COURT OF CRIMINAL APPEAL

JUDGE

The Hon. Dr. Antonio Mizzi LL.D., Mag. Juris (Eu Law)

Appeal no. 502/2016

The Police
(Inspector Mario Cuschieri)

v.

Johan Germaine Corneille Van Oudenhove,
son of Andre', born in Dendermonde, Belgium, on the 17th May, 1963,
holder of Belgian identity card number 591-6053433-56

This, twenty-second (22) day of November, 2016

The Court,

Having seen the charges brought against the appellant Johan Germaine Corneille Van Oudenhove before the Court of Magistrates (Malta) :

That following the issue of an alert in the Schengen Information System for the purpose of extradition bearing Schengen ID number BEC0000000226337000001, the appellant was arraigned in front of the Court of Magistrates (Malta) as a Court of Preliminary Inquiry (for purposes of the Extradition Act referred to as a Court of Committal) in order to be extradited to the requesting country, Belgium, a scheduled country in terms of Regulation 5 of Subsidiary Legislation 276.05, for the purpose of prosecution for the

offence of 'abuse of confidence' (misappropriation) which is punishable with a maximum term of five (5) imprisonment.

Having seen the judgement of the 21st October, 2016, delivered by the Court of Magistrates (Malta) as a Court of Preliminary Inquiry (for purposes of the Extradition Act referred to as a Court of Committal), ordered the return of the appellant, that is Johan Germaine Corneille Van Oudenhove to the Kingdom of Belgium on the basis of the European Arrest Warrant issued against him and committed him to custody while awaiting his return to the Kingdom of Belgium in terms of Regulations 13(5) and 24 of the Order.

Having seen the application of appeal of the defendant Johan Germaine Corneille Van Oudenhove filed on the first (1) day of November, 2016, wherein he is praying this Court to to REVERSE the order of committal and consequently DISCHARGE him.

That the grounds of appeal of defendant consist of the following:

That the grievance that the appellant is raising is that although he did not raise any bars, under article 13 of the Order, regarding the requisites of the European Arrest Warrant requesting his extradition from Malta to the Kingdom of Belgium, he raised the plea that the Court was not to order his extradition. The appellant raised this plea in front of the Court of Committal on the basis that according to the EAW he is requested in Belgium for further investigation, as he is still a suspect.

That article 5, subarticle 2 of the Extradition (Designated Foreign Countries) Order, under Subsidiary Legislation 276.05 of the Laws of Malta, specifies that *"the reference to any arrest warrant in subarticle (1) is a reference to a relevant arrest warrant for prosecution or a relevant arrest warrant after conviction."* In fact, this is also specified in Article 1.1 of the Framework Decision on the European arrest warrant and the surrender procedures between Member States which states:

> The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a

> requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

Therefore, both local and European laws state that for a person to be extradited from the requested country to the requesting country, he is to either be facing charges in Court or else to execute a custodial sentence.

That in the ongoing case, the appellant is neither being requested in Belgium to undergo criminal prosecution and nor to serve a sentence after conviction. The fact that the appellant is being requested for further investigation, does not allow Malta to extradite him since there are no formal charges issued against the appellant in Belgium.

The EAW issued against the appellant indicates that he is being requested in Belgium for further investigation in regards to the offence of misappropriation. This does not and should not imply that the requested person, the appellant, is to be considered as an 'accused' person and be extradited from the requested country, in this case Malta. The Court cannot assume that once the requested person is extradited he will be eventually prosecuted since if the investigation results to be unfruitful, then that person will not be charged in Court. That when the Honorable Court determines that the requested person, when requested for further investigation, is to be considered to fall under the definition of an 'accused' person, with all due the respect, this should not be permitted since at that stage the requested person is only a suspect. Even though the investigation may be conducted by the Prosecution, this should not fall under article 5, subarticle 4 of the Order:

[…] that the person in respect of whom the warrant is issued is wanted in the scheduled country for the purposes of conducting a criminal prosecution for the commission of an offence specified in the warrant.

Therefore, it is clear that a mere suspect is not sufficient for the validity of the warrant of arrest under article 5 of the Order, as was also stated in the iconic case of **Re Ismail:**

> It is common ground that mere suspicion that an individual has

committed offences is insufficient to place him in the category of 'accused' persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their enquiries" something more is required.

It is also not sufficient that the requested person is requested only to help the Police or the authorities in their investigations or inquiries, in the stages preceding the trial in Court. That the Order, which after all is a subsidiary legislation under the Extradition Act, requires more than a *prima facie.* It requires that the investigating authorities would have completed their work in a way that the authorities would have taken a clear and unequivocal decision to pass onto the next stage, that is to prosecute. In the penal camp, there is the basic principle between when a person is going to be accused with a crime, and when the authorities would have taken the decision to prosecute that person, the distinction between the investigation and the prosecution stages.

That in fact, since extradition proceedings may have serious consequences, in that of restricting one's liberty, one has to understand that for the warrant of arrest to be valid, the Order establishes a particular degree which has to be satisfied, that is that a person is either already charged or else going to be prosecuted. In other words, the stage of the investigation would have already been concluded and the authorities would have already decided that that person is to be charged in Court. This particular degree has to be reached before one is ordered to get extradited so that the requested person will not be extradited with the possibility of causing serious consequences and that person spending a considerable amount of time arrested, and then from the investigation it may result that the requested person is not to be charged in Court. Now, in this ongoing case there is no proof that the Belgian authorities have concluded their investigations in respect of the appellant, and that charges are going to or have been issued against him.

The law is clear, that is, a person is to be extradited only to undergo proceedings in Court or serve a sentence in prison; **and not undergo an investigation.** In fact, in the case with the names **Il-Pulizija v. Micheal Spiteri,** delivered on the twenty-fifth (25th) of November of the year two thousand and thirteen (2013) by the Court of Criminal Appeal

as per the Hon. Judge Antonio Mizzi, it was stated that the system of extradition was in fact created so that persons accused or convicted of a crime can be easily extradited:

> Ghalhekk, gie kreat dan is-sistema, flimkien ma' ohrajn, biex persuni kundannati jew akkuzati b'xi reat, li hu specifikat ukoll fl-Avviz Legali, ikun jistghu jigu facilment tradotti minn pajjiz ghal iehor. Dak li hu nteressanti f'dan is-sistema hu li issa tali decizjoni li ttiehed ghandha tkun wahda gudizzjarja. Dan ibiddel kompletament il-kuncett fejn tali decizjonijiet fil-passat kienu jiehdu xejra politika. Illum, ghal inqas taht il-paramentri ta' l-Ordni hi decizjoni gudizzjarja.

That, as the Honourable First Court referred to, the **Re Ismail** case, delivered in the year 1999, stated that a person is to be **considered as an "accused" person from the moment that he is arrested and subsequently charged with the accusations:**

> the charging of an arrested person marks the beginning of a prosecution and the subject becomes an 'accused' person.

Therefore, in the ongoing case, the appellant cannot be referred to and considered as an "accused" person since he is as yet to be charged with the alleged crime that he has manifested in Belgium; thus the prosecuting stage has not yet been initiated.

Moreover, as the mentioned case of Il-Pulizija v. Michael Spiteri cited, in the case of Assange, the following was stated:

> We agree with the approach of Toulson LJ in Bartlett that the language of the EAW should make clear that **'The investigation must have reached the stage at which the requesting judicial authority is satisfied that he faces a case such that he ought to be tried for the specified offence or offences, and the purpose of the request for extradition must be to place him on trial.'** (paragraph 50) In our view, the terms of the EAW read as a whole made clear that not only was the EAW issued for the purpose of Mr. Assange being prosecuted for the offence, but that he was required for the purposes of being tried after being identified as the

> perpetrator of specific criminal offences. He was therefore accused of the offences specified in the EAW. Nothing in the EAW suggested he was wanted for questioning as a suspect." Fil-paragrafu 150 ta' din is-sentenza (Assange) il-Qorti rrilevat li taht il-procedura Svediza l-akkuzat jista' jigi mitlub jirrispondi domandi ulterjuri qabel decizjoni tittiehed jekk jigix processat o meno. Madankollu hu fondamentali li "but to ensure that there is no proper basis for the accusation not to proceed swiftly to trial" Dan ifisser li suggett wara tali investigazzjoni jew domandi ghandu jitressaq il-Qorti 'swiftly' u nafu ben tajjeb x'ifisser dan il-kuncett ghall-Qrati nglizi. Jidher car li dik il-Qorti kienet sodisfatta li l-persuna setghet titregga lura anki ghaliex il-kawza kellha tibda 'swiftly'.

Moreover, if it was necessary for the Belgian authorities to investigate further the appellant, the Belgian and Maltese authorities could have easily conducted an interrogation of the appellant by means of letters rogatory, under article 649, subarticle (1) of the Maltese Criminal Code:

> Where the Attorney General communicates to a magistrate a request made by a judicial, prosecuting or administrative authority of any place outside Malta or by an international court for the examination of any witness present in Malta, or for any investigation, search or/and seizure, the magistrate shall examine on oath the said witness on the interrogatories forwarded by the said authority or court or otherwise, and shall take down the testimony in writing, or shall conduct the requested investigation, or order the search or/and seizure as requested, as the case may be […].

Therefore, apart from the fact that since the appellant **is being requested for an investigation, first and foremost, he should not be ordered by Court to be extradited to the requesting country, since the is not according the European and Local Laws. Moreover, if it is the case that the appellant is requested for further investigations, there is an alternative procedure under Maltese Law, that is letters rogatory, which can be conducted by the Belgian authorities in Malta.**

Having seen the records of the case.

Having seen the updated conviction sheet of the defendant.

Having heard the parties to this case.

Now therefore duly considers,

The grievance which the appellant has brought to the attention of this Court is that essentially he has not been accused in the Belgian Courts of an offence but he is wanted solely and exclusively for the purposes of investigation of the crime of abuse of confidence under article 491 of the Belgian Criminal Code.

This Court as presided has already had the occasion to pronounce itself on such a circumstance. The judgement in question is reported above in the appeal application and there is no need to reproduce it hereunder. It must be said that as a consequence of that judgement, within twenty-four hours Legal Notice 421 of 2013 was brought into force substituting section 5(4). The thrust of that judgement (Il-Pulizija v. Michael Spiteri, decided by this Court on the twenty-fifth day of November, 2013 - Appeal no. 447/2013) was that no person can be extradited unless he is accused of a crime. Extradition for the purposes of a simple investigation would not be granted. The current section 5(4) indicates that a European Arrest Warrant can be issued also "...ghall-finijiet tat-tmexxija ta' prosekuzzjoni kriminali...". The appellant is of the opinion that notwithstanding the change in the Legal Notice 320 of 2004 [L.S. 276.05] as amended by Legal Notice 421 of 2013 the substance of the issue has not changed. This means that if the appellant is wanted for the purposes of an investigation his extradition must not be granted by the Court.

On the other hand, the Prosecution is of the opinion that the law as amended must be given a very wide interpretation. It is of the opinion that a previous judgement by this Court (not as presided) must be upheld. The judgement in question is "Il-Pulizija v. Philip Mifsud decided on the 18th October, 2013. Consequently, even for investigative

purposes the warrant must be executed against the appellant. This Court does not agree with the reasoning put forward by the Prosecution and is of the opinion that notwithstanding the latest amendment of the law the position remains unchanged in the sense that no extradition is to be granted for the purposes of a simple investigation where the person who is extradited does not enjoy the same safeguards enshrined in our Constitution, prior to being accused of a crime. If, on the other hand, the person to be extradited has already been accused in Court with his committing a crime then the extradition is to be granted. This would mean that the person would be charged in the Court of the requesting State and he would have to answer to such a charge or charges.

The solution of this dilemma lies in a correct reading of the European Arrest Warrant which is in the records of this case. This is the next step to be undertaken which is of vital importance to a correct reading of a European Arrest Warrant. The simple fact that a warrant is requested is not enough. An in depth analysis is required. The first Court made an extensive use of the English case: In Re Ismail of the 29th July, 2008. This Court concurs with the construction of the concept of "accused" found in this judgement. However, the judgement highlights a certain uneasiness in applying that concept for an English Court to decide the issue when referring to a civil law jurisdiction. Consequently, this Court is of the opinion that great care must be taken and it may be also necessary in certain situations to depart from accepting and embracing this judgement without looking for other pointers to resolve the issue in question. This is why it is of the utmost importance to analyze the documentation which is sent by the requesting State. The fact that a European Arrest Warrant is requested does not render that request an order. The extraditing State must look most carefully at what is being requested and in terms of the documentation submitted must act according to its domestic safeguards to guarantee to the person being requested for extradition that its rights are being safeguarded just the same as a citizen of this State. This must be applied to all persons, be they citizens of this State or foreigners who happen to be on our soil.

The European Arrest Warrant is made up of several parts amongst which the information regarding the identity of the requested person. Naturally, this is a sine qua non condition for its validity. The fifth part of this warrant deals with the offence(s) which the requested person has to answer. In this particular case the explanation given is very

extensive. As a matter of fact, it puts forward how it all began. Secondly, the civil aspect of this case has been highlighted with the appellant leaving the Kingdom of Belgium on the same day that the Court of Appeal in Brussels delivered its judgement. What is interesting to note is that the Court ordered the appellant to return four cars which where the subject of this case along with a request for payment to plaintiff company. Moreover, the investigation which lead to the disappearance of these four cars is included in detail. [This is all found in the records of this case at folio 12 et seq., hence there is no need to reproduce what is found in those pages.] This leads this Court to conclude that the Belgian authorities have concluded their investigations and the return to the Kingdom Of Belgium of the appellant will lead to his being charged under article 491 of the Belgian Criminal Code.

Consequently, for the foregoing reasons this Court does not uphold the appeal filed by Johan Germaine Corneille Van Oudenhove, confirms the judgement of the remanding Court and orders the return of the above-named to the Kingdom of Belgium.