MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 5 th March, 2009

Rikors Number. 56/2008

Aweys Mani **KHAYRE**

vs

AVUKAT ĠENERALI u l-Kummissarju tal-Pulizija

The Court:

Having taken cognizance of the Application filed by Aweys Maani Khayre on the 20th of November, 2008, by virtue of which and for the reasons therein mentioned, he requested that this Court (a) declare that he has suffered a breach of his fundamental human rights in terms of Article 39(8) of the Constitution of the Republic of Malta (hereinafter referred to as “the Constitution”) as well as

under Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), since the *khat* plants found in his possession on his arrival at Malta on the night between the 9th and the 10th of May, 2008, does not constitute the material element of any offence under Maltese law; (b) order that all criminal procedures taken against him be fortwith stopped and that he be immediately released from custody; (c) condemn respondents to pay him aqeduate compensation for the said violations; and (d) issue such orders and directives as it deems necessary in order to safeguard the full enjoyment of his fundamental rights;

Having taken cognizance of the Reply filed jointly by respondents on December 3rd., 2008, whereby, by way of preliminary pleas, they claim that the application is untimely owing to the fact that criminal proceedings against applicant are still pending and the provisions which the applicant relies upon as having been breached apply only after criminal proceedings have been concluded and not before. Furthermore, respondents submit that the Court should refrain from exercising its special "constitutional" and "conventional" jurisdiction, in terms of Article 46(2) of the Constitution and of Article 4(2) of the Convention, owing to the fact that the applicant has not yet been convicted of any offence and he has not exhausted all the ordinary remedies available to him at law for a proper defence against the charges profferred against him. As to the merits, respondents deny that they have in any way breached any of the applicant's fundamental human rights he claims to have been violated;

Having ruled that all proceedings of this case be heard in English, and that, before proceeding further into the merits, this Court should rule on the validity of the two preliminary pleas;

Having noted the joint declaration made by counsel to both parties during the hearing of the 12th. Of December,

2008, as to the facts of the case relevant to the points at issue;

Having ordered that parties file their submissions by way of written pleadings;

Having seen the Note of Submissions filed by respondents on the 23rd. December, 2008[1], relating to the two preliminary pleas under examination;

Having seen the Note of Submissions filed by applicant on January 2nd., 2009[2], in reply to those of respondents;

Having heard further oral submissions by counsel to the parties at the hearing of January 29th., 2009;

Having put off the case for to-day's hearing for judgment on the said two preliminary pleas;

Having Considered:

That the applicant claims to have suffered a breach of his fundamental human right protecting him from conviction for an act or omission which did, not, at the time it took place, constitute an offence in terms of law. Applicant bases his claim both under the Constitution as well as under the Convention. He claims that criminal proceedings currently taken against him before the Magistrates' Court as a Court of Criminal Judicature constitute a breach of this fundamental principle of legality. He is therefore also requesting the immediate termination of those proceedings as well as the award of adequate compensation;

That respondents plead that this action is untimely, in that any action of an alleged violation of one's fundamental rights under the provisions of law relied upon by applicant can only be instituted once criminal proceedings have

[1] Pgs. 21 – 5 of the acts
[2] Pgs. 27 – 9 of the acts

been concluded and only if, on their conclusion, the applicant would have been convicted. They, therefore, enjoin the Court to consider refusing to exercise its special "constitutional" and "conventional" jurisdiction on the grounds that the action filed by applicant is premature and, in any case, he has as yet to exhaust all the ordinary remedies (still) available to him under the "ordinary" law in raising a proper defence to the charges levelled against him;

This judgment relates to an examination of the said preliminary pleas which, because of the nature and circumstances surrounding the present case, are intertwined and shall be treated jointly for the purpose of this exercise;

As to the facts of the case which are relevant to the issue at this juncture, the parties are generally in agreement. Applicant arrived in Malta during the night between the ninth (9th) and the tenth (10th) of May of last year, and was found to be in possession, amnongst other things, of fourteen (14) kilogrammes of *khat* (an indigenous plant) leaves. He was arraigned in Court the following day and charged with importing a restricted and psychotropic substance (*cathinone* and *cathine*) without being duly licensed to that effect, as well as of being in possession of such dangerous substance under circumstances that indicate that it was not for his exclusive use. On arraignment, applicant denied the charges. He was remanded in custody and denied bail. He is being detained at the Corradino Correctional Facility. During the hearing of the 28th. May, 2008[3], before the Mgistrates Court as a Court of Criminal Inquiry, a court-appointed expert expressed himself in a way which suggested that, by merely chewing fresh *khat* leaves, one cannot extract specifically and solely the substances *cathine* or *cathinone*;

That as to the legal considerations relating to the pleas under discussion, it is to be pointed out that the pleas

[3] Doc "A", pgs. 3 – 7 of the acts

under discussion are based on two related issues. Both are intimately connected. Respondents suggest that the action filed by the applicant cannot succeed because the (criminal) procedures taken against him are not yet concluded and no judgment has been pronounced in his regard. For this reason, they claim that, besides not having as yet exhausted all the procedural and substantive remedies available to him in the course of those same proceedings, it is not open for any person to claim a breach of a fundamental right under the provisions of law relied upon by the applicant, unless and until a conviction has been handed down over a criminal charge;

That when considering whether or not to exercise its exclusive jurisdiction, this Court has to be wary not to relinquish it unless and until it is fully convinced that there exist sufficient reasons which dictate that it should do so, considering that the exercise of such a discretion is an exception to the basic rule and duty of any court to hear and decide any question validly brought to its attention. Nevertheless, such a discretion has been provided for in the basic law of Malta expressly in order to enhance this special and specific jurisdiction, chielfly to protect it from unneccessary recourse where other remedies are available to the aggrieved party;

That the circumstances which a court has to consider before deciding to exercise its discretion not to hear a case on a "constitutional" or "conventinal" issue are now well established in our legal system and this Court is refraining from elaborating further other than to refer to judgements pronounced by the country's highest tribunals[4];

That when it is claimed that an 'alternative ordinary remedy' is available to the aggrieved party, it has to be shown (by the party alleging such remedy) that the remedy referred to is accesible, satisfactory, effective and adequate to address the grievance[5]. However, it does

[4] E.g. Kons. **16.1.2006** in the case ***Olena Tretyak vs Direttur taċ-Ċittadinanza u Expatriate Affairs***

[5] Kons. **5.4.1991** in the case ***Vella vs Kummissarju tal-Pulizija et*** (Kollez. Vol: **LXXV.i.106**)

not have to be shown that such a remedy is assured or guaranteed, as long as the manner of achieving it can be pursued in a practical, effective and meaningful manner[6];

That in their learned submissions, respondents argue that in no way can applicant succeed in his action at the current state of affairs, since otherwise one would be pronouncing oneself prematurely on an issue which is as yet undefined. They further argue that it is established jurisprudence that any alleged breach of the principle of certainty of law – as embodied in the two legal provisions upon which the applicant relies – can only be ascertained after due process and not while proceedings are still under way before the competent court;

That, on the other hand, applicant rebuts these arguments by claiming that they aim at a rigid and restrictive interpretation of the provisions invoked. He avers that the principle of *nulla poena sine previa lege* militates also against prosecutions (and not solely actual convictions) undertaken in the absence of an express legal sanction. He furthermore claims that, since during the time this Application was being heard, the Court of Criminal Inquiry has found that there exist sufficient grounds to prosecute him before the Court of Criminal Judicature, this committal amounts to a 'conviction' in terms of law and that he has no way whatsoever to contest that committal by any ordinary means or procedure. For these reasons, he submits that this Court should reject the respondents' preliminary pleas;

That it considers the arguments raised by respondents as both valid and pertinent to the examination of the current pleas. In fact, it is established that "The wording of Article 7(1) is limited to cases in which a person is 'found guilty', i.e. convicted, of a criminal offence. A prosecution that does not lead to a conviction cannot raise an issue under article 7 – at least not by means of an individual application"[7]. This position has also been upheld by

[6] P.A. Kons **9.3.1996** in the case ***Clifton Borġ vs Kummissarju tal-Pulizija*** (unpublished)
[7] Harris, Boyle & Warbrick *Law of the European Convention on Human Rights*, pg. 275

Maltese Courts, both when considering the alleged violation under the provisions of the Constitution[8] as well as when considering them under the provisions of the Convention[9]. It is also established that 'found guilty' has to be interpreted as understood by the law of the State where the particular court sits. It is evident that, in this present case, by no stretch of the imagination can one suggest that applicant has been so declared or found to be guilty, considering further that, under our system of law, he is still presumed to be innocent until convicted;

That from what this Court understands to be the present situation, the criminal procedures against applicant are as yet under way and no judgment has been handed down, either acquitting him or conviting him of the charges raised against him. This circumstance alone, in the light of the considerations just made, makes the inquiry into the alleged violations suffered by applicant utterly premature and of mere academic value, keeping in mind the specific legal provisions upon which the Application relies;

That even as regards the availability of other effective remedied, the Court finds that applicant has not yet exhausted such remedies nor reached a stage when he needs to have recourse to them. Some of these remedies are, as yet, untapped;

That, as to applicant's argument that his committal to criminal proceedings amounts to a 'conviction', the Court is not favourably inclined to accept such an interpretation. What the Court of Criminal Inquiry did by decreeing that there were sufficient grounds for the applicant's committal to prosecution and the Attorney General's decision that such prosecution was to take place summarily before the Magistrates Court as a Court of Criminal Judicature, do not, in this Court's considered opinion, amount to a pronouncement on the applicant's guilt, let alone to a conviction as correctly understood. As things stand, the applicant has been charged with an offence and he is

[8] Kons. **20.12.2000** in the case ***Benny sive Benigno Saliba vs Avukat Ġenerali et*** (Kollez. Vol: **LXXXIV.i.525**)
[9] P.A. Cons. TM **12.1.2006** in the case ***Mark Charles Kenneth Stephens vs Avukat Ġenerali***

entitled to rebut and defend himself against such charge, while still being presumed innocent at this juncture. Furthermore, his interpretation of the applicability of a redress against an alleged violation under article (1) of the Convention to his present situation does not seem to reflect a correct reading of that provision;

That, furthermore, the Court believes that some of the requests made by applicant in his Application amount to an unwarranted incursion into the jurisdiction of that court which, by the laws of Malta, is vested with the sole jurisdiction of deliberating and deciding on issues of the existence or otherwise of the elements of a crime and of the applicability or otherwise of the charges to the person accused thereof. In fact, the requests by the applicant seem to pre-empt the orderly and timely exercise by the competent court of criminal judicature of its legitimate functions and deprive it of its jurisdiction by way of a generic declaration based on an alleged violation of a fundamental human right *in abstracto*. In the proper exercise of its constitutional jurisdiction, this Court cannot usurp the specific competence vested by law in the various courts and tribunals set up under the Maltese legal system, nor may it substitute its discretion or judgment to theirs;

For the above-mentioned reasons, the Court hereby declares and decides:

To uphold the two preliminary pleas raised by respondents, and declares that it is availing itself of its discretion to decline to exercise its “constitutional” and its “conventional” jurisdiction in terms of article 46(2) of the Constitution and article 4(2) of the Convention, on the basis that the action filed by applicant is premature in that he has as yet not exhausted all the ordinary remedies still available to him to redress any ot the complaints raised by him in this Application; and

To dismiss the Application on the grounds above-mentioned, with costs against applicant, but entirely without prejudice to any remedy which applicant would be

entitled to request at the proper time and if the need arises.

Read and delivered

< Final Judgement >

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