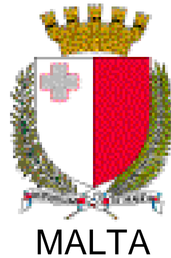

MALTA

COURT OF CRIMINAL APPEAL

HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 20 th October, 2005

Criminal Appeal Number. 273/2005

The
Police.
(Supt.
Peter Paul Zammit)
(Inspt. Christopher Pullicino)
(Inspt. Mario Haber)
(Inspt. Sandro Haber)

vs.

Omissis
Carmelo Borg
Omissis

The Court,

Having seen the report filed by the Police before the Court of Magistrates (Malta) against the appellant Carmelo Borg and others who is wanted by the Italian

authorities, a scheduled country in terms of Article 5 of Legal Notice 320 of 2004, for offences of, participation in a criminal organisation and for trafficking in human beings, which offences are listed as scheduled conduct in Schedule 2 of L.N. 320 of 2004 listed in the said Warrant with respect to which his surrender to Italy is being sought and in which it was requested to proceed against said Carmelo Borg and others according to the provisions of the extradition act, Chap. 276 of the Laws of Malta and Legal Notice 320 of 2004.

Having seen the Order given by the Court of Magistrates (Malta) as a Court of Committal on the 4th October, 2005, whereby that Court ordered that in accordance with article 24 of Legal Notice 320 of 2004, the appellant is to be kept under custody to await his extradition to Italy. Moreover, in accordance with Article 32 ibid., the Court informed the appellant that he will not be extradited before the expiration of seven days commencing from the date of that Order and that he can appeal to the Court of Criminal Appeal and that if he feels that his human rights have been, are being, or are going to the infringed, he has a right of redress under Article 46 of the Constitution of Malta or under Chapter 319 of the Laws of Malta.

Having seen the application of appeal filed by appellant on the 7th October, 2005, wherein he requested this Court to grant the annulment, revocation and cancellation of the order and to order the release of the appellant under those dispositions which it regards suitable and appropriate.

Having seen the records of the case;

Having considered that appellant's grounds for appeal are briefly the following :- that appellant disagrees with the statement by the Court of Committal , wherein it stated that ***"it is to be pointed out that this case is the first to be brought before the Maltese Courts under the new procedure as regulated***

by the Legal Notice 320 of 2004 and in dealing with this matter having no previous jurisprudence or parliamentary debate to guide it in interpreting Article 12 and 13, the same Court proceeded to do this "arbitrio boni viri" and to interpret it accordingly". **This because the provisions of the said Legal Notice were clear and left no room for interpretation. All the Court of Magistrates (Malta) had to do was to follow the procedure laid down in the Legal Notice. The appellant disagrees that there is nothing mentioned in the Legal Notice that precludes the court from giving one decree instead of two separate decrees in line with what is stated, according to the Court, with what is stipulated in Articles 12 and 13 of the Legal Notice. The Legal Notice stipulates clearly, one by one, the steps that should be taken by the Court. That sub-article 2 of Article 12 states that :-**

"*The court must decide whether the offence specified in the warrant is an extraditable offence."*

This meant that the Court must, after it has verified the identity of the persons against whom a European Arrest Warrant has been issued, decide whether the offences with which the persons are charged in the European Arrest Warrant are offences under the Second Schedule of the Legal Notice. Then the Court has two options, either to decide that the offences with which the accused are being charged are not extraditable offences under the second schedule and therefore apply sub-article 3 or else apply sub-article 4 which states that :-

"*if the Court decides in the affirmative, it must proceed under article 13."*

Therefore it is clear that the Legal Notice itself contemplates separate stages and the appellant stresses that "*ad validitatem*" the Court must 'decide'. The appellant disagrees that the two stages necessary to enforce the European Arrest Warrant

should be considered as one stage. It is the Law that stipulates two stages.

An analogy is to be drawn between Article 10 and the way it was applied by the Court of Committal , when it gave a separate decision in a decree regarding the identity of the persons involved. And did not simply rely on the declarations of the parties.

The Court could not have tried to remedy this situation through a statement in the final Order. Without a decree in accordance with Article 12 (2), the Court could not have proceeded to the next stage, i.e. to decide whether there were any bars to extradition according to Article 13.

Having seen the Note filed by the Attorney General on the 12th. October, 2005, whereby he pleaded that the application of appeal does not satisfy the requisite mentioned in article 419 (1) (a) of the Criminal Code in that what purports to be a brief statement of the facts is nothing more than a reproduction of the request by the Italian authorities enhanced by references to local legislation. This was manifest from the fact that the first and sixth paragraph of the appeal application are identical.

Having heard submissions on this plea;

Having seen the minutes entered in the course of the sitting of the 13th. October, 2005, whereby the parties agreed that, without prejudice to the Attorney General's preliminary plea, this Court should hear submissions on the merits of the appeal and deliver one judgement in due course.

Having also heard submissions on the merits of the appeal;

Having seen the minute of the same sitting in which the parties agreed that Italy was included as a

Scheduled Country by means of Legal Notice 289 of 2005;

Duly considers:

That it is obvious that this Court has first of all to dispose of the Attorney General's preliminary plea of nullity of the appeal application.

Considers that:-

Section 419 of the Criminal Code lays down that ;-

" (1) Besides the indications common to judicial acts, the application shall, under pain of nullity, contain –
(a) a brief statement of the facts;"

That this Court presided over by The Hon. Mr. Justice Dr. V. De Gaetano (now Chief Justice) in its judgement in the case "The Police vs. Joseph Said**" [25.7.1994] , after analysing previous case law on the matter, stated that:-**

*"Il-gurisprudenza, ormai kopjuza dwar in-nullita' tar-rikors tal-appell minhabba karenza tar-rekwizit tal-fatti fil-qosor, ma hix gurisprudenza bbazata fuq formalizmu jew inflessibilita' procedurali izda gurisprudenza bbazata fuq interpretazzjoni ragjonevoli tal-imsemmi dispost tal-ligi (Art. 419 (1)…"Il-principji stabiliti … jinsabu rispekkjati f'sentenzi aktar recenti bhal, per ezempju, "**Il-Pulizija vs. Lawrence Zammit u Paul Spiteri"** [25.7.1986]; **"Il-Pulizija vs. Alfred Debono"** [23.4.1992] u l-"**Il-Pulizija vs. Julian Bonello"** [14.5.1992], lkoll appelli kriminali, jistghu jigu riassunti fis-segwenti tlitt propozizzjonijiet : (1) ir-rikors ghandu jkun fih espozizzjoni tal-fatti saljenti u essenzjali tal-kawza, esposti b' mod car u komplet , b' mod li l-kontroparti tkun tista' tifhem fuqhiex ghandha tiddefendi ruha jew tittratta, u b'mod li din il-Qorti tkun tista' ssegwi sewwa l-izvolgiment tal-kaz u tillimita d-dibattitu ghal dak li hu bzonnjuz u tirrikjedi l-iskjaramenti mehtiega; (2) il-ghalhekk ma jkunx sodisfatt il-vot tal-ligi*

jekk il-fatti jkunu sparpaljati b'mod li wiehed irid joqghod jistad ghalihom biex forsi jindividwhom; u (3) li certament mhux il-kompitu tal-Qorti li toqghod tipprova tispigola l-fatti mill-aggravji jew vice versa. …"

In other words the large body of case law dealing with the plea of nullity of the appeal application arising from an omission to give a statement of the facts is not one which is based on formalisim or procedural rigidity but one based on a reasonable interpretation of section 419 (1) . These principles are echoed in more recent judgements of this Court and can be summed up as follows :- (1) the application is to contain a statement of the salient and essential points of the cause , stated in a clear and complete manner, and in such a manner that the other party can understand what it has to defend itself against and in a manner that the Court of Appeal can follow the development of the case and thus limit the debate to what is necessary and be in a position to request the necessary claifications. (2) Hence the requirement of the law would not be satisfied if the facts are scattered in such a way that one will have to fish for them in an attempt to identify them. ; and (3) it is certainly not the Court of Appeal's duty to try to pick out the facts from the grounds of appeal and vice versa.

In the Criminal Appeal "The Police vs. Vincent Fenech**" [17.10.1997], this Court presided over by the Hon. Mr. Justice Dr.V. De Gaetano said that although it lauded every effort to economise in the use of words in judicial acts, it was evident that such economising should not be at the expense of the sense and juridical object of the judicial act in question. In other words it should not be an economy of words which reduces to nothing and renders that act inoperative and meaningless.**

It has also been held by this Court presided by a different judge in the criminal appeal : "Il-Pulizija vs. Joseph Galea" **[30.6.1995], that :-**

"…skond gurisprudenza kostanti , in-nuqqas ta' xi wiehed mir-rekwiziti imsemmija fl-artikolu 419 (1) tal-Kodici Kriminali hi anki sollevabbli "ex officio" mill-Qorti essendo dik id-dispozizzjoni u dawk ir-rekwiziti huma ta' ordni pubbliku . Ir-"raison d'etre tal-artikolu 419 (1) (a) (b) u (c) huwa s-simpliifikazzjoni u l-kjarezza u l-legislatur ried li r-rikors tal-appell ghandu jkun redatt b'tali mod li mill-ewwel ipoggi kemm lill-Qorti kif ukoll lill-intimat fil-pozizzjoni li jkunu jafu ezatt x'inhuma l-fatti kollha essenzjali , min x'hiex qed jilmenta l-appellant u x'inhu jitlob . Il-vot tal-ligi ma jkunx sodisfatt jekk dawn ikunu sparpaljati l' hawn u l'hinn b'mod li wiehed irid joqghod jistad ghalihom biex forsi jindividwhom."

"Hekk ukoll , meta r-ragunijiet ta' l-appell ikunu inkomprensibbli , gie ritenut li r-rikors huwa null."

In The criminal appeal : "Il-Pulizija vs. George Felice" **[11.10.1995] it was held that :-**

" Huwa evidenti li l-motivi indikati (tal-appell) ghandhom ikunu specifikati w konkreti u mhux semplici dikjarazzjoni ta' ideja vaga u indeterminata li tirrendi necessarja tfittxija biex il-gudikant jistabilixxi n-natura vera tal-motiv tal-appell ; ghax inkella l-motiv ma jkunx jiftiehem u ma jissodisfax l-iskop li ghalih huwa ntiz mill-ligi…u gie ritenut li "il-motivo e' specifico quando circoscrive il punto della decisione su cui e' richiamata l'attenzione del giudice al gravame , ed individua in modo, sia pure succinto , ma preciso , gli elementi di fatto e di diritto che stanno a base di una concreta censura"

It has also been held that :-

"Il-fatti fil-qosor ghandhom ikunu migburin f' paragrafu "ad hoc" , biex mir-rikors u minghajr in-necessita' ta' riferenza ghall-atti tal-process, ikunu jiftehmu ghall-ahjar zvilupp tar-rikors." **[Criminal Appeal** ***:*** "Il-Pulizija vs. Peter Campbell **–** ***15.10.1990].***

and that ***:-***

"Il-fatti fil-qosor u l-motivi tal-appell huma zewg rekwiziti li ma jigux sostitwiti wiehed b' l-iehor." [**Criminal Appeal** ***:.*** "Il-Pulizija vs. Alfred Debono" **–** ***23.9.1992]***

and that ***:-***

"Bil-"fatti fil-qosor" wiehed jifhem il-fatti saljenti tal-kaz, esposti b'mod car izda konciz u b'tali mod li kemm l-intimat kif ukoll il-Qorti ikunu jistghu mill-ewwel jaqbdu x'inhuma l-fatti kif allegati mill-istess appellant . Ma jkunx sodisfatt il-vot tal-artikolu 419 (1) (a) jekk il-fatti jew ikunu sparpaljati 'l hawn u 'l hinn jew ikunu maghguna mall-aggravji. Bhal ma indikazzjoni tal-aggravji ma tistax issir b'semplici riferenza ghall-fatti, hekk ukoll il-fatti jridu jkunu esposti indipendentement mill-aggravji ." [Criminal Appeal: **"Il-Pulizija vs. Martin Fenech"** – *17.10.1997 (Vol. 81, (1997) IV, p. 269.}*

In the Criminal Appeal : "**Il-Pulizija vs. Julian Bonello**" [14.5.1992] it was again held that :-

"Ma hux il-kompitu tal-Qorti li tispigola l-fatti mill-aggravji . Il-fatti saljenti , taht piena ta' nullita' iridu jigu esposti mill-appellant b'mod car u komplet."

That there is a large and uniform body of case law which adopts the principle that where the facts of the case are omitted, where they are not clearly stated, incomplete or where they are interspersed with the grounds of appeal, this renders the application of appeal null and void. This Court has followed this case law in a spate of more recent judgements, namely **"Il-Pulizija vs. Raymond Camilleri**" [5.12.2002]; "**Il-Pulizija vs. Charles Mangion**" [1.10.2003]; "**Il-Pulizija vs. Herman Mckay u Stiano Agius"** [7.1.2004]; **"Il-Pulizija vs. Patrick Gatt"** [22.1.2004]; "**Il-Pulizija vs. Tarcisio Gatt"** [22.1.2004]; **"Il-Pulizija vs. Anthony Micallef"** [18.3.2004]; **"Il-Pulizija vs. Gaetano Bonnici**" [18.3.2004]; **"Il-Pulizija vs. Arthur Agius**" [24.6.2004]; "**Il-Pulizija vs. Mariella**

Grima” [4.11.2004]; [6.1.2005]; **“Il-Pulizija vs. Carmelo Penza”** [14.4.2005]; **“Il-Pulizija vs. Angelus Bartolo**” [26.5.2005]; **“Il-Pulizija vs. Anthony Carter”** [9.6.2005] and **“Il-Pulizija vs. Michael Attard**” [23.6.2005]

From an examination of the contents of the appeal application it appears that appellant dedicated one paragraph to the statement of the facts of the case . This is being quoted verbatim hereunder :-

“That the facts are the following;

That the Tribunale di Modica issued a European Arrest Warrant [EAW] against Wang Wei, Carmelo Borg and Lin Yi, wherein it is stated that their same persons are wanted by the Italian Authorities, a Scheduled Country in terms of Article 5 of Legal Notice 320 of 2004, for offences of participation in a criminal organisation and for trafficking in human beings, which are offences listed as scheduled conduct in Schedule 2 of Legal Notice 320 of 2004 listed in said Warrant with respect to which their surrender to Italy is being sought.”

The application then goes into the grounds of appeal. It then appears from an examination of these grounds for appeal that the whole issue is what the appellant alleges to have been a procedural error in the proceedings before the Court of Committal. It is only in this latter part of his application that the appellant refers to certain facts, i.e. the *res gestae* before the Court of Committal which are at the basis of his appeal. These facts are interspersed among legal arguments and submissions and sometimes it was difficult for the Court to distinguish between references to what took place before the Court of Committal from submissions or legal arguments and the Court had to refer constantly to the records of the case before the Court of Committal to be able to follow what facts were being referred to.

The relative paragraph of the application which purports to state the facts of the case clearly contains

no reference to the alleged offences for which the European Arrest Warrant was issued and, perhaps more importantly in this case, no reference whatsoever to the actual procedural irregularities before the Court of Committal on which appellant is basing his appeal.

In their oral submissions before this Court regarding this preliminary plea, learned Counsel for the Prosecution, Dr. Stephen Tonna Lowell and Dr. Donatella Frendo Dimech argued that in this appeal all the rules regulating appeals from the Court of Magistrates applied, notably section 419 (1) (a) of the Criminal Code which required appellant to include a brief statement of the facts in his application, under pain of nullity. They submitted that the facts stated had however to be linked to the grounds of appeal. They further submitted that the above quoted paragraph was a cut and paste copy of the first paragraph of the appeal application which referred to the institution of extradition proceedings and nothing more and this could not be deemed to constitute a statement of the facts.

Learned Counsel for the defence, Dr. Jose' Herrera and Dr. Edward Zammit-Lewis countered that this was not an appeal from an ordinary judgement of the Court of Magistrates in its criminal jurisdiction but an appeal from an Order and therefore a derogation to the ordinary rules of Criminal Law as embodied in the Criminal Code which did not apply in this case. Indeed Chapter 276 contained many derogations to the provisions of the Criminal Code. Counsel referred to Section 18 of Chapter 276 in particular. As such an appellant was not bound to state any facts in a similar application.

Defence Counsel further submitted that, in any case, the facts were those stated as the defence did not know of any other facts in view of the particular procedure under review. The irregularities committed in the Court of Committal do not constitute the facts

to be stated in an appeal application. Section 419 only applied in cases of appeals from judgements of the Magistrates Court as Courts of Criminal Judicature. Therefore it was clear that the legislator had in mind the creation of a new and special form of appeal.

Prosecuting Counsel rebutted that the purpose of Section 18 of Chapter 276 was different from that stated by Defence Counsel. The first Court in extradition proceedings was a Court of Committal. As there was no appeal from a decision of a Court of Criminal Enquiry, Section 18 granted a right of appeal but it in no way derogates from the general rules regulating criminal appeals. If one had to accept the Defence's line of thought, one could argue that if Section 419 did not apply to appeals from decisions of the Court of Committal, neither Section 418 establishing the constitution of the Court of Criminal Appeal from judgements of the Magistrates Courts applied. This, of course, would be absurd as otherwise this Court, as constituted, would not be the Court competent to hear this appeal. But this was certainly not the case as all rules contained in the Criminal Code governing appeals applied, including section 419.

Now section 18 (1) of the Extradition Act, Chapter 276 of the Laws of Malta, referred to by the parties, states that an appeal from an order committing a person to custody under Section 15 of the Act, shall be made by an application to the Court of Criminal Appeal, containing a demand for the reversal of the court's order and shall be filed in the registry of the court of committal not later than four working days from the date of said order. This sub-section clearly refers to appeals from the person committed to custody. In fact appeals from the Attorney General from an adverse decision of the Court of Committal are regulated by Section 19 (1) which lays down a three working day time limit for appealing from the day the Attorney General receives the records of the case and the decision of the Court of Committal.

Other than imposing different time limits for filing the appeal and some other minor procedural details, the special provisions of Sections 18 and 19 contain no further express derogation to the general rules governing appeals to the Court of Criminal Appeal, clearly in its inferior jurisdiction. In line with the legal maxim **"ubi lex voluit, dixit**", this Court cannot therefore assume that the legislator in Sections 18 and 19 wanted to derogate to the rules governing appeals other than where it expressly stated so. Hence this Court cannot uphold appellant's argument that the general rules governing appeals do not apply in such cases. It follows that the requirements of Section 419 of the Criminal Code are equally applicable to appeals from similar extradition proceedings as they are in all other appeals lodged before this Court.

Having therefore established this point, the Court will now have to decide whether the appeal as drafted conforms to the strict requirements of Section 419 of the Criminal Code, as interpreted by case law.

The Court notes that although appellant makes no reference to the facts of the case in so far as they refer to facts giving rise to the charges he is to face before the Italian Courts, this would appear to be understandable in view of the nature of the special procedure being invoked where the facts alleged do not appear to need any proof in the Court of Committal and are therefore not an object of the debate before that Court. As such, this Court feels that the facts as outlined in the only paragraph dedicated by appellant to the statement of the facts are not entirely out of order.

But if these facts, as stated, are in order as far as they go, they do not go too far and certainly in no way indicate what are the facts giving rise to the present appeal. In fact the facts as quoted above could well purport to be an introduction to the statement of facts one would have expected of appellant, but certainly give no inkling of the facts upon which the appeal is supposed to be based, i.e. an irregularity or a series of procedural irregularities

committed by the Court of Committal, which appellant claims to have vitiated the entire proceedings making them null and void. In this Court's view a detailed chronological account of the alleged irregularities had to form the basis of any statement of facts, as this would immediately have set the stage for the debate and examination required by and in this Court. This however was not forthcoming in the application of appeal.

Clearly, if section 419 has to have an practical meaning and effect other than a merely formal and procedural one, the facts in issue - be they the facts of the case as normally understood to mean the facts accompanying the alleged crime or crimes of which appellant has been charged or convicted, or the facts as meaning the *res gestae* before the court of first instance, in cases where appeals hinge only or mainly on procedural irregularities before said court - should be clearly and unequivocally spelt out in the paragraph or paragraphs dedicated to the statement of the facts, required under pain of nullity by Section 419 (1) (a) .

However, as already stated, appellant did not make one single reference to the procedural irregularities in the sole paragraph indicated by himself to contain the facts of the case. This Court could only begin to understand what the matter in issue in this appeal was when it went on to read the subsequent paragraphs of the application containing the grounds of appeal and even here it had to make a conscious effort to try to sift the wheat from the chaff, i.e. the facts being complained as giving rise to the procedural irregularities alleged by appellant from the legal arguments and submissions of learned Counsel for the defence.

In this Court's opinion therefore the appeal application is defective because it does not contain a statement of the facts of the cause and it merely states how the extradition procedures were initiated and stops there, without giving any inkling as to the facts, i.e. the procedural irregularities on which this appeal is solely based.

In the light of the above case law, this defect renders the application null and void.

For the above reasons this Court upholds the Attorney General’s preliminary plea of nullity of the appeal and accordingly abstains from taking any further cognisance of the case.

< Final Judgement >

---------------------------------END---------------------------------