MALTA

CONSTITUTIONAL COURT

THE HON. MR. JUSTICE -- ACTING PRESIDENT

GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE

NOEL CUSCHIERI

THE HON. MR. JUSTICE

JOSEPH ZAMMIT MC KEON

Sitting of the 28 th April, 2014

Civil Appeal Number. 50/2011/2

Jovica Kolakovic

v.

Attorney General

Preliminary

1. These are retrial proceedings instituted by plaintiff [applicant] following a judgment given by this Court on the 12th November 2012. The request for a retrial is based on paragraph (l) of article 811 of the Code of Organisation and Civil Procedure, namely that the said judgment "with regard to the second grievance ... was the effect of an error resulting from the proceedings or documents of the cause".

2. Respondent on his part is requesting that for the reasons indicated by him in his reply this Court reject applicant's request and confirm the judgment in question, together with an order that all costs be borne by applicant.

3. As already indicated above, the factual grounds on which applicant is basing his application relate to the contents of the judgment under the heading "Second Grievance", and more specifically to paragraphs 22 to 25 of the judgment, which read as follows:

> "22. The Court observes that this conclusion is not borne out in any way by the evidence produced. Evidence shows that applicant was arrested on the 8th September 2009, on the 9th he released the first statement, and on the 10th September he released his second statement and was arraigned on this same date. From the moment of his arraignment onwards applicant was legally assisted. During his arraignment he was assisted by a state-appointed lawyer, and after four days he was assisted by a lawyer of his choice. On the 6th July 2010 applicant, through his counsel, made a generic request for telephonic

data from the United Kingdom ... On the 19th July, the Criminal Court ordered applicant to adhere by the procedure laid down by law, as requested by the Attorney General. On the 27th September 2010 applicant filed a request for Letters Rogatory, in terms of article 399 of the Maltese Criminal Code, to be sent to the United Kingdom. Since this application was filed incorrectly, applicant filed another application on the 1st October 2010 requesting telephonic data for a specified period. On the 10th December 2010 Letters of Request were forwarded to the UK Central Authority, but these could not be processed for lack of proper documentation. On the 3rd March 2011 applicant filed fresh letters of request, which were forwarded to the United Kingdom authorities on the 17th March 2011.

"23. By the time applicant filed correct Letters of Request covering a specific period, the year for the data retention period in the UK had already elapsed, with the result that that data could not be produced as evidence in the criminal proceedings.

"24. As respondent rightly points out, had this telephonic data been so vital for applicant's defence, why did applicant let so much time pass before he made the first request, which request was not even in conformity with the law? Respondent rightly argues: "If applicant was so convinced that such data could be used to his advantage, as he claims, why did he remain passive about it for so long? So how can he now blame the State for 'loss of precious time'?"

"25. For the above reasons, the Court observes that although, during the pre-trial stage, applicant was not legally assisted, it cannot validly be said that this fact has seriously prejudiced the fairness of his trial. Therefore there is no violation of Article 6 of the Convention. Consequently respondent's appeal is justified and is being upheld, whilst applicant's appeal in this regard is unfounded and is being rejected."

Parties' Submissions

4. Applicant is basing his request for a retrial on the fact that in its decision of the 12th November 2012 this Court had overlooked the decree which had been given by the Criminal Court on the 24th August 2010, ordering that applicant's application before the Criminal Court "be once again notified to the

Attorney General for him to take the necessary action in terms of Section 405 (5) of the Criminal Code".

5. In brief applicant's submissions are the following:

6. (a) Since there is no reference to this decree in the judgment, the Court must have overlooked it, and as a result of this the Court came to a wrong decision based on the supposition of the non-existence of a fact the existence whereof has been positively established;

7. (b) The said decree is "vital evidence in support of this claim because it shows that it was the duty of the Attorney General to send the letters rogatory to obtain the evidence needed by the defence, and thus the Attorney General's delay irremediably prejudiced applicant's defence". Applicant further argues that "since the request by the defence for the telephonic data was first made on the 6th July 2010, it is abundantly clear that the defence made the need for the telephonic data amply clear at a time when the evidence was still retrievable".

8. He also submits that "the Constitutional Court attributed the irretrievability of the telephonic data to the fact that defence counsel took too much time in preparing correct Letters of Request, but these were steps he

was not obliged to take owing to the fact that the duty was imposed on the Attorney General who made absolutely no effort in ensuring the expediency of the process of sending the letters rogatory".

9. Finally, whilst quoting case law and doctrine on the article of law on which he is basing these proceedings, applicant affirms that "This mistake is certainly one on which the decision of the Constitutional Court is based, seeing as it is of such importance that it determined the decision on the complaint relating to equality of arms, in such a way that the judgment cannot possibly be deemed to be based on any other reason than the mistaken reasoning based on the inadvertence of the Court to the existence of the decree of the Criminal Court".

10. Respondent rebuts applicant's submissions, on the following grounds: (a) The mere fact that the aforementioned decree was not mentioned by the Constitutional Court in its judgment does not necessarily mean that that Court had overlooked the decree in examining the evidence; (b) applicant's arguments are based on a wrong interpretation of article 405(5) of the Criminal Code as well as the implications of the court decree itself. Respondent explains that his duty consisted in sending the letters rogatory to the UK as expeditiously as possible, after the correct legal procedures will have been followed by applicant and the relative information will have been fully furnished by the latter; and (c) from the records of the case it results

abundantly clear that the delay was not due to any omission by respondent, but to applicant's own shortcomings, who initially had failed to follow the correct legal procedures in making his request, and, when these were finally followed, had for quite some time failed to provide respondent with all the information necessary for the transmission of the letters rogatory and their subsequent execution on the part of the requested State according to law.

Considerations of the Court

11. As stated above, the present proceedings are based on article 811(1) which as far as relevant reads as follows:

> **"811.** A new trial of a cause decided by a judgment given in second instance or by the Civil Court, First Hall, in its Constitutional Jurisdiction, may be demanded by any of the parties concerned, such judgment being first set aside, in any of the following cases:
>
> "... … …
>
> "(l) where the judgment was the effect of an error resulting from the proceedings or documents of the cause.
>
> "For the purposes of this paragraph there shall be deemed to be such error only where the decision is based on the supposition of some fact the truth whereof is incontestably excluded, or on the supposition of the non-existence of some fact the truth whereof is positively established, provided that, in either case, the fact was not a disputed issue determined by the judgment."

12. Case law has identified the following principles relating to this provision of law:

"App.Civ. Joseph Grech *vs* Joseph Bowman[1]

> ""*L'errore che può costituire motivo di ritrattzione dev' essere un errore materiale di fatto e non un errore di criterio e di interpretazione*" (Vol. XXV.I.139). Mortara jispjega: "*... l'errore di fatto è un vero errore dei sensi; il magistrato ha creduto di vedere negli atti quel che non esiste od ha fondato la sua convizione sul presupposto della inesistenza di quel che avrebbe subito veduto se avesse esercitato gli occhi del corpo e dell'intelletto sulle carte del processo*" (Vol. 1C, p. 404).

> "Biex żball ta' fatt jagħti kawża għar-ritrattazjoni tas-sentenza jeħtieġ (Mattiriolo Vol. IV, p. 825):

> > "1. Illi l-iżball ikun żball materjali ta' fatt mhux żball ta' kriterju jew ta' interpretazzjoni;
>
> > "2. Illi l-iżball jirriżulta mill-atti u dokumenti tal-kawża, u għalhekk hija assolutament inammissibbli l-produzzjoni ta' atti u dokumenti ġodda biex tiġi fornita l-prova tal-iżball;
>
> > "3. Illi l-istess żball ikun manifest, tali li jemerġi mis-sempliċi konfront bejn id-dikjarazzjonijiet tas-sentenza u l-atti u dokumenti tal-kawża, b'mod li jkun jidher prodott esklussivament mis-sempliċi inavvertenza tal-ġudikant;
>
> > "4. Illi l-iżball ikun iddetermina d-deċiżjoni tal-ġudikant – jiġifieri l-istess żball ikun jikkostitwixxi l-fondament prinċipali tas-sentenza u għalhekk ma jkunx hemm lok għar-revoka tas-sentenza jekk dina għalkemm ivvizjata minn żball ta' fatt manifest tkun tista' tiġi sorretta b'raġunijiet oħra indipendenti minn dik żbaljata;
>
> > "5. Illi l-esistenza jew inesistenza tal-fatt li fih manifestament ikun żbalja l-ġudikant ma tkunx iffurmat punt ta' kontroversja jiġifieri punt kontraddett u diskuss bejn il-partijiet li fuqu s-sentenza tkun ippronunzjat (ara ukoll Gaetano Mifsud *vs* Gaetano Zahra – 18 ta' Ġunju 1954).

1 Vol. LXXXI.II.653.

"App. Pio Vassallo *vs* Emanuele Chetcuti *et*[2]

> ""L-esiżenzi processwali f'materja ta' ritrattazjoni għandhom jiġu u dejjem ġew strettament interpretati" (Vol. XXXIX.III.854).

"L-iżball kontemplat fis-sub-inciż (l) mhux biss għandu jkun wieħed determinanti imma wkoll irid ikun żball dovut għan-nuqqas ta' attenzjoni momentanja tal-ġudikant li jonqos li japprezza l-fatti kif jirriżultaw fil-process quddiemu u jqishom b'mod żbaljat.

> ""L*'errore di fatto deve inoltre trovarsi in rapporti di casualità colla decisione*" (Vol. XXVII.I.432). Jeħtieġ li jkun manifest li (l-iżball) jkun iddetermina d-deċiżjoni *i.e.* li s-sentenza vvizzjata b'dak l-iżball ma tistax tiġi sorretta minn xi raġunijiet oħra indipendentement minn dik żbaljata (Vol. XXXVIII.I.323). "*Richiedendo la legge che l'errore risulti dagli atti e dai documenti della causa esse suppone che il giudice non li abbia consultati per inavvertenza momentanea*" (Vol. XXVII.I.853). Jeħtieġ li l-iżball ikun jirriżulta mid-dokumenti talkawża u mhux minn xi atti ġodda (Vol. XXXVII.I.323). "*Bisogna che sia un errore materiale, intuitivo, risultante dal semplice confronto delle dichiarazioni della sentenza cogli atti e documenti*" (XXIV.I.609 – ara wkoll App. Ċiv. Roger Ruggier *vs* Beatrice Pisani Vol. LXXXI.II.644)."

13. The Court considers opportune the following observations relevant to the point at issue.

14. As rightly pointed out by respondent, the Court in its judgment is not bound to refer to every document in the records of the proceedings, and the fact that a document has not been mentioned does not necessarily lead to the conclusion that the Court had overlooked the document. It is in the discretion of the court delivering judgment to decide which documents, if any, it should specifically refer to in its judgment in support of its observations and conclusions. *Multo magis* in cases such as the present case where the records of the proceedings are voluminous and it surely cannot not be

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reasonably expected that the Court in its judgment refer to every document inserted in the records.

15. In the circumstances, as respondent rightly pointed out, judging by the lengthy, detailed and motivated deliberations and considerations of the Court on each grievance, respondent has every reason to conclude that the decree of the 24th August 2010 was examined by the Court just as it examined all the other documents filed in these proceedings.

16. In the present case, the Attorney General's duties under article 405(5) aforementioned were never questioned, so it was not crucial for the Constitutional Court to refer to that decree in its judgment. What resulted to be crucial and of a decisive nature was the delay in the transmission of the letters rogatory to the UK – an issue which has been examined and fully considered by the Court when reaching the conclusion that the delay was not due to any fault on the part of respondent, but was solely due to the applicant's initial insistence on adopting a procedure which was not in conformity with the law, and susbsequently applicant's failure to provide to respondent without delay all the information necessary for the requested State to perform its obligations correctly and according to law.

17. In fact, though applicant states that the defence had made its first request for the telephonic data to be obtained on the 6th of July 2010, yet he

had failed to provide the correct information necessary for the setting up of his defence in this regard. So much so that during the sitting of the 30th September 2010[3] before the Magistrates' Court defence counsel for applicant, then accused, requested "the Court to authorise him to replace the dates of the letters of request with regards to the dates mentioned and that by a note he would inform the Court of the said new dates". Also, from the records of the proceedings, it results that as late as the 29th December 2010 applicant had failed to present the necessary information for the letters of request to be followed by the UK authorities. So much so that in a letter bearing the same date, the UK Home Office informed the Attorney General[4] that "Unfortunately we have been unable to forward your request to an appropriate prosecuting agency/police force to execute. This is because your request does not contain the following information ...". The missing information included details which could only be furnished by applicant, on whose request the letters rogatory were issued.

18. It is relevant to note that, in the case of evidence by commission, the duties of the criminal courts, the Court Registrar and the Attorney General are regulated by law in article 399 of the Criminal Code making applicable in this respect articles 618 and 619 of the Code of Organization and Civil Procedure. In brief, the duty of the Attorney General is to transmit the letters rogatory as

3 Vol.3 – *fol.* 542 of the Constitutional proceedings.

4 Copy exhibited as Dok. AG2t – Vol.3 – *Fol.* 548

expeditiously as possible, once the party demanding the letters rogatory – in this case applicant – has provided all the information necessary for the requested State to be able to conduct the examination of the witnesses.

19. On the merits, the Court observes that the decree referred to by applicant merely confirms the Attorney General's duty to proceed according to what is stated in article 405(5) of the Criminal Code, that is, to forward the records of the proceedings to the court of criminal inquiry so that the witness which the accused may wish to examine or re-examine be heard by that court. So even if, merely for the sake of argument, this Court had in fact inadvertently overlooked the decree, the mistake was not such as to render applicable paragraph (l) of article 811 aforementioned, since it was not a determining factor that led the Court in its judgment to reject defendant's second grievance; from the judgment it is manifest that, in its consideration of this grievance, the Court took into account and passed judgment on all the issues that had been raised by applicant.

20. On the strength of the above this Court is of the opinion that applicant's request for a retrial is ill-founded.

Conclusion

For the above reasons the Court rejects applicant's requests. All costs are to be borne by applicant.

< Final Judgement >

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