



**QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-29 ta' Frar, 2012

Referenza Kostituzzjonali Numru. 67/2011

The Police

vs

Nelson Arias

The Court,

Having seen the Constitutional reference from the Magistrates Court as a Court of Criminal Inquiry of the 18 October 2011 which states as follows:

Having seen Defence's request for a Constitutional Reference in the sitting of the 14.10.2011;

Seen records of the case;

Considers:

That most definitely the time within which accused could be held in preventive custody has elapsed, so the Court today is granting bail as per attached bail conditions;

Furthermore Court after going through the records of the case realised that there were certain instances – at least four, where no effective sitting was held due to the fact that Court had no interpreter to assist accused in translating the proceedings from the English into the Spanish language. An anomaly also exists in the records of the case, considering that Prosecuting Officer had declared that he had rested the case at least on three occasions dating back to 2009, and after such declaration Attorney General remitted a very lengthy request as per note at folio 158;

Therefore Court accedes to the request and refers this to the Constitutional Court, First Hall, Civil Court, to examine such reference;

Having seen the reply submitted by the Attorney General and the Commissioner of Police which was filed in Maltese and is being reproduced verbatim:

Illi r-referenza kostituzzjonali maghmula mill-Qorti tal-Magistrati (Malta) bhala Qorti Istruttoria permezz tad-Digriet tagħha tat-18 ta' Ottubru 2011, hija fis-sens illi 'That most definitely the time within which accused could be held in preventive custody has elapsed, so the Court today is granting bail as per attached bail conditions. Furthermore Court after going through the records of the case realised that there were certain instances – at least four, where no effective sitting was held due to the fact that Court had no interpreter to assist accused in translating the proceedings from the English into the Spanish language. An anomaly also exists in the records of the case, considering that Prosecuting Officer had declared that he had rested the case at least on three occasions dating back to 2009, and after such declaration Attorney General remitted a very lengthy request as per

note at folio 158. Therefore Court accedes to the request and refers this to the Constitutional Court, First Hall, Civil Court, to examine such reference'.

L-esponenti jixtiequ jipprecizaw illi r-referenza ma saritx skont ir-Regolament 5 tar-Regolamenti dwar il-Prattika u l-Procedura tal-Qrati u l-Bon-Ordni stante li ma tikkontjenix liema hi d-disposizzjoni tal-Kostituzzjoni ta' Malta jew tal-Konvenzjoni Ewropeja li allegatament gew miksura. Madanakollu mill-verbal tas-seduta tat-18 ta' Ottubru 2011 jidher illi l-lanjanza hija fis-sens illi hemm allegat dewmien fil-proceduri penali liema trapass taz-zmien allegatament jilledi jew x'aktarx jilledi d-drittijiet tar-rikorrenti kif sancit fl-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 (1) tal-Konvenzjoni Ewropeja (Kap. 319 tal-Ligijiet ta' Malta) kif ukoll allegata vjolazzjoni tal-Artikolu 5(3) tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem in kwantu nzamm taht arrest preventiv ghal massimu permess mill-Ligi.

L-esponenti xtaqu jirrilevaw illi qabel ma saret dina r-referenza, l-esponenti qatt ma gew notifikati b'verbal, nota jew rikors li kien juri bic-car liema fatti u artikoli qed jillamenta minnhom l-imputat u dan wassal sabiex l-esponenti gie mcahhad mill-opportunita' illi juru illi t-talba tar-rikorrenti hija semplicement frivola u vessatorju u tikkostitwixxi biss tattika u manuvra sabiex itawwal il-proceduri penali b'mod illi l-proceduri penali tar-rikorrenti jinstemghu l-ahhar u cioe' wara li jkunu ntemmghu l-kawzi tal-imputati l-oħra li huma involuti fl-istess cirku ta' droga li huwa involut fih ir-rikorrent.

Illi l-esponent jikkontesta l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti stante illi huma nfondati fil-fatt u fid-dritt ghar-ragunijiet segwenti :

Ebda ksur tal-artikolu 5(3) tal-Konvenzjoni Ewropeja

Illi preliminarjament, l-esponenti jissottomettu illi wara li jghaddi l-istadju tal-prezentata sabiex persuna tinheles mill-arrest trid taghmel talba għall-helsien mill-arrest permess ta' rikors u dan ai termini tal-artikolu 575(2) tal-Kodici Kriminali (Kapitolu 9 tal-Ligijiet ta' Malta). Ma

jirrizultax illi r-rikorrenti ghamel tali talba fil-kors tal-proceduri li ghaddejnin quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttoria u ghalhekk kull allegazzjoni da parti tar-rikorrenti illi huwa inzamm taht arrest preventiv hija allegazzjoni totalment gratwita u tirrizenta l-fieragh peress illi r-rikorrenti kellu rimedju ordinarju fil-forma ta' talba permezz ta' rikors ghall-helsien mill-arrest. Dan huwa rimedju effettiv u li kien a disposizzjoni tar-rikorrenti. Ghalhekk dina l-Onorabbli Qorti ghandha tastjeni milli tisma' dan il-kaz ai termini tal-proviso tal-artikolu 4 tal-Konvenzjoni (Kap. 319 tal-Ligijiet ta' Malta) in kwantu jirreferi ghall-allegata lezjoni tal-artikolu 5(3) tal-Konvenzjoni Ewropea.

L-esponenti jissottomettu illi mhijiex il-prosekuzzjoni li taghti l-liberta' provizorja izda huwa l-imputat illi jitlobha u hija biss il-Qorti ta' kompetenza kriminali li tista' tilqa' tali talba. Ir-rwol tal-prosekuzzjoni huwa li tressaq l-osservazzjonijiet legali u ragunijiet jekk l-imputat jilqax il-vot ta' fiducja kif rikjest fl-artikolu 575 tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Illi fil-mertu, l-esponenti jissottomettu illi l-jedd ta' persuna arrestata li tinghata l-helsien mill-arrest preventiv m'huwiex wiehed assolut. Il-qofol kollu tal-helsien mill-arrest huwa dak li jizgura li l-persuna mehlusa ma tonqosx li tidher fil-kaz taghha kull meta tissejjah ghal dan. Il-helsien mill-arrest ghandu jinghata biss fejn il-Qorti ta' gurdizzjoni kriminali tkun soddisfatta li l-prezenza tal-persuna mixlija fil-proceduri kontra taghha tkun garantita.

Illi l-artikolu 5(3) tal-Konvenzjoni jipprovdi li 'Kull min ikun arrestat jew detenut skond id-disposizzjonijiet tal-paragrafu (1)(c) ta' dan l-artikolu ghandu jingieb minnufih quddiem imhalef jew funzjonarju iehor awtorizzat b'ligi biex jezercita setgha gudizzjarja u jkollu dritt ghal procedura fi zmien ragonevoli jew ghal helsien waqt pendenza tal-proceduri. Il-helsien jista' jkun taht kundizzjoni ta' garanziji biex jidher ghall-proceduri'.

L-esponenti jissottomettu illi meta Qorti ta' kompetenza kriminali tigi biex tqis jekk ghandhiex tehles persuna mill-

arrest, hija ghandha thares lejn dawk il-kundizzjonijiet li jistghu jwasslu biex jigi ffissat l-ammont xieraq tal-garanzija li dik il-persuna trid taghti biex tkun tista' tinheles. Ghalhekk, meta l-ligi ssemmi bhala wahda mill-kriterji 'il-kundizzjoni tal-imputat', ma tkunx qed tfisser biss il-qaghda finanzjarja tal-imputat. Dan ifisser illi l-Qorti ghandha tqis kemm kriterji oggettivi (marbuta max-xorta u l-ghamla tar-reat u l-piena tieghu) u kif ukoll dawk suggettivi li jintrabtu mal-kundizzjoni tal-imputat (maghduda maghha, per eżempju, l-qaghda socjali tieghu, id-dipendenza tieghu fuq haddiehor, u x-xoghol tieghu jekk ikun il-kaz).

L-esponenti jissottomettu illi l-allegazzjoni tar-rikorrenti hija allegazzjoni gratwita tenut kont tal-fatt il-gravita' tar-reat u cioe' traffikar ta' droga kif ukoll l-ammont ta' xhieda li kellhom jinstemghu fil-kaz tar-rikorrenti. Inoltre, l-arrest jew detenzjoni skont il-ligi ta' persuna sabiex tigi migjuba quddiem l-awtorita' legali komptendenti fuq sospett ragjonevoli li tkun ikkommettiet reat jew anke meta jkun meqjus ragjonevolament mehtieg biex jigi evitat li tikkommetti reat jew li tahrab, tali arrest mhuwiex meqjus li jivvjola d-drittijiet fundamentali tal-individwu.

Illi in vista tas-suespost ma hemm l-ebda ksur ta' dan l-artikolu.

Ebda ksur tal-artikolu 39 tal-Kostituzzjoni ta' Malta u l-artikolu 6(1) tal-Konvenzjoni Ewropeja

Illi preliminarjament, l-esponenti jissottomettu illi dina l-azzjoni in kwantu titratta allegazzjoni ta' dewmien irragjonevoli tal-proceduri kriminali, hija wahda intempestiva u dan peress illi l-proceduri ghadhom ma gewx konkluzi.

Illi skond il-gurisprudenza assodata kemm nostrali kif ukoll dik Ewropea, sabiex Qorti tasal ghal konkluzjoni dwar jekk kienx hemm ksur tad-dritt ta' process fi zmien ragjonevoli, il-procedura gudizzjarja mertu tal-allegazzjonijiet trid tkun

ezaminata fl-assjem taghha u ma jistax ikun ezaminat biss element jew parti wahda minn din il-procedura.

L-esponenti jirreferu ghall-kaz fl-ismijiet **Merit v Ukraine** (applikazzjoni numru 6656/01 deciz fit-30 ta' Gunju 2004) fejn il-Qorti Ewropeja osservat illi 'in criminal matters, the «reasonable time» referred to in Article 6 (1) of the Convention begins to run as soon as a person is «charged»; this may occur on a date prior to the case coming before the trial court (see, for example the above-mentioned, *Deweere v. Belgium*, judgment, p. 22, 42, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, pp. 26-27, 19; *Neumeister v. Austria*, judgment of the same date, Series A no. 8, p. 41, 18, and *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no 13, p. 45, 110). "Charge", for the purposes of Article 6 (1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see, the above mentioned *Deweere v. Belgium* judgment p. 24, 46; *Foti & Others v Italy*, judgment of 10 December 1982, Series A no. 56, 52). As regards the end of the "time", in criminal matters the period governed by Article 6 (1) of the Convention covers the whole of the proceedings in issue, including appeal proceedings (see *König v. Germany*, judgment of 28 June 1978, Series A no. 27, p. 33, 98)'.

In oltre, dina l-investigazzjoni m'ghandhiex issir semplicistikament fit-termini doq ta' dina l-kawza partikolari izda tali investigazzjoni ghandha ssir f'termini ferm aktar wiesgha li jhaddnu c-cirkostanzi kollha referibbilment ghaz-zmien relattiv.

Illi sabiex dina l-Onorabbli Qorti tkun tista' tikkonsidra b'mod serju t-talba tar-rikorrenti, jinkombi fuq ir-rikorrenti illi jipprova illi mhux biss il-kaz tieghu qed idum pendent

Kopja Informali ta' Sentenza

izda li tali dewmien huwa wiehed kapriccuz u ntiz biex jizvantaggah fit-tgawdija tad-drittijiet tieghu skond il-Ligi.

Illi in vista tas-suespost ma hemm ebda vjolazzjoni ta' dawn l-artikoli.

Salv eccezzjonijiet ulterjuri.

Bl-ispejjez.

By a decree of the 11 January 2012 the parties agreed that the reference did not specify the articles of the law constituting the alleged violations of human rights but in this regard the Attorney General and Commissioner of Police were withdrawing their plea of nullity in the interests of justice;

During the sitting of the 9 February 2012 Counsel to the Commissioner of Police submitted that the applicable article of law relevant to the alleged violations in the Constitutional reference was only article 5(3) of the European Convention. Counsel to Nelson Arias submitted that the reference by the Magistrates Court was the consequence of formal submissions made by defence counsel and the allegations referred to violations in connection with article 5(3) and 6(1) of the European Convention and article 39 of the Constitution of Malta. However the parties adhered to the Court's decree of the same sitting that even though the Constitutional reference was unclear this Court would consider the relevant provisions in the light of the evidence submitted.

The Court therefore being bound primarily by the wording of the Constitutional reference will be delivering its decision based on an alleged violation of article 5(3) of the European Convention since the alleged violations can be summed up as follows:

a. the unjustified length of time taken by the prosecution to conclude their evidence before the Inquiry Magistrate;

b. the prolonged custody of Nelson Arias without being given freedom from arrest on certain conditions;

Both allegations fall within the parameters of the above-mentioned article of the European Convention, however the Court will, in the interests of all concerned, refer to article 6 and article 39 of the Constitution in so far as these articles might be relevant and connected with article 5(3) of the European Convention;

Having heard the counsel to the parties and their submissions on the issues, and having taken cognisance of all the evidence and documents filed;

Having seen that the case has been put off for judgement for 29 February 2012;

Considers as follows.

Facts

It would be useful to recapitulate briefly the facts leading to this reference. Nelson Arias was arraigned before the Magistrates Court on various charges on the 4 November 2008. During the same sitting he requested provisional freedom from detention which was turned down by the Court because of the nature of the offence, the possibility of tampering with the evidence and the lack of ties of the accused with Malta.

Evidence tendered by the prosecution before the Inquiry Magistrate was concluded on the 14 October 2011 when the prosecution finally declared to rest its case. On two previous occasions, namely the 2 September 2009 and 16 October 2009, the prosecution had declared it was resting its case but the Attorney General had requested the production of further evidence. There were no objections or comments made in this regard during the proceedings. More than 25 sittings were held before the Magistrates Court, some of which had to be adjourned because accused was not assisted by an interpreter or no evidence or scanty evidence was brought by the prosecution.

Moreover from the 19 January 2011 till the 14 October 2011 the prosecution did not bring forward any evidence of note. It was only after the prosecution declared to have rested its case on the 14 October 2011 that defence counsel to Nelson Arias raised the Constitutional issues of continued detention without the grant of provisional freedom for more than twenty consecutive months and the unjustified delays in the tendering of evidence by the prosecution. These issues led to the two Magistrates Court decrees on the 18 October 2011, one of which granted Nelson Arias provisional freedom from detention under certain conditions and the Constitutional reference to which defence counsel to Nelson Arias made its submissions on the 14 October 2011.

Other available remedies

The Court notes that respondents are pleading that the accused had a practical and legal remedy to address his prolonged incarceration and this was a request to the Court to grant bail. This request could have been filed several times over if his request was declined since the law did not limit this redress.

Respondents quoted several judgments to support this issue amongst which **Vella vs Commissioner of Police** (05/04/1991), **Clifton Borg vs Commissioner of Police** (09/03/12996), **David Axiaq vs Public Transport Authority** (14/05/2004).

This Court considers it discretionary whether the First Hall of the Civil Court should or should not decline to exert its jurisdiction depending on the nature of the violation, the availability of a remedy (as opposed to its success) and the effectiveness of the remedy.

Respondents have argued that Nelson Arias chose not to apply for provisional freedom throughout the gathering of evidence at inquiry stage of proceedings when the law clearly provided for this right.

This Court agrees that Nelson Arias could have requested at any stage to be granted provisional freedom following the refusal when he was arraigned. The Court will take this into account its deliberations and concessions but as shall be seen later in this judgment, the law also provides for an automatic grant of provisional freedom after a certain lapse of time in custody and this is a legal obligation imposed on the National Authorities.

Therefore the fact that Nelson Arias could have applied for provisional freedom at any stage of the inquiry does not exclude or diminish the relevant authority's responsibility in safeguarding the rights of the accused unless these are or were renounced by the accused which is now the case.

In this case therefore the Court decides to exercise its discretion and examine Nelson Arias complaints.

Alleged violation under article 5(3) of the European Convention

This articles provides:

Every arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority or reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

The first part of the Constitutional reference deals with the lack of provisional freedom from detention of Nelson Arias pending the procedures before the Magistrates Court as a Court of Criminal Inquiry.

Following Nelson Arias's arraignment on the 4 November 2008 and the rejection of his request for provisional freedom on the same day, Nelson Arias remained in custody till defence counsel made a statement raising this issue of continued uninterrupted detention for more than twenty months before the Magistrates Court on the 14 October 2011. It was as a result of this statement that the Magistrates Court issued its decree of the 18 October 2011 granting provisional freedom from detention under certain conditions.

The parties agree that Nelson Arias is still in custody. Defence counsel to Nelson Arias has submitted before this Court that the conditions imposed by the Court for provisional freedom from custody were unreasonable (vide Court record of the 11 January 2012). This Court notices that no submissions or indeed a formal request for provisional liberty was made before the Magistrates Court issued its decree on provisional liberty. This Court invites the Magistrates Court to consider the conditions of bail if and when an application is made before it asking it to review the conditions already imposed, taking into account all the circumstances including the personal and financial status of Nelson Arias and to what extent if any the reasons in rejecting provisional liberty in 2008 are still valid in the present circumstances when balancing the conditions to be imposed in the grant of provisional freedom as a safeguard to ensure the presence of the accused in the criminal proceeding taking into account the right to liberty of the accused.

Having said this, this Court make it clear that the Constitutional reference does not extend to a review as to the reasonableness of the bail conditions imposed by the Magistrates Court on the 14 October 2011 as a condition to provisional freedom from detention but only whether the

time spent by Nelson Arias in detention since his arraignment was in violation of his fundamental human right to freedom.

Article 575(5) and 575(6) of Chapter 9 of the Laws of Malta render illegal continued uninterrupted arrest without the grant of provisional freedom in certain circumstances. These articles state as follows:

575. (5) Where in the case of a person accused of a crime in respect of which the Court of Magistrates has proceeded to the necessary inquiry, the Attorney General has not either -

(a) filed the indictment, or

(b) sent the accused to be tried by the Court of Magistrates as provided in paragraph of article 370(3)(a) or in article 433(5) or in similar provisions in any other law within the terms specified in sub article (6), to run from the day on which the person accused is brought before the said court, or from the day on which he is arrested as provided in article 397(5), that person shall be granted bail.

(6) (a) The terms referred to in the preceding sub article are:

(i) twelve months in the case of a crime liable to the punishment of imprisonment of less than four years;

(ii) sixteen months in the case of a crime liable to the punishment of imprisonment of four years or more but less than nine years; and

(iii) twenty months in the case of a crime liable to the punishment of imprisonment of nine years or more.

(b) The terms mentioned in paragraph (a) shall be held in abeyance for the corresponding period during which the terms referred to in articles 401, 407 and in article 432(3) are held in abeyance for any of the reasons mentioned in article 402(1) and (2), as well as for such period during which the court is unable to proceed with the inquiry except after the determination of any issue before any other court.

(c) The terms mentioned in paragraph (a) shall also be held in abeyance for the corresponding period during

which the record of the inquiry is with the Court of Magistrates for the examination of witnesses as provided in article 405(5).

It has been proved that 23 months elapsed from the date of arraignment of Nelson Arias till the grant of provisional freedom from arrest on 18 October 2011, during which period Nelson Arias remained in custody. The length of time under continued detention of Nelson Arias rendered his arrest illegal and therefore unjustified taking into account the longest period of time in which an arrested person can be kept in custody depending on the nature of the punishment tied to the offence with which the arrested person is charged (vide **Jovica Kolakovic vs Attorney General**, Constitutional Court, 14/02/2012).

This Court is not taking account that Nelson Arias is still under custody as was jointly declared by the parties, since his continued detention following the Magistrates Court decree of the 18 October 2011 is a consequence of other issues not relevant to the reference in question, and over which the parties are at liberty to take whatever remedial action is available to them.

The reasons given by the Magistrates Court in the refusal to grant provisional freedom pending proceedings on the 4 November 2008 were based on (a) the nature of the charges relating to drug offences, (b) the possibility of tampering with the evidence, (c) the lack of ties of the accused with Malta.

Taking into account the limited Constitutional reference and the relevance of these reasons to the continued detention of Nelson Arias for 23 months, this Court finds that even though these reasons might have had a certain weight at the time of arraignment, when the prosecution's case was only at the initial stages, these reasons lost their weight with the passing of time and when the evidence tendered in the records of the criminal proceedings do not sustain the necessity of Nelson Arias detention for such a long period, taking into account the fragmentary and lax manner in which the evidence was brought forward by the

prosecution. Following the sitting of the 18 November 2008 the evidence of three primary witnesses resulting from the respective *proces verbal* in connection with these witnesses was exhibited in the proceedings against Nelson Arias. Evidence resulting from a *proces verbal* is considered as valid and permissible in proceedings against third parties (article 580 Criminal Code). Furthermore as early as 2 September 2009 the prosecution had already on one occasion closed its case only to reopen it some weeks later. The length of time itself lessened the threats which might have been present at the early stage of proceeding and that freedom from detention could have been granted by the Court earlier (as the Magistrates Court has the duty to look into as empowered to do by the Criminal Code itself in the proviso to article 401) under such conditions as would have insured the accused's presence during proceedings and in conformity with established case law on this issue [vide **Tomasi vs France**, A-241 (1992)].

The nature of the charges (drug related) and the lack of any connection with Malta cannot be considered as a justification for the prolonged detention of an arrested person especially where, as in this case, there is no evidence to show that the arrested person was in any way a threat to justice being meted out having regard to the fundamental human rights of the arrested person. It is dangerous and unjust to treat criminal cases as mere problems which have to be solved by the relevant authorities whilst not giving due weight or at worst disregarding the dignity of the human being who is the subject of the proceedings being conducted against him.

As was stated in **Assenov and others v. Bulgaria** (28/10/1998):

154. The Court reiterates that it falls in the first place to the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a

departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings (see the *Toth v. Austria* judgement of 12 December 1991, Series A no. 224, p. 18, § 67).

It is true however that Nelson Arias through his defence counsel did not, following the first rejection of provisional freedom on 4 November 2008 again request the grant of provisional freedom pending proceedings and this shall be taken into account in this Court’s decision on the remedy available.

The Court therefore finds that Nelson Arias right to provisional freedom pending proceedings against him was violated in view of what has been stated above.

The second violation alleged by Nelson Arias is founded on the issue of the delay in the proceedings before the Court of Criminal Inquiry which delay it is being alleged was unreasonable and unjustified and prolonged Nelson Arias detention.

Since detention was not justified on the ground of the violation of the provisions of the Criminal Code which led to a violation of Nelson Arias is right to freedom from detention under article 5(3) there is in principle no need to

assess the further alleged violation under the same article arising from the allegation that Nelson Arias's detention was prolonged beyond a reasonable time because the proceedings were not conducted with the required expedition.

Alleged violation under article 5(3) in conjunction with 6(1) of the European Convention and article 39 of the Constitution of Malta

However this Court deems it necessary in the circumstances of this case to deal with this issue since the guarantee in article 5(3) which overlaps that in article 6(1) and its Maltese counterpart article 39 of the Constitution requires that in respect of a detained person the authorities show special diligence in the conduct of the proceedings [vide on this requirement **Herczegfalvy vs Austria**, A-244(1992)] without hindering the efforts of the judicial authorities to carry out their tasks with proper care. It is to be noted that article 6(1) and article 39 of the Constitution of Malta speaks in general of a person's entitlement to a fair and public hearing within a reasonable time. The relevant factors to be taken into account in considering the 'reasonable time' factor are the complexity of the case, the conduct of the accused and the efficiency of the national authorities. Obviously the facts of each case have to be considered individually.

The Court finds that the issue of excessive time in detention on the part of Nelson Arias has already been dealt with by this Court and that a violation of his fundamental right to liberty under article 5(3) has been prejudiced thereby. This further alleged violation leads this Court to the same conclusion since the length of time taken up by the prosecution to conclude its case at inquiry stage proceedings is unjustified. This is being stated by this Court on account of the fact that few witnesses were brought during the 23 months it took the prosecution to conclude its case whether or not the prosecution had to rely on the Attorney General's conduct of the case and the production of further evidence. There were significant gaps of time wherein the prosecution brought little or not

evidence and no diligent effort was shown by the prosecution to conclude its case within a reasonable period of time vide [**Chraidi vs Germany** (2006)]. The records of the case are practically taken up with adjournments for one reason or another over which accused had not control but over which the prosecution could have used its wide and far reaching powers to avoid, and thus conclude its evidence.

The Court does not agree with the prosecution's submissions that this allegation could only be brought following the conclusion of proceedings since the proceedings had to be taken as a whole. Once the prosecution had closed its case at inquiry stage it is within the accused's rights and this Courts' power to review whether the prosecution had acted diligently in ensuring that the procedures brought against Nelson Arias by the Police are concluded within a reasonable period of time in so far as this concerns the part played by the prosecution. This was not proven to be so.

Decide

For these reasons the Court decides, in reply to the reference made by the Court of Magistrates as a Court of Criminal Inquiry that Nelson Arias suffered a violation of his fundamental human right to be granted provisional freedom under conditions pending proceedings since his continued detention is deemed by this court unreasonable and excessive under article 5(3) of the European Convention and also in the light of what has been stated above regarding his continued detention in violation of the Criminal Code articles 575(5) and 575(6).

Moreover the Court finds that the prosecution unjustifiably prolonged the conclusion of its evidence when it transpired that 23 months elapsed for the prosecution to conclude its evidence at inquiry stage taking into account the few witnesses involved and the relevance of other evidence tendered as well as the way in which it was tendered and therefore also finds that article 5(3) in conjunction with article 6(1) and article 39 of the

Constitution of Malta relating to trial within a reasonable time has been breached.

The Court finds that Nelson Arias should be compensated for these violations by being granted non pecuniary damages and after taking into account the nature of the violations involved and that Nelson Arias only requested provisional freedom at the initial stages of the criminal proceedings, the Court deems it just that Nelson Arias be awarded the sum of €1,500 in connection with the violations falling under article 5(3) and 6(1) of the European Convention and article 39 of the Constitution of Malta.

The Court orders the records of this case and a copy of this decision be transmitted to the Court of Magistrates so that proceedings resume in accordance with that decided by this Court.

The Commissioner of Police shall bear all costs.

< Sentenza Finali >

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