The Court of Magistrates (Malta)

As a Court of Criminal Judicature

Magistrate Dr. Kevan Azzopardi B.A., LL.D

The Police

--vs--

De Quan Feng

Today, 11th March 2024

The Court,

Having seen the minutes of the sitting of the 14th November 2023 whereby the defence counsel informed the court that he was going to raise the plea of nullity of these proceedings on account of a serious procedural defect;

Having seen that the court granted the defence two weeks for the filing of an application in relation to the mention plea, and also granted the prosecution two weeks from being served with the said application to file a reply;

Having seen the decree of the Court of the 17th November whereby it granted the Attorney General a similar period to file its reply;

Having seen the reply by the Attorney General of the 1st of December 2023 as well as the reply by the Prosecuting Officer of the 16th January 2023;

Having seen the replica of the defence of the 24th January 2024;

Now therefore, the Court has before it an application for a declaration of the nullity of these proceeding on account that:

> *"the (Artikoli) accusations issued by the Attorney General on the 9th of February 2018, paragraph B, we find that the applicant was accused under article 2(1)(C), 3(1) of chapter 63 of the laws of Malta. These accusations are distinct an[d] autonomous from those contemplated in the other articles of Law given under chapter 63 of the Laws of Malta.*
>
> *That when the original accusations are examined, which accusations were presented and sworn in according to Article 390 (1) of the Criminal code, it will result that the applicant was not accused with the aforementioned accusations.*
>
> *For all intents and purposes it should be pointed out that both of these two new accusations carry with them a penalty of a term of imprisonment from 3 to 10 years.*
>
> *That the consequence of this fact alone brings with it the nullity of these criminal proceedings since these accusations would not have been sworn in in conformity with that which is provided for in Article 390 (1) of Chapter 9 of the Laws of Malta.*
>
> *If in the eventuality, that the Attorney General needed to rectify or amend any acts of the case, he could have made use of the so-called referral of 5 days, according to Article 432(2) of Chapter 9 of the Laws of Malta, which he did not.*
>
> *In this respect, applicant makes ample reference to the judgement delivered by the Court of Criminal appeal as per Judge of Dr. Aaron M. Bugeja, Appeal number 34/2021 in the names of The Police Vs Gianluca Caruana Curran and Charles Joseph Mercieca."*

Considerations

The jurisdiction of the Court of Magistrates is twofold, that is as a court of criminal judicature for the trial of offences which fall within its jurisdiction, and as a court of inquiry in respect of offences which fall within the jurisdiction of a higher tribunal.

The competence of the Court of Magistrates as a Court of criminal judicature is then dealt with under Sub-title I, Title II, Part I, Book Second of Chapter 9 of the Laws of Malta. The first two sub-articles of article 370 set out the original competence of the said Court, whilst the third and forth subarticle set out what is referred to as the extended competence of the Court of Magistrates.

Now therefore in terms or article 370(3)(a), if the Attorney General is of the opinion that from the evidence gathered in the Criminal Inquiry conducted by the Court of Magistrates, a crime that does not fall within the original competence of the said Court, should be dealt with and adjudicated by the said Court, with the consent of the accused it becomes vested with an adjudicative competence, is converted to a Court of Criminal Judicature, and may proceed to gather any further evidence tendered by the prosecution if the Attorney General so requests, as well as evidence by the defence in order to deliver judgement.

Now the procedure that leads to this extended competence may be read into article 370(3). A note of remittal is sent by the Attorney General to the Court, in which he explains the terms by which the Court must decide the case, thereby indicating not only the crimes about which it can judge the accused, but also whether the Court should hear any other witnesses before proceeding to its decision, as already pointed out above.

The present proceedings commenced through the Court of Magistrates as a Court of Criminal Inquiry, through what is commonly referred to as the compilation (kumpilazzjoni) since charges brought against the accused carried a punishment which exceeds the original competence of the Court of Magistrates. The said compilation continued until eventually the Attorney General on the 9th of February 2018, issued a note of remittance, and asked the Court to proceed as a Court of Criminal Judicature in terms of the following articles of the Criminal Code:

(a) Articles 248A(1)(2)(3), 248B, 248E(1) and 18 of Chapter 9 of the Laws of Malta of the Laws of Malta;
(b) Articles 2(1)(c), 3(1), 7(1)(3), 8(1)(3) and 9 of Chapter 63 of the Laws of Malta and 18 of Chapter 9 of the the Laws of Malta;

(c) Regulations 7, 18(d), 23(1)(2) of Subsidiary Legislation 409.08, article 43(1)(b) of Chapter 409 and article 18 of Chapter 9 of the Laws of Malta;
(d) Articles 382A, 383, 384, 386 & 412C of Chapter 9 of the Laws of Malta;
(e) Articles 17, 18, 23A, 23B, 31 and 533 of Chapter 9 of the Laws of Malta & article 5 of Chapter 373 of the Laws of Malta;

The said note was read on the 18th of February 2018 and the accused gave his consent for the Court to proceed as a Court of Criminal Judicature. In the case **Il-Pulizija vs. Michael Carter**, decided by the Court of Criminal Appeal on the 7th December 2001, it was held that:

> *"Huwa prinċipju assodat fis-sistema ġuridika nostra li meta ... ir-rinviju għall-ġudizzju jsir skond is-subartikolu (3) ta' l-Artikolu 370 (u allura wieħed jitkellem fuq għall-anqas reat wieħed, fost dawk imputati, li huwa ta' kompetenza tal-Qorti Kriminali) in-nota ta' rinviju għall-ġudizzju tassumi rwol simili għal dak ta' att ta' akkuża quddiem il-Qorti Kriminali. Fin-nota ta' rinviju għall-ġudizzju skond l-Artikolu 370(3) ma jistgħux jiżdiedu reati li dwarhom ma tkunx saret il-kumpilazzjoni; l-Avukat Ġenerali, naturalment, jista' jnaqqas reat jew reati u anke jżid skużanti. Bhal fil-kaz tal-att ta' akkuza, jekk fin-nota ta' rinviju ghall-gudizzju taht l-imsemmi Artikolu 370(3) l-Avukat Generali jakkuza lil xi hadd bhala awtur ta' reat, il-Qorti tal-Magistrati, wara li tkun akkwistat il-kompetenza bil-kunsens ta' l-akkuzat (Art. 370(3)(c)), tista' ssibu hati ta' tentattiv ta' dak ir-reat, jew ta' reat iehor anqas gravi izda kompriz u involut f'dak ir-reat, jew bhala komplici f'dak ir-reat. In fatti din it-tielet ipotezi kien il-punt principali fis-sentenza ta' Seisun et. (cioe' li l-Qorti tal-Magistrati, wara rinviju ghall-gudizzju skond l-Artikolu 370(3), tista' ssib lill-akkuzat hati bhala komplici flok bhala l-ezekutur materjali; ghandu jinghad ukoll, pero', li f'din is-sentenza din il-Qorti, diversament presjeduta, ma jidhirx li apprezzat id-differenza bejn rinviku skond l-Art. 370(3) u rinviju skond l-Art. 433(5)). Issa, fil-kaz in dizamina, l-Avukat Generali rrinvija mhux skond l-Artikolu 433(5) izda skond l-Artikolu 370(3); ghalhekk ma jistax jippretendi li l-Qorti Inferjuri setghet issib lill-appellant hati ta' xi reat iehor, salv, naturalment, dak li ghadu kif inghad dwar it-tentattiv, ir-reat anqas gravi izda kompriz u involut, u l-komplicita'."*

The court considers that most of the articles indicated in the said note of remittal of the Attorney General are reflected in the charges brought against the accused at the instance where the court exercised its jurisdiction as a Court of Criminal Inquiry, that is in the

compilation of evidence. Therefore, in relation to these articles the Court is well suited to proceed with its function, now that with the consent of the accused it has been converted as a Court of Criminal Judicature, and to deliver judgement in relation to those charges which are based on the said articles.

However, the defence claims that in its note of remittal of the 9th of February 2018, the Attorney General sends the accused to be judged by the Court on at least two articles which are different from the charges which had been served on the accused originally. The remedy sought by the defence, in its application is contradicting as it requests the court to find the acts null and void, and at the same time to acquit the accused from all the charges.

The defence makes reference to the case **The Police Vs Gianluca Caruana Curran and Charles Joseph Mercieca**. The Court, as rightly pointed out both by the Attorney General and by the Prosecuting Officer, notes that the plea in relation to a procedural irregularity of the note of remittal in that case was raised on grounds which are substantially different from that of the case at hand. In the cited case the court was faced with a situation where the accused was charged on the basis of one or more articles of the Criminal Code, whist the note of remittal sent by the Attorney General was based on another, or on other different articles of the Criminal Code. The Attorney General in the cited case had therefore remitted the acts to the Court of Magistrates, in order for it to find the accused guilty of a crime which was not reflected in the facts alleged against them in the original charges, and therefore the Court ordered their acquittal. This case was confirmed upon appeal by the Criminal Court of Appeal.

What is interesting to point out is that neither the Court of First Instance, nor the Court of Appeal did at any stage consider the nullity of the proceedings in this case. Instead it ordered the acquittal. Furthermore, it is to be pointed out that the plea was raised as part of the final submissions when the case was due for judgement. In these proceeding the plea as to the irregularity claimed by the defence was raised at a point in time when the proceedings were not due for judgement.

In its considerations as to whether this irregularity brings about the nullity of the procedures *in toto*, the Court makes reference to article 428 of the Criminal Code which

deals with the remedies available to the Court of Appeal. Of particular relevance are the first five subarticles of this article which deal specifically with the question of jurisdiction and competence, and the consequences arising. In terms of this article, the law does not provide for the declaration of nullity of the procedures in toto, but only allows the Court of Appeal to quash the final judgement and either to decide the case itself, or to remit the acts to the Court of Magistrates, in order for such Court to proceed in terms of law.

Furthermore, the Court makes refence to a very recent case decided on the 23rd February 2024 by the Court of Criminal Appeal presided by Hon Judge Dr Edwina Grima, LL.D. in the names **Il-Pulizija vs Peter sive Pierre Falzon**, whereby the learned Judge in examining a plea relating to an irregularity in the procedure under Article 370 of the Criminal Code, stated that:

> *"Illi allura, n-nullita' ravviżata mill-Ewwel Qorti kellha tolqot il-proċeduri biss u unikament mill-mument illi l-provi tal-Prosekuzzjoni ingħalqu, u qabel ma l-Qorti għaddiet biex tibda tisma' il-provi tad-Difiża, billi minn dan il-mument kellha tkun segwita il-proċedura indikata mill-liġi, għalkemm hija l-fehma tal-Qorti illi il-fatt illi l-appellat adixxa lil Qorti fil-vesti tagħha aġġudikattiva u ressaq il-provi u għamel is-sottomissjonijiet tiegħu, huwa kien indirettament qed jaqbel illi l-Qorti, kif adita mill-Avukat Ġenerali bħala dik ta' Ġudikatura Kriminali meta intbagħtet in-nota ta' rinviju għal ġudizzju, kellha tkun hi li tiddeċiedi l-każ u kwindi lanqas ma jista' jingħad li hemm xi nullita' assoluta, għalkemm ma hemmx osservanza sħiħa ma' dak dispost fil-liġi. Kwindi sabiex ma jkun hemm ebda difett fl-iter proċesswali jkun għaqli illi l-atti jkunu dikjarati nulli mill-mument tal-egħluq tal-provi tal-Prosekuzzjoni bil-Qorti tal-Maġistrati, fl-vesti tagħha ta' Qorti ta' Ġudikatura Kriminali għandha tara li jinqraw l-artikoli tal-liġi ndikati mill-Avukat Ġenerali fin-nota tiegħu tad-09 ta' Settembru 2014, u wara dan tistaqsi lill-appellat jekk huwa għandux oġġezzjoni li l-każ tiegħu jkun trattat bil-proċedura sommarja, u wara li tikseb dak il-kunsens, tgħaddi biex tisma' l-provi tad-difiża u tiddeċiedi l-każ skont il-liġi."*

Now in this case the defect alleged by the defence only relates to two of the articles mentioned in the note of remittal by the Attorney General. As already pointed out by the Court in its considerations above, with regards to the rest of the articles in the note of remittal, the Court is well suited to proceed with its function as a Court of Criminal

Judicature, and to deliver judgement in relation to those charges which are based on the said articles.

Thereagain, there is the issue as to the timing of the plea raised by the accused through its application of the 15th November 2023 under consideration, and therefore whether the Court should grant a remedy now or at a later stage when delivering judgement.

The Court primarily considers that the same approach taken in the case **Il-Pulizija vs Peter sive Pierre Falzon** should be applied to the case at hand, and if anything only the part of the note of remittal which is affected by the procedural irregularity should be considered in the light of the relevant articles of the law and jurisprudence. The Court therefore rules out that the procedural irregularity brings about the nullity of the proceedings in toto. Furthermore, the Court considers in view of what has been already stated above that this matter should be considered further at a later stage when delivering judgement.

Conclusion

Therefore, for the abovementioned reasons, the Court rejects the request made by the defence and orders the continuation of the proceedings.

Dr. Kevan Azzopardi B.A., LL.D

Magistrate