



Court of Criminal Appeal

Hon. Justice Giovanni M. Grixti LL.M., LL.D.

Appeal No: 322/2019

The Police

(Inspector Kurt Ryan Farrugia)

vs

Biondy Clayd Raafenberg

Sitting of 18th December, 2019

The Court,

Having seen the appeal application of Biondy Clayd Raafenberg, a Dutch national, born in Goirle, The Netherlands on the 7 September 1989, holder of Dutch Passport number NPL926329 and Maltese Residence Document MT7073436, which application was presented in the registry of this Court on the 29 November 2019 by means of which he requested this Court to cancel and revoke the judgment of the Court of Magistrates (Malta) as a Court of Committal delivered on the 26 November, 2019 ordering the return of appellant to the Holland on the basis of a European

Arrest Warrant issued against him and committed him to custody while awaiting his return to Holland;

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Committal of the 26 November 2019 whereby it ordered the return of Biondy Clayd Raafenberg to the Netherlands on the basis of the European Arrest Warrant and Schengen Information System Alert issued against him on the 14 October, 2019 and the 18 October 2019, respectively, and committed him to custody while awaiting his return to the Netherlands.

The Court further stated that this Order of Committal was being made on condition that the present extradition of the person requested to the Netherlands be subject to the law of speciality and thus solely in connection with those offences mentioned in the European Arrest Warrant issued against him and deemed to be extraditable offences by this Court, namely for armed robbery and greivous bodily harm.

In terms of Regulation 25 of the Order as well as Article 16 of the Extradition Act, Chapter 276 of the Laws of Malta, this Court is informing the person requested that:

- (a) He will not be returned to the requesting country until after the expiration of seven days from the date of this order of committal and that,
- (b) He may appeal to the Court of Criminal Appeal, and
- (c) If he thinks that any of the provisions of Article 10(1) and (2) of the Extradition Act, Chapter 276 of the Laws of Malta has been contravened or that any provision of the Constitution of Malta or of the European Convention Act is, has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of the court's order of committal, he has the right to apply for

redress in accordance with the provisions of article 46 of the said Constitution or of the European Convention Act, as the case may be;

Having seen the grounds of appeal;

Having heard oral submission by learned counsel to appellant and learned counsel to the Attorney General;

Having seen all documents and records of the proceedings;

Considered:

1. That the facts of this case relate to a European Arrest Warrant issued by the Examining Magistrate in Amsterdam, Ms. V. Zuiderbaan LL.M from the Court of Amsterdam, in the Netherlands, dated the 14 October 2019, a Schengen Information System Alert issued for the purposes of extradition bearing number NL0000010345338000001 as well as the Attorney General's certificate signed by the Attorney General on the 28 October 2019 against **Biondy Clayd RAAFENBERG**, with personal details as listed above;
2. Biondy Clayd Raafenberg was arraigned under arrest before the Court of Magistrates (Malta) as a Court of Criminal Inquiry on the 30 October, 2019 on the basis of the above alert and warrant as being wanted by the competent judicial authorities of The Netherlands, a scheduled country in terms of Article 5 of Subsidiary Legislation 276.05, for purposes of criminal prosecution;
3. Appellant felt aggrieved by the judgement of the First Court and brought forward the following ground of appeal reproduced hereunder:

“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 Holland, he raised the plea that the Court was not to order his extradition on the basis that according to the EAW he is requested in Holland for further investigation, as he is still a suspect.”

4. Prior to making any further considerations, this Court notes that in the introductory part of its judgement, the first Court considered that *“the conduct for which the person is being sought, the offence of fraud, constitutes a scheduled offence”*. The offence for which the person is being sought is in fact that of armed robbery and of grievous bodily harm, which also constitute scheduled offences. It is evident, however, that this can be considered as a *lapsus calami* and has no bearing on the rest of the judgement so much so that in its conclusions, the first Court, in ordering the return of Mr Biondy Clayd Raafenberg to the Netherlands, stated that:

*This Order of Committal is being made on condition that the present extradition of the person requested to the Netherlands be subject to the law of speciality and thus solely in connection with those offences mentioned in the European Arrest Warrant issued against him and deemed to be extraditable offences by this Court, namely **armed robbery and grievous bodily harm**”* (emphasis of this Court);

5. Considered further that from an examination of the records of the proceedings, there is no contestation with regard to the alleged offences for which the person is being requested, armed robbery and greivous bodily harm subject to a maximum term of nine (9) years deprivation of liberty, as being scheduled offences and that the requested person, namely Biondy Clayd Raafenberg did not raise any bars to extradition in the Netherlands , being a scheduled country, and that his return is not prohibited by any of the reasons mentioned in Regulation 13(1) of S.L.276.05. That which is being contested and which therefore forms the basis of this appeal is that the requested person is still a suspect in an ongoing investigation which in turn excludes the applicability of a European Arrest Warrant;

6. Having examined the appeal application, it is more than evident that appellant is in agreement with the general principles and reasons of the issue of a European Arrest Warrant being limited to (a) criminal prosecution; or (b) execution of a custodial sentence or detention order. There is also no contention with regard to the latter second limb as this relates to proceedings which have come to an end with a custodial sentence or a detention order which is not applicable in this case. This court is in agreement with appellant's citations that with regard to criminal prosecution, it is not the intention of a EAW to extradite a person for the purposes of interrogation in an ongoing investigation;

7. Appellant cited extensively from judgements of this Court of Appeal with regard to those cases where a EAW had been requested for the return of a suspect wanted for questioning in an ongoing investigation. Such requests, originating in their majority from Italy, had been made for the purposes of

an “ordinanza per cautela domiciliare” under the Italian penal code which provides for a system where, upon service of a writ, a suspect has the opportunity to file a reply which shall be considered by the prosecuting magistrate who shall then decide whether to prosecute or otherwise. As stated above, appellant’s contention is that this is one of such cases and that the first Court could not therefore find in favour of the prosecution by upholding the EAW;

8. The translation of the original EAW (marked in the records as Dok KRF5 and Dok KRF4 respectively on folios 11 to 14 A) states as follows: “*This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or enforcing a custodial sentence or a detention order*”. The part with heading “b) Decision on which this warrant is based” states as follows:

1. Arrest warrant in an non-flagrante delicto case pursuant to Section 54 of the Dutch Code of Criminal Procedure, Public Prosecutor A. Ruijs LL.M dated 13 May 2019.
2. Enforceable judgement: Reference: N/A

9. The Court also deems it necessary to quote from the said EAW, the translation, with regard to the offences allegedly committed by the requested person in order to ascertain whether the said person is still under investigation, for which other mutual assistance procedures may be available, or wanted for purposes of prosecution:

This warrant relates in total to two offences.

Description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person.

On Thursday 23 August 2018, the police received a report that a robbery had taken place at a hotel in Amsterdam. The highly emotional receptionist stated that an unknown man wearing a mask had pointed a firearm at her. The man had then hit the receptionist against her head with the firearm and again pointed the firearm at her, whereupon she tried to push the firearm away. The man then grabbed the receptionist by the throat which made it difficult for her to breathe. After the man suddenly released the receptionist and ran away, she saw that he had ransacked the reception area but that nothing seemed to have been taken. As the man had hit the receptionist, she was injured and bleeding. The police who arrived at the scene found a rucksack in the immediate vicinity of the hotel. Investigation has revealed that a glove which was in the rucksack contained two DNA profiles of the aforementioned requested person Raafenberg and the receptionist.

Applicable sections of the law: Sections 289, 287, 312 in conjunction with 45 of the Dutch Criminal Code.

9. This warrant was issued under the hand of the Examining Magistrate in Amsterdam. According to Doc KRF1, a certificate issued by the Attorney General of the Republic of Malta, then states that: “The Examining Magistrate in Amsterdam from the Court of Amsterdam in The Netherlands, the Authority at the request of which the alert was issued ... has the function of requesting the issue of alerts in the Netherlands;

10. A translation of Doc YA at folio 17 then reads as follows:

“Dear colleague,

Following a number of questions asked by Mrs. Abela, as the public prosecutor in the case in question I can provide you with the following information.

I intend to prosecute the suspect, Raafenberg, not for murder or manslaughter and not for attempted murder or attempted manslaughter. It is not the intention that further investigation takes place into the suspect, Raafenberg, but that we prosecute him here in the Netherlands for attempted robbery. This means that we will summon him for a hearing of the Three-judge Division of the Court of Amsterdam”.

11. Appellant quotes extensively from the judgement of this Court, *Il-Pulizija vs Michael Spiteri* of the 25 November, 2013 which made reference to the Julian Assange case *Julian Assange vs Swedish Prosecution Authority (High Court of Justice Queen’s Bench Divisional Court)* of the 2 of November 2011 which had in turn referred to *In Re Ismail [1999] 1 AC 320* . In *Michael Spiteri*, the Court of Appeal pointed to a particular excerpt from *Assange* which had made reference to *In 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 in their inquiries’. Something more is required. What more is needed to make a suspect an ‘accused’ person? There is no statutory definition. Given the divergent system of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not

surprising that the legislature has not attempted a definition. The Starting point is that ‘accused’ is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an ‘accused person’. Extradition treaties, and extradition statuts, ought, therefore, to be accorded a broad and generous construction so far as the text permits it in order to facilitate extradition. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decided that there is sufficient evidence to charge an arrested person and then proceeds to charge him. The charging of an arrested person marks the beginning of a prosecution and the subject becomes an ‘accused’ person”.

12. In another excerpt, the Court also quoted from paragraph 140 at page 29 of the *Assange* case which it deemed to be of particular interest:

“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”.

13. In page 19 of his application of appeal, appellant alleges that his return to Holland is not requested to undergo criminal prosecution or to serve a sentence after conviction but is being requested for further investigation and this creates an obstacle to extradition since there are no formal charges issued against the appellant in Holland. This Court can not agree with this allegation. Following a thorough examination of the records of the case there is a clear and unequivocal declaration by the requesting state that appellant is wanted for prosecution following an investigation of the case which led to him being a suspect and who will be prosecuted on his return to the Netherlands. That makes him to be “an accused” within the term as employed in Regulation 5(4) of the Order (LS 276.05). Appellant’s conclusion that since the EAW was signed by an Examining Magistrate therefore means that he is still under investigation, is incorrect. Reference is made to that part of the judgement of the first Court referring to the competence of all public prosecutors in the Netherlands and sees no reason to elaborate further;

14. The Court refers back to the judgement of the first Court and deems that the said Court arrived at its conclusions after having examined the matter in a very clinical, methodical and learned manner. The Conclusions of the first Court are correct and there is no apparent reason why this Court should intervene by revoking or in any other manner changing these conclusion. The EAW is an instrument which based on mutual thrust and recognition and as quoted earlier from Document YA (folio 17 and 18), under the hand of A.M. Ruijs, Public Prosecutor, “I intend to prosecute the suspect... It is not the intention that further investigation takes place into the suspect...”

15. For the above reasons, this appeal is not being upheld and the Court consequently confirms the judgement of the first Court as a Court of Committal in ordering the return of **Biondy Clayd RAAFENBERG** and committing him to custody while awaiting his return to the Netherlands and after having seen article 16, 18 and 21 of Chapter 276 of the laws of Malta, and establishes a term of fifteen days within which Biondy Clayd Raafenberg may, if he so wishes, request a remedy if he deems that any of the dispositions of subarticles (1) and (2) of article 10 of Chapter 276 have been breached or that any articles of the Constitution of Malta or the European Convention Act is being, was or that it is likely that it will be breached with regard to his person so that a revocation, annulment or modification of the order for custody is justified, may proceed with obtaining a remedy in terms of Article 46 of the Constitution of Malta or of the European Convention Act as the case may be. The Court is also informing appellant of this right and that in accordance with Article 21(2)(a) of Chapter 276, he will not be returned to the Netherlands before the lapse of fifteen (15) days to start running from today;

16. The Court makes particular reference to that part of the judgement of the Court of Committal, that the return of the requested person of Biondy Clayd Raafenberg to the Netherlands is subject to the law of speciality and therefore only for those offences indicated in the European Arrest Warrant issued against him and deemed to be extraditable offences namely for armed robbery and grievous bodily harm.

17. The Court also orders that a copy of this judgement be transmitted by the Registrar to the Minister responsible for Justice.