



CONSTITUTIONAL COURT

JUDGES

**THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE ANTHONY ELLUL**

Sitting of Monday, 17th June 2024.

Number: 7

Application number: 599/2023/1

Republic of Malta

v.

Sarath Babu Kondagan

1. Sarath Babu Kondagan ('appellant') appealed the decision delivered by the Court of Criminal Appeal on the 31st October 2023 refusing his request for a reference to the Civil Court, First Hall in terms article 4(3) of the European Convention Act (Chapter 319) and 46(3) of the Constitution.

2. On the 9th January 2023 a bill of indictment was issued against the appellant (**The Republic of Malta vs Sarath Babu Kondagan, 2/2023/1**)

wherein he is accused *inter alia* with the defilement of a minor under the age of sixteen years. He is also accused of participating in sexual activities with the minor child (article 204C(1) of the Criminal Code). Appellant is claiming that article 204C of the Criminal Code is in breach of article 7 of the European Convention on Human Rights, since the constitutive elements of the offence are not clearly defined and easily understood by an individual. He also claims that recent amendments to the law have made the offence more serious than the offence of defilement of minors (article 203 of the Criminal Code). Furthermore, he complains that the current law breaches his fundamental right as guaranteed by article 39(8).

3. By a decision delivered on the 31st October 2023, the Criminal Court rejected the appellant's request, "*due to the fact that his request is frivolous and vexatious*". The Criminal Court stated *inter alia* said that:

"This Court does not agree with the accused when he states that originally this article was introduced as a minor offence, and this is reflected in the parliamentary debate above. Furthermore, this Court also refers to the fact that the accused stated that Article 204C of the Criminal Code infringes Article 7 of the European Convention on Human Rights and Article 39(8) of the Constitution. Both these articles stipulate that no one shall be held to be guilty of a criminal offence of any act or omission that did not, at the time it took place, constitute such a criminal offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed. This has nothing to do with the complaint brought forward by the accused.

Even though the law does not define 'sexual activities', the term has been developed and interpreted by the Courts, hence there is a clear definition of the actus reus. Moreover, this Court also disagrees with the other

reasons stated by the accused why this Court shall accede to his request and refer his complaint to the First Hall C Court”.

4. On the 15th November 2023 the appellant filed an appeal. He complains that:

i. Amendments introduced to article 204C of the Criminal Code have made the offence more serious than the criminal offence of defilement of minors (article 203);

ii. Article 7 of the Convention requires clarity and accessibility of the penal provision and proportionality. The appellant contends that there is lack of:

(a) clarity as there is no clear definition of the elements of the criminal offence referred to in article 204C of the Criminal Code;

(b) proportionality, as there is no right of withdrawal of the complaint. On the other hand a complaint can be withdrawn when the accused is charged of defilement of minors through lewd acts, of a minor under sixteen years. Furthermore, the appellant argues that the “..... *glaring disparity is shown in the Deniro Bugeja judgement. Bugeja was acquitted because there was insufficient evidence that carnal connection was against the will of the minor. But for participation in sexual activities,*

doing the same things, even with the consent, the crime persists. Punishment is practically the same”.

5. The appellant also claims that:-

“... when one examines Legal Notice 11 of Chapter 12, known as the Rules of Court, cannot desume that there is no right of appeal when the defendant or the person who raised the question is not entitled to an appeal to the Constitutional Court”.

6. On the 23rd November 2023 the State Advocate filed a reply and *inter alia* stated that the appeal is null as in terms of law there is no right of appeal from the decision delivered by the Criminal Court on the 31st October, 2023.

The Court's considerations.

7. The law grants a right of appeal to the Constitutional Court from judgements of the First Hall of the Civil Court under article 46 of the Constitution (article 39(5) of the Constitution. Vide also article 4(5) of the European Convention Act). On the other hand the law does not grant an appeal, *“.... from any determination under this article that the raising of any question is merely frivolous or vexatious”* (article 46(5) of the Constitution and article 4(5) of the European Convention Act).

8. Although the appellant referred to Subsidiary Legislation 12.09 (Court Practice and Procedure and Good Order Rules), there is no

regulation granting a right of appeal to the Constitutional Court when a court rejects as frivolous or vexatious a person's request to order a reference to the Civil Court, First Hall in terms of article 46(3) of the Constitution and article 4(3) of the European Convention Act. On the other hand, regulation 4(2) grants a right of appeal from a decision given upon a reference made in terms of the said provisions of law.

9. Therefore, the appeal filed by the appellant is null. An appeal that has led to an unnecessary delay of eight months.

10. In his reply the State Advocate referred to the recent judgement delivered on the 25th October 2023 by this Court in the case, **Dr Anthony P. Farrugia vs Financial Intelligence Analysis Unit**. The circumstances of that case were completely different to the case under review. The plaintiff had filed an appeal from a judgement delivered by the Civil Court, First Hall after the Court of Appeal had refused his request to order a reference in terms of the above-mentioned articles of the Constitution and European Convention Act. The Court of Appeal decided that plaintiff's request was untimely since his appeal was *sub judice*. Although this Court rejected plaintiff's appeal from the judgement delivered by the Civil Court, First Hall, it made it amply clear that plaintiff's right to file a lawsuit alleging a breach of his fundamental right to a fair

hearing, remained intact on conclusion of the proceedings pending in the Court of Appeal (vide paragraph 24).

Decision.

The Court upholds the State's Advocate preliminary plea and declares as null the appeal filed by the appellant. All judicial costs are at his sole charge.

An authenticated copy of this judgement is to be inserted in the court file of the case **The Republic of Malta vs Sarath Babu Kondagan,** 2/2023/1.

Mark Chetcuti
Chief Justice

Giannino Caruana Demajo
Judge

Anthony Ellul
Judge

Deputy Registrar
SS