MALTA

QORTI TAL-MAGISTRATI (GHAWDEX) BHALA QORTI TA' GUDIKATURA KRIMINALI

MAGISTRAT DR. LAURENCE QUINTANO

Seduta ta' l-14 ta' April, 2008

Numru 247/1999

Il-Qorti

1. Rat l-imputazzjonijiet dedotti kontra Ludwig Bugeja ta’ 28 sena mwieled Pieta’ fil-5 ta’ Frar 1976 bin Angelo u Yvonn nee Camilleri u li joqgħod 18 Leo Street Bormla detentur tal-karta ta’ l-identita’ bin-numru 113276 (M)

Akkużat talli fis-17 t’April, 1998 f’dawn il-Gżejjer u f’dawn l-aħħar żminijiet qabel din id-data

a) forna jew ipprokura jew offra li jforni jew li jipprokura d-droga eroina speċifikata fl-Ewwel Skeda ta’ l-Ordinanza dwar il-Mediċini Perikoluži Kap 101 tal-Liġijiet ta’ Malta lill-persuna jew persuni jew għall-użu ta’ persuna jew persuni mingħajr ma kellu liċenzja mill-President ta’ Malta mingħajr ma kien awtorizzat bir-regoli ta’ l-1939 għall-kontroll intern ta-drogi perikoluži (GN 292/1939) jew minn xi awtorita’ mogħtija mill-President ta’ Malta li jforni d-droga u mingħajr ma kien fil-pussess ta’ awtorizzazzjoni

għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Prinċipali tal-Gvern skond id-dispożizzjonijiet tas-sitt taqsima ta' l-Ordinanza msemmija u mingħajr ma kellu liċenzja jew kien xort oħra awtorizzat li jimmanifatura jew iforni d-droga msemmija u mingħajr ma kellu liċenzja li jipprokura l-istess droga u dan bi skur tar-regolament 4 tar-regoli ta' l-1939 għall-kontroll intern tad-drogi perikoluż (GN 292/1939) kif sussegwentement emendati u bi ksur ta' l-Ordinanza dwar il-Mediċini Perikoluż Kap 101 tal-Liġijiet ta' Malta;

b) kellu fil-pussess tiegħu id-droga eroina speċifikata fl-Ewwel Skeda ta' l-Ordinanza dwar il-Mediċini Perikoluż Kap 101 tal-Liġijiet ta' Malta meta ma kienx fil-pussess ta'awtroizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Prinċipali tal-Gvern skond id-diżpożizzjonijiet tar-4 u s-6 Taqsima ta' l-Ordinanza u meta ma kienx bil-liċenzja jew xort'oħra awtorizzat li jimmanifattur jew li jforni d-droga msemmija u meta ma kienx b'xi mod ieħor bil-liċenzja jew xort'oħra awtorizzat li jimmanifattura jew li jforni d-droga msmmija u meta ma kienx b'xi mod ieħor bil-liċenzja mill-Presdient ta' Malta li jkollu d-droga msemmija fil-pussess tiegħu u naqas li jipprova li d-droga msemmija kienet fornuta lilu għall-użu tiegħu skond ir-riċetta kif provduta fir-regolamenti msemmija u dna bi ksur tar-regoalment 9 tar-regoli ta' l-1939 dwar il-kontroll intern tad-drogi perikoluż (GN 292/1939) kif sussegwentement emendati u bi ksur ta' l-ordinanza dwar il-Mediċini Perikoluż Kap 101 tal-Liġijiet ta' Malta;

ċ) talli f'dawn il-Gżejjer fis-17 t'April 1998 kellu fil-pussess tiegħu mediċina speċifikata u psikotropika meta ma kienx awtorizzat kif imiss bi ksur tar-regolament 3(1) ta' l-Avviż Legali 22 ta' l-1985 kif sussessgwentement emendat u la-rtikoli 40A u 120A u t-Tieelt Skeda ta' l-Ordinanza dwar il-Professjoni Medika u l-Professjonijiet li għandhom x'jaqsmu magħha Kap 31 tal-Liġijiet ta' Malta u la-rtikolu 16 ta' l-Att V ta' l-1985 kif emendat.

d) talli fl-istess żmein iffalsifika biljetti tal-flus jew mexxa biljetti tal-flus falsifikati li kien jaf li kienu falsifikati u cioe' liri Maltin u dan bi ksur ta' l-artikolu 45 tal-Kap 204 tal-Liġijiet ta' Malta;

e) talli mingħajr awtorita' legali jew mingħajr skuża leġittima jew raġonevoli xtara jew irċieva minn għand xi persuna jew persuni jew kellu fil-kustodja jew pussess tiegħu biljetti tla-flus falsifikati li kienu jafu li l-istess biljetti kienu falsifikati u cioe' liri Maltin skond l-artikolu 46 tal-Kap 204 tal-Liġijiet ta' Malta.

2. Il-Qorti ntalbet sabiex, f'każ ta' ħtija, tordna lill-imputat iħalls l-ispejjeż li għandhom x'jaqsmu mal-ħatra ta' l-esperti ai termini ta' la-rtikolu 533 tal-Kap 9.

3. Rat l-atti kollha tal-proċess inkluż iċ-ċertifikat tat-twelid ta' l-imputat Ludwig Bugeja bin-numru 1132 ta' l-1976, l-istqarrija tiegħu a fol.7 magħmula fil-21 t'April 1998 fil11.02 am, l-Ordni ta' l-Avukat Ġenerali tas-17 t'Awissu, 1998 u tas-17 ta' Lulju 1998 (fol 26), il-fedina penali ta' l-imputat a fol.46, l-ordni għas-separazzjoni tal-ġudizzju magħmula mill-Qorti (ara fol.100 u fol.123 u 127),[1] il-Proċes Verbal magħmul mill-Maġistrat Dr.Antonio Miżżi ai termini ta' l-artikolu 24A(12)(13) tal-Kap 101 intitolat 'Xhieda Ġuramentata ta' Joseph Attard fl-20 t'April, 1998', il-ħatra ta' Philip Chircop sabiex jagħmel eżami tal-flus allegatament foloz, ir-rinviju ta' l-Atti lill-Avukat Ġenerali minħabba l-imputazzjonijeit dwar il-flus foloz sabiex l-atti jkunu sanati, il-verbal tas-seduta ta' meta nqaraw l-artikoli, (fol.209, u l-artikoli mibgħuta mill-Avukat Ġenerali u l-kunsens ta' l-imputat sabiex dawn il-proċeduri jkunu sommarji. (fol.209)

4. Skond ix-xhieda ta' l-Ispettur Norbert Ciappara, fl-20 t'April, 1998 irriżulta li ċerta Joseph Attard kien ġab xi flus li mhumiex ta' valur legali biex jixtri d-droga għal xi persuna oħra. Dan kien iltaqa' ma' l-imputat u persuna oħra (Trevor Camilleri) u b'dan il-flus kien xtara kienet

[1] Hemm numru ta' paġini fil-proċess li huma identiċi.

inxtrat id-droga minn għand Jesmond Aquilina. L-imputat kien innega li xtara d-droga b'dawn il-flus jew li xxerja din id-droga flimkien ma' Joseph Attard u Trevor Camilleri.

L-Istqarrija ta' l-Imputat

5. Fl-istqarrija tiegħu l-imputat stqarr li hu kien jaf lil Joe Attard id-detox. Dan Attard kien saqsa lill-imputat jekk kienx jaf lil-Lembut għaliex Attard kellu jagħti xi flus lil din il-persuna. L-imputat żied jgħid li peress li ma kinux sabu lil-Lembut, Attard ma kienx tah flus. (fol.8). Huwa nnega li kien abbuża bl-eroina flimkien ma' Attard jew li kienx xtara l-eroina minn għand il-Lembut bi flus foloz. Huwa qal li minn Jannar tas-sena 1998 'l hawn ġieli kienn uża xi pakkett ta' l-aeroina u l-aħħar li uża kien xi ħamest ijiem jew ġimgħa qabel (fol.8). Meta kien mistoqsi jekk kienx ġieli qasam xi droga ma' ħadd ieħor huwa wieġeb hekk:

"Mhux dejjem; il-biċċa l-kbira waħdi.'

Huwa kien sar jaf li l-flus li kienu għaddew kienu foloz minn għand Trevor Camilleri.

6. Clifford Cauchi, ir-rappreżentant tas-CGMO a fol.86 xehed li f'April ta' l-1998 l-imputat ma kellux Drug Control Card għall-mediċini psikotropiċi.

7. Xehdet l-Ispettur Marija Stella Cutajar li qalet li fis-17 t'April, 1998 kienu nfurmati mill-Casualty Department illi ċertu Joseph Attard kien iddaħħal b'overdose. Attard kien qal lix-xhud (li kienet akkumpanjata mill-Ispettur Ciappara) li huwa (Attard) kien xtara xi sachets minn għand persuan magħrufa bħala l-Lembut minn Bormla. Attard kien mar x-Xgħajra ta' Bormla u ltaqa' ma' l-imputat Ludwig Bugeja li ried jixxerja d-droga ma' Attard. Attard għadda lil Ludwig Bugeja karta ta' Lm20 sabiex Ludwig Bugeja jkun jista' jixtri d-droga minn għand il-Lembut. Attard qal li l-flus li ta lill-imputat kienu foloz.

Ix-Xhieda Ġuramentata ta' Joseph Attard

8. Mix-xhieda ġuramentata ta' Joseph Attard mogħtija quddiem il-Maġistrat Antonio Mizzi jirriżutla li fil-15 t'April, 1998, Attard kien mar Ħal-Qormi biex jixtri d-droga minn għand bneidem magħruf bħala x-Xalo. Dan qal li ma kellux xogħol u wara ta żewġ karti ta' l-għoxin lira Maltija lix-xhud. Minn hemm mar ħdejn l-iskola ta' San Ġorġ fejn iltaqa' ma' ċertu Cefai li ġab gramma lix-xhud. Kien ix-Xalo' lit a 'daqqa' lil dan ix-xhud. Minn hemm reġa' mar il-Pjazza ta' San Bastjan b'Lm40 li kien tah ix-Xalo, xtara u reġa'mar għand ix-Xalo li reġa' tah daqqa oħra. Sadanittant Joseph Attard ma kienx jaf li l-flus kienu foloz. Kellu jerġa' jmur għand l-istess bniedem tal-Pjazza ta' Ħal-Qormi u reġa' mar għand ix-Xalo' li ma kienx hemm. L-għada kien hemm il-Pulizija wara r-remissa tax-Xalo u x-xhud mar jinqeda mill-Hamrun. Imbagħad kien sabu l-ewwel wieħed li kien inqeda minn għandu u qallu li l-flus kienu foloz. Wieħed tal-ħanut kien iċċekkjalu li l-flus huma foloz.

Sussegwentement kien mar għand il-Lembut li li tah żewġ pakketti u għal dawn ix-xhud ħallas bil-flus foloz. (fol.115) li għalihom ħallas Lm20 bil-flus foloz. Wara mar ma' person li kien jafha bħala Skossi b'karozza bajda żgħira mini-metro. Din il-persuna l-oħra 'inqdieť u marru 'jagħmluhom flimkien.' Fol.115. X'ħin ħaduha marru 'l isfel lejn ix-Xagħra ta' Bormla fejn kien hemm Trevor Camilleri. Dan tela' għand il-Lembut u ġab il-pakketti u maru jagħmluhom flimkien. (fol.116). Kien ġab ukoll xi valium u minnhom ħa erba' Joseph Attard u l-oħrajn qasmuhom. Wara ħaduh id-Detox.

9. Xehed l-espert Philip Chricop li kkonstata li fi tnejn mill-erba' karti karti ta' Lm20 li huwa rtira fid-19 t'Ottubru 2002 mis-sur Bruno Zahra kien hemm numru duplikat – ħaġa li qatt ma tista' tkun għaliex in-numri f'kull denominazzjoni huma uniċi. Bara dan il-watermark ma tidhirx. Is-security threat tidher li hija mbagħbsa wkoll. Għalhekk dwn il-karti huma foloz. (fol.155 u fol156).

10. Fol.161 sa 176 huma l-istess bħal fol 103 sa 120.

11. Tela’ jixhed Joseph Attard li kien għamel id-dikjarazzjoni ġuramentata u l-Qorti kellha twissieh għal aktr minn darba li kien taħt ġurament u li ma kenitx qed temmen li ma kienx qed jiftakar min kien l-imputat. Baqa’ jinsisti ‘Ma nafhomx, ma niftakrax min huma.’ (Ara fol.196) Inqratlu l-istqarrija kollha li kien għamel u l-Qorti kellha tissospendi s-smigħ. Meta reġa’ tela’ jixhed it-tieni darba huwa qal li li dawk li kienu ltaqa’ magħhom ma kinux preżenti fl-Awla u qal li kien iltaqa’ maghom dik id-darba biss. Għal mistoqsija li saret mill-Prosekutur jekk ix-xhud kienx jinsab il-ĦAbs u jekk l-imputat kienx miegħu fl-istess division, ir-risposta kienet ‘Iva’.

12. L-Avukat Ġenerali bagħat l-artikoli 45 u 46 tal-Kap 204 kif ukoll l-artikoli 17(b)9c), 20, 23 u 533 tal-Kap 9. L-imputat ta l-kunsens tiegħu sabiex il-proċeduri jkunu sommarji u l-Prosekuzzjoni għalqet il-provi taħgha

13. Fit-30 ta’ Marzu, il-kawża tħalliet għall-provi difiża.

14. L-imputat kien mgħarraf fit-2 ta’ Lulju 2007 li l-kawża kienet ser titħalla għat-3 ta’ Diċembru għall-finali trattazzjoni.

15. Fit-3 ta’ Diċembru, 2007, l-imputat ma deherx fil-Qorti u l-kawża tħalliet għas-sentenza gaħt-22 ta’ Jannar 2008.

Konsiderazzjonijiet tal-Qorti.

16. Jirriżulta mill-istqarrija ta’ l-imputat li huwa kien uża d-droga eroina xi ġimgħa jew sitt jiem qabel ma saret l-istqarrija Dan il-perjodu jaqa’ fil-parametri tad-dati ta’ l-imputazzjoni. Għalhekk il-Prosekuzzjoni ippruvat it-tieni imputazzjoni.

17. Dwar l-ewwel imputazzjoni -it-traffikar tad-droga- il-Prosekuzzjoni straħet fuq l-istqarrija ġuramentata tax-xhud Joseph Attard li kien iddaħħla b’overdose.

18. L-imputat, fl-istqarrija tiegħu, qal li ‘Mhux dejjem (qasam id-droga) iżda l-biċċa l-kbra waħdu. L-imputat qat

li kien uża xi pakkett ta' l–għaxra li minn Jannar 'l hawn għax kien 'dan l-aħħar' li qed juża d-droga. Mir-risposta jidher li l-imputat ma kienx juża d-droga qabel Jannar tas-sena 1998. Għalhekk, la beda juża d-droga fl-Jannar 1998, jekk qasam id-droga kien fiż-żmien ta' bejn Jannar 1998 u is-17 t'April, 1998 li jaqa' fil-parametri ta' taż-żmien ta' l-ewwel imputazzjoni.

19. Il-Qorti qed tqis ukoll ix-xhieda mogħtija mix-xhud Joseph Attard quddiem il-Maġistrat Inkwirenti. Il-Qorti qed tagħmilha ċara li ma emmnitx lil dan ix-xhud meta kien fuq il-pedana tax-xhieda u qal li ma beda jiftakar xejn. Il-Qorti ma tikkonsidrax il-kliem biss ta' dak li jkun qed jixhed iżda wkoll il-komportament tiegħu. Hemm differenza bejn li wieħed ġenwinament ma jiftakarx u wieħed li jgħid li ma jiftakarx.

20. Stante li x-xhieda mogħtija bil-ġurament hija dettaljatissima u tibda fil-fatt QABEL ma dan ix-xhud iltaqa' ma' l-imputat u TAQBEL ma' punti ewlenin imsemmija mill-imputat innifsu fl-istqarrija tiegħu, il-Qorti m'għandha ebda dubju li dak li qal Joseph Attard quddiem il-Maġistrat Inkwirenti hija l-verita'. Il-Qorti wkoll qed tannetti bħala appendiċi għal din is-sentenza d-Deċiżjoni tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem propju dwar punt identiku u li għandu jservi ta' gwida f'kawżi ta' din ix-xorta. Id-Deċiżjoni kienet 'Carmel Camilleri against Malta' u ngħatat mit-Tieni Sezzjoni tal-Qorti Ewropea fis-16 ta' Marzu, 2000. F'dan il-każ, il-Qorti Ewropea kienet qieset l-allegazzjoni li kien hemm nuqqas ta' smigħ xieraq bħala x-xhieda kienet ingħatat waqt l-inkjesta 'manifestly ill-founded'. L-imputat kellu kull ċans li jagħmel kontro-eżami fuq dak li kien xehed ix-xhud quddiem il-Maġistrat Inkwirenti jew li jtellgħu bħala xhud tiegħu. Jekk wieħed jiskarta l-istqarrijiet magħmula quddiem il-Maġistrat Inkwirenti għax ix-xhud taparsi nes jew mhux jagħraf lill-persuna li kienet miegħu, ikun qed jirendi ħajja faċli għal traffikanti tad-droga billi xhieda importanti jgħidu li ma qed jiftakru xejn.
(Ara d-Deċiżjoni fl-intier tagħha bħala appendiċi fl-aħħar ta' din is-sentenza).

21. Kemm l-imputat kif ukoll ix-xhud isemmu l-Ġimgħa 17 t'April 1998 bħala l-jum li fih iltaqgħu x-Xgħajra ta' Bormla (ara fol.7 u fol.108). L-imputat jirreferi għax-xhud bħala Joe – l-istess isem tax-xhud waqt li x-xhud jireferi għall-imputat bħala l-persuna tal-Metro li ltaqa' miegħu fix-Xgħajra ta' Bormla. (fol.108). L-imputat jgħid li Joe talab lil Trevor sabiex imur għand il-Lembut bil-flus. Ix-xhud jgħid li lil dan tal-Metro tah karta ta' għoxrin lira. L-imputat jgħid li meta mar għand il-Lembut dan ma keinx id-dar u Joe baqa' isfel u jien (l-imputat) tlajt fuq. (fol.8) Min-naħa l-oħra, dejjem fl-istess jum, ix-xhud jgħid ' Dan tal-Metro qal li xtaq jinqeda u morna għand il-Lembut ta' Bormla' (fol.108).

22. L-imputat qal ukoll:

'Dak il-ħin stess jiena, Joe u Trevor wassalna lil Joe l-Isptar. Joe kien ġie x-Xgħajra ta' Bormla għall-ħabta tan-nofs siegħa u meta wasslnieh lejn l-Isptar kienu għall-ħabta tas-seigħa u nofs ta' wara nofs in-nhar.' (fol.8) Min-nħaa l-oħra ix-xhud kein stqarr: 'Lil dan tal-Metro jien għidtlu biex iwasslni d-Detox' u aktar 'l isfel fl-istess paġina 'Jien kont għidtilhom biex iwassluni l-Isptar.' (Ara fol.108).

23. Ix-xhud qal li tal-Metro kien ġablu żewġ pakketti minn għand il-Lembut (qabbel ma' l-istqarrija ta' l-imputat fejn hu qal li kien mar ma' dan ix-xhud għand il-Lembut u waqt li x-xhud baqa' isfel, l-imputat tela' fuq (fol.8)).

24. Ix-xhud qal li 'Aħna ddeċidejna li bil-flus il-foloz li kien fadal nixtru erba' pakketti u naqsmuhom flimkien. Trevor tela' għand il-Lembut u ġab erba' pakketti eroina ta' l-għaxra 'l wieħed bil-flus foloz li kien fadal jiġifieri erbgħin lira. Aħna sajjarnieha u ħadnieha flimkien.'

25. Minn dan kollu l-Qorti qed tikkonkludi li safejn għandu x'jaqsam ma' imputazzjonijiet dwar il-pussess jew il-fornitura ta' droga, mix-xhieda ġuramentata mogħtija waqt l-inkjesta jirriżulta li l-imputat kien avviċina lil-Lembut u xtara u d-droga għal ħadd ieħor kif ukoll li qasam din id-

droga ma’ ħadd ieħor imqar jekk dan kollu l-imputat innegah fl-istqarrija tiegħu.

26. Għalhekk il-Qorti qed tikkonkludi li l-Prosekuzzjoni ppruvat kemm l-ewwel kif ukoll it-tieni imputazzjoni fil-konfront ta’ l-imputat.

27. Dwar il-pussess tal-valium, a fol.109, mill-istqarrija ġuramentata ta’ Joseph Attard, jirriżulta li persuna oħra – mhux l-imputat – kienet ġabet dawn il-valium u li dawn inqasmu bejniethom. L-imputat ma kellux permess li jkollu l-valium u dank if jirriżulta mix-xhieda ta’ Clifford Cauchi a fol.86 tal-proċess. Għaldaqstant il-Qorti qed tiddeċiedi li l-Prosekuzzjoni ppruvat it-tielet imputazzjoni.

Imputazzjonijiet (d) u (e) u Artikoli ta’ l-Avukat Ġenerali – 45 u 46 tal-Kap 204; 17(b)(c, 20, 23 u 533 tal-Kap 9.

28. Dwar il-pussess ta’ flus falsifikati, il-Prosekuzzjoni ppruvat l-element materjali. Iżda l-Qorti ma tistax tistrieħ fuq ix-xhieda ġuramentata minħabba li din tapplika fil-Liġi speċjali (Kapijiet 31 u 101 biss) u ma tgħoddx għal Kap 204. L-imptutat innega li kien jaf fl-istqarrija tiegħu u jidher li l-persuna li ċċirkulathom kienet persuna oħra imsemmija a fol.107 u 108 u x-xhud Joe Attard. Minħabba nuqqas ta’ provi, il-Qorti qed tillibera lill-imputat mill-imputazzjonijiet (d) u (e) li għalihom l-Avukat Ġenerali ta’ l-artikoli hawn fuq imsemmija

Konklużjoni

29. Il-Qorti, wara li rat l-artikolu 17(f) u 17(h) tal-Kap 9, it-Taqsimiet 4 u 6, l-artikoli 22(1)(a), 22(2)(b)(i)(ii), u 22(1B) tal-Kap 101 u r-regolamenti 4 u 9 tal-GN 292/1939, ir-regolament 3(1) ta’ l-Avviż Legali 22/1985, l-artikoli 40A, 120A(1)(a), 120A(2)(b)(ii) tal-Kap 31, kif ukoll l-aritkoli 45, 46 tal-Kap 204, u l-artikoli 17(b)(c), 20, 23, u 533 tal-Kap 9, qed issib lill-imputat ħati ta’ l-ewwel, tat-tieni, u tat-tielet imputazzjoni bit-tieni imputazzjoni assorbita fl-ewwel waħda u qed tilliberah mir-raba’ u l-ħames imputazzjoni.

30. Dwar il-piena, il-Qorti qieset il-fatti kollha b'mod speċjali, fil-każ ta' l-imputat, bniedem li qed ifittex li jehles mid-droga malajr kemm jista' jkun. Il-Qorti qed tqis it-trapass taż-żmien, li sar (a) parti minnu minħabba li x-xhud prinċipali kien għadu għaddej proċeduri hu stess; (b) u parti minnu minħabba assenzi ta' l-imputat. Il-Qorti għalhekk qed tapplika l-proviso li kien introdott bl-Att XVI tas-sena 2006 taħt l-artikolu 22 tal-Kap 101 u qed tikkundanna lill-imputat iħallas multa ta' 698 Ewro. Din il-multa tista' titħallas b'rati ta' 117-il Ewro fix-xahar bl-ewwel pagament iseħħ fi żmien erba' ġimgħat mil-lum. Fin-nuqqas ta' ħlas ta' xi pagament, il-bilanċ jitħallas kollu f'daqqa. Jekk xi parti mill-multa ma titħallasx, din tinbidel f'jum priġuernija għal kull 11.65 Ewros li ma jitħallsux.

31. Il-Qorti mhix tappliak l-artikolu 533 tal-Kap 9 għaliex l-uniku espert li tqabbad kellu x'jaqsam ma' l-allegazzjoni li l-flus użati kienu foloz u l-Qorti lliberat lill-imputat minn dawn iż-żewġ imputazzjonijiet.

MAĠISTRAT

APPENDIĊI

(Paragrafu 20 tas-sentenza.)

Deċiżjoni tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem

SECOND SECTION

DECISION
AS TO THE ADMISSIBILITY OF
Application no. 51760/99
by Carmel CAMILLERI
against **MALTA**

The European Court of Human Rights (Second Section), sitting on 16 March 2000 as a Chamber composed of
Mr C.L.Rozakis, *President*,
Mr M.Fischbach,
Mr B.Conforti,
Mr G.Bonello,
Mrs V.Strážnická,
Mrs M.Tsatsa-Nikolovska,
Mr E. Levits, *judges*,
and E. Fribergh, *Section Registrar*,
Having regard to the above application introduced on 10 September 1999 and registered on 12 October 1999,
Having deliberated, decides as follows:

THE FACTS

The applicant is a Maltese national, born in 1953 and living in Valletta, **Malta**. He is represented before the Court by Dr J. Herrera and Dr J. Giglio, lawyers practising in **Malta.**

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was charged before the Court of Magistrates with possession of and trafficking in heroin while in prison.
The prosecution case relied on a signed statement which one of the prisoners, G.F., made under caution to a police inspector on 30 November 1991 accusing the applicant of having supplied him with drugs in the confines of the prison. G. F. confirmed his statement under oath before an investigating magistrate who came to the prison to interview him on 1 December 1991.
G.F. later retracted the incriminating statement in an affidavit sworn in prison before a notary and in the presence of the applicant on 7 January 1992. Part of the affidavit was made in reply to questions put to him by the applicant's lawyer.
At the applicant's trial G.F. confirmed that he had revoked the statement made to the investigating magistrate. He stated that he was under the influence of drugs at the time and could not reason properly. G.F. was cross-examined as to his statement by the applicant's counsel. A copy of the impugned statement was produced in court.
Counsel for the applicant requested the Court of Magistrates to rule G.F.'s statement inadmissible. The request was rejected. With reference to the provisions of the Criminal Code, the Court of Magistrates decided that G.F.'s statement to the investigating magistrate could be admitted in evidence given that it took the form of a properly drawn up *procès verbal* containing the deponent's allegations against the applicant. With respect to G.F.'s testimony in court, the Court of Magistrates found:
"[That] the presence of the accused when the affidavit was drawn up indicates that [the applicant] wanted to feel assured that what [G.F.] had previously declared in his absence was going to be revoked by [G.F.] by means of the affidavit. The words of [G.F.'s] companions: 'What have you done to [the applicant]' were indicative of what is considered among prison circles as lack of 'camaraderie' on the part of [G.F.] who had revealed what was going on in prison. By his testimony in court, by his willingness to revoke his original testimony, [G.F.] continued to reveal that his only interest lay in trying to repair the harm he had

caused. He maintains that on the day he made the statement he was not conscious of what he was saying; he said that he did not even remember that he testified before the Inquiring Magistrate and that he was under the influence of pills he was taking. This Court cannot believe him in any way: the testimony which he made before the Inquiring Magistrate was very detailed. A person who is not conscious of what he says, who does notknow what he says, would not provide all the details which [G.F.] gave when he testified. The Court can understand [G.F.'s] preoccupation since it is well-known that it is very difficult to testify in the presence of the person who has supplied him with certain illicit drugs regarding some fact. And what had originally prompted him to denounce the [applicant] was the fact that he had gone to hospital and left [G.F.] without heroin."

In its judgment of 7 April 1994 the Court of Magistrates found the applicant guilty as charged and sentenced him to a term of imprisonment of 5 years and a fine of 2000 Maltese Liras.

The applicant appealed to the Court of Criminal Appeal. Before the Court of Criminal Appeal the applicant's counsel contended that G.F. was not a credible witness since he had been found guilty of perjury on two occasions back in 1991 and was barred from giving evidence, as prescribed by the Civil Code. Counsel further asserted that G.F.'s statement to the investigating magistrate should not have been admitted in evidence at the trial on account of the fact that G.F. had testified before the investigating magistrate in the applicant's absence. In counsel's submission, and with reference to section 646(1) of the Criminal Code, a witness' statement must be given orally to the trial court as a condition of its admissibility.

On 2 February 1996 the Court of Criminal Appeal dismissed the applicant's appeal. The court observed that G.F. had in fact appeared before the Court of Magistrates and was cross-examined as to the content of the impugned statement which he had confirmed before the investigating magistrate. The court further observed that G.F.'s evidence was properly ruled admissible since it was a declaration within the meaning of the Dangerous

Drugs Act. In addition, the bar on G.F. giving testimony did not extend to the giving of testimony before a court of law including before an investigating magistrate.
The applicant appealed to the First Hall of the Civil Court, which rejected his appeal in a judgment dated 27 June 1997. According to the First Hall of the Civil Court, and with reference to Convention case-law, the criminal proceedings against the applicant and in the way in which the testimony of G.F. were given were fair.
The applicant subsequently appealed to the Constitutional Court, arguing that his right to be present throughout the whole of the criminal proceedings against him had been violated on account of his absence at the time when G.F. deposed before the investigating magistrate. Counsel for the applicant referred the court to Article 39 of the Maltese Constitution and to the case-law pertaining to the Strasbourg's Court's interpretation of Article 6 of the Convention.
In its judgment of 31 May 1999 the Constitutional Court dismissed the applicant's appeal. The court ruled that G.F.'s statement to the investigating magistrate had been legally obtained and was admissible in evidence against the applicant. Moreover, G.F. had appeared before the trial judge and his evidence was open to challenge by the defence. The Court of Magistrates properly exercised its discretion to admit G.F.'s statement in evidence, it being noted that the court had weighed in the balance the fact that G.F. has retracted the incriminating statement before a notary. In the opinion of the Constitutional Court:
"It is not within [its] competence to interfere in the appreciation of the evidence as long as it is satisfied that the proceedings were carried out correctly and that they respected the principle of 'equality of arms' and granted [the applicant] the right to an 'adversarial trial' during which , at every moment, prosecution and defence would have every opportunity to control all the evidence produced and the submissions made during the proceedings ... In the case under examination the Court does not perceive anything which might counter its conviction that [the applicant] had every opportunity to verify every piece of evidence adduced against him and in

particular to cross-examine the person who had made his depositions elsewhere .... .

COMPLAINT

The applicant complains that he was denied a fair trial, in breach of Article 6 of the Convention.

THE LAW

The applicant maintains that he was denied his right to a fair hearing in breach of Article 6 of the Convention, which provides in relevant part:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...

(...)

3. Everyone charged with a criminal offence has the following minimum rights:

(...)

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(...)”

In the applicant’s submission, he was convicted solely on the basis of an incriminating statement made by G.F. in his absence. That statement was in fact retracted by G.F. and the latter again dissociated himself from its contents in open court. Notwithstanding, the Court of Magistrates chose to give credence to the statement. In effect, his right to cross-examine G.F. had been rendered illusory and his right to a fair trial violated in consequence.

The Court observes that the guarantees of paragraph 3(d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of that Article. It will thus consider the applicant’s complaint under the two provisions taken together (see, among many other authorities, the Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is not to give a ruling as towhether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole,

including the way in which evidence was taken, were fair (see the Doorson v. the Netherlands judgment of 26 March 1996*, Reports of Judgments and Decisions* 1996-II, p. 470, § 67; the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34). Furthermore, the Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict (see the above-mentioned Doorson judgment, p. 472, § 78).

The Court further recalls that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings (see the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43; the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 51).

With these principles in mind the Court notes that the applicant was able to call G.F. at his trial before the Court of Magistrates and to cross-examine him as to the reasons which led him to make the incriminating statement. In the Court’s opinion the opportunity allowed to the applicant to undermine the probative value of that statement more than compensated for any alleged disadvantage which may have resulted from the fact that the statement was made in circumstances in which he was unable to challenge its veracity. It cannot be maintained therefore that the rights of the defence were not secured at the trial.

The Court does not accept the applicant’s submission that the decision of the Court of Magistrates to convict him

solely on the strength of the impeached statement in reality curtailed his defence rights. It is to be noted that the court had to make a choice between competing versions of the truth. It had the advantage of hearing the oral testimony of G.F. and observing at first hand his demeanour in the witness box under cross-examination. The court gave detailed reasons for its decision to attach weight to G.F.'s accusatory statement before the investigating magistrate, which reasons were reviewed and upheld on appeal. The Court for its part notes that G.F. first gave his statement on 30 November 1991 of his own volition and under caution to a police inspector. The following day he confirmed the content of that statement under oath before the investigating magistrate. G.F.'s consistency of approach over this period would strongly argue against his assertion that he was not lucid at the material time. Moreover, the Court of Magistrates could properly have regard to the fact that the applicant himself was present when G.F. retracted his statement before the notary on 7 January 1992, implying that some pressure may have been brought to bear on G.F. to withdraw the earlier statement.

The Court considers therefore that the verdict of the Court of Magistrates cannot in the circumstances be deemed arbitrary or manifestly unreasonable, all the more so since it was affirmed by three instances on appeal.

Having regard to the above considerations, the Court concludes that the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

ErikFribergh ChristosRozakis

Registrar President

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< Sentenza Finali >

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