



Court of Criminal Appeal

Hon. Justice Dr. Giovanni M Gixti LL.M., LL.D

Appeal No. 631/2021

Sitting of 15th October 2021

The Police

(Inspector Omar Zammit)

(Inspector Geoffrey Cutajar)

vs

Frank Salvatore Rafaraci

The Court;

Having seen the application of appeal filed by the Attorney General in the registry of this Court on the 28th September 2021, whereby this Court was requested to: 1) declare that the continued discharge from custody of Frank S. Rafaraci runs counter to the dictates of the Extradition Act and therefore order the arrest of Frank S. Rafaraci until this appeal is disposed of; 2) to declare null and void the proceedings before the first Court and; 3) in the eventuality that the second request is not acceded to, reverse the decision of the first Court

which was such that the return of Frank Salvatore Rafaraci cannot take place and consequently, based on the contents of the acts of the proceedings and any further evidence which may be exhibited before this Honourable Court in accordance with the law, and also in light of what will result from further submissions before this same Honourable Court, declare that the evidence against Frank Salvatore Rafaraci, as a person accused in the United States of America, is sufficient to warrant his trial for the concerned offences if they had been committed within the jurisdiction of the Courts of Criminal Justice of Malta and therefore commit him to custody to await his return to the United States of America in accordance with the law;

Having seen the pleas raised by respondent as dictated and entered into the minutes of the proceedings during the hearing of the 13th October 2021 whereby respondent premised the nullity of the appeal from the formal aspect of the non adherence of the requisites of article 419 of the Criminal Code and substantively in that the decision of the first Court is not subject to appeal;

Having seen the instrument of arraignment under arrest of Frank Salvatore Rafaraci, of 68 years, born in New York, USA on the 23 November 1952, having USA Passport bearing number 488937236 and Italian Passport bearing number YA3294198 wherein the prosecution requested the first Court to proceed against the said Frank Salvatore Rafaraci according to the provisions of the Extradiction Act, Chapter 276 of the Laws of Malta and Subsidiary Legislation 276.07;

Having seen the decision of the Court of Magistrates as a Court of Criminal Inquiry dated 27 September 2021 wherein the Court “*declines the request*” and adjourned the case to the 4 October, 2021;

Having seen the decree of the Court of Magistrates (Malta) as a Court of Criminal Inquiry (differently presided) in the Maltese language bearing the date of the 28th September 2021;

Having seen the decree of the Court of Magistrates (Malta) as a Court of Criminal Inquiry (differently presided) bearing the date of the 28 September 2021 declaring therein not to have the relevant “*competence to decide regarding this request and according to Article 19 of the Extradition Act, Chapter 276 of the laws of Malta orders that the Acts together with the decision are sent to the Attorney General immediately*”;

Having heard the Registrar of the Criminal Courts and Tribunals under oath;

Having heard submissions by the parties;

Having examined all the records of the proceedings;

Having considered:

1. That the facts of this case are that following the issue of a provisional arrest warrant for the purposes of extradition of Frank Salvatore Rafaraci, henceforth referred to as the “requested person”, the said requested person was arraigned under arrest before the Court of Magistrate’s (Malta) as a Court of Criminal Inquiry. Learned Counsel to the requested person contested the validity of the arrest warrant issued in terms of article 14 of the Extradition Act, Chapter 276 of the laws of Malta and after hearing the prosecuting officer under oath and having heard oral submissions, the Court declined the request and adjourned the case to the 4th October 2021. The Attorney General lodged an urgent application before the Criminal Court for the re-arrest of the requested person which application was dismissed by that Court for reasons therein stated. The Attorney General then lodged an appeal before this Court requesting a) that the continued discharge of the

requested person from custody runs counter to the Extradition Act and therefore order the arrest of same until this appeal is disposed of; b) to declare that the proceedings before the first Court are null and void; and c) alternatively reverse the decision of the first Court and consequently commit the requested person to custody to await his return to the United States of America;

2. Now, prior to dealing with the merits, this Court must first dispose of the preliminary pleas raised by the requested person with regard to the validity of the appeal under examination. The requested person raised the plea of nullity based on the non observance of the procedural and substantive rules pertaining to appeals. The Extradition Act, Chapter 276 of the laws of Malta does not provide for the form and substance of an appeal other than that it has to be presented before this Court within the time limits prescribed for the requested person and for the Attorney General and the form of the demand (as per articles 18 and 19 of the Act). Since the procedure is not provided for in this legislation being a *lex specialis* recourse must be had to the general law which in this case is the Criminal Code, Chapter 9 of the laws of Malta and in particular article 419 of the said Code;

3. The first plea of nullity raised by Counsel to the requested person is twofold with the first being that the facts in brief as recounted by the Attorney General in the appeal application are not correct. Now article 419(1) lays down the essential requirements for a valid application of appeal before this Court with subsection (a) requiring a brief description of the facts. From a reading of these facts in brief as proffered by the Attorney General one may argue that they contain details which are not *stricto jure* tied to the merits in that the Attorney General is not seeking a reversal of the “decision” of the first Court for reasons, for example, of it being based on a wrongful interpretation of the facts or the law. Prior to the amendments made by means of Act I of 2018, failure to state the

facts in brief amounted to nullity of the application. Failure to adhere to the strict wording of the law might have given rise to a serious debate but the legislator has, since, made it clear through these amendments that no nullity shall be forthcoming even if appellant fails to state the facts in brief. Now the facts as recounted by the Attorney General give more detail than is actually required and those details emanate from the very documents presented by the prosecution and are not therefore alien to the matter at hand. In conclusion and for these reasons, this Court can not uphold the requested person's plea based on the non observance of the requirement to state the facts of the case in brief;

4. The second limb of the first plea relates to the alleged infringement by the Attorney General in failing to indicate in the application the decision which she intends and demands to be declared null or to have it reversed. Now from a reading of the application, there is no doubt that the Attorney General is refereing to the decision of the Court of Magistrates as a Court of Criminal Inquiry of the 27th October, 2021. This is evident in the third paragraph of page two of the application of appeal. Whereas it would have been more prudent for the Attorney General to indicate in clear and precise wording which decision is being attached and which decision she wishes to have reversed as is required by subsection (1) of article 419 of the Criminal Code, and frankly speaking this Court expects a better rendition from the Attorney General, which would avoid any speculation and the untoward inference that this Court could well search in the documentation to verify the fact for itself, the direction nowadays is for a less rigid approach to formality. On this basis, therefore, this second plea of nullity is being dismissed;

5. The second plea of nullity of the application of appeal refers to the lack of the right of appeal of the Attorney General on the subject matter. This plea, in fact concerns the merits and very nature of the appeal of the Attorney General as expounded in the second grievance and by way

of introduction reference is immediately made to the relevant articles of the Extradition Act granting the right of appeal to the parties concerned. Whereas the Act in article 18 provides for the cause and manner of appeal granted to the person committed in custody, that is the requested person, article 19 provides for the right of appeal granted to the Attorney General as follows:

19. (1) Where the decision of the Court of Magistrates is such that the return of the person requested cannot take place, the court shall, within twenty-four hours, transmit to the Attorney General the records of the case together with a copy of its decision, and the Attorney General may, within three working days from the date of the receipt of such record, appeal to the Court of Criminal Appeal by an application, to be accompanied by the said record and by a copy of the decision of the court of committal, filed in the registry of the Court of Criminal Appeal. A copy of the application shall be served on the person whose return is requested.

6. The first and most important thing to note in this subsection is that it is not any “decision” of the Court that is subject to appeal, but a decision **that the return of the person requested cannot take place**. In other words it is only a judgement of the Court of Committal which declines the request of the prosecution to extradite the requested person which is subject to appeal. It therefore follows that this Court must now examine whether such a decision was made by the first Court which would otherwise grant the right to the Attorney General to lodge an appeal;

7. From a thorough examination of the records it is evident that the requested person was arraigned under arrest before the Court of Criminal Inquiry presided by the Magistrate on roster duty for that day. According to the formal assignment of duties made by the Chief Justice on the 31st October 2018 (as evidenced by the document

submitted by the Registrar of Courts before this Court), the Magistrate assigned to hear cases of Extradition and therefore sitting in the Court of Magistrates as a Court of Committal in terms of the Extradition Act is not the same Magistrate whose decision is being appealed. For purposes of clarity it must be stated that under our judicial system all arraignments are made before the Magistrate on duty. Aside from the possibility of issues of entering a plea of guilt, the Duty Magistrate presiding over the Court of Magistrates as a Court of Criminal Inquiry, having followed the relevant formalities must order that the records be transmitted to the Registrar of Courts to be assigned according to law and according to the assignment of duties issued by the Chief Justice;

8. In the case under examination, upon arraignment of the requested person before the Court of Magistrates (Malta) as a Court of Criminal Inquiry, the said requested person contested the validity of his arrest and the Court proceeded in the manner as appears in the foregoing:

The Court;

Having seen the indictment;

Having seen the testimony of Inspector Omar Zammit;

Having seen the oral submissions of both the Defence and the Prosecution;

Notes that it was presented with only photocopies of the Purported documents essential to the charges brought before it.

Also notes that no explanation was forthcoming from the Prosecution regarding the nature of the basis of the documents requesting the issue towards the extradition of Mr. Frank Rafaraci.

In such circumstances, declines the request.

The court adjourns the case to the 4th of October, 2021 at 9am.

9. The Attorney General interprets this to be a judgment of the first Court which declined in a definitive manner the request of the Prosecution to extradite the requested person to the requesting State and this Court adduces no fault on the part of the Attorney General in interpreting same in the manner due to the unhappy choice of words of the First Court. Now however, it is more than evident that this is not a judgment nor a decision declining extradition and this for more than one reason. The decision of the first Court was clearly made to address the request of the prosecution to remit the requested person, in this case respondent, to a continued state of provisional arrest until the extradition procedures are decided by the Court of Committal. That which the Attorney General considers to be a judgement is merely a decree dictated in the minutes of the proceedings before the Court of Inquiry upon arraignment. It is not signed by the presiding Magistrate because Magistrates do not sign the minutes except where the law states otherwise notably in the case where the Magistrate must initial all the records before they are sent to the Attorney General in the renvoire stage;

10. As learned Counsel to respondent rightly pointed out, the Duty Magistrate, having turned down the request of the prosecution for his continued detention, set forth a date for hearing and the records were transmitted to the Court of Magistrates as a Court of Committal. It is unfortunate that the minutes and the records before the first Court are in such economical and equivocal terms as it would have been desirable to first of all state that what and whose request was being declined and secondly subscribe to the normal procedure where the Court orders that the records be transmitted to the Registrar of Courts to be assigned according to law. This transmission did, however, take place and this is evidenced by the decree issued by the Court of Magistrates (Malta) as a Court of Criminal Inquiry presided by a different Magistrate and which is dated the 28 September 2021. This decree was issued in the

Maltese language albeit proceedings were conducted in the English language. Through this decree, the Court stated that it had seen the records of the proceedings and that for some reason the records of the request for extradition were sent before it, when the merits were decided by the Court presided by another Magistrate when it “declines the request”;

11. The Court of Committal which received the records from the Court of Inquiry apparently interpreted the words “declines the request” as meaning that it had decided the extradition proceeding *per se*. It then ordered that the records be transmitted immediately to the Attorney General and this set in motion a domino effect with the Attorney General having no other option and understandably, but to interpret this to mean that she had been notified of the records in terms of article 19 of the Act and which set off the countdown for the right of appeal within three working days. In the first place this is tantamount to proof that the records were transmitted from the Court of Criminal Inquiry to the Court of Committal and again this Court can not but bring to the attention of the first Court to adhere *stricto jure* to the laws of procedure and all administrative norms in such matters in order that all parties, at any time, may be ascertained of a proper channeling and handing over of the proceedings from one court to another and from the court to the Attorney General via the registrar of courts. Secondly, this Court can not but conclude that following transmission of the records by the first Court to the Court of Committal the latter is still seized with a pending procedure which it must now determine in accordance with the Extradition Act;

12. When the first Court set a date for hearing after having declined the request it was thereby making it very clear that the proceedings were not yet determined. It must be explained for the benefit of all that in such matters a Court of Inquiry initially seized with a cause, having dispensed with all the formalities and having ordered

that the acts be transmitted to the Registrar of Courts to be assigned according to law, will set a date for hearing before the receiving court in order not to adjourn the case without a date and this for various reasons which this Court need not enter into. But, having done so, means that the first Court was fully aware that as presided, it was not competent to hear and determine the merits other than matters of Civil and Procedural issues and therefore sent the records to be duly assigned;

13. It is therefore the conclusion of this Court that the Attorney General has entered an appeal on extradition proceeding which have not yet been determined and which are still pending before the Court of Committal which appeal is not allowed in terms of article 19 of the Extradition Act. The appeal is therefore being declared null and void and whilst abstaining from taking further cognisance of the grievances raised by the Attorney General, the Court orders that the records be transmitted immediately to the Court of Criminal Inquiry as a Court of Committal to determine the request for extradition as set forth in the arraignment sheet folio 1 and 3 of the records of the proceedings. The requested person shall remain in the same state as declared by the first Court prior to the appeal lodged by the Attorney General and this without prejudice to any discretion exercisable by the Court of Committal as it deems proper should any request be made by the Attorney General in respect thereof and by the requested person as the case may be.

(sgd) Giovanni M. Grixti

Judge

True copy

Christopher Camilleri

Deputy Registrar