

**CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)**

**THE HON. JUDGE
JACQUELINE PADOVANI GRIMA LL.D. LL.M.
(IMLI)**

Court Hearing of Wednesday 11th October 2017

Constitutional Reference No.: 79/2015 JPG

Case No.: 1

**The Police
(Inspector Maurice Curmi)**

Vs

Tolga Temuge

The Court,

Having seen the reference dated 30th October 2015, of the Courts of Magistrates (Malta) preceded by Magistrate Dr. Charmaine Galea LL.D.;

Having seen the decree of the court of the 5th November 2015, whereby this court ordered a notification to all parties concerned of the said Constitutional Reference and appointed it for hearing;

Having seen the decree of this court of the 21st January 2016, (vide fol 59 et seq);

Having seen the Explanatory Note by Tolga Temuge of the 7th March 2016, which reads as follows;

That, following a complaint filed by his wife Caroline Temuge Muscat, applicant was charged before the Court of Magistrates (Malta) as a court of criminal judicature with a number of offences including harassment.

That applicant appeared before the said Court on the 26th October, 2015 and pleaded not guilty to the charges. Applicant was, out of his own free will, unassisted by a lawyer.

That applicant refused to sign a provisional Protection Order. He was ordered to do so upon the insistence by Caroline Temuge Muscat's legal representatives. His refusal was deemed by the Court to be in contempt and he was then condemned to a period of ten (10) days detention. No mention to the provision of law sustaining such punishment was mentioned.

That on the 30th October, 2015, applicant, now assisted by the undersigned lawyer, explained his refusal to sign the Protection Order and requested the Court to revoke or vary its decree of the 26th October, 2015 (erroneously referred as the decree of the 2nd October, 2015 in the minutes of the sitting).

That applicant however refused to sign the Protection Order and his request was consequently refused. At this point he asked the Court to refer the matter to the First Hall of the Civil Court due to an alleged violation of Article 5 of the European Convention. The Court of Magistrates referred the matter notwithstanding complainant's absurd assertions that the request was frivolous and vexatious.

That, ironically, on the 4th November, 2015, complainant's team of lawyers filed an application requesting the Court to give effect to the Protection Order irrespective of applicant's consent. On the 10th November, 2015 applicant replied to this request (vide fol 48 of the acts of the proceedings) and, inter alia, explained that his actions were not contemptuous but merely a consequence of complainant's behaviour. The Court acceded to the complainant's request.

That applicant's request for the matter to be referred to this Honourable Court is due to the fact that his detention for ten days is unlawful and, moreover, he was not given the chance to explain the reason for his refusal. He was simply coerced to sign an order which he did not understand and which he believed to be a manipulative act by his wife.

That section 686 of the Criminal Code states that the provisions of the Code of Organization and Civil Procedure relating to the respect due to the court, are applicable to the courts of criminal jurisdiction. It would seem that the Court of Magistrates condemned applicant to the said period of detention in terms of section 991 of the Code of Organization and Civil Procedure. There is no other provision that could warrant such a sentence without a proper trial.

That section 991 of the Code of Organization and Civil Procedure refers to "any indecent word or gesture". Applicant's refusal to sign a Protection Order cannot in any way be coined as an indecent word or gesture. In the absence of a provision in the Criminal Code specifically dealing with such a refusal, it is being submitted that the Court of Magistrates should have applied section 992 of the Code of Organization and Civil Procedure and afforded applicant the possibility of a trial to defend his actions. Condemning applicant to a period of ten days detention without informing

him which provision of law had been breached is in all due respect in violation of Article 5 of the European Convention.

Therefore applicant respectfully requests this Honourable Court to declare that his condemnation to a period of ten days detention is in violation of the said Article.

Having seen the Responsive Note by the Attorney General of the 17th March 2016, which reads as follows;

1. *That this note is in accordance with the decree issued by this Honourable Court during the sitting of the 21st January 2016.*
2. *That on the 26th October 2015 the Court of Magistrates (as a Court of Criminal Judicature) ordered applicant to sign a Protection Order, however, he refused to do so and the Court deemed his refusal to be in contempt and proceeded by condemning applicant to 10 days detention.*
3. *That applicant explained and clarified in his explanatory note the terms of the constitutional reference wherein he is claiming that the decision of the Court of Magistrates to condemn applicant to a period of ten days detention for refusing to obey a court order is unlawful and in breach of article 5 of the European Convention.*
4. *That respondent humbly submits in addition to the pleas raised in his reply dated 16th November 2015 that this Honourable Court should abstain from exercising its “special” constitutional jurisdiction in terms of Article 4(2) of Chapter 319 of the Laws of Malta since applicant blatantly did not make use of other “ordinary” remedies available to him at law to redress any perceived grievances he holds against the decision of the Court of*

Magistrates. In this sense reference is made to two judgments given by the Constitutional Court in the names Nardu Balzan Imqareb vs. Registratur tal-Qrati tal-Gustizzja 18 of May 2006: 'Rikorsi Kostituzzjonali huma, min-natura taghhom, specjali u straordinarji, u meta s-sistema ordinarja ta` ridress tipprovdi mod ta` soluzzjoni effettiva, dik is-sistema ordinarja trid tigi uzata u adoattata qabel ma` l-Gvern, jew l-amministrazzjoni taghha, jigi akkuzat bi ksur tad-drittijiet fundamentali tieghu. Ma jistax jinghad li l-Gvern ikun kiser id-drittijiet fundamentali tac-cittadin, meta lic-cittadin ikunu pprovdi u hemm disponibbli ghalih rimedji ghal-lanjanzi tieghu' and Olena Tretjak vs. Direttur tac-Cittadinanza u Expatriate Affairs 16 ta` Jannar 2006 where the Court observed: 'M`huwiex moghti lil persuna l-beneficju li l-ewwel thalli jghaddi ghalxejn iz-zmien li fih setghet tiehu r-rimedju ghall-ksur tal-jedd taghha, u mbaghad tressaq ilment kostituzzjonali jew konvenzjonali dwar l-istess ksur bhallikieku l-procedura kostituzzjonali jew konvenzjonali kienet xi rimedju in extremis li wiehed jista` jirrikorri ghalih biex isewwi zball jew nuqqas li ma messux twettaq qabel'

5. *That in view of the fact that applicant is claiming that the decision of the Court of Magistrates to order his detention was unlawful, he had the ordinary remedy of redress in terms of article 409A of the Criminal Code. If applicant truly considered his detention at the prisons manifestly unfounded and illegal he could have filed an urgent application before the Court of Magistrates requesting his immediate release. Such a remedy was accessible, effective and adequate to address the grievance.*
6. *That without prejudice to the above, applicant had also another ordinary remedy found under Title XVII of Chapter 12 of the Laws of Malta.*
7. *That in view of this respondent requests this Honourable Court to exercise its discretion not to hear the case on the merits owing to the fact that applicant*

failed to avail himself of ordinary remedies available to him to redress his grievances.

Having heard all the evidence proffered by the parties to the case;

Having taken cognisance of all the acts of the proceedings;

Having heard oral submissions of the parties.

Deliberates:

Tolga Temuge testified at Fol 71 *et seqq.* that after he and his wife Caroline separated, his ex wife would not allow him to visit their dog, who was old and about to die, and that every time he tried to communicate with her, it was only about the dog. He continued that he was very surprised when he was ex wife reported him to the police for domestic violence and in fact decided to go to court without a lawyer because he figured that they would be able to resolve the issue amicably. He also added that this was the first criminal case brought against him by his ex wife.

Temuge testified that since he was unassisted, while his ex wife showed up with three lawyers, the Magistrate asked him whether he wanted a lawyer, and the case continued when he replied that he did not see the need for one. He continued that his ex wife's lawyer asked the Court to issue a Protection Order, at which point he interjected, submitting to the Court that it should hear his version of the events before accepting such a request. He explained that the Court then stated that he was in contempt in court for refusing to sign the Protection Order and sentenced him to detention. He added that given the choice he would not have gone to jail but would have signed the order. He clarified that when the Magistrate told him he would be held in contempt he was not offered a lawyer at any point, and his ex wife's lawyer kept interrupting him everytime he tried to speak and explain himself.

He continued that from jail he managed to contact his friends who found him a lawyer, who in turn suggested that they meet at the hearing, which was scheduled for four or five days after he was detained. He also confirmed that he never received a summons charging him with contempt of court but was instead simply sent to jail immediately after he was declared as being in contempt of court during the sitting. Finally he testified that whilst he was sentenced to ten days detention, he was in fact released after the ninth day because during the sitting the Magistrate said that the Protection Order can be enforced whether he signed it or not so he did not need to sign it.

WPS 223 Charlene Calleja testified at Fol 84 *et seq* that she had been present in Court during the sitting in question and confirmed that Temuge was detained for refusing to sign the Protection Order, because he wanted to be able to see his ex wife's dog. She explained that both the Inspector and the Magistrate tried to explain to him the consequences of not signing the Protection Order but he insisted on not signing it.

Under cross-examination at Fol 86 she testified that she did not remember that Temuge did not have a lawyer during these proceedings.

Caroline Muscat testified at Fol 92 *et seq* that she and Temuge separated in August 2015, and on the 21st of that month Temuge had showed up at her apartment demanding to see the dog, but that after she closed the apartment door he remained in the corridor calling her names and she had to call the police, although he would have left by the time they showed up. She continued that there were numerous other similar incidents, but he would always leave before the police turned up. She explained that she was present during the sitting in question, where Temuge was not assisted by her lawyer. She had requested that a Protection Order be issued after she testified and gave her version of the events. She continued that at that point the Magistrate asked him to sign the Protection Order, but he refused and insisted on being heard, which is what led to the Court's decision to detain him. She also explained that she had asked for a Protection Order to be issued because she was scared of her ex-husband.

Under cross-examination at Fol 97 *et seqq.* she agreed with the defence lawyer's suggestion that her ex-husband used to contact her only because he wanted to see the dog, and confirmed that there were even emails sent by her ex-husband asking to see the dog. She stated that in fact she had arranged for him to see the dog before he had to be put down, through third parties, and that this was after the Protection Order had been issued. She confirmed that the proceedings in question were instituted after the first ever complaint that she filed against her ex-husband.

Inspector Godwin Scerri testified at Fol 102 *et seq* that around early August 2015 the Qawra Police Station had received a report of domestic violence from Caroline Muscat against her ex-husband Tolga Temuge. He continued that after a few days they had received a second report according to which Temuge had threatened Muscat with exposure of intimate photographs that were taken during their marriage. He explained that in his statement Temuge refused to reveal any personal information, and that at first the issue seemed that Muscat was not allowing him to see the dog. He testified that on the basis of this information, the police pressed charges against Temuge for insults and threats, which charges are being heard before the Court of Magistrates.

He explained that during the first sitting, just before the case was adjourned, the prosecution asked for a Protection Order to be issued in favour of Muscat so that Temuge would stop trying to contact her. He continued that when the Magistrate accepted the request, Temuge made it clear that he would not stop contacting Muscat, while the Magistrate insisted that he must obey the Protection Order. He also stated that Temuge was not assisted by a lawyer during these proceedings because he said that it was a small case and he thought it would be over in a day.

Under cross-examination at Fol 106 *et seq* he confirmed that nobody required his testimony to be minuted during the proceedings before the Court of Magistrates. Asked about the evidence that he produced in court against the accused, he testified that the evidence produced consisted of the photos and a letter allegedly sent to Muscat by

Temuge. Asked for the reason for Temuge refusal to sign the Protection Order, he stated that he did not remember the reason given by him.

WPS 274 Francesca Quattromani testified at Fol 118A *et seq* that Caroline Muscat had filed a report on the 25th of August 2015 that her ex-husband was ringing the bell to the front door of the block of apartments. She explained that Temuge was not present when she arrived, but added that Muscat told her that he had been constantly harassing her and that she had filed other reports about this, and therefore she issued charges against Temuge. She continued that she also spoke to Temuge about it who told her that he only went to Muscat's apartment because he wanted to see their dog who was sick.

Under cross-examination at Fol 118C *et seq* she testified that Muscat had not informed her that Temuge had gone to her apartment to see the dog and had in fact **never mentioned the dog**. She also testified that she was not present for the court sitting.

Deliberates;

The Attorney General pleaded that applicant has not exhausted the ordinary remedies available to him, as he could have filed an application under Article 409A of the Criminal Code, a remedy that he failed to peruse.

On this matter the Court agrees with applicant that Article 409A was not applicable in his case, since his detention was in fact connected with the offences that he was charged with. Whilst it true that he was sentenced to detention for contempt of court, and not for one of the offences he was charged with, the Court arrived to its decision to detain applicant because he refused to comply with a court order which the Court of Magistrates was making directly due to the nature of the offences with which he was charged. The Court therefore has doubts as to whether this remedy was accessible to applicant, due to the strong likelihood that it would have been decided that Article 409A was not applicable in his case due to the connection between the detention order and the offences

with which he was charged. Therefore it is the Court's considered opinion that it should not decline from exercising its powers and determining this matter.

Deliberates;

The Court makes reference to the judgement delivered by the Constitutional Court on the 18th of July 2017 in the names **Il-Pulizija (Assistent Kummissarju Norbert Ciappara) vs Mario Zammit**, wherein the Constitutional Court considered that it has the power to bring to the referring court's attention the possibility of a violation of an article of the Convention which is different from the one indicated by the referring court in its reference, where it feels like the situation so necessitates.¹ After making this consideration the Constitutional Court went on to examine the matter under Article 7 of the Convention, which had not been a part of the reference made to it, and found that there was a possibility of a violation of the rights of the accused under this article.

In the present case, it is uncontested that the accused chose not to be assisted by a lawyer when he appeared for the first hearing before the court. It is also uncontested that he remained unassisted when the Court decided that his refusal to sign a Protection Order in favour of the injured party amounted to contempt of court and sentenced him to 10 days imprisonment. It is also an uncontested fact that the decision that the accused was in contempt and the detention order were handed down immediately, during the same hearing.

The Court observes that the right to self-representation is one of the minimum guarantees of the right to a fair trial, and that as such it cannot be unduly restricted. The Court is however also mindful of the fact in some situations a Court may override an accused's wish to self-represent, if it considers that the interests of justice so require, in particular if

¹ Par. 20: "*Din il-Qorti tibda bl-osservazzjoni li, minkejja li t-termini tar-referenza huma cirkoskritti ghad-dritt ta' smigh xieraq, id-determinazzjoni ta' din il-vertenza tinnecissità li tigi ezaminata l-pozizzjoni legali ta' Mario Zammit fl-ambitu wkoll tad-dritt fundamentali protett bl-artikolu 7 tal-Konvenzjoni.*"

it determines this as being necessary in order to ensure that the right to a fair trial as a whole remains practical and effective.

Furthermore, the Court is also aware that the right to a fair trial may require that an individual be given notice before a hearing, so that he may have time to prepare his defence.

The Court also refers to Article 2 of the Seventh Protocol to the Convention, relating to the right of appeal in criminal matters, and to Article 1003 (1) of the COCP, where no appeal from a judgement passed under Article 990 or 991 may be lodged.

The Court considers that it in light of the facts of this case, it needs also to be determined whether Article 2 of the Seventh Protocol to the ECHR is applicable in the present case, and if it is, whether this case falls under the exception provided for in the second sub-article to the same article, in order to elicit whether the accused may have suffered a violation of his right of appeal.

In view of this, and in light of the aforementioned Constitutional Court judgement, the Court is of the opinion that this reference must also be examined with reference to Article 6 of the ECHR as well as Article 2 of the Seventh Protocol to the same Convention.

Mindful that the parties have not had the opportunity to present their submissions on these issues, and in order to appropriately guarantee the right to a fair hearing, the Court considers that before examining the facts of this case in relation also to these articles, it should first grant the parties time to submit any evidence which they might consider relevant to these issues if any, and to proffer submissions on these two articles.

The Court therefore accords the parties two weeks to inform the Court whether they intend to produce any evidence with regards to the aforementioned articles, and this by means of a note to be filed in the Registry and notified to the other party. In the event that

the parties have no further evidence to produce, the Court will hear their final submission on these matters during the next hearing.

For these reasons, the Court, while rejecting the Attorney General's preliminary plea of non-exhaustion of ordinary remedies, declares that this reference may also be examined in light of Article 6 of the Convention, and Article 2 of the Seventh Protocol of the same Convention, apart from Article 5 as indicated by the referring court, and orders the parties to inform the Court within two weeks from the date of this decision whether they intend to produce any additional evidence, and in the event that no additional evidence needs to be proffered, orders that the parties present their final submissions on these new matters on the hearing of the 2nd November 2017 at 1:15pm.

The issue of costs is being reserved for final judgement.

Read.

Judge Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar