MALTA

CONSTITUTIONAL COURT

THE HON. MR. JUSTICE -- ACTING PRESIDENT

GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE

TONIO MALLIA

THE HON. MR. JUSTICE

NOEL CUSCHIERI

Sitting of the 2 nd March, 2015

Civil Appeal Number. 52/2013/1

The Republic of Malta

v.

Nelson Mufa

Preliminary

This is an appeal lodged by the Attorney General ["the applicant"] from a judgment given on the 8th May 2014 by the First Hall of the Civil Court ["the first court"] in its constitutional jurisdiction pursuant to a constitutional reference ["the reference"] made by the Criminal Court in the records of the case 10/2013 in the afore-mentioned names, whereby the first court decided as follows:

> "… that the application of section 22(2) of Chapter 101 to the instant case is likely to result in a breach of Article 7 of the European Convention on Human Rights and of Article 39 of the Constitution because the relevant legal provision fails to satisfy the foreseeability requirement and to provide effective safeguards against arbitrary punishment. … Costs are to remain untaxed between the parties."

The reference in question reads as follows:

> "Is the application of section 22(2) of Chapter 101 to the instant case likely to result in a breach of Article 7 of the European Convention on Human Rights and/or of Article 39(8) of the Constitution because the relevant legal provision fails to satisfy the foresee ability requirement and to provide effective safeguards against arbitrary punishment?"

In its decision the first court made an analysis of the facts leading to this case, and of the considerations leading to its decision. The relevant part of the judgment reads as follows.

> "The merits of this case are similar to those of the other cause, also decided in a separate judgment of today's date, in the names "***The Republic of Malta vs Patrick Ndubisi Ndah*** (App. 53/14 LSO).The parties agreed that the oral and written submissions in this case would also be applicable and form part of the records of the second application and both cases were heard contemporaneously.[1]
>
> "The facts that emerge from the Reference are not in dispute and were stipulated to by the parties to the present proceedings.[2] The following facts were agreed to:-
>
> > "1) On the 5th of May 2010 on the strength of Art.22(2) of Chapter 101 of the Laws of Malta, the Advocate General gave an order that the accused Nelson Mufa be brought to charge before the Criminal Court to answer the different charges brought against him in breach of the provisions of Chapter 101.
> >
> > "2) By means of the Bill of Indictment 10/2012 the accused Nelson Mufa was arraigned before the Criminal Court and charged with various offences related amongst other things to conspiracy for the purpose of selling or dealing in the drug heroin in breach of Chapter 101 of the Laws of Malta which drug had a quantity of nine hundred and forty eight grams (948) with 35% purity in breach of Chapter 101.
>
> "The present constitutional proceedings were referred to this Court by the Criminal Court in view of determining whether by application of Article 22 (2) of Chapter 101 of the Malta to the case of Nelson Mufa is likely to result in a breach of Article 7 of the European Convention for the Protection of Human

[1] See Court record of the sitting of the 3rd October 2013 at fol. 686.
[2] See court record of the sitting of the 5th September 2013 at fol. 682.

Rights and Fundamental Freedoms and/or Article 39 (8) of the Constitution of Malta because Article 22 (2) of Chapter 101 fails to satisfy the forseeability requirement and to provide effective safeguards against arbitrary punishment.

"In his application before the Criminal Court, the accused referred to the decision of the European Court of Human Rights (ECHR) given on the 22nd January 2013 in the case "***John Camilleri vs Malta***"[3].

"The relevant para of this decision is as follows:

> *""44. In the light of the above considerations, the Court concludes that the relevant Legal provision [120A (2) of Chapter 31] failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7."*

"**<u>The Attorney General's Reply</u>**

"The Attorney General opposed the accused's plea and argued that the discretion exercised in terms of Art 22(2) was not in violation of Art 7 of the Convention or of Article 39(8) of the Constitution. Briefly, respondent in this case pleaded that his office as established by Article 91 of the Constitution of Malta, grants him the power to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment[4]. Moreover, this discretion merely gives direction and does not constitute the criminal proceedings which continue independently of the respondent.

"Furthermore, in the present case, his discretion was exercised conscientiously and in terms of the established parameters and criteria which may easily be traced and identified in local jurisprudence, namely, the type and quantity of drugs in question, the level of participation of the accused in the crime, his statement, as well as aggrieving circumstances and other facts relevant to this particular case.

[3] App. 42931/10

[4] In the exercise of these powers the Attorney General shall not be subject to the direction or control of any other person or authority

"The Attorney General strongly contended that there is no breach of the Articles referred to. Although the criteria are not established by law, the exercise of his discretion in determining which court is to try and punish the accused may be scrutinised in court since the latter have discretion to determine whether the respondent's decision is *ultra vires* or otherwise. Furthermore, each case has its particular circumstances and his decision took into account the particular circumstances of the accused's case.

"In his reply, the Attorney General furthermore drew the following distinctions between the present proceedings and that which was the object of the decision of the European Court of Human Rights in ***Camilleri vs Malta***[5]. These can be summarised as follows:

"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.

"III <u>LEGAL CONSIDERATIONS</u>

"Article 7 of the ECHR provides as follows:

[5] App. No. 42931/10 decided on the 22nd January 2013

> *""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."*

"Article 39(8) of the Maltese Constitution is substantively identical to Article 7 and the reasoning of this court as to the legality or otherwise of the Attorney General's discretion in the light of Article 7 are equally applicable to Article 39(8). In view of the reliance of the accused's application and of recent case law on the decision of the ECHR, this court will address the issue in the light of Article 7.

"The first paragraph of this Article (7) embodies the principle "*nullum crimen, nulla poena sine lege".* In essence this is the principle of legality which is a core value, a human right, and also a fundamental defense to a criminal law prosecution according to which no crime or punishment can exist without a legal basis. In addition to that, it contains the principle 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 what the consequences of transgressions will be **(**ECHR **"*Kokkinakis v. Greece*")[6].**

"In essence criminal convictions and penalties are to be based on the law. This flows from the principle of the rule of law embodied in the preamble to the European Convention and which also permeates various Articles of the Convention. Article 7 has been the subject of interpretation by the ECHR. Thus the notion has been held to encompass both written and unwritten legal rules and entails certain qualitative requirements including those of accessibility and foreseeability ("***Achour v France")[7].*** In particular, the legal basis for a conviction has to be sufficiently clear and its scope must be foreseeable. However, absolute precision is not required ("***Soros vs France***")[8]. Therefore, Article 7 does not prohibit the gradual clarification of laws through judicial decisions and the development of case law.

[6] Application No. 14307/88, 25th May 1993. See para 52.
[7] Application No. 67335/01, 29th March 2006. See para 42.
[8] Requête n° 50425/06 ,para 51.

"The criterion of foreseeability is connected to two other criteria - that of clarity and accessibility as applied to the law ("***Sunday Times vs United Kingdom")***[9]. In particular, the principle of foreseeability requires that the citizen knows what facts will give rise to criminal proceedings and what penalties are associated with them. The criteria of clarity, accessibility and foreseeability also apply to the legality of the penalty. (See for example, "***Coeme and others v Belgium***").[10]

"However, the clarity of the law can be evaluated if the party has appropriate advice. This was stated by the ECHR in its judgment in the case "***Cantoni vs France"***[11] whereby the Court held that : "*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 a given action may entail "(see also, among other authorities, the* ***Tolstoy Miloslavsky v. the United Kingdom*** *judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37) as ignorance of the law is no defence*.

"With regards to the criterion of foreseeability, it is evident from the judgments of the ECHR that this is not an absolute as the Court has determined that a reasonable foreseeability of a change in the penal law would not lead to a violation of Article 7 (See "***S.W. v UK"***[12]**,** "***Pessino v France***[13]).

"In its appreciation of the applicability of Article 7 criteria, the ECHR has thus proceeded with a casuistic approach and to this extent, the submission made by the Attorney General that the court's decision in the Camilleri case was based on the particular circumstances of that case is a valid one. However this court is not convinced that the pronouncement of that Court do not also apply to this case particularly with reference to the arbitrary nature of the discretion exercised by the Attorney General under Article 22(2) of Chapter 101 of the Laws of Malta and the uncertainty that ensues to the accused as to the penalty applicable.

[9] App. 6538/74 decided 26th April 1979 at para 47.This seminal judgment laid out the requirement that a criminal law is to be precise.
[10] Application nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145
[11] Application 17862/91 decided on the 11th November 1996, para 35.
[12] Application No 20166/92,22 November 1995, para 44
[13] Application No. 40403/02, 10 October 2006 para 36,

"At this point, it is useful to state that the similarity between the discretion arising from section 120A(2) of Chapter 31 of the Laws of Malta, and the current section under review, namely section 22(2) of Chapter 101 is not in dispute.

"Furthermore, since the decision of the ECHR in the Camilleri case, there have been various pronouncements by the national courts which have applied the dicta of the ECHR to the parallel provision under review. The Criminal Court, in its reference, mentioned the decision in the case "***Mario Camilleri v Avukat Generali"***[14] whereby it was decided that the same discretion under scrutiny today, in line with the decision of the ECHR, also violated Article 7.

"The Court here refers to four other judgments delivered recently, namely, "***Joseph Lebrun vs Avukat Generali"*** and ***"Martin Dimech vs Avukat Generali"***,[15] "***Repubblika ta' Malta vs Matthew Zarb"***[16] and "***Repubblika ta' Malta vs Giovanna Pace et"***[17] whereby our courts were unanimous in their finding that this provision still breached the requirements of Article 7. These last four judgments referred to recent criminal prosecutions and to this extent can be said to be settled law at least until the matter is finally determined by the Constitutional Court. This is not to apply the doctrine of binding precedent, but is measured to ensure uniformity and consistency.

"The provision under scrutiny essentially empowers the Attorney General with the exercise of a discretion. In his learned study on "***The Rule of Law as a Fundamental Principle of the European Convention on Human Rights*** "[18] Professor J.J. Cremona states:

> *""The link between foreseeability and the conferment of a discretion is a crucial one. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference". The author asserts further that "Arbitrariness is the precise antithesis of the rule of law. In fact the Court has*

[14] PA (AF) decided on the 9th July 2013
[15] PA (AE) both decided on the 21st February 2014
[16] PA (TM) decided on the 7th March 2014

[17] PA (AE) decided on the 28th March 2014.
[18] Prof.J.J. Cremona "*Selected Papers 1990-2000"* Vol. 2 "*Human Rights and Constitutional Studies"*

considered that the principle of the rule of law in a democratic society requires a minimum degree of protection against arbitrariness."[19]

"The same defences raised by the Attorney General in these proceedings have already been studiously considered by our courts in the aforementioned judgments delivered by the Hon. Mr. Justice Anthony Ellul. This Court makes full reference to those judgments and the reasoning therein applied and, seeing no reason to depart from their conclusions, embraces them as its own as applicable to the case in review. In particular, the following reasons bear emphasis.

"In its *Camilleri v. Malta* judgment the European Court noted that, in the situation complained of, the domestic law provided no guidance on the circumstances in which a particular range of sentence applied, and the prosecutor had unfettered discretion to decide the minimum penalty applicable to the same offence. The national courts were bound by the prosecutor's decision and could not impose a sentence below the legal minimum, whatever concerns they might have had as to the use of the prosecutor's discretion. The Court concluded that such a situation did not comply with the requirement of foreseeability of the criminal law for the purposes of the Convention and did not provide effective safeguards against arbitrary punishment, in violation of Article 7 of the Convention. (Emphasis added by this Court).

"The ECHR did not find any ambiguity in the text of the law, which 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. The Court then considered the issue of foreseeabiilty and the Ordinance's qualitative requirements, with reference to the manner of choice of jurisdiction as this reflected on the penalty that the offence in question carried."[20] The Court then made the following observations:

"i. The accused would only know which of the two punishment brackets would apply to him when he was charged, that is after the exercise of discretion by the AG.

[19] Herezegfalvy vs Austria, 24.9.92, Series A, No 244, para 89
[20] Judgment at para 40

> "ii. The decisions taken upon a finding of guilt were at times unpredictable.
>
> "iii. Any criteria to which the AG gave weight in taking his decision were were not specified in any legislative text or made the subject of judicial clarification over the years - thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied.
>
> "iv. Article 21 of the Criminal Code provides for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons. However, section 120A(7) of the Medical and Kindred Professions Ordinance, (as well as 22(9) of Chapter 101) which provides for the offence with which the applicant was charged, specifically states in its subsection (7) that Article 21 of the Criminal Code shall not be applicable in respect of any person convicted of the offence at issue.

"It is true that the charges brought against the accused occurred several years since John Camilleri's conviction. The Attorney General argued, and produced an exemplary list of cases prosecuted whereby he contends that the element of uncertainty has been done away with by praxis.

"However, this argument in itself, does not address the glaring flaw that whatever parameters the Attorney General may set for himself, these are not found in any law, nor indeed in any judicial pronouncements (although on this point one should clarify that such decisions would in any case not be binding on the national courts as the principle of *stare decisis* does not apply in Maltese law). The choice of forum results from the Attorney General's decision. It cannot be said that the accused has *a priori* the legal certainty of such a decision. This was highlighted by the ECHR which drew such an inference from a comparison of two similar cases where, however, the accused were charged before different fora. To this extent, the discretion is indeed an arbitrary one[21] independently of the considerations which the court, appraised of a criminal prosecution before it, may eventually make on the proofs made.

[21] See also para 43 Camilleri v Malta.

"Again, the Attorney General has argued, in the light of established case law[22], that his decision is always subject to judicial review. But this does not address the qualitative requirement of *foreseeability* which requires the element of *a priori* certainty.

"The Attorney General, in his response, has also relied on the dissenting opinion given by Judge Lawrence Quintano in the Camilleri case. Frankly this court finds this attitude rather strange without in any manner seeking to diminish the learned contribution of Judge Quintano. The decision of the European Court of Human Rights clearly and unequivocally considers the Attorney General's discretion to be in violation of the rule of legality which, as has been seen, is a core human rights provision. As such, the national courts should not easily discard the decisions of that Court. In the matter of fundamental human rights, the national courts , like the States parties to the Convention, are obliged to give effect to the judgments of the European Court unless strong reasons impede them from doing so.

"The spate of litigation which the Camilleri case has spawned, in the face of the passivity of the State authorities to address the issues raised, is not the ideal situation and places an unnecessary burden on the taxpayer. It is not the place of the courts to legislate but suffice it to say that the decision of the ECHR does not require that the legislator eliminates the Attorney General's discretion, but that the law introduces the element of certainty, possibly through the stipulation of guidelines, or the possibility of lowering the minimum punishment applicable even before the Criminal Court.

"In his oral submissions, the Attorney General raised the plea of inapplicabity of article 7 on the basis that the proceedings against the accused have not yet been "concluded" .

"This point was considered by the ECHR in the case of "***Mirchev and others vs Bulgaria"***[23] where it was held that with reference to "*nullum crimen sine lege"* "*that the applicants cannot claim to have been "victims", within the meaning of Article 34 of the Convention, of a violation under Article 7 § 1 of the Convention by the mere opening of criminal proceedings against them. The proceedings remained at the stage of the preliminary investigation and never resulted in actual convictions and punishment. In addition, they were terminated*

[22] See "***Claudio Porsenna vs Avukat Generali "*** **Civ. App. - dec. 16th March 2001**

[23] *(Application no. 71605/01),*27th November 2008 .

because the authorities themselves concluded that the actions of the applicants had not constituted offences."

"On this question, the Court notes that in the ***Dimech, Lebrun and Pace*** cases proceedings against the accused were still pending. This is also true of the fourth case, already cited, "***Republic of Malta vs Matthew Zarb"***. The judgments delivered in these cases all found that Article 7 had been breached. Furthermore the Mirchev judgment referred to *nullum crimen sine lege* and is therefore not identical to this case which does not of itself even address the formulation of the penalty applicable, but rather, the arbitrariness of the discretion of choice of forum and consequential penalty bracket applicable.

"The Court considers that the accused in this and similar cases is faced with a decision already made by the Attorney General which not only impacts the choice of forum (and is not merely "*directional"* as the Attorney General contends*)* but also determines the penalty bracket applicable to him and this is known to him only at the moment he is charged before one court and not another. Article 7 is breached not because the penalties applicable are unclear, but because the discretion is arbitrary in the terms discussed *ante.* The uncertainty does not depend on a finding of guilt but on the making of the decision itself in violation of the principles of the rule of law underpinning Article 7.

"The Court in view of the foregoing, does not see any reason to depart from the decisions consistently taken by this Court as presided by different members of the judiciary already quoted.

"<u>The Issue of a Remedy</u>

"The accused, through his advocate, made detailed submissions on the necessity, and indeed, on the legal obligation incumbent on our courts arising from the primacy of fundamental rights and freedoms embodied in our Constitution and in the European Convention, to provide an effective remedy.

"However, this case was brought before this court by the reference procedure established in Article 46(3) of the Constitution, and the Court must therefore act within the limitations of that procedure.

"This issue was addressed by the Constitutional Court in the case "***The Police v. Arias"*** (dec. on the 28th September 2012) whereby it was held that:

> *""55. In respect of this issue this Court points out that as a rule whenever a constitutional reference is made to the First Hall Civil Court under Article 46(3) of the Constitution that Court's function is circumscribed by the terms of the reference made to it and that Court is required to limit itself to giving its replies to the questions referred to it by the referring Court. The terms of the reference made to the first Court did not extend to the liquidation and order of payment of compensation to the defendant Arias Nelson who was not the person making the reference since the referring authority was the Court of Magistrates. When, therefore, the first Court liquidated the sum of €1,500 by way of compensation in favour of the defendant it went beyond the limits of its competence as delineated by the terms of the reference and this is sufficient to lead to the revocation of this part of the judgment without there being any need to consider the other aspects raised by the appellants in connection with this issue."* This decision was also followed in ***Republic of Malta v. Matthew Zarb."***[24]

"A constitutional reference is not "an action" but a question put to this court and defines the parameters of the investigation which is to be made which have to be strictly adhered to. Consequently this Court cannot determine or order an effective remedy which was not requested in the reference.

"However, the finding of a breach of Article 7 will result from the acts of the criminal proceedings and the Criminal Court is to take notice of this finding for the purposes of the application of the punishment if the accused is eventually found guilty in the proceedings instituted against him."

The Appeal

[24] See also "***Massa et v d-Direttur ghall-Akkomodazzjoni Socjali "*** *-Const. Court - dec. 30th April 2012.*

In his appeal applicant is requesting this court to revoke the judgment given by the first court and, instead, declare that there is no breach of Article 7 of the European Convention of Human Rights ["the Convention"] and Article 39(8) of the Constitution of Malta ["the Constitution"].

On his part respondent did not file a written reply but made oral submissions.

Applicant is basing his appeal on three grievances: [1] that in the present case Article 7 of the Convention is inapplicable, [2] that the first court has made an incorrect evaluation of the exercise of the Attorney General's discretion in the context of both Article 7 of the Convention and Article 39(8) of the Constitution, and [3] that the first court should not have found a breach of the fundamental human rights of respondent.

The Court's Considerations

The Grievances

Since these are intimately connected, the Court will be dealing with them as one.

The first grievance is based on Article 7 of the Convention, and is to the effect that the present case is factually different from the case ***John Camilleri v.***

Malta decided by the European Court, cited by the first court, in that, whilst in the *Camilleri Case* the criminal case had already been decided by the national court and was therefore considered to be a *res iudicata*, in the present case the case is still pending before the Criminal Court. It is precisely this different scenario which makes the European Court's considerations in that case inapplicable to the case at issue, and which justifies this grievance in respect of the non-applicability of the said Article 7.

On this issue this court refers to its considerations made in a recent case ***Ir-Repubblika v. Matthew Zarb et*** decided on the 6th February 2015 where this court, after quoting local and European case-law[25], decided that Article 7 was not applicable since the case was still pending and therefore the applicant could not be considered as being "held guilty", in terms of the said article, of the criminal charges brought against him. For this reason, the issue regarding the constitutionality or otherwise of Article 22(2) of Chapter 101 raised at this stage must be considered as premature.

Moreover, respondent's arguments in this regard are fatally weakened by two considerations, one of fact and the other of law. The first consideration is that,

25 Q.Kos. App.84/13 Joseph Lebrun vs Avukat Generali, u Q.Kos.61/13 Martin Dimech v Avukat Generali, both decided on the 17th September 2014; App.C 1/2010. Avukat Jose' Herrera nomine v Avukat Generali, decided on 13 April 2011; ECHR Mirchev and Others v Bulgaria, Appl.71605/01 decided on the 27th November 2008;

by virtue of the recent amendments made by Act XXIV of 2014 to the relevant provisions of Chapter 101, which came into force on the 14th August 2014 and with effect from that same date, the accused has been granted the right of appeal, pending the criminal proceedings, to the Criminal Court from the Advocate General's decision. Therefore now the said Advocate General's discretion has been made subject to judicial review thereby eliminating the possible exercise of *"unfettered discretion"* and any possibility of arbitrariness in the use of his discretion.

The second consideration is that respondent Nelson Mufa, availing himself of this change in the law, has filed an application before the Criminal Court challenging the Advocate General's decision that his case be decided by the Criminal Court. By a decree given on the 23rd October 2014, the said Court however dismissed the application primarily on the grounds of the "amount of drugs involved [total 639.90 grams] and the purity contained (*sic*)."

On the strength of the afore-mentioned considerations, this Court considers that applicant's grievances are justifiable in fact and at law, and are being upheld.

Decision

For the above reasons the Court upholds applicant's appeal, and revokes the judgment of the first court, with costs to be borne by respondent. The Court further orders that a copy of this judgment be inserted in the records of the criminal proceedings.

< Final Judgement >

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