MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE -- ACTING PRESIDENT
DAVID SCICLUNA

THE HON. MADAM JUSTICE
ABIGAIL LOFARO

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 12 th December, 2013

Number 5/2012

Bill of Indictment No. 5/2012

The Republic of Malta

v.

Ferdinand Onovo

The Court:

1. This is an appeal from a judgement delivered by the Criminal Court on the 16th January 2013 regarding preliminary pleas raised by the accused Ferdinand Onovo. The accused appealed by means of an application filed on the 21st January 2013.

2. Ferdinand Onovo was accused, by means of a Bill of Indictment filed by the Attorney General on the 1st February 2012, of having (1) on the night between the second (2nd) and third (3rd) day of February of the year two thousand and eight (2008) and during the previous days, weeks and months, with criminal intent, with another one or more persons in Malta, or outside Malta, conspired for the purpose of selling or dealing in a drug in the Maltese Islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or by promoting, constituting, organizing or financing such conspiracy; (2) on the night between the second (2nd) and third (3rd) day of February of the year two thousand and eight (2008) and during the previous days, weeks and months, with criminal intent, rendered himself guilty of participating in the act of aiding, abetting, counselling or procuring the commission in any place outside Malta of any offence punishable under the provisions of any corresponding law in force in that place, or who with another one or more persons conspires in Malta for the purpose of committing such an offence, or does any act preparatory to, or in furtherance of, any act which if committed in Malta (illegal dealing in and exportation of dangerous drugs to a foreign country) would constitute an offence in breach of the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

3. In his application of appeal, appellant requested that this Court vary the appealed judgement by revoking the decision in regard to his first three pleas and confirming the rest of it.

4. Ferdinand Onovo's first three pleas, as results from his note of pleas filed on the 27th February 2012, are the following:

"1. The nullity of the bill of indictment in view of the total absence of the order committing the accused for trial (vide minute at fol. 872);

"2. The inadmissibility of the accused's statement, his sworn declaration (fol. 107 et seq.) and parts of evidence mentioning his declarations including that tendered by Superintendent Norbert Ciappara, PC 10 Trevor Cassar and PC 1086 Johann Micallef as well as the parts of the proces-verbal where such declarations are mentioned (fol. 92 et seq.) in view of the fact that they were made without prior consultation with a lawyer and without a lawyer being present during such declarations;

"3. The inadmissibility of the sworn statement of Aulis Zopp in view of the fact that it was made without prior consultation with a lawyer and without a lawyer being present during such statement".

5. In its judgement regarding these pleas, the Criminal Court said:

"Regarding the first plea accused is stating that the bill of indictment is null in view of total absence of the order committing the accused for trial. The accused is claiming that after a five-day referral from the Attorney General the judicial process had to start all over again. This was not deemed necessary as the Defence declared that all acts done before the act of referral by the Attorney General were to be certified. However, at this stage the Defence is claiming that in spite of it certifying all acts, the decree committing the accused for trial still had to be given. This was not and therefore the bill of indictment is null.

"Considers :

"The Court does not agree with this argument. To start with, the order committing the accused for trial was given before the five-day referral sent by the Attorney General. When the Defence certified all the acts (vide page 872), it also certified the decree

committing the accused for trial. So there was no need for this decree to be given afresh. All the Court had to do was to send the acts back to the Attorney General. The referral at page 870 was just a precautionary referral just in case there was a mistake. The five-day referral is specifically provided for in article 432(3) of the Criminal Code. It just says that the Court should conclude the fresh inquiry or rectify the record and shall send the same to the Attorney General. Nowhere does it say that the first Court is obliged to re-issue a decree committing the accused for trial. The first Court observed the first article to the letter. The records were sent to the Attorney General who in time issued the bill of indictment. This Court does not see any nullity in this procedure and therefore rejects the first plea raised by the accused.

"Considers :

"Regarding the second plea, accused is claiming that his statement and sworn declaration and parts of evidence mentioning his declarations are not admissible in Court in view of the fact that they were made without prior consultation with a lawyer and without a lawyer being present during such declarations.

"This plea has got to be considered on the basis of the recent judgement delivered by the Constitutional Court on the eighth (8th) of October two thousand and twelve (2012), "Stephen Muscat versus Attorney General" wherein it was stated that :

"'The Judge will worn jurors on the danger of considering only the statement when deciding on guilt, without also considering other evidence, and moreover the Judge may advise the jurors to discard the statement if evidence is shown .... That the statement was obtained by violence, fraud or threats.' (page 19)

"This Court will observe such guidelines when addressing the jury.

"For these reasons, dismisses the second plea of the accused, declares the accused statement and sworn declaration and parts of evidence mentioning his declarations mentioned by Superintendent Norbert Ciappara, PC 10 Trevor Cassar and PC 1086 Johann Micallef as well as the parts of the proçes verbal where such declarations are mentioned, as admissible evidence to be tendered during the trial.

"As regards the third plea regarding the inadmissibility of the sworn statement of Alius Zopp, the Court observes that this person is being called as a witness to the Prosecution who will be giving his evidence *viva voce* in front of the jury where he would be subject to all the controls mentioned by the Law in which case his sworn statement will only be allowed in so far as it is used to control the evidence tendered by Alius Zopp.

"The Court, therefore, dismisses the third plea submitted by the accused."

6. Appellant's grievances relate to the Criminal Court's decision to dismiss his first three pleas, and will be dealt with *seriatim*.

7. In respect of the first plea, appellant submits that the conclusions reached by the Criminal Court were based on factually incorrect premises. He says:

"The Court stated that applicant claimed that after a five-day referral from the Attorney General the judicial process had to start all over again. A cursory reading of the Attorney General's referral of the 7th March 2011 makes it amply clear that the claim was not made by the applicant. The request was made by the Attorney General and is based on the dictates of section 432(2) of the Criminal Code. Therefore the Court's assertion in this sense is incorrect.

"That the Court went on to state that the Defence declared that all the acts done before the said referral were to be certified. Again this is incorrect. The Court referred to the minute of the hearing of the 10th March 2011 (a folio 872) to substantiate these incorrect premises. It results from this minute that, following the said referral, the parties exempted the Court from hearing the evidence already compiled. It goes without saying that there is an enormous difference between exempting the Court from hearing evidence and certifying the acts. With all due respect section 597(4) of the Criminal Code leaves no room for interpretation and applicant's first plea should have been accepted."

8. By means of a note of referral dated the 20th January 2011 and an identical note of referral dated the 7th March 2011[1], the Attorney General requested that the Court of Magistrates (Malta) as a Court of Criminal Inquiry start the criminal inquiry anew as he deemed that "following the demand in writing filed by him on the 13th November 2010 the term for the conclusion of the inquiry mentioned in article 401(1) of the Criminal Code was not observed and therefore the records of the compilation proceedings are defective in terms of article 432(2) of the Criminal Code". He specifically requested that that Court (a) receives the report of the prosecuting officer on oath; (b) proceeds with the examination of the accused, without oath; (c) receives all the evidence in support of the prosecution's case (except that the defence may be requested to grant its exemption to the prosecution from producing all the evidence already compiled during these proceedings); (d) concludes this criminal inquiry within five working days; and (e) sends the records of this criminal inquiry to the Attorney General in terms of articles 432(2)(3) of Chapter 9 of the Laws of Malta.

9. During a sitting held on the 10th March 2011, the report by the prosecuting officer was received on oath, the

[1] After the note of referral of the 20th January 2011, the prosecuting officer requested that the case be adjourned and the records were remitted to the Attorney General without the Court of Magistrates having done what had been requested by the Attorney General.

accused was examined without oath, the parties exempted the Court from hearing the evidence already compiled, the prosecution declared that it had no further evidence and the records were remitted to the Attorney General. Appellant contends that the Court of Magistrates should have at this point declared whether or not there were sufficient grounds for committing the accused for trial on indictment and not simply that it had complied with the Attorney General's request in his note of referral of the 7th March 2011.

10. Now, it would appear that the Attorney General's request was based on a mistaken date entered into the Court of Magistrates' decree dated 14th December 2010 whereby that Court stated that it was remitting the records to the Attorney General following his note of referral of the "13.11.2010"[2]. From the Attorney General's note of referral it results that this note was dated the 30th November 2010 and not the 13th, as results clearly from such note at folio 860. The records were remitted to the Attorney General on the 14th December 2010, i.e. only fourteen days after said note of referral. Consequently there was absolutely no defect or irregularity in the compilation proceedings and the Attorney General's request for the inquiry to proceed anew was unnecessary.

11. Article 597(4) of the Criminal Code provides that **"[t]he indictment cannot be impugned on the ground of any defect in the record of inquiry, nor can the accused demand that, on the ground of any such defect, the trial on the said indictment be not proceeded with, unless such defect consists in the total absence … of the order committing the accused for trial …."** In this case it cannot be said that there is a total absence of the order committing the accused for trial because such order is to be found at folio 482 in the Court of Magistrates' decree dated 25th April 2008.

12. Appellant's first grievance is thus dismissed.

[2] Fol. 864 of the compilation proceedings.

13. As to his second grievance in relation to his second plea, appellant believes that said plea should not have been dismissed. He says:

"That the Criminal Court based its findings on the judgement of the Constitutional Court in the names **Stephen Muscat v. Attorney General** (08.10.2012). With all de respect to that judgement, the Court cannot simply brush aside the multitude of judgements given by the same Constitutional Court and by the European Court of Human Rights. Applicant is referring to, *inter alia*, the judgements in the names **Il-Pulizija v. Alvin Privitera** (11.04.2011), **Il-Pulizija v. Mark Lombardi** (12.04.11) and **Il-Pulizija v. Esron Pullicino** (12.04.11) and the judgement given by the Grand Chamber of the European Court in the names **Salduz v. Turkey** (27.11.2008). In these cases it was held that the taking of a statement from a suspect without allowing prior legal consultation was in violation of the respective applicants' rights sanctioned in Article 6 of the European Convention.

"That applicant believes that one should [not] wait for his human rights to be breached and then dish out a half-baked remedy. Moreover it is evident that the judgement quoted by the Criminal Court refers to the particular circumstances of the applicant *de quo*. Therefore even this second plea should have been accepted."

14. In so far as the taking of a statement without access to a lawyer and verbal declarations related to such statement are concerned, suffice it to refer to this Court's decisions in the cases **Ir-Repubblika ta' Malta v. Antonio Abdilla et** decided on the 9th May 2013 and **Ir-Repubblika ta' Malta v. Giovanna Pace et** decided on the 13th June 2013. This Court reaffirms the position as enunciated in those cases.

15. This Court further wishes to point out that, as was held in its decision of the 5th November 2013 in the case **The Republic of Malta v. Ana-Maria Beatrice Ciocanel**, *"it is a well established principle that as a rule questions relating to fair trial are to be addressed upon an*

assessment of the trial as a whole and that it is only at the conclusion of such trial that a proper assessment of whether there has been a fair trial can be made."

16. Consequently appellant's second grievance is also dismissed.

17. Appellant's final grievance relates to his third plea. He argues:

"That with all due respect applicant filed a plea regarding the inadmissibility of the sworn statement of Aulis Zopp in view of the fact that it was made without prior consultation with a lawyer and without a lawyer being present during such statement. The fact that Aulis Zopp will be tendering evidence *viva voce* is beside the point. The witness should not, if the need arises, be controlled with a statement that was taken in violation of his human rights."

18. Now, it results that the case instituted against Aulis Zopp has been decided by the Criminal Court[3] and no appeal lodged therefrom. He is thus in a position to testify in this case. He has been indicated in the list of witnesses as a witness for the prosecution and, as declared by the prosecution, is going to be summoned by the prosecution in order to tender evidence *viva voce*. This is perfectly legitimate and it is just as legitimate to control this witness's testimony with his previous sworn declaration. As stated by the Criminal Court, said witness "would be subject to all the controls mentioned by the Law".

19. Appellant's third grievance is thus dismissed.

20. For these reasons the Court dismisses the appeal entered by Ferdinand Onovo from the judgement of the Criminal Court of the 16th January 2013 and orders that the record be forthwith sent back to that Court for the case to proceed according to law.

[3] **Ir-Repubblika ta' Malta v. Aulis Zopp et**, 24th November 2011.

< Final Judgement >

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