 455 - once guratti intazlu ha jinqara mir registratt l-bill of indictment jekk qalx li guilty jew le.
- 456 - addresses jury bil-fatti li għandu l-AG
- 457
- 441 sub 2
- 441 sub 6
- 459A
- 459A b cc
- 460 - after cross examination no questions shall be asked - position of witnesses shall be summarized.
- 458 - defence can be made - then replica of AG - sottomissjonijiet mhux provi
- 464
- 465 - indirizz tal-imhallet u johorgu l-ġurati jiddeliberaw

### **Article 466 - Deliberation by jury**

466. On the conclusion of the address by the Court, the jury shall consider their verdict466. On the conclusion of the address by the Court, the jury shall consider their verdict

### **Article 470 - Explanation required to jury by Court**

*470.(1) The jury may apply to the Court for any elucidation or explanation they may require for the discharge of their duties. And every such elucidation or explanation shall be given in open Court.Place for deliberating*

*.(2) The jury may, for the purpose of considering their verdict, withdraw to the place appointed for that purpose. Means of communication between jury and Court.*

*(3) When the jury shall have retired to deliberate, the registrar shall be the means of communication between the jury and the Court.*

To date, the new amendments will not be in the exam.

The jury may ask the Court questions and even the jury. The jury may ask the Court for any elucidation or explanation they may require for the discharge of their duty. And every such elucidation or explanation shall be given in open Court. For considering their verdict, the Jury may withdraw to a place appointed for that purpose - article 470.

#### **Article 471 - Jurors can not absent themselves or communicate with unauthorised persons**

471.(1) A juror once impanelled must not, until the recording of the verdict of the jury, absent himself or communicate with anyone except with the Court, the other jurors, or the officer authorized to communicate with the jurors, save, in some special case, with leave of the Court.

(2) When a trial does not come to an end on the same day in which the names of the persons to serve as jurors have been drawn, the Court may, unless it deems it prejudicial in the interests of justice, allow the jurors to return to their respective home on condition that they present themselves in Court on the day and time to which the trial has been adjourned, and on such other conditions that the judge may deem fit to impose in the interests of justice

471 - A juror who took oath must always be present throughout the trial and until the recording of the verdict of the jury. A jury cannot communicate with anyone except with the Court, the other jurors, or officers authorised by the Court.

#### **Article 469 - Duties of foreman of jury**

469. The foreman of the jury shall collect the votes of the other jurors in respect of each verdict, noting down against the name of each juror respectively the vote given by such juror, and shall finally add his own vote; and after counting the votes, and ascertaining the concurrence of at least six votes, he shall write down the verdict to be returned, which he shall lay before the other jurors.

469 - Il-prim Gurat. The foreman of the jury shall collect the votes of the other jurors in respect of each verdict. Notes down against the name of each juror respectively the vote given by such juror, Shall finally add his own vote.

**Article 467 Criminal Code - Functions of the jury and rules connected therewith**

In their deliberations the jury shall consider:

Whether the accused is guilty of the offence charged against him in the indictment.

Shall consider all the aggravating circumstances, if any, specified in the bill of indictment

If the jury is of opinion that such guilt is proved, they shall, in the manner provided in articles 468 and 469, find the accused "guilty"

It is lawful for the Jury to find that an accused charged as the principal or one of the principals in the offence, was in fact an accomplice or of being guilty of conspiracy to commit that offence.

Where a person is accused in the indictment of being an accomplice in an offence it shall be lawful for the Jury to find him guilty of conspiracy to commit that offence or of being the principal, or one of the principals, in that offence.

The Jury can also find that an accused charged with conspiracy to commit an offence, is found guilty of being an accomplice, or of being a principal, or one of the principals, in that offence, completed or attempted.

However, where a person accused in the indictment of conspiracy to commit an offence is found guilty of being a principal, or one of the principals, in the offence, completed or attempted, the punishment shall not be more severe than the punishment demanded in the bill of indictment.

Where two or more individuals are indicted as principals in an offence and there is proof that such offence was committed by one or more of them, but there is no proof as to which one of them or which of them committed the offence, it shall be lawful for the jury to find all the accused guilty as accomplices in the offence, if it is proved that all of them took in the offence a part sufficient to render them accomplices.

Where the offence is not proved in the terms in which it was specified in the indictment, but it shall appear at trial that an offence of a less aggravated character, or lesser offence, or attempted has been committed, provided it is included in any part of the indictment,

The Jury may:

Exclude the aggravating circumstances, or

Add those circumstances which make the offence of a less aggravated character, or

Find the accused guilty of such lesser offence or of an attempted offence, or of the facts constituting such lesser offence or attempted offence, as the case may be (provided the offence is included in any part of the indictment).

If the jury is of the opinion that the accused is not guilty in any form as aforesaid, they shall find the accused "not guilty".

467 - Functions of the jury and rules connected with the jury. They shall consider, whether the accused is guilty of the offence charged against him in the indictment, shall consider all the aggravating circumstances, if any, specified in the bill of indictment. If the jury is of the opinion that such guilt is proved, they shall in the manner provided in articles 468 and 469, find the accused “guilty”.

It is lawful for the jury to find that an accused charged as the principal or one of the principals in the offence, was in fact an accomplice or of being guilty of conspiracy to commit that offence. Where a person is accused in the indictment of being an accomplice in an offence it shall be lawful for the jury to find him guilty of conspiracy to commit that offence or of being the principal, or one of the principals, in that offence.

Where two or more individuals are indicted as principals in an offence and there is proof that such offence was committed by one or more of them, but there is no proof as to which one of them or which of them committed the offence, it shall be lawful for the jury to find all the accused guilty as accomplices in the offence, if it is proved that all of them took in the offence a part sufficient to render them accomplices.

Where the offence is not proved in the terms in which it was specified in the indictment, but it shall appear at trial that an offence of a less aggravated character, or lesser offence, or attempted has been committed, provided it is included in any part of the indictment the jury may:

Exclude the aggravating circumstance, or

Add those circumstances which make the offence of a less aggravated character, or

Find the accused guilty of such lesser offence or of an attempted offence, or of the facts constituting such lesser offence or attempted offence, as the case may be - provided the offence is included in any part of the indictment.

If the jury are of the opinion that the accused is not guilty - they can declare him as such.

### **Republic of Malta vs Lamin Jobe 22st January 2025**

*“In his grievance, however, appellant seems to confuse two legal institutes, that of the concurrence of offences and the other dealing with alternative charges. With regards to the latter, Article 467 of the Criminal Code lays out the manner in which the jury is to proceed in its deliberations prior to reaching its verdict, when it is stated that the jury shall first consider, whether the accused is guilty of the offence charged against him in the indictment, with all the aggravating circumstances, if any, therein specified, and, if the jury shall be of opinion that such*

*guilt is proven, they shall, in the manner provided in articles 468 and 469, find the accused "guilty". If the jury finds no proof that the accused is guilty as a principal in the commission of the offence, they may find him guilty as an accomplice or as a co-conspirator, or vice-versa. Then subsection 4 of article 467 lays down the rules to be followed by the jury in its deliberations when alternative verdicts to the offence mentioned in the Indictment by the Attorney General is reached.*

### **Republic of Malta vs Nizar I. Mustafa Al Gadi 9th January 2025**

Illi l-artikolu 467(4) tal-Kodici Kriminali jikkonferma dwar il-fakolta' tal-guri li jsibu htija ta' reati anqas gravi minn dak indikat fl-Att tal-Akkuza jew tat-tentattiv tar-reat li jkun, jew billi jeskludu l-aggravanti, basta li dawn ikunu komprizi u nvoluti fir-reat addebitat lill-akkuzat. Illi din il-lanzanza hija marbuta mal-aggravju ventilat u li diga' gie trattat dwar is-sejbien ta' htija ghar-reat inqas gravi tal-omicidju involontarju, liema aggravju kien michud ghar- ragunijiet fuq spjegati. Ghalhekk a skans ta' repetizzjoni, ladarba kif diga' inghad l-appellant f'ebda stadju matul il-guri ma indika lill-qorti jew lill-gurija illi setghet tinsab htija ghal reat alternattiv jew anqas gravi, u billi ukoll anke jekk dan kien il-kaz ir-reat tal-omicidju involontarju ma setax jikkonfigura mal-fattispecje tal-kaz, dan l-aggravju jirrazenta l-fieragh. Il-Qorti Kriminali fl-ebda mod ma naqset mill-obbligi taghha meta m'ghamlitx referenza ghal din id-disposizzjoni tal-ligi u ghall-fakolta' tal-guri li jsibu htija ghal xi reat inqas gravi meta din id-difiza alternattiva ma kenitx tressqet, u meta mill-provi kien evidenti illi dan ir- reat anqas gravi ma seta' qatt jikkonfigura.

### **Article 468 - Number of votes to be stated in every verdict**

468. For every verdict of the jury, whether in favour of, or against the accused, there shall be necessary the concurrence of at least six votes

482 - every verdict of the jury shall state the number of votes which concurred in such a verdict.

### **Article 474 Criminal Code - Reading out of the verdict**

**474.** *The Court shall, through the registrar, ask the jury, "whether the accused is guilty of what is adduced against him in the indictment", and the foreman, in the presence of all the other jurors, shall read out in open Court the verdict returned by the jury, and such verdict shall be given to the registrar to be by him recorded*

474 - the jury shall inform the Courtroom that they are ready to return their verdict in order that it may hear the delivery thereof in open Court. Through the registrar, the Court shall ask the jury whether the accused is guilty and the foreman...



**Article 475 - Additional declaration by jury relative to facts amounting to an excuse.**

475. If, after the accused has been in any form found guilty, the Court is of opinion that, upon the submissions made by the defence or as a result of the facts proved at the trial, there should be a further declaration on the part of the jury as to whether some fact, which the law expressly specifies as an excuse and of which no mention was made in the indictment, has or has not been proved in the case, the Court shall refer the question for the determination of the jury who shall answer affirmatively or negatively, as they shall adjudge:

Provided that nothing in this article shall prevent the jury, when finding the accused guilty in any form as provided in article 467, if so satisfied from the evidence, from declaring on their own initiative and without waiting for any question by the Court to that effect, that some particular fact, which the law expressly specifies as an excuse, has been proved; in which case, the jury shall find the accused guilty, and also that the facts constituting the excuse specified in the law have been proved.

475 - When the Court is of the opinion that from the submissions made by the defence or as a result of the facts proved at the trial, there should be a further declaration made by the jury on facts which can amount to an excuse as proved by law, the Court shall refer the question for the determination of the jury who shall answer affirmatively or negatively, as they shall adjudge.

The issue can also be raised by the jury...

**Article 477 Criminal Code - Power of the Court**

477. It shall be in the power of the Court to require the jury to consider any question upon which they are empowered to enter a verdict according to the provisions of article 467, and also to consider whether any material circumstance which will serve to complete or explain the first verdict, has or has not been proved

477 - The Court may require the jury to consider any question upon which they are empowered to enter a verdict according to the provisions of 467.

**Article 479 Criminal Code - Verdict not to be recorded before it is complete**

*479. In all cases where a further deliberation by the jury is required in order to render their verdict complete, the Court shall order that the verdict be not recorded until it is complete.*

479 - In all cases where a further deliberation by the jury is required in order to render their verdict complete...

**Article 481 Criminal Code - Separate Verdict in respect of each offence and of each accused**

481. If more offences are charged in the same indictment or if the accused on trial are more than one, the jury shall give a separate verdict in respect of each offence and of each accused

481 - **very important.** If more offences are changed in the same indictment or if the accused on trial are more than one, the jury shall give a separate verdict in respect of each offence and of each accused.

### **Repubblika ta Malta vs Timothy Joseph Agius - 22th June /2022**

“Issa kif kien ribadit f’sentenzi in materia mogħtija minn din il-Qorti, kull Kap fl-Att ta’ l-Akkuża għandu jittqies b’mod indipendenti, u dan skont dak dispost fl-artikolu 589 tal-Kodiċi Kriminali, fejn il-legislatur jikkonferma li għandu jkun fih l-Att ta’ l-Akkuża meta jkun hemm ix-xilja ta’ reat wieħed biss. Illi meta l-Avukat Ġenerali jkun irid jixli lil għidabbli b’aktar minn reat wieħed, l-Att ta’ l-Akkuża jinqasam f’Kapi separati li madanakollu jibqgħu indipendenti minn xulxin irrispettivament minn jekk ir-reati jkunux konnessi jew alternattivi għal xulxin. Fil-fatt l-artikolu 593(1) tal-Kodiċi Kriminali jgħid li ‘ ... l-att ta’ l-akkuża għandu jinqasam f’diversi kapi, u f’kull wieħed minnhom għandha tithares id-disposizzjoni ta’ l-artikolu 589.’ Tant hu hekk illi l-artikolu 481 tal-Kodiċi Kriminali jiddisponi illi : “Jekk fl-istess att ta’ akkuża jkun miġjub aktar minn reat wieħed, jew jekk l-akkużati fil-kawża jkun tnejn jew iżjed, il-ġuri għandu jagħti verdett separat fuq kull reat u għal kull akkużat.”

### **Article 482 Criminal Code - Number of votes to be states in every verdict**

*482. Every verdict of the jury shall state the number of votes which concurred in such verdict*

482 - every verdict of the jury shall state the number of votes which concurred in such a verdict.

### **Article 483 Criminal Code - Further deliberation in default of legal number of votes.**

483. Where, on the reading out in Court of any verdict, the absence of the concurrence of at least six votes in support of such verdict is made to appear to the Court by a number of jurors sufficient to show such defect, the Court shall require the jury to retire for further deliberation under the direction of the foreman of the jury or of any other juror whom the Court shall appoint for that purpose in order that a true verdict may be returned; and no verdict shall be recorded so long as there is not the number of votes required by law for a true verdict.

### **Article 484 Criminal Code - Recommendation of accused to mercy of tthe Court**

484. Any juror may recommend to the mercy of the Court the accused person found guilty, stating the reason for so doing; and the Court may take into consideration any such

recommendation, either in applying the law, or by communicating the same to the President of Malta in a report made for the purpose, or in any of the reports referred to in articles 493 and 494

484 - Any juror may recommend to the mercy of the Court the accused person found guilty, stating the reason for doing so. The Court may take into consideration any such recommendation, either in applying the law, or by communicating the same to the President of Malta.

#### **Article 485 Criminal Code - Trial to go on without interruption**

485. Once the jury has been impanelled, the trial of the cause shall be continued without interruption up to the recording of the verdict of the jury inclusively; and it shall not be adjourned, except for such intervals as the Court may think necessary for the rest of the Court itself, of the jurors, witnesses, or parties accused, or if a Saturday, a Sunday or other public holiday intervenes:

Provided that the Court may, if it deems it expedient so to do, continue the trial of the cause on any Saturday, Sunday or other public holiday.

485 - Once the jury has been impaneled, the trial shall be continued without interruption up to the recording of the verdict of the jury...

#### **Article 487 Criminal Code - Acquittal and Discharge of Accused if declared not guilty**

487. If the jury find the accused not guilty in terms of article 467(5), the Court shall acquit him, and shall order that he be set at liberty, unless he is in custody for some other reason

487 - acquittal and discharge of accused if declared not guilty.

#### **Article 488 - Insanity and want of discretion as ground for acquittal to be stated in the verdict.**

488.(1) If the accused is found not guilty on the ground of his insanity at the time of the offence, or if the accused, being under fourteen years of age or a deaf-mute, is found not guilty on the ground of want of discretion, such ground shall be stated in the verdict of the jury.

(2) If such ground is not stated in the verdict, the Court shall put to the jurors a specific question on that point, and the jurors shall answer affirmatively or negatively as they shall have adjudged.

(3) If the majority of the jurors shall answer affirmatively, the provisions of article 35(3) and (4), or of article 39(2), or of article 623(1), as the case may be, shall apply

### **Article 489 Criminal Code - Previous Convictions not to be disclosed to jury**

489. Where the law by reason of any previous conviction prescribes an increase of punishment for a subsequent offence, the trial shall proceed as if the previous conviction and sentence of the accused had not been alleged in the indictment; and the allegation of any such previous conviction and sentence shall not be submitted to the jury until after and if the jury shall have declared the accused guilty of such subsequent offence:

Provided, however, that, if upon the trial in respect of such subsequent offence or relapse, evidence is adduced as to the good character of the accused, it shall be lawful for the AttorneyGeneral, in answer thereto, to read out the indictment and to prove the conviction of, and sentence passed on, the accused for the previous offence, even before the jury shall have found the accused/guilty

489 - previous convictions not to be disclosed to the jury.

### **Republic of Malta vs Fabian Catania - 21st June 2023 Qorti tal-Appell Kriminali (Sede Superjuri)**

*“Illi jibda biex jingħad illi fil-kors taċ-ċelebrazzjoni tal-ġuri ma jistax jingiebb a konjizzjoni tal-ġurati l- addebitu tar-reċidiva qabel ma jingħata l-verdett finali dwar l-akkużi li dwarhom l-persuna akkużata tkun giet mixlija. Dan isir biss wara tali verdett, u allura kull kwistjoni jew prova ta’ fatt marbuta ma’ dan l- addebitu għandu jkun imressaq għad-deċiżjoni tal-ġurati wara li jingħata tali verdett li neċessarjament irid ikun wieħed ta’ htija. Illi huwa f’dan l-istadju, wara li l-Prosekuzzjoni tressaq il-provi fir-rigward, il-ġurati jiġu ggwidati mill-Imħallef li jkun qed jippresjedi l-ġuri, fejn imbagħad huma jindirizzaw dina l-akkuża finali. Fil-fatt l-artikolu 489 tal-Kodici Kriminali jiddisponi illi: Meta l-ligi, minhabba r-reċidiva, tkabbar il- piena għar-reat li jsir wara, il-kawża għandha titmexxa bħallikieku fl-att tal-akkuża ma kienx hemm miġjub li, qabel, l-akkużat kien ġie misjub ħati u ikkundannat; u m’għandux jingħad lill-ġuri li l-akkużat kien ġie qabel misjub ħati u ikkundannat, ħlief wara u jekk il-ġuri jkun iddikjara l-akkużat ħati ta’ dan l-aħħar reat.”*

### **Republic of Malta vs Gamil Abu Bakr - 27th April 2009**

*“Id-deciżjoni jekk l-akkużat - una volta misjub ħati - hux recidiv jew le għall-fini tal-artikolu 49 u 50 jew xi wieħed biss minn dawn l-artikoli, hija deciżjoni ta' fatt li tispetta biss lill-ġurija w dana wara li jkunu taw verdett ta' htija kontra l-akkużat u b' verdett separat, stante li kif jiddisponi l-artikolu 489 tal-Kodici Kriminali, meta l-ligi, minhabba r-recidiva, tkabbar il-piena għar-reat li jsir wara, l-kawża għandha titmexxa bħallikieku fl-att ta' l-akkuża ma kienx*

*hemm migjub li, qabel, l-akkuzat kien gie misjub hati w ikkundannat u m'ghandux jinghad lill-guri li l-akkuzat kien gie qabel misjub hati w ikkundannat, hlief wara u jekk il-guri ikun iddikjara l-akkuzat hati tal-ahhar reat. In osservanza ta' din id-dispozizzjoni l-prassi minn dejjem kienet li l-Imhallef li jippresjedi l-guri, wara verdett ta' htija w wara li jinqara lill-gurati l-addebitu tar-recidiva ghall-ewwel darba w jingiebu l-provi dwar ir-recidiva - fejn dan l-addebitu ikun kontestat mill-akkuzat - u wara sottomissjonijiet mill-avukati, jindirizza mill-gdid lill-gurati w "inter alia" jispjegalhom il-punti ta' dritt li jkunu jirregolaw l-applikazzjoni tar-recidiva, mbaghad jitlobhom jirtiraw mill-gdid biex jaghtu verdett ulterjuri dwar l-addebitu tar-recidiva kontenut fl-Att ta' l-Akkuza."*

### **Article 490 Criminal Code**

490.(1) The fact of the guilt of the accused having been established, the Court shall ask him if he has to say anything in regard to the applicability of the punishment demanded by the Attorney General. If no opposition is made, the Court, if it is satisfied that the punishment demanded is that prescribed by law, shall pronounce sentence; but, in case of opposition, or of a doubt expressed by the Court itself, the Court shall hear the Attorney General, and, in answer, the accused or his advocate. After the answer, the Attorney General may reply, and after the reply, the accused or his advocate may put in a rejoinder.

(2) After the submissions of the Attorney General and of the accused or his advocate, the Court shall decide whether punishment demanded is that which ought to be applied according to law and, if it decides that it is not, it shall determine the punishment applicable to the case, stating the reasons for its decision. Submissions by injured party on sentence.

(3) An injured party may, by application, request the Criminal Court to be allowed, personally or through legal counsel, to make submissions on the appropriate sentence to be passed on the accused and if the Court allows the application the injured party or his legal counsel shall be given the opportunity to make such submissions at the stage referred to in sub-article (1) and before the Court asks the accused if he has to say anything in regard to the applicability of the punishment demanded by the Attorney General:

Provided that the failure, for any reason, of the injured party to make submissions on sentence as aforesaid shall not preclude the Court from proceeding with any hearing or from pronouncing judgment as provided in article 491

490(1) - Once guilt is established, the Court shall ask the accused what he has to say in regard to the punishment demanded by the Attorney General. If no opposition is made, the Court, if it is satisfied that the punishment demanded is that prescribed by law, shall pronounce sentence. In

case of opposition, or of a doubt expressed by the Court itself, the Court shall hear the Attorney general...

In case of opposition ,or of a doubt expressed by the Court itself, the  
(ART 490(1) CC)

Court shall hear the Attorney General, and, in answer, the accused or his advocate.

The Attorney General may reply, and after the reply, the accused or his advocate may put in a rejoinder.

After, the Court shall decide whether the punishment demanded is that which ought to be applied according to law and, if it decides that it is not, it shall determine the punishment applicable to the case, stating the reasons for its decision.

490(3) - Parte Civile may apply to the Court in relation to the punishment. An injured party may, by application, request the Criminal Court to be allowed, personally or through legal counsel, to make submissions on the appropriate sentence to be passed on the accused.

The Court may award a lesser punishment when the jury are not unanimous. The Court can award a lesser punishment where at any time before the constitution of the jury the accused declares himself guilty. The Court may, instead of awarding the punishment of imprisonment for life, impose the punishment of imprisonment for a term from twelve to forty years.

The Court can award a lesser punishment where the jury is not unanimous. It shall be lawful for the Court to award a sentence of imprisonment for a term of not less than 12 years in lieu...

Recommendation by judge for pardon or mitigation of punishment.

### **Article 491 Criminal Code - Judgement**

491. The Court shall pronounce judgment as soon as possible

### **Article 492 Criminal Code - Court may award a lesser punishment when jury are not unanimous**

492. (1) Where at any time before the constitution of the jury the accused declares himself guilty and for the fact admitted by the accused there is established the punishment of imprisonment for life, the Court may, instead of the said punishment, impose the punishment of imprisonment for a term from twelve to forty years.

(2) It shall be lawful for the Court to award a sentence of imprisonment for a term of not less than twelve years in lieu of the punishment of imprisonment for life if, in establishing a fact involving the latter punishment, the jury shall not have been unanimous

**Article 493 Criminal Code - Court's recommendation on passing sentence of imprisonment for life**

493. After sentencing any person to imprisonment for life, the Court may recommend in writing to the Prime Minister within twenty-four hours the minimum period which in its view should elapse before the prisoner is released from prison. Such recommendation shall be made available to the person sentenced, and a copy thereof shall be kept by the registrar.

**Article 494 Criminal Code - Recommendation by judge for pardon or mitigation of punishment**

494. It shall be lawful for any judge, who sat in a trial, to recommend to the President of Malta, for pardon or mitigation of punishment any person sentenced by making for this purpose a report in writing stating the reason for such recommendation.