MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MADAM JUSTICE
JACQUELINE PADOVANI GRIMA

Sitting of the 23 rd July, 2014
Referenza Kostituzzjonali Number. 66/2013

Bill of Indictment Number 1/2013 LQ

Ir-Repubblika ta' Malta

Vs

Jose' Edgar Pena

The Court ,

Having seen Constitutional Reference Number 66/2013 issued by the Criminal Court in the Records of the Bill of Indictment Number 1/2013 LQ on 27th August 2013 which as translated, reads as follows:

*"*Is the Bill of Indictment 1/2013 in the aforesaid names compatible with Article 7 of the European Convention on Human Rights (Chapter 319 of the Laws of Malta) and Article 39 of the Constitution of Malta, as the said Bill of Indictment was issued in terms of the discretionary powers of the Attorney General who issues the charges "as he deemed fit", and

this in the light of the judgement pronounced by the European Court of Human Rights on the 22nd January 2013. If the answer is in the affirmative, what is the remedy?"

Having seen the reply of the Attorney General, of the 10th September 2013;

Having seen the decree of this Court of the 29th August 2013 wherein the Constitutional Reference was appointed for hearing for the 11th September 2013 at 11.00am;

Having seen the decree of the 24th September 2013 wherein service of judicial acts was accepted on behalf of Jose Edgar Pena;

Having seen the decree of the 24th September 2013 where the Court confirmed that from that said date onwards, the proceedings will be continued in English Language;

Having seen the reply of Jose Edgar Pena, of the 27th September 2013, (at page 19 et. seq) ;

Having seen the note of submissions of the Attorney General of the 1st November 2013 (at page 25 et. seq) ;

Having seen the note in the record of the proceedings of the 28th November 2013;

Having heard oral submissions of the parties;

Having examined all exibited documents and the record of the proceedings;

Deliberates:

The facts as cited in the reference posed by the Criminal Court are as follows:

The Bill of Indictment consists of one charge, that is, the conspiracy with others for the purposes of selling or dealing in the drug cocaine in Malta. The alleged amount of drugs cited in the Bill of Indictment is that of 1,500 grams of cocaine. The police acquired information

from a certain Enrique Martinez Burgoa who travelled to Malta to consign, in violation of the law, the drug cocaine to Joseph Edgar Pena and others.

The Criminal Court was concerned as to whether the discretion granted by law to the Attorney General to decide on whether the case be heard by the Court of Magistrates' or the Criminal Court results in uncertainty, in the mind of the accused, of the punishment at the time of the commission of offence.

The Attorney General contends that there is no alleged incompatibility between the Bill on Indictment 1/2012 and Article 7 of the European Convention on Human Rights (Chapter 319 of the Laws of Malta) and Article 39 of the Constitution of Malta for the following reasons:

1. That Article 7 of the European Convention on Human Rights (Chapter 319 of the Laws of Malta) and Article 39 of the Constitution of Malta, create the principle of certainty on the elements of the crime and punishement which were operative by law at the relevant time;

2. That Constitution of Malta, the highest law of the land, by means of Article 91 stipulates that the exercise of the power of the Attorney General to institute criminal proceedings are not subject to the control of or scrutiny by any person or Authority. The Attorney General added that his discretionary power was a directional one and not one that was constitutive of a penal action.

3. That in the context of these proceedings, the discretion of the Attorney General in the choice of forum before which the accused was to be tried, was exercised according to law, conscientiously and according to criteria easily adduced and indentifiable in local jurisprudence namely, the quantity and type of drugs in question, the level of participation of the accused in the crime, his statement to the police, as well as any other aggravating circumstance and fact relevant to this particular case.

4. The Attorney General reiterated that although the criteria are not esthablished by law, the exercise of his discretion in determining which Court was to try the accused should not automatically result in the finding of a violation of the fundamental human rights

of the accused under Article 7 of the European Convention on Human Rights (Chapter 319 of the Laws of Malta) and Article 39 of the Constitution of Malta.

5. The Attorney General's decision as to which Court was to hear the case may be scruitinised before the local Court, which Court may determine whether his decision was ultra vires or otherwise.

6. The Attorney General reiterated that every case has it particular circumctances and the order issued by the Attorney General for the accused to be tried before the Criminal Court, was taken in a conscientious manner.

7. In his reply the Attorney General drew the following distinctions between the present proceedings and those that terminated in the decision of European Court of Human Rights in **John Camilleri vs Malta (App. Nru 429311.10) 22nd January 2013**.

   i) John Camilleri had been tried and found guilty by the Criminal Court and punished 15 years imprisonment, which punishment falls exclusively within the competence of the Criminal Court. In the present case, the proceedings are not yet concluded.

   ii) That the ECHR found a breach of Article 7 only in the context of what the European Court defined as 'lack of forseeability' of the mentioned provision of the Dangerous Drugs Ordinance <u>in the particular circumstances of that case</u>. The current proceedings were instituted several years after Camilleri was indicted and the accused in these proceedings had every possibility to anticipate and predict, well in advance of the moment when he was actually brought before the Criminal Court, which court would have tried and punished him.

   iii) Respondent endorsed the partly dissenting opinion of Judge L. Quintano in the ECHR proceedings.

Jose Edgar Pena contended that the Criminal Court has raised two issues, that is the compatibility of the bill of indictment with Article 7 of the Convention and secondly the identification of an effective remedy.

He reiterated that the recent amendment i.e. Article 6A, delegated power to the Prime Minister to amend any law so as to bring it in conformity with the European Convention of Human Rights according to the interpretation given by the ECHR.

Jose Edgar Pena reiterated that the Maltese Courts have persistently applied jurisprudence from Strasbourg, citing **The Republic of Malta vs. Shnishia, the Bordieri case**, and in the case before Court of Criminal Appeal **The Police vs. John Zammit**, wherein the Maltese Courts decided the issues under examination, not according to Maltese law, but according to the case law of the European Court of Human Rights.

The accused Pena declared that in the Mario Camilleri case, the Court held that there was a violation, but gave no remedy. In the Constitutional Court preliminary ruling, Joseph Camilleri vs Attorney General, decided on the 1st July, 2013, the Constitutional Court said that as there was no violation of Article 6, a violation of Article 7 could be dealt with *"in some other way"*. :

Article 13 of the Convention required *"an effective remedy at national level "*. A very recent judgment on this point was awarded by the ECHR of the 23rd Ju1y 2013, **M.A. v Cyprus,** wherein it was held:

> *"132. The notion of an effective remedy under Article 13 in this context requires that the remedy* ***may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible****. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see M.and Others v. Bulgaria, ro. 41416/08, S 129, 26 July 2011; Salah Sheekh v. the Netherlands, no. 1948/04. § 153, 11 January 2007; and Conka v. Belgium, no.51564/99, § 79, ECHR 2002-l).”*

Edgar Pena reiterates that: "... there is no question that the Bill of Indictment violates Article 7 according to the ECHR. An effective remedy must be such that the "remedy **may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible".**"

In the case Aquilina vs. Malta, there is a statement that the Maltese Courts follow the case law of the European Court of Human Rights

Edgar Pena, maintained that there is a duty incumbent on the State of Malta, not only to apply the law to a particular case but also to similar cases and attendant cases, citing paragraph 49 of the **Baliystki vs. Ukraine** (31/11/2011) :

> *"49. The Court reiterates that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under ihe supervision of the Committee of Ministers, appropriate general and / or individual measures to secure the right of the applicant which the Court has found to have been violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings (see Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 120, ECHR 2002-Vl; Lukenda v. Slovenia, no. 23032/02, § 94, ECHR 2005-X; and ,S. and Marper v. the United Kingdom [GC], nos.30562/04 and 30566/04, § 134, ECHR 2008-...). This obligation has been consistently emphasised by the Committee of Ministers inthe supervision of the execution of the Court's judgments (see, for example, ResDH (97)336,IntResDH(99)434, IntResDH (2001)65 and ResDH (2006)1). In theory it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention. However, the Court's concern is to facilitate the rapid and effective suppression of a shortcoming found in the national*

> *system of protection of human rights (see Driza .v. Albania, no.33771/02, § 125, ECHR 2007XII (extracts)).*"

Pena contends that both Chapter 319 and Article 46 of the Constitution make it clear that the Civil Court First Hall and every other Court has a duty to prevent the commission of a violation of a human right rather than attempt to remedy it at a later stage, holding that the principles ennunciated in the John Camilleri vs. Malta case applies not only apply to John Camilleri but to all pending similar cases.

As regards the question of effective remedy Pena reiterated that the jurisprudance of the European Court of Human Rights is considered the cornerstone of human rights, and that it is was not possible to derogate from Article 7, even in times of war, citing from the Scoppola(2) case of the 27/9/2009 by the Grand Chamber:

> *"92. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S.W. v. the United Kingdom and C.R. v. the United Kingdom, 22 November 1995, § 34 and § 32 respectively, Series A nos. 335-B and 335-C, ,and Kafkaris, cited above, § 137).*"

Pena reiterated that the question of remedy is one of the most important elements in Fundamental Human Right cases, is reflected in Article 13 of the European Convention which goes to the root of the matter.

According to Chapter 319 and Article 46 of the Constitution, the plethora of remedies that the Court may grant, is not limited or restricted soley to the payment of nominal damages.

Pena states that there can be only one remedy, that is, an amendment to Article 22 of Chapter 101 and incidentally to Article 120 of Chapter 33 and also in the Money Laundering Act where this discretion of the Attorney General violates human rights.

Pena stated that on the 9th February 2007 the Constitutional Court in the case of The Police vs. Joseph Lebrun had actually decided on the necessity of a legislative amendment. In paragraph 17 of that judgment, the Court declared that the proceedings should be suspended for a period of three months and, if by the end of that period, there was failure to legislate, then Joseph Lebrun would have been acquitted according to the decision of the Court dated the 23rd November 2005

In the Lebrun case, Parliament had acted promptly and legislated within the three months time limit.

> *"It is for the Courts to protect human rights, it is for Parliament to legislate. But the Constitutional organs have the power and duty to keep Malta in conformity with the observance of human rights. Need more be said when Article 242(1) of Chapter 12 makes the matter clear ?"* – vide page 21.

Deliberates:

Article 7 of the European Convention on Human Rights provides as follows:

> ***"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.***
>
> ***2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was***

> ***committed, was criminal according to the general principles of law recognized by civilized nations."***

Now Article 39(8) of the Consistution of Malta is a reflection of Article 7 of the European Convention. Therefore the reasoning of this court as to the legality or otherwise of the Attorney General's discretion in the light of Article 7 of the Convention apply equally to Article 39(8) of the Consistution of Malta.

The first paragraph of this Article (7) embodies the principle "nullum crimen, nulla poena sine lege". According to the precepts ennunciated in **"Kokkinakis v Greece "** 25th May 1993 Series A no. 260-A page 52, and **"Mark James Taylor v United Kingdom"** App No. 48864/99 decided on 3rd December 2002, the principle, "*that only the law can define a crime and prescribe a penalty."* is a principle of cardinal importance, a human right, and a fundamental defence to a criminal law prosecution. This principle gives rise to the precepts of certainty and foreseeability in that criminal laws have to be sufficiently clear and precise so as to enable individuals to ascertain which conduct constitutes a criminal offence and to foresee the precise consequences of any transgression. (Vide **"Achour vs France**" App. No 67335/01 decided on 29th March 2006, **"Soros vs France** " App. No. 5042/06) Moreover, inherent in the criteria of foreseeability are the precepts of clarity and accessibility. (vide "**Sunday Times vs United Kingdom** " App. No. 6538/74 decided on the 26th April 1979 and "**Coeme and others v Belgium** " App No. 32492, 32547, 32548, 33209, 33210 of 1996)

It is pertinent to state that according to **"Cantoni vs France**" App. No 17862/91 decided on the 11th Novembru 1996 the ECHR reaffirmed :

> *"A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which agiven action may entail "*

(Vide **"Tolstoy Miloslavsky v. the United Kingdom"** judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37)

It is almost superfluous to state that the Attorney General discretionary power granted by virtue of Article 22 (2) of Chapter 101, has been employed as is evidenced by the issuing of the Bill of Indictment 1/2013.

In evaluating the compatibility of Article 7 of the European Convention, with the discretion granted to the Attorney General on the choice of Forum in drug trafficking cases, this Court examined not only the submissions profferred by the Attorney General, the facts in issues, the decision of the European Court of justice in the Camilleri case, but also the recent pronouncements of the Maltese Courts regarding the same issue, that is the judgements **"Joseph Lebrun vs Avukat Generali**" and "**Martin Dimech vs Avukat Generali"** , PA per Mr. Justice Ellul both decided on the 21st February 2014 "**Repubblika ta' Malta vs Matthew Zarb**" PA per Mr. Justice Mallia decided on the 7th March 2014 and **"Repubblika ta' Malta vs Giovanna Pace et"** PA per Mr. Justice Ellul decided on the 28th March 2014. **"Republic of Malta vs Ndubisi Ndah Patrick**", PA per Madam. Justice Schembri Orland decided on the 8th May 2014.

Indeed this Court finds that the defences raised by the Attorney General in these proceedings, have already been the subject of intense scrutiny in the judgements pronounced by these Courts indicated above, and this Court adopts their findings and acknowledges no impelling reason to depart from the conclusions reached therein. Virtually the same defences were addressed and dismissed by the European Court of Human Rights in the **"Camilleri vs Malta**" judgement, when that Court held:

> *"39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of the law was sufficiently clear and satisfied the requirements of accessibility and foreseeability at the material time.*
>
> *40. The Court finds that the provision in question does not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that section 120A (2)*

of the Medical and Kindred Professions Ordinance provided for the punishment applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A (2) of the above-mentioned Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of foreseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried.

41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

42. The Court considers relevant the cases of G. and M. mentioned by the applicant (see paragraph 25 above). It observes that although these cases were not totally analogous (in that G., unlike M., was a recidivist), they were based on the same facts, offences in relation to which guilt was found, and a similar quantity of drugs. However, G. was tried before the Criminal Court and eventually sentenced to nine years' imprisonment whereas M. was tried before the Court of Magistrates and sentenced to fifteen months' imprisonment. More generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable. It would therefore appear that the applicant would not have been able to know the punishment applicable to him even

> *if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court.*
>
> *43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which would aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards..."*

In the case under review the Court notes that unfortunately to date, no measures have been implemented by the legislative of arm of this country to remedy this situation, through the promulgation of the necessary legislation. It is evident that the decision of ECHR in the Camilleri case, did not require the legislator to abrogate the Attorney General's discretion but required the legislator to establish the requisite and precise criteria or guidelines that would regulate, to a significant extent, the Attorney General's discretion, and thus nullify the perceived arbitrariness of the same.

This has put the Courts of Malta in an unenviable position, in that they have been repeatedly called upon to provide an effective remedy. This Court understands that the function of the Court is to adjudicate according to the principles of law and the facts of the case. The Court further understands that it is not for the Courts of Justice to legislate.

The Court however, in finding of a breach of fundamental human rights, is called upon to provide an effective remedy.

This Court has examined the remedies given by the Maltese Courts, in the cases cited above, post the John Camilleri case, wherein our Courts have profferred the remedy that, in the eventuality of the accused being found guilty of the charges brought agaist him before the Criminal Court, that same Court, in establishing punishment, may take into account the fact that the Civil Court in its Constitutional Jurisdiction decided that the discretion granted to the Attorney General by virtue of Article 22 (2) of Chapter 101 of the Laws of Malta was inconsistent with Article 7 of the European Convention for the protection of Human Rights and Fundamental Freedoms.

Is this an effective remedy? Is this remedy aimed at the cessation of the continuing human right violation?

Deliberates:

In examining what is understood as the right to an effective remedy, this Court considers that it is essential, under the rule of law, that a state provides effective remedies, effectivess of justice and more importantly provides an effective recourse to any person who alleges a breach of his fundamental right and freedoms. In absence of these, the scope of justice remains an illusive one or simply a desiderata.

Article 13 of the European Convention of Human Rights provides that:

> ***"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority nothwithstanding that the violation has been committed by persons acting in an official capacity."***

It has been said that " The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by

Article 13 **must be "effective" in practice as well as in law**. (see, for example, **Olhan v. Turkey** [GC], no. 22277/93,§ 97, ECHR 2000-VII).

> *The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, the Silver and Others v. the United Kingdom judgement of 25 March 1983, Series A no. 61, p. 42,§ 113, and the Chahal v. the United Kingdom judgement of 15 November 1996, Reports 1996-V, pp. 1869-70,§ 145).*
>
> *It remains for the Court to determine whether the means available to the applicant in Polish law for raising a complaint about the length of the proceedings in his case* ***would have been "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.*** (vide **Kudla v. Poland** App. No. 30210/96 decided on the 26th October 2000 - ECHR)

It is this Court considered opinion that is imperative that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not illusionary. This Court understands the need of self restraint on the part of the judiciary where it is called upon to provide effective remedy. The Court equally understands that ***,''the failure of the Court to maintain its dynamic and evolutive approach would risk rendering it a bar to reform or improvement"*** vide **Stafford vs Uk** App. No. 46295/99 decided 28th May 2002.

The Court considers that it is of paramount importance that effective measures necessarily need to be aimed at the cessation of continuing human right violations.

In the Camilleri vs Malta case the European Court indeed identified **the core of the problem** when it stated in paragraph 43 :

> ***''An insoluble problem was posed by fixing different minimun penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penaltiy would be applicable with respect to the same offence. The decision was inevitably subjective and lef room for arbitrariness, particulary given the lack of procedural safeguards.''*** Ibid at page 12

Moreover, the prohibition through Article 120A of Chapter 101 of the applicability of Article 21 of the Criminal Code, makes it impossible for a lesser sentence to be imposed by the Criminal Court***,''despite any concerns the judge might have had as to the use of the prosecutor's discretion''***Ibid at page 13.

In the absence of the promulgation of legislation by the Maltese Parliament, and until such time as the matter is addressed legislatively, it has become incumbent on this Court to provide **a real and effective**, rather than an illusionary remedy. This Court is of the opinion that **the effective remedy** to the perceived arbitrariness of the Attorney General's discretion and the lack of foreseeabilty **needs to focus** on the **minimun punishment** of four (4) years imprisonment.

Therefore and for these reasons this Court decides, further to the Reference of the Criminal Court and finds:

1. That the **Bill of Indictment Number 1/2013** in the aforesaid names, **is incompatible with Article 7 of the European Convention on Human Rights and Fundamental Freedoms (Chapter 319 of the Laws of Malta) and Article 39 of the Constitution of Malta**, as the said Bill of Indictment was issued in terms of the discretionary powers of the Attorney General, which in the light of the judgement pronounced by the European Court of Human Rights on the 22nd January 2013, **failed to satisfy the foreseeability requirement and to provide effective safeguards against arbitrary punishment;**

2. The effective remedy in this case is that, in the eventuality that in the proceedings before the Criminal Court, Jose' Edgar Pena be found guilty of the charges brought against him, the Criminal Court, in apportioning the punishment due, may take into consideration the fact that the Court, in its Constitutional Jurisdiction, pronounced that the discretion of the Attorney General by virtue of Article 22(2) of Chapter 101 of the Laws of Malta, was inconsistent with Article 7 of the European Convention on Human Rights and Fundamental Freedoms, and the Criminal Court may, if it deems fit, discard the minimum punishment of four (4) years imprisonment**,** and award punishment from a minimum of six (6) months imprisonment (established where the forum is the Court of Magistrates) up to life imprisonment, **should the Criminal Court have ''any concerns ...," ''as to the use of the prosecutor's discretion.".**

3. The Court furthers orders that a copy of this judgement be inserted in the acts of Bill of Indictment Number 1/2013.

Costs shall be borne by the Attorney General.

Read.

< Final Judgement >

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