MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
TONIO MALLIA

Seduta tal-15 ta' Ottubru, 2010

Rikors Numru. 30/2010

Khalif Id Ahmed

vs

Avukat Generali

The Court:

Having seen the application of Khalif Id Ahmed filed in the Maltese language on the 15th April, 2010, which reads as follows:

Illi hu gie arrestat fit-22 ta’ Lulju, 2006. Tressaq il-Qorti u l-kaz gie finalment deciz mill-Qorti tal-Appell fl-14 ta’ Lulju, 2009. Prattikament ghamel tlett snin mizmum il-habs. Dawn huma ekwivalenti ghal 4 snin u nofs habs b’kundanna.

Illi hu kien akkuzat li mporta l-Cat, haxix li ma taqax taht l-ebda ligi. Fil-fatt wara tlett snin gie liberat peress li l-fatt mhux reat, u dan mill-Qorti tal-Appell.

Illi l-kaz fih innifsu ma kienx jipprezenta diffikultajiet kbar ta' provi. Kien hemm l-introduzzjoni f'Malta, l-esponenti kellu l-pussess, u kien jonqos biss il-prova xjentifika. Mal-ewwel instab li din kienet il-haxixa Cat, u ma kinitx prevista mil-ligi bhala droga.

Illi minkejja li dak kollu kien manifest, l-esponenti kellu jghaddi zmien twil il-habs u l-process tieghu ha t-tul taz-zmien aktar minn dak li hu ragjonevoli.

Mhux hekk biss. Imma bl-emenda li saret fil-ligi tal-procedura penali, kull kumpilazzjoni trid tmur ghand l-Avukat Generali u ddum certu zmien u wara terga' tmur quddiem il-Qorti tal-Magistrati b'rinviju. Il-Qorti taghti differiment minn qabel, u ghalhekk l-istess Qorti lanqas tista' tghaggel u thaffef kaz ta' wiehed li jinsab arrestat. Mela wiehed li qieghed barra jidher kull xahar u nofs, u wiehed li qieghed arrestat jidher ukoll kull xahar u nofs. Ghalhekk ma jistax jinghad li l-istat qed juza special diligence fejn jidhlu l-arrestati.

Illi kunsidrat it-tul taz-zmien, in-nuqqas ta' special diligence li tohrog mil-ligi, u l-fatt l-esponenti kien taht arrest, u l-fatt ma kienx jikkostitwixxi reat, kien hemm ksur tal-Artiklu 6 tal-Konvenzjoni Ewropea dwar id-drittijiet tal-Biedem.

Illi minhabba z-zmien li dam arrestat l-esponenti sofra danni kemm materjali u kemm morali.

Illi huwa ghandu dritt li jkun trattat bhala bniedem daqs kull bniedem iehor, irrispettivament minn kif jinstab Malta.

Ghaldaqstant l-esponenti jitlob bir-rispett li din l-Onorabbli Qorti, tenut kont tac-cirkostanzi hawn fuq imsemmija, prevja l-allegazzjoni tal-atti processwali quddiem il-Qrati Kriminali (1) tiddikjara li kien hemm ksur tal-Artiklu 6 tal-Konvenzjoni Ewropea dwar process fi zmien ragjonevoli

fil-konfront tal-esponenti u (2) taghtih kumpens pekunjarju ghal tali vjolazzjoni.

Having seen the reply of the respondant, filed also in the Maltese language which reads as follows:

Illi fir-rikors promotur, ir-rikorrent qieghed jallega li gew lezi d-drittijiet fundamentali tieghu kif kontemplati fl-Artikolu 6 tal-Konvenzjoni Ewropea u qieghed jitlob li jinghata kumpens prekunjarju. Illi in linea preliminari, din l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-kompetenza Kostituzzjonali taghha ai termini tal-proviso tas-subartikolu (2) tal-Artikolu 46 tal-Kostituzzjoni ta' Malta u tal-proviso tal-Artikolu 4(2) tal-Kap. 319 u dan in vista tal-fatt li mit-talbiet tar-rikorrent jirrizulta b'mod car li l-ghan tar-rikorrent huwa li jigu likwidati danni peress li, skond huwa, inzamm il-habs inutilment ghal tlett snin.

Illi minghajr pregudizzju ghas-suespost u fil-mertu, it-talbiet tar-rikorrent ghandhom jigu michuda peress li l-allegazzjonijiet u l-pretensjonijiet tar-rikorrent huma kollha infondati fil-fatt u fid-dritt ghar-ragunijiet segwenti li qed jigu elenkati minghajr pregudizzju ghal xulxin:

IL-FATTI

Il-fatti kif maghrufa lill-esponenti huma s-segwenti:

1. Illi r-rikorrent huwa ta' nazzjonalita' Somala;

2. Ir-rikorrent tressaq il-Qorti akkuzat talli fil-lejl bejn il-21 u t-22 ta' Lulju, 2006, importa droga psikotropika u ristretta cioe' *cathinone* u *cathine* minghajr awtorizzazzjoni legali u dan bi ksur tad-dispozizzjonijiet tal-Kap. 31 tal-Ligijiet ta' Malta, avviz legali numru 22 tas-sena 1985, u talli kien fil-pussess tal-istess droga f'cirkostanzi li juru li l-pussess ta' tali droga ma kienx ghall-uzu esklussiv tieghu;

3. Illi ghandu jigi rilevat li r-rikorrent gie bl-ajru mill-Olanda bi ftit inqas minn tnax-il kilogramma weraq tal-pjanta *khat*. Dawn il-weraq kienu mgezwra fil-weraq tal-banana u f'tissue sabiex jinzammu friski. Ir-raguni ghal

dan hija li jekk il-weraq tal-pjanta *khat* ma jigux ipprezervati sewwa, il-pjanta tispicca b'weraq bla sugu ghaliex id-degradazzjoni tal-istess weraq hija wahda li tissuccedi b'mod accelerat hafna;

4. Illi r-rikorrent ma nghatax il-helsien mill-arrest ai termini tal-Artikolu 575 tal-Kap. 9 u nzamm il-habs stante li ma setax jaghti lill-Onorabbli Qorti garanzija sufficjenti li ma jahrabx minn Malta sabiex jinghata l-helsien mill-arrest preventiv li jidher ghall-process.

5. Illi l-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja dehrilha li kien hemm ragunijiet bizzejjed sabiex ir-rikorrenti nomine jitqieghed taht att ta' akkuza;

6. Illi l-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fit-8 ta' Mejju, 2009, sabet lir-rikorrent hati tal-akkuzi migjuba kontrih u kkundannatu ghal sitt xhur prigunerija u multa ta' erba' mija u sitta u sittin Ewro (€466), u kkundannatu jhallas is-somma ta' mija u sitta u erbghin Ewro u wiehed u hamsin centezmu (€146.51) rapprezentanti spejjez inkorsi a tenur tal-artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta;

7. Illi r-rikorrent interpona appell quddiem il-Qorti tal-Appell Kriminali li permezz tad-decizjoni taghha tal-14 ta' Lulju, 2009, laqghet l-appell interpost u lliberat lir-rikorrent mill-akkuzi migjuba kontrih u dan peress li ma kinitx tirrizulta l-*mens rea*.

DWAR L-ALLEGAT KSUR TA' L-ARTIKOLU 6 TAL-KONVENZJONI EWROPEA

1. Illi filwaqt li r-rikorrent gie misjub hati u kkundannat mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, il-Qorti tal-Appell Kriminali, fuq appell tieghu, illiberatu mill-akkuzi migjuba kontrih. Ghalhekk, l-akkuza u t-tezi tal-Prosekuzzjoni kienet komfortata mid-decizjoni tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali li sabet lir-rikorrent hati fit-8 ta' Mejju, 2009.

2. Illi minghajr pregudizzju ghas-suespost, ma sehhet l-ebda lezjoni tad-drittijiet fundamentali tar-rikorrent hekk kif sancit fl-Artikolu 6 tal-Konvenzjoni Ewropea.

Illi huwa evidenti minn qari tas-sentenza tal-Qorti tal-Appell Kriminali ta' l-14 ta' Lulju, 2009 li dik l-Onorabbli Qorti dehrilha li fil-kaz li kienet qeghda tezamina ma kienx hemm il-*mens rea* tar-rikorrent ghat-twettiq tar-reat imputat u mhux li r-rikorrent ma importax droga psikotropika u ristretta, cioe' *cathinone* u *cathine* minghajr awtorizzazzjoni legali u dan bi ksur tad-dispozizzjonijiet tal-Kap. 31 tal-Ligijiet ta' Malta. Avviz Legali numru 22 tas-sena 1985, u li ma kienx fil-pussess tal-istess droga f'cirkostanzi li juru l-pussess ta' tali droga ma kienx ghall-uzu esklussiv tieghu.

Il-fatt li r-rikorrent gie lliberat mill-akkuzi migjuba kontrih mill-Qorti tal-Appell, ma jista' qatt iwassal ghall-konkluzjoni awtomatika li huwa gie akkuzat kapriciosament jew li x-xhieda ma tressqux fi zmien ragjonevoli jew li ma kellux smigh xieraq.

3. Illi inoltre b'referenza ghall-fatt li r-rikorrent inzamm detenut fil-habs dan ma kienx attribwibbli ghan-natura tal-akkuza li biha kien qieghed jigi akkuzat.

L-unika raguni kienet ghaliex l-istess difiza ma kkonvincietx lill-Onorabbli Qorti u ma gabitx garanziji sufficjenti li r-rikorrent ma jahrabx minn Malta jekk jinghata l-helsien mill-arrest preventiv. Infatti, ir-rikorrent ma kellu l-ebda rabtiet f'pajjizna u ma setax ghalhekk jissodisfa l-Onorabbli Qorti li kien jista' jissodisfa d-dispozizzjoni tal-Artikolu 575 tal-Kap. 9. Kien minhabba f'hekk li l-Qorti m'ordnatx il-helsien mill-arrest preventiv.

Konsegwentement, jekk ir-rikorrent sofra xi danni (li l-esponenti qed jikkontestaw kategorikament) dan kien rizultat tal-agir tieghu stess u b'ebda mod ma jistghu jigu addebitati ghal xi azzjoni tal-esponent li dejjem agixxa fil-parametri tal-ligi;

4. Salv Eccezzjoniiet ulterjuri.

Ghaldaqstant, l-esponent umilment jitlob lil din l-Onorabbli Qorti joghgobha tichad ir-rikors tar-rikorrent; bl-ispejjez kontra l-istess rikorrent.

Having seen the records of the criminal proceedings in the names “The Police vs Khalif Id Ahmed” disposed of by the Court of Criminal Appeal on the 14th July, 2009;

Having seen all the acts and documents filed in this case and the Notes of Submissions filed by the parties;

Having heard the oral submissions of the parties;

Considers;

That in this case, applicant was charged before the criminal courts of having in these islands imported and been in possession of a psychotropic and restricted drug (*cathinone*) without a special authorization by the Superintendent of Public Health in breach of local laws. He was found guilty of such an offence by the Courts of Magistrates (Malta) as a Court of Criminal Judicature on the 8th May, 2009, but the court of Criminal Appeal revoked the judgement on the 14th July, 2009, and declared the applicant to be not guilty of the charge. The Court of Criminal Appeal revoked the judgement of the inferior courts on the grounds that while the component chemicals derived from the imported plant are “controlled substances”, the plant itself was not so controlled and its importation was not, therefore, prohibited. The Court followed the reasoning given in an earlier judgement, “The Police vs Aweys Maani Khayre”, decided on the 3rd July, 2009, which had also arrived at such a conclusion.

It results that during the pendency of these proceedings, applicant was denied bail primarily because he did not have a fixed abode in these islands and he had no family in Malta, and it was thus feared that he would abscond from these islands and from justice; from the day of his arrest to his final acquital, applicant spent same three years in jail.

Applicant is claiming that given the nature of the offence he was accused of, a three year process was too long, and he is also claiming a violation of his rights under article 6 of the European Convention of Human Rights, because local law does not provide for a speedier trial in the case of an accused held under preventive custody.

By virtue of his first complaint, applicant argues that his case turned solely on scientific evidence to determine whether the plant imported was a prohibited drug or not, and the case should not have, therefore, taken three years to be decided.

On the issue of time taken to determine a criminal case, this Court in the case "Joseph Attard vs Attorney General", decided on the 8th June, 2000, set out the following principles which are to serve as guidelines for the court to decide whether there was an unreasonable delay. The Court said:

"*Il-Kostituzzjoni ta' Malta [Art. 39] kif ukoll il-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem [Art. 6] jiggarantixxu lil kull persuna akkuzata b'reat kriminali smigh xieraq fi zmien ragjonevoli. Dan hu minhabba:*

- *Id-dewmien ipoggi fil-periklu l-**effettivita'** u l-kredibilita' tal-gustizzja [Ara **H. vs France**, Qorti, 24 ta' ta' Ottubru, 1989];*

- *Hemm bzonn li jigi assigurat lill-akkuzat l-**opportunita'** ta' difiza xierqa u effettiva [Ara **Stephanos Stavros – The guarantees for Accused Persons under Article 6 of the European Convention on Human Rights** – pagni 77 et: "The right to a speedy trial has traditionally been perceived as protecting two basic rights of the accused. First the accused should not for an unduly long period remain in a state of uncertainty about his fate or be subjected to a series of disabilities normally associated with the initiation of criminal proceedings. Secondly speedly proceedings are designed to safeguard the right of the accused to mount an effective defence; the*

passage of time may result in the loss of exculpatory evidence".

- *Id-dewmien ihalli lill-akkuzat ghal zmien twil fi stat ta' incertezza fuq il-verdett tal-innocenza jew ir-reita' tieghu u naturalment id-destin tieghu;*

- *Proceduri Kriminali fit-tul ghandu effett negattiv fuq ir-reputazzjoni tal-akkuzat.*

"Biex jigi determinat jekk kienx hemm dewmien irragjonevoli kull kaz irid jigi studjat fuq il-mertu tieghu u d-decizjonijiet ta' Strasbourg huma indikattivi u mhux konkluzivi. ***F'Harris, Boyle & Warbrich, Law of the European Convention on Human Rights****, 1995, p. 228 insibu: "Although consistently acting on the basis that each case must be considered on its facts, so that there is no objective limit to the length of time that can be taken, in all cases which have taken over eight yours or more, the court has in fact always found a breach of Art. 6(1)". Iz-zmien jibda jiddekorri minn meta l-akkuzat ikun rinfaccjat b'cirkostanzi tali li "substantially affect the situation of the suspect". Normalment dan jirriferixxi ghall-mument meta persuna tkun infurmata dwar ir-reat li fuqu qeghda tigi investigata jew minn meta tigi arrestata. Mhix rilevanti d-data ta' meta sar ir-reat, jew meta ssir l-inkjesta magisterjali. Il-gurisprudenza stabbiliet tlett kriterji principali indikattivi tar-ragjonevolezza ta' dan it-tul taz-zmien:*

- *Il-komplessita' tal-kaz;*

- *Il-mod kif il-proceduri kriminali gew kondotti mill-Qorti; hawn wiehed irid iqis il-kwantita' enormi ta' xoghol li jinsabu mghafsa bih il-Qrati taghna, u l-fatt li ghandha tinghata precedenza lil min qieghed taht arrest preventiv; izda il-piz enormi tax-xoghol fuq il-Qorti, u l-fatt li l-Qorti ppruvat taghmel dak li hu umanament possibbli ma jwassalx ghal gustifikazzjoni ta' dewmien irragjonevoli li kull akkuzat ma ghandux ibati;*

▪ *Il-kondotta tal-applikant – hawn irid jinghad li ghalkemm b'rizultat ta' eccezzjonijiet u mossi tattici akkuzat jista' facilment itawwal il-kors tal-proceduri dawn ma ghandhomx jaffettwaw ir-ragjonevolezza tad-dewmien sakemm ma jkunux kapriccuzi jew frivoli, u naturalment fl-istess kriterju ta' dewmien ragjonevoli n-natura ta' dawn l-eccezzjonijiet iridu jittiehdu in konsiderazzjoni*".

This Court does not think that the merits of this case where as simple as pointed out by the applicant. Given the sudden influx of irregular migrants, especially from Somalia into these islands, the authorities where faced with a novel situation where certain "drugs" used as a matter of course by these people, started to be brought into Malta. The novelty of the situation arose because while the plant imported was not prohibited, components of the plant where, and the courts where initially faced with the delicate issue of deciding whether or not there was a breach of the law. The identification of the nature and content of the imported drug was easy to determine through scientific evidence, but the issue of the legalty of the act was not so easy. For a time, the criminal courts adopted a stand of treating such an act of importation as a breach of the law, this was so until the Court of Criminal Appeal in Khayre's case gave a very detailed and studied judgement which set the record straight. The Court in this case pointed out that:

"*To limit oneself to plants, our law, in the Dangerous Drugs Ordinance, targets specifically the opium poppy (papaver somniferum), the coca plant (Erythroxylum Coca) and the cannabis plant. However it cannot be said that any other drug which is listed in the schedule to either the Dangerous Drugs Ordinance or the Medical and Kindred Professions Ordinance (or regulations made thereunder), and which may occur naturally in some other plants, automatically renders that other plant "illegal", whether for purposes of possession (simple or aggravated) or for purposes of trafficking (which includes importation and cultivation). If that were to be the case, it would open a Pandora's box, rendering liable to prosecution people in possession of certain plants simply*

because the particular plant happens to contain, alone or in combination with other substances or alkaloids, a prohibited drug or substance.

He went on to state that the only exception to the above would occur where the mind of the agent – whether possessor or trafficker – was specifically directed to the possession of or trafficking in the drug naturally occurring in the plant. In other words there must be knowledge of the nature of the substance possessed or trafficked. This point was made by the Supreme Court of Canada in ***The Queen v Dunn****, overruling the decisions in the same procedures of both the County Court of Vancouver Island and the British Columbia Court of Appeal. The case concerned the sale of Mexican magic mushrooms – mentioned in the above excerpt from* ***Goodchild*** *– where the indictment charged trafficking in psilocybin. He went on to quote what Justice Mclntyre had to say in delivering the judgement of the entire Court*".

As a result of this judgement, the matter has been clarified, but the situation was certainly not so clear before the delivery of this learned judgement. This judgement was delivered in July 2009, and before that time, the issue was hotly debated before the criminal courts. Given the novelty of the issue and the complex legal arguments surrounding the case, one cannot say that three years to decide the case was excessive.

The second point is a bit more complex. As pointed out earlier, it is expected that cases involving persons under preventive arrest be treated with more *urgency* – "*ghandha tinghata precedenza lil min qieghed taht arrest*". It is also required that the proper authorities treat such cases with "special diligence". As applicant pointed out, however, when an accused is brought before the competent court and it proceeds with the compilation of evidence, the law does not provide for a speedy process in case of accused under detention, and the process of referral ('*rinviju*') operates in the same way, whether or not the accused is out on bail or in preventive custody. It is claimed by applicant, that the fact that the law does not

provide for a speedier process in the case of persons in preventive custody violates his right to have his case decided within a reasonable time.

This Court believes that there is a lot of sense in this argument, however, it does not feel that in this case this alleged procedural "defect" had an unduly prejudicially effect on the length of the proceedings. This Court has already pointed out that due to the novelty of the case, the time taken for the case to be decided, especially, by the Court of Magistrates, was a reasonable one. The applicant had arrived in Malta by air from the Netherlands, and was found to be carrying a quantity of Khat plants. He admitted to the Police that he had brought the plants into Malta for his own use and to distribute same among his Somali friends living in Malta. He stated that only Somalis eat Khat and that in Somali, Khat means 'salad'. It resulted, from a scientific examination of the plant, that the plant contained Cathine, a mild stimulant, subject to controls in Malta. The case was not an easy one to decide, and the courts had to refer to English case-law on matters which were similar, but not identical, to the case before them. Given the delicate situation, it cannot be said that the case was not treated with "special diligence". There could be instances where the fact that the law does not specifically allow for urgency in cases of accused held in preventive custody, might lead to the particular case being held to have been the object of an unreasonable delay, but given the circumstances of this case, this cannot be said to be so. The issue to be examined by this Court whenever a case of alleged delay is brought before it, is not to examine the applicable provisions of the law in vacum, but to examine whether, in that particular case, the law operated in such a way as to cause an unreasonable delay in the proceedings. In this case and on the facts, this Court does not hold that there was an inordinate delay in the determination of the criminal proceedings taken out against applicant. The case, as noted, was treated with due diligence, and it has to be noted that although the prosecution declared it had no further evidence on the 23rd October, 2008, it results that, on a number of occasions during further sittings before

the criminal court held for the benefit of defendant's evidence and/or submissions, defendant's chosen lawyer had failed to make an appearance, as a result of which little progress could be made. During the period taken by the prosecution for the compilation of evidence, a number of technical and scientific reports where needed to be done, and, as said, given the novelty of the situation, the Court does not bemoan the desire of the criminal court to be sure of the type and quality of the substance the accused was being charged with illegally importing into Malta.

Hence, for the above reasons, the Court dismisses the application of plaintiff, and denies the request for a remedy as requested.

Each party is to bear his own costs of the case.

< Sentenza Finali >

----------TMIEM----------