# The Validity of Statements made in Police Detention without Lawyer Assistance

**TONIO BORG**

In this article, **Dr. Tonio Borg** reviews and analyses the case-law of the Maltese Courts on statements given to the police without lawyer assistance, as a potential exception to the 'no forbidden fruit theory' recognised by Maltese Law.

**TAGS:** CONSTITUTIONAL LAW, CRIMINAL LAW, HUMAN RIGHTS, STATEMENTS TO THE POLICE

Dr Tonio Borg is a resident senior lecturer in public law at the University of Malta. He is a former European Commissioner, and former Deputy Prime Minister and Cabinet Minister. He is the author of *A Commentary on the Constitution of Malta* (2016), *Leading cases in Maltese Constitutional Law* (2019), *Leading cases in Maltese Administrative Law* (2020), *Judicial Review of Administrative Action in Malta* (2020) and *Administrative Law* (2021).

olj online law journal

# 1. The Forbidden Fruit Theory

The 'Forbidden Fruit Theory' in Criminal and Constitutional Law can be explained in the following way: if the investigating authorities, particularly the Police, infringe any of the procedures or conditions required by law in obtaining evidence, that evidence is tainted and excluded as evidence before a court of law. The doctrine developed mostly in the United States of America and was established in 1920 by the decision in ***Silverthorne Lumber Co. v United States***,[1] and the phrase 'fruit of the poisonous tree' was coined by Justice Frankfurter in his 1939 opinion in ***Nardone v United States***.[2]

## 1.1. No Forbidden Theory in Malta

In Malta this doctrine was never accepted; if evidence is obtained irregularly, steps can be taken against the person committing such acts, both criminal and disciplinary, but the evidence itself is allowed and admitted in a court of law. Consequently, a murder weapon discovered as a result of a search conducted without a warrant is allowed as evidence. The only exception admitted in Maltese Law was in the case of a statement made by the suspected person in police custody which was not voluntary. In that case the doctrine applied.

As evidence of this resistance to the doctrine, one can also refer to Article 349(2) of the Criminal Code, which provides that:

> *The omission of any precaution, formality or requirement prescribed under this Title shall be no bar to proving at the trial in any manner allowed by law, the facts to which such precaution, formality or requirement relates.*[3]

Besides, Rule 19 of the Code of Practice for Interrogation of Arrested Persons in the Third Schedule to the Police Act[4] states that:

> *The lack of observance of any of the provisions of this Code will not invalidate the statement taken, unless such non-observance nullifies the voluntariness of the statement. However, disciplinary proceedings may be instituted against persons who do not observe the provisions of this Code.*

---

[1] 251 US 385 (1920).

[2] 308 US 338 (1939).

[3] Chapter 9 of the Laws of Malta. The Title referred to is titled '*Of the Powers and Duties of the Executive Police in respect of criminal prosecutions*'.

[4] Police Act, Chapter 164 of the Laws of Malta.

## 2. Development of the Rule in Favour of Legal Assistance in Malta

The development of the rule that a person in police custody should be offered legal assistance is a relatively new one. For a long time, even in Malta, it was assumed that such right to legal assistance applied only once a person was charged with a criminal offence.

In European jurisprudence, however, the idea evolved that what happens in the pre-trial stage; e.g., lack of legal assistance, police acting as *agents provocateurs*, or unusual blocking of access to a court,[5] could amount to a breach of the right to a fair hearing, for such incidents have a bearing on the fairness of the subsequent trial or hearing.

In European Court jurisprudence, the norm developed in the form of an interpretation of the right to a fair hearing; namely, that legal assistance was necessary during police custody, even more so where rules of inference of guilt in the case of non-cooperation of the suspect existed in national law.[6] In 2008, in the case of ***Salduz***,[7] the European Court ruled that;

> *In order for the right to a fair trial to remain sufficiently "practical and effective" article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.*

Still, and this point is important for the examination of the validity of statements taken irregularly later on, the Court always stressed that no particular incident should be taken *in abstracto* or in isolation when one considers the fairness of a trial or hearing, but that one should make a holistic assessment and has to view the proceedings as a whole.

In 2010, Article 355AT of the Criminal Code came into force, which provided that a criminal suspect in police detention had the right to consult privately with a lawyer, in person or by phone, for a maximum period of one hour before the interrogation. The Police had a duty to inform such suspect of this right. Therefore, according to law, the consultation used to take place prior to the interrogation, not during such interview.

In 2016[8] a new Article 355AU was introduced, which allowed legal

---

[5] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975).

[6] See Van Dijk and Van Hoof, *The Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 631: 'these guarantees may be relevant during the pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them'. See I*brahim and Others v United Kingdom* App no 509541/08 (ECtHR, 13 September 2016).

[7] *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).

[8] Act No. LI of 2016.

assistance even during the interrogation of the suspect. This was in consequence of the transposition of a 2013 EU Directive on the right to a lawyer in criminal proceedings.[9] In April 2017, rules were passed introducing conditions such as that the lawyer could not hinder the questioning of the suspect, or suggest replies, or make other reactions, and that only at the end of the questioning by the Police, could he make such comments or reactions.

## 3. The Problem of the Validity of Statements made without Legal Assistance

The problem which remains is what happens if a statement is made and the police do not allow an arrested person to receive legal advice? What happens to those statements made without legal assistance, **prior** to the introduction of the right to legal assistance in 2010 as developed in 2016? Is there a fundamental human right to legal assistance while a person is in police detention? Is it retrospective?

### 3.1. Legal Assistance in Police Detention under the Constitution and Convention

This right is not mentioned in Article 34 of the Constitution or Article 5 of the Convention. However, is it possible to apply to pre-trial police detention the right to a lawyer guaranteed in Article 39 and Article 6? That is to say, does the right to a fair hearing, guaranteed in Article 6 of the European Convention on Human Rights and Article 39 of the Constitution of Malta, apply **also** to pre-trial proceedings such as police detention and interrogation?

A restrictive interpretation of both articles would lead us to a negative answer. Article 39(1) refers to '***any person charged with a criminal offence***', and Article 6 of the European Convention refers to '*everyone* ***charged with a criminal offence***'.[10]

It is however now firmly settled in European and Maltese case-law, particularly after ***Salduz v Turkey***[11] but also ***Averill v UK***[12] and ***Murray v UK***,[13] that Article 6 *'may be relevant before a case is sent for trial if and*

[9] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ 2 294/1.

[10] Emphasis added to both quotes.

[11] *Salduz v Turkey* App no 36391/02 (ECtHR 27 November 2008).

[12] *Averill v United Kingdom* App No 36408/97 (ECtHR, 8 February 1996).

[13] *Murray v United Kingdom* App No 8731/1 (ECtHR, 8 February 1996.

*so far as the fairness of the trial is likely to be seriously prejudiced*'.[14]

The legal issues which have arisen relate to: whether the absence of legal assistance in the pre-trial stage should be the only factor to be considered in the wider context of a fair trial, in order to assess whether such absence prejudiced the fairness of the hearing as a whole; or, whether the question of legal assistance at the pre-trial stage has been raised to a stand-alone fundamental human right.[15]

In ***Victor Lanzon et noe vs Commissioner of Police***,[16] the question which had to be placed was whether the absence of legal assistance in a particular case vitiates the fairness of such hearing. Indeed, the Court ruled that the trial had to be considered as a whole and one should not focus separately on any particular incident. It even expressed surprise that the actual criminal proceedings against the applicant, a minor accused of drug trafficking and possession, had been suspended pending the outcome of the Constitutional case. For how could the fairness of the trial *as a whole* be assessed if the hearing itself had been suspended?

Even according to the legal position prevailing then, the Court should have seriously questioned the fairness of a hearing based exclusively on a statement signed by a minor in Police detention, in the absence of his legal guardian, and without access to legal assistance.[17] Admitting to the commission of a crime carrying a mandatory prison term is no light matter. Coming from a seventeen-year-old in complete isolation, even from his lawyer and/or parents, constituted a serious prejudice to the fairness of a trial as a whole, whatever the outcome of the trial proper.

The ***Salduz*** judgment marked a shift from the trial-as-a-whole concept. Even here, the case revolved around a minor being interrogated by the Police in Turkey on state security offences in the absence of a lawyer.

The Grand Chamber of the European Court of Human Rights, in reversing a judgment of the Court of first instance which had rejected the applicant's claims on the basis of the trial-as-a-whole concept, remarked

---

[14] Emphasis added.

[15] See 56/2011 *George Pace vs Attorney General et*, Constitutional Court 30 October 2014: '*As correctly stated by the Attorney General the right at law is that to a fair hearing and not to legal assistance during interrogation. The denial of such assistance may lead to a breach of that right, not ipso facto but only if, because of such shortcoming, plaintiff suffers an unjust prejudice regarding his procedural rights. But the effect of such shortcoming must always be considered not as an isolated incident, whereby by itself and irrespective of the circumstances, it amounts to a breach, but always in the context of the entire proceedings*'.

[16] 15/2002 *Victor Lanzon et noe vs Commissioner of Police*, Constitutional Court 29 November 2004.

[17] The Code of Practice for Interrogation of Arrested Persons, in the Fourth Schedule to the Police Act (Chapter 164) provides in Article 15: '*Special attention should be given when persons under 18 years of age are being interviewed. As far as possible, and if this is not prejudicial to the investigation, these persons should be interviewed in the presence of one of the parents, or their tutor, or in the presence of any other person, not being a member of the Police Force, who is of the same sex as the interviewed person, e.g. the person who has the effective care and custody of the young person, or a social worker*'.

that: '*although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer* […] *is one of the fundamental features of a fair trial.*' And again: '*Early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination.*'

The Court concluded that:

> *Article 6(1) requires that as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the Police, unless it is demonstrated in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right.*

The Court here clearly stated that it would consider the absence of access to a lawyer as an irretrievable prejudice to the fairness of a trial.

So even though it did not completely jettison the trial-as-a-whole approach, it stated that as a rule, unless there is strict justification, absence of access to a lawyer shall be a *faux pas* so serious that it prejudices the fairness of a trial even when considered as a whole. This interpretation was confirmed by the Maltese Constitutional Court in the case of ***Charles Steven Muscat vs Attorney General***,[18] decided by the Constitutional Court **after *Salduz***.

In that case, the applicant tried to get a declaration of nullity of his statement, which he had voluntarily given to the Police years before the ***Salduz*** judgment. The Constitutional Court, while accepting that the ***Salduz*** judgment had brought about a development regarding legal assistance in pre-trial stages, nonetheless warned against any automatic exclusion of a statement or finding of a breach of Article 6 just because *sic et simpliciter* no legal assistance was afforded.[19]

Many are of the view that the ***Salduz*** case has practically declared a new fundamental human right to legal assistance at the pre–trial stage with restrictions. The Constitutional Court in the ***Muscat*** case was not so sure.

It recognized that there had been a development and that this was due to the particular circumstances of the case; namely, an interrogation by a minor in a predominantly political case. But it was adamant in not allowing ***Salduz*** to be used to apply to the case of an adult, who was the subject of several criminal proceedings in the past, and had voluntarily released a statement to the Police.

---

[18] 75/2010 *Charles Steven Muscat vs Attorney General*, Constitutional Court 8 October 2012.

[19] '*It must be stated that even the European Court in the Salduz case observed that the lack of legal assistance during interrogation leads to a violation of the right to a fair hearing only when, because of such absence, the element of justice in the proceedings is prejudiced*'.

In other cases, the Constitutional Court has decided that, when there was no evidence of any vulnerability of the suspect or other circumstances indicating irregularity; e.g. not giving the caution prior to the statement, then the fact that the statement had been given voluntarily, even in the absence of legal assistance, did not amount to a breach of Article 6.[20]

In one case,[21] applying the criterion and test of vulnerability, the Court struck down a statement signed by the accused, even though he had reached the age of majority, but ordered that it remain in the records of the case for the purposes of assessing the credibility of other witnesses in the case.

## 4. Borg vs Malta: a Legal Earthquake

However, the hint in the ***Dimech*** case that ***Salduz*** was not being properly interpreted by the local Courts, particularly the condition introduced by the Constitutional Court in a number of judgments that there will only be a violation of Article 39 of the Constitution and Article 6 of the Convention if the person interrogated without legal assistance was a vulnerable one, was taken up in the case of ***Borg v Malta***.[22]

In that case the European Court of Human Rights ruled that:

> *In order for the right to a fair trial to remain sufficiently "practical and effective" Article 6(1) requires that, as a rule, access to a lawyer should be provided from the first interrogation*

---

[20] See *Charles Steven Muscat vs Attorney General* (n 18): '*When one also considers that plaintiff has still to undergo criminal proceedings with all the procedural guarantees which they offer, where all the evidence received, and not just the statement of the accused, will be examined; that during those proceedings the accused shall be assisted by a lawyer, and that the robed judge will warn the jurors of the danger of relying only on the accused`s statement when they determine the issue of guilt without considering all other evidence, and that the judge may indeed caution the jurors to ignore the statement if proof is presented – that has not been produced before this Court – that the statement was procured through violence, fraud or threats, this Court is of the opinion that there results no breach of the right to a fair hearing with the taking of the applicant`s statement in the absence of legal assistance*'; See also 43/2011 *Republic of Malta vs Martin Dimech*, Constitutional Court 26 April 2013: '*This Court has already had the occasion to state that it is not the case that where there is the absence of legal assistance this* ***by itself*** *means that there has been a breach of the right to a fair hearing but there must exist other circumstances, amongst which particular circumstances indicating vulnerability of the interrogated person, which then lead to the conclusion that because of such absence, there was not that guarantee of legitimacy required so that the statement be not considered to be in breach of the right to a fair hearing*' (emphasis added).

[21] See 35/2012 *Anthony Taliana vs Commissioner of Police et*, Constitutional Court 6 February 2015: '*When one considers all the factors, this court is of the opinion that the fact that plaintiff was not a minor does not mean that, because he was twenty or twenty one years of age, he possessed sufficient maturity not to feel intimidated by the atmosphere of an interrogation, the more so when he knew that he had driven a car which had hit and killed a person. It could have been different had he been a hardened criminal, who had committed a pre-meditated crime, and therefore was prepared to face an interrogation and knew how to handle it* […] *this Court is of the opinion that the statement of applicant should be struck from the records of the case; however since his confession was made in circumstances where the right of plaintiff under Article 6 was not altogether observed, the person who has to adjudicate this case and his guilt should not take into account the statement as evidence of its contents for the purpose of establishing the guilt or otherwise of applicant; but may consider it for the purpose of controlling and verifying the credibility of witnesses*'.

[22] *Borg v Malta* App no 375237/13 (ECtHR, 12 January 2016) 57.

> *of a suspect by the Police, unless it demonstrated, in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right* […] *the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.*

This judgment did create a legal earthquake in local jurisprudence, for it tore apart the notion of vulnerability from the finding of a violation of Article 6 owing to lack of legal assistance. Maltese jurisprudence had to move in a different direction in order to be consonant with that of the European Court. The explicit reference to incriminating statements made without access to a lawyer as irretrievably prejudicing the rights of defence also cast a long shadow on the validity of pre-2010 statements released to the Police.

This, therefore, led to the question of whether, at least as far as a right to legal assistance is concerned, a forbidden fruit theory has developed in Maltese jurisprudence, whereby statements made in the absence of a lawyer *ipso facto* are invalid.

Indeed, two days after the ***Borg v Malta*** judgment, the First Hall of the Civil Court in ***Malcolm Said***[23] expunged from the records of a case an incriminating statement owing to lack of legal assistance. However, the Constitutional Court on appeal begged to differ,[24] stressing the importance, once again, of looking at the trial in its entirety, but at the same time affirming that its jurisprudence was correct, admitting that it could not ignore ***Borg***. It stated:

> *Although this Court believes and reiterates that its interpretation in the Charles Stephen Muscat case and other subsequent judgements is correct and proportionate since it prevents abuses by the Prosecution and protects the rights of a person charged with a criminal offence, it seems that such interpretation – at least when the criminal proceedings have come to an end – is no longer tenable in the light of the abovementioned judgment in Borg v. Malta recently decided by the European Court. Therefore today this Court is of the view that it would not be wise to insist on the interpretation it gave in the Muscat case, though it again reiterates that is the correct proportionate interpretation based on common sense.*
>
> *The judgment in Borg, however, has to be read as well in the light of another judgment of the same European Court in Dimech already mentioned, where the Court held that it had to consider*

[23] 78/14 *Said Malcom vs Attorney General*, Civil Court (First Hall) 14 January 2016.
[24] ibid, Constitutional Court 24 June 2016.

> *the proceedings as a whole in order to examine whether the hearing was fair, and therefore where the criminal proceedings as in the present case are still pending, it had to wait for the case to close so that the proceedings are considered in their entirety to see whether the hearing was fair.*
>
> *However, in the present case the Court is of the view that it would not be wise that the criminal proceedings be allowed to continue with the production of the statement made by applicant for it feels that the lack of legal assistance was not a shortcoming which would not have any prejudicial effect against applicant, since the applicant admitted his guilt in the statement. In the circumstances it is proper that as stated by the court of first instance no use should be made of the statement in the criminal proceedings.*

The Court concluded by saying that there had not yet been a violation of any human right in the taking of the statement, but that such violation would occur in the future if use were to be made of such statement.[25]

This fudged reasoning of the Court, torn between sticking to ***Muscat*** and bowing its head to ***Borg***, has increased the uncertainty relating to the matter.

The forbidden fruit theory, however, did raise its head once again in ***Christopher Bartolo***.[26] In that case the court of first instance had annulled not only a statement taken without legal assistance but also an admission of guilt before a court of law when the accused was assisted by legal counsel, arguing that the two facts were intimately linked. Moreover, the court did so not because no legal assistance was offered, but because such assistance had not been provided for during interrogation: a legal duty

---

[25] See also 80/15 *Daniel Gatt vs Attorney General*, Constitutional Court 27 November 2017, and 83/16 *Graziella Attard* vs Attorney General, Constitutional Court 27 September 2019.

[26] 92/2016 *Christopher Bartolo vs Attorney General*, Constitutional Court 5 October 2018. See also 44/2016 *Trevor Bonnici vs Attorney General*, Constitutional Court 18 July 2017, where a judgment by a court of criminal jurisdiction based on a statement taken without legal assistance was annulled. The Court stated: '*On the other hand, in circumstances which fall under the second type of situation viz. when the* criminal proceedings have come to an end, *according to the reasoning of the European Court in the* Borg *case, the very fact that the accused was not allowed to consult with a lawyer of his choice at the interrogation stage automatically means that there has been* a breach of his rights*. Besides it should be considered irrelevant (i) whether plaintiff was vulnerable at the time when he made the statement; (i) whether the statement was made voluntarily without threats promises of advantage and that who made it was* given the caution according to law*; (iii) whether he understood the circumstances in which he found himself and (iv) whether he ever challenged the validity or voluntariness of the statement*'. See also 47/2016 *Dominic Camilleri vs Attorney General*, Constitutional Court 2 March 2018, where the Court ordered a statement taken without legal assistance to be expunged from the records of the case, but also ordered that the proceedings which were at an appeal stage start anew before the court of first instance so that the Prosecution would be able to produce evidence in favour of its case once the statement was being so expunged. See also 176/2019 *Morgan Onuorah vs State Advocate*, Constitutional Court 27 January 2021: '*That the criminal suspect speaks to his lawyer before the interrogation, or that he is assisted by counsel after the interrogation and the adversarial nature of the subsequent criminal proceedings are not adequate guarantees to remedy the shortcoming that the suspect was not assisted by a lawyer during the interrogation which* occurred when he was under arrest'.

which was not in force at the time of the taking of the statement in 2013.

On appeal, the Constitutional Court allowed the admission of guilt to stand since it decided that there was no necessary nexus between the statement and the said admission. However, it still ordered that no notice be taken of the statement made without the presence of a lawyer during interrogation.[27] The order of not taking into consideration statements made without legal assistance during interrogation apparently followed the strict application of the forbidden fruit theory once again.

In contrast in ***Alexander Hickey***,[28] the Court ruled that a statement given during interrogation without legal assistance, even though the suspect had consulted his lawyer prior to the Police interview, should not only be removed from the records *but the admission made before a court of criminal jurisdiction was invalid as well*. The Court stated that:

> *Obviously in view of the considerations made by this court in the preceding paragraphs, a judgment based on the guilty plea of the appellant could lead to a breach of article 6(1) and (3) of the Convention and Article 39 of the Constitution. This based on the probability that the appellant filed a guilty plea based also on the two self-incriminating statements he gave to the police on the 2nd and 3 April 2012 without the assistance of a lawyer.*

However in ***Aiello***[29] the apex court in Malta ruled that a criminal suspect who refused legal assistance before interrogation, could not then complain that he did not have legal assistance *during* the interrogation.

In the case of ***William Gatt***,[30] the Constitutional Court seems to have taken a step backwards, ruling that the mere fact of lack of legal assistance did not amount to a breach of Article 6 of the Convention, and therefore the statement of the accused was not invalid. The applicant had been charged with defilement of a minor and subsequently with carnal knowledge with violence. The Court said that the case had to be viewed in its entirety. Amongst other factors which the Court considered were the following:

> *(i) there was no evidence that the applicant could be considered as a vulnerable person when the statements were made. (ii) at no stage in the criminal proceedings did applicant challenge the authenticity of the statements made on 9 February 2010 and 27 December 2011; (iii) before the court he stated that he was not*

[27] See also 16/2016 *Dustin Bugeja vs Attorney General et*, Constitutional Court 5 October 2018; 104/2016 *Police vs Aldo Pistella*, Constitutional Court 14 December 2018; and, 175/2019 *Clive Dimech vs Attorney General*, Constitutional Court 27 January 2021.

[28] 141/2019 *Police vs Alexander Hickey*, Constitutional Court 27 January 2021.

[29] 38/2018 *Republic of Malta vs Martino Aiello*, Constitutional Court 27 March 2020.

[30] 60/2017 *William Gatt vs Attorney General*, Constitutional Court 20 July 2020.

*contesting the voluntariness of the statements (iv) in its judgment of 12 June 2015, the Court of Magistrates did not refer to these statements and decided the case on the basis of the testimony of the minor and that of the accused; (v) the court did not give any importance to the two statements of the accused wherein he rejected all allegations against him; (vi) at no stage of the proceedings did the accused withdraw the statements or allege that he was forced to make them; (vii) when the accused gave evidence in the criminal proceedings he did not refer to what happened before or during interrogation Nor did he contest the answers he gave.*

In ***Castillo***[31] the Court referred to the recent case of ***Stephens v Malta***[32] where the European Court stated that:

*70. However, the Court notes that the non-observance of one of the minimum rights guaranteed by Article 6 § 3 will not lead to an automatic violation of that provision (see, for example and by implication, Ibrahim and Others v. the United Kingdom [GC], nos. 50541/08 and 3 others, 13 September 2016, and Schatschaschwili v. Germany [GC], no. 9154/10, ECHR 2015). The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, Beuze v. Belgium, [GC], no. 71409/10, §§ 120, 9 November 2018 and the case-law cited therein) […] 73. It follows from the above that, while there is no doubt that G.R.E.'s initial statements were made in the absence of a lawyer, it cannot be said that such circumstances automatically led to G.R.E having had an unfair trial. Indeed the domestic court found that it did not, and the Court is not called upon to re-examine the domestic court's findings in that case. Further, the Court notes that those statements were not taken in breach of domestic law, since at the time such circumstances were lawful.*

It added that:

*Particularly relevant to the present case, the Court observes that in the recent Beuze judgment,* ***the Grand Chamber departed from the approach taken in previous cases that systematic restrictions on the right of access to a lawyer led, ab initio, to a violation of***

[31] 175/2019 *Roderick Castillo vs Attorney General*, Constitutional Court 27 January 2021.

[32] *Stephens v Malta* App no 25989/14 (ECtHR, 14 January 2020).

> ***the Convention*** *(see, in particular, Dayanan v. Turkey, no. 7377/03, § 33, 13 October 2009, Boz v. Turkey, no. 2039/04, § 35, 9 February 2010, and Borg, cited above, § 62). In Beuze, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them.*[33]

In the ***Beuze*** judgment,[34] quoted with approval by the Constitutional Court in the above mentioned case, and in the case of ***Paul Caruana***,[35] the European Court established the following criteria to examine whether a statement made without legal assistance amounts to a breach of Article 6:

(a) Whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

---

[33] Emphasis added. See also 13/2016 *Stephen Pirotta vs Attorney General et*, Constitutional Court 27 September 2019, where the Court reiterated, in a case where no legal assistance was provided before or during interrogation, but there was enough other evidence for the prosecution to secure, as it did secure, a conviction, that the trial had to be seen as a whole and added that just because there occurred a procedural irregularity in the interrogation stage, does not entail an automatic finding of a breach of the right to a fair hearing.

[34] *Philippe Beuze v Belgium* App no 71409/10 (ECtHR, 9 November 2018).

[35] 64/2014 *Paul Caruana vs Attorney General et*, Constitutional Court 31 May 2019.

(h) Whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) The weight of the public interest in the investigation and punishment of the particular offence in issue; and,

(j) Other relevant procedural safeguards afforded by domestic law and practice.

In ***Farrugia v Malta***,[36] the European Court confirmed ***Beuze*** and stated that:

> *Being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court had occasion to further examine the matter in Ibrahim and Others, Simeonovi and more recently in Beuze, where the Court departed from the principle set out in the preceding paragraph. In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them.*

This means that for legal assistance to be excluded there must first be compelling reasons to do so, and if these do not exist, then one examines stringently whether there was overall fairness to ensure that no serious prejudice was suffered by the applicant.[37]

This is certainly a departure from previous jurisprudence as admitted by the European Court itself, and this is reflected in the ***William Gatt*** judgment. However, the matter is still uncertain and there have been conflicting judgments in the space of a few years. Just stating that 'the facts in each case were different' does not sufficiently explain conflicting views by the apex court on the matter.[38]

---

[36] *Farrugia v Malta* App no 63041/13 (ECtHR, 4 June 2019).

[37] ibid: '*Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.*'

[38] In 5/2021 *Republic of Malta vs Andrew Mangion* (Criminal Court) 29 July 2021, the Court remarked that: '*It is the Court's own submission that because of the judgments mentioned before, there clearly result absolute divergences in the interpretation given by our Courts, namely the Constitutional Court and the Court of Criminal Appeal; in the absence of any Court of Cassation, the Constitutional Court has the duty to remove any uncertainty and not create it itself.*' The Court, while expressly declaring that it was not pronouncing itself on whether the right to a fair hearing had been infringed, ruled, in a murder case, that the statement made by the accused who

This line of reasoning was followed in the case of ***Briegel Micallef***,[39] where the Constitutional Court allowed a statement made without legal assistance to remain in the records of the case. In that case one must add there was other evidence justifying the finding of guilt of the accused before the Court of Magistrates. It stated that:

> *It is true that this very Court in other judgments stated that it would be proper that a statement released by a person charged be removed from the records of the criminal proceedings to ensure that there would be no danger that eventually constitutional proceedings would be filed which could lead to an annulment of the entire proceedings. However, while one must state that there are other judgments where this Court simply made a recommendation regarding such statements, one must also remember that each case has its own particular circumstances. In this particular case there was already a judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature in which an assessment was made of all the evidence produced before it in the course of the proceedings - a circumstance which did not exist in other cases decided by this Court. Naturally this assessment will be reviewed by the Court of Criminal Appeal.*

If one were to recapitulate, one may lay down, in spite of the often conflicting trends of the jurisprudence of the Maltese courts, the following principles:

1. As a rule, legal assistance should be available from the very beginning of any police interrogation. This is implicit in the right to a fair hearing since occurrences happening before the hearing itself can influence the fairness of the subsequent hearing itself;

2. Lack of such legal assistance creates a presumption that something of prejudice to the criminal suspect has occurred;

3. Usually once a breach of the right to a fair hearing has occurred and is confirmed by the court, the statement would be considered vitiated;

4. According to recent jurisprudence, the mere fact that there was a lack of legal assistance does not automatically bring about a breach of the right to a fair hearing; one has to look at the entirety of the hearing, and in most cases this can be done only when the proceedings come to an end;

5. In certain cases the Court has, prior to the conclusion of criminal proceedings, and as a preventive measure to avert a breach of Article 6,

---

had consulted a lawyer before the interrogation, but who had no legal assistance during the Police interview, was not admissible at law. This is perhaps the closest a Court has come to embracing wholly the forbidden fruit theory.

[39] 101/2019 *Briegel Micallef vs Attorney General*, Constitutional Court 30 June 2021.

ordered that a statement taken without legal assistance be ignored by the court of criminal jurisdiction.

6. Factors to be taken into account to gauge whether lack of legal assistance amounts to a breach of the right to a fair hearing include: whether the suspect was a vulnerable person, whether there was other evidence incriminating the accused apart from the statement, whether the court took into account such statements, and whether the accused attempted in his evidence or submissions to challenge the contents of his statements.

7. If no prejudice has been suffered by the applicant, the lack of legal assistance will be remedied by a mere declaration that his rights have been infringed.[40] This usually applies where other evidence supports the finding of guilt.

8. Where the facts so indicate, a guilty plea based on statements made without legal assistance can be considered invalid.

## 5. Conclusion

The position at law, however, appears to still be fluid. Shall our Courts adopt the strict application of the forbidden fruit theory as in the case of ***Christopher Bartolo*** in this restricted field of law, or will the trial-as-a-whole doctrine prevail? Legally valid arguments for one or the other theory abound. At the present moment the trial-as-a-whole theory seems to have the upper hand, but what will happen in the future, in view of changes in European jurisprudence, is hard to tell.

[40] 34/2016 *Raymond Bonnici et vs Attorney General*, Constitutional Court 27 October 2017. See also 8/2015 *Joseph Feilazoo vs Attorney General et*, Constitutional Court 13 November 2017, and 90/2016 *Police vs Brian Vella*, Constitutional Court 14 December 2018.


olj
online
law
journal