CONSTITUTIONAL COURT

JUDGES

THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE ANTHONY ELLUL

Sitting of Monday 24th August 2020

Number: 1

Application number: 159/19 GM

Stephen Izechukwu Egbo

v.

The Attorney General who by law was substituted by The State Advocate

The Court:

1. On the 29th August 2019 the applicant filed a constitutional case complaining of unreasonable delay in the criminal case **The Republic of Malta v. Stephen Izechukwu Egbo 1/2017**, and a breach of the fundamental right to a fair hearing when the Court of Criminal Appeal refused to consider the fresh grounds of appeal on a point of law raised during oral submissions. The applicant requested the first Court to:

> *"....to declare and decide that in view of the delay in the aforementioned criminal proceedings which were instituted against the Applicant on the part of the Respondent, which procedures were initiated on the 29th November of the year 2010 and were finally concluded only on the 12th June of the year 2019; as well as in virtue of the judgement delivered by the Court of Criminal Appeal on the 12th June 2019, in the same case in the names 'The Republic of Malta vs Ikechukwu Stephen Egbo" (Bill of Indictment No. 1/2017), the Applicant's fundamental right to a fair hearing within a reasonable time as protected under Article 39 of the Constitution of Malta and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been breached and consequently that this same Honourable Court proceeds to provide those effective remedies and to give those orders, issue those acts and give those directives which it deems fit and opportune to ensure compliance with the said dispositions under Article 39 of the Constitution of Malta and Article 6 of the European Convention for the Protection of Human Rights and Liberties"*.

2. On the 5th September 2019 the Attorney General replied whereby he contested applicant's claims.

3. On the 16th June 2020 the Civil Court, First Hall delivered final judgement and decided:-

> *"For these reasons the Court decides this case as follows:*
>
> *1. Rejects the applicant's claim that there was a breach of fair hearing due to violation of the audi alteram partem rule;*
>
> *2. Finds that the length of time the proceedings against applicant in the case in the names The Republic of Malta v Izechukwu Stephen Egbo (Bill of Indictment 1/2017) is in breach of applicant's right to a fair hearing within a reasonable time protected under article 39 of the Constitution of Malta and under article 6 of the European Convention for the Protection of Human Rights and Liberties.*
>
> *3.Orders the Attorney General to pay applicant the sum of two thousand and five hundred euros (€2,500) by way of compensation for the violation of the right to a fair trial within a reasonable time.*
>
> *Costs are to be divided equally between the complainant and the respondent"*.

4. The applicant filed an appeal from the judgement of the first Court.

Facts.

1. The principal facts are the following:-

i. The applicant was accused that on the 27th November 2010 and during the preceeding months he agreed with another person to illegally deal in, import and receive cocaine from the Netherlands to Malta.

ii. A trial by jury was held, and on the 22nd July 2017 the Criminal Court delivered judgement, after the jurors issued a unanimous verdict of guilt.

iii. The applicant was condemned to a term of imprisonment of thirteen (13) years and payment of a fine of thirty thousand euro (€30,000).

iv. The applicant appealed the judgement. The appeal was based on a point of fact. In the appeal application he declared:-

> *"21. The basis of the appeal is that all the evidence tendered points to the fact that the appellant had no involvement in any drug conspiracy and that it is only Somylai who indicates the appellant's involvement. Put simply – it is only through Somylai's testimony that the jurors could have found a guilty verdict.*
>
> *22. Somylai's evidence is tainted with so many inaccuracies, incorrect statements and lies that his whole testimony cannot be trusted. It is to*

be kept in mind that Somylai's testimony led to him being given a lesser prison sentence.

23. the inaccuracies in Somylai's testimony are as follows:

.....

24. So the issues of lies and mistakes directly affect the testimony given by Somylai because they are a direct attack on his credibility which is the only basis for the guilty verdict since everything else points away from the appellant.

25. The facts pointing away from the appellant are as follows:

.....

26. Thus this trial was in the opinion of the defence tainted by missing evidence which of course put further doubt on all the other evidence that was put to the jury.

i. No police phone exhibited – thus we cannot know what was said.
ii. No recording – once more we have no record of what was said.
iii. No full CCTV in supermarket – so we have only a one-sided CCTV version of events.
iv. No translator present for Somylai's calls to his boss who understood the language he was to speak.

27. What all this leads us to is that which the most ***unacceptable*** *in a court of law – that of having assumptions. It is this which, in the opinon of the appellant, led to the guilty verdict being delivered.* ***The jurors made the erroneous conclusion based upon assumptions and not facts****.*

28. All the facts point towards Somylai not saying the truth but the jurors assumed he was saying the truth in only one respect, that is, that the appellant was his contact. All the factual evidence points in a different direction. Thus, logically, the only legitimate conclusion is that the jurors made the said assumption.

29. In order to accept what Somylai is stating we must make the following assumptions:

.....

30. It is clear therefore that what we have here is the situation where the evidence of one witness was enough to convince the jurors of the guilt of the appellant. This is in accordance with article 638(3) of the Criminal Code (Chapter 9 of the Laws of Malta).

> *31. As has been constantly pointed out by our Courts this is enough. However, in deciding, one has to be circumspect and careful especially when there is a conflict of evidence or when evidence points one way rather than the other.*
>
> *.....*
>
> *35. Also, could the jurors have accepted the testimony of the said Somylai only in part when in so many respects his testimony is deficient ? This point is being re-affirmed because the conculsion that the jurors arrived at doe not bear confirmation in the facts placed before the jurors themselves"*.[1]

v. By judgement delivered by the Court of Criminal Appeal on the 12th June 2019, applicant's appeal was dismissed. The Court confirmed that:

(a) The appellant could not raise fresh grounds of appeal during oral submissions, *"and will therefore limit its considerations on the ground of appeal mentioned in the appeal application and to matters related and involved"*.

(b) The jurors legitimately and reasonably concluded that appellant was involved in a conspiracy to import and deal in cocaine with Somylai and others.

vi. On the 29th August 2019 the appellant filed the constitutional case wherein he complained of:-

- Unreasonable delay throughout the criminal proceedings;

[1] Extract from the appeal application filed by the applicant in the Court of Criminal Appeal.

- A breach of his fundamental right to a fair hearing in the appeal stage since the Court of Criminal Appeal failed to take cognizance of grounds of appeal mentioned during the sitting of the 1st March 2019. Appellant contends that the Court of Criminal did not apply Article 498 of the Criminal Code and the principle of *audi alteram partem*. Furthermore, he referred to Article 419 and claimed that the Court of Criminal Appeal failed to realise that the words *'under pain of nullity'* were deleted by Act I of 2018.

vii. By judgement delivered on the 16th June 2020 the First Hall upheld the first complaint and confirmed that there was unreasonable delay in the criminal proceedings **The Republic of Malta v. Izechuwku Stephen Egbo** (1/2017) and condemned the Attorney General to pay the sum of €2,500 as compensation. Furthermore, the Court rejected the other complaint that, *".... there was a breach of fair hearing due to violation of the audi alteram partem rule"*.

viii. On the 3rd July 2020 the applicant filed an appeal from that part of the judgement whereby the first Court rejected his claim concerning the Criminal Court of Appeal's rejection to consider the submissions of a legal nature raised by defence counsel during the sitting of the 1st March, 2019.

First Court's reasoning.

2. The relevant part of the judgement of the First Court for the purposes of this appeal, reads:-

> *"According to the appellant, the Court of Criminal Appeal violated his right to a fair hearing by refusing to consider the legal submissions put forward by his counsel during the oral hearing of the appeal but which were not to be found in his Application of Appeal; namely that the Court:*
>
> *(i) wrongly cited Article 419(1) of the Criminal Code, not realizing that the words "under pain of nullity", qualifying the requisite that all grounds must be stated in the Application of Appeal had been deleted;*
>
> *(ii) ignored Article 498 of the Criminal Code (more precisely, Article 498(4)) which confers upon it the "full power to determine, in accordance with this Title, any questions necessary to be determined for the purpose of doing justice in the case before the court.*
>
> *(iii) completely ignored the audi alteram partem rule;*
>
> *In his Application before this Court, applicant reproduced in detail his oral submissions before the Court of Criminal Appeal;*
>
> *In his written note of submissions, applicant pointed out that part of his oral submissions had not been recorded, ostensibly due to a technical failure and that nevertheless the Court proceeded to deliver judgement without hearing the submissions afresh;*
>
> *Having further considered that:*
>
> *Applicant's grievance is, in substance, that the decision of the Court of Criminal Appeal declaring as inadmissible his submissions made during the oral hearing and which were not based upon the grievances which he had included in his Application of Appeal violated his right to a fair hearing – specifically, the right to be heard – because the declaration of inadmissibility was based upon a wrong application of the law;*
>
> *The applicant's grievance cannot be looked into without a prior decision by this Court as to whether the decision of the Criminal Court of Appeal not to consider the further submissions was valid or not according to the rules of criminal evidence. This entails this Court acting as a third court of appeal, or as a court of cassation – which lies beyond its jurisdiction. Article 6 entails that an accused be given ample opportunity to put forward his case. This must be done according to the rules of*

preclusion laid down by the rules of criminal evidence of member states. There is no right to be actually heard; only the right to be given the opportunity to do so. The rules of preclusion are applied and interpreted by the court of criminal jurisdiction. Whether these rules have been properly applied and interpreted by that court is an issue of criminal law. The issue might possibly give rise to grounds for rehearing; but not to a breach of Article 6, which recognizes the fundamental right of the accused of the opportunity to put forward his case, but does not dictate how this opportunity is made available. If this were the case, Article 6 would become a Trojan Horse enabling human rights courts to become courts of appeal or of revision of courts of criminal justice;

Furthermore, "Article 6, para 1 does not lay down any rules as to the admissibility of evidence which is primarily a matter for regulation under national law". The grievance of applicant does not relate to the admissibility of evidence as such; only to the admissibility of grounds of appeal not made in the Application of Appeal. If admissibility of evidence is beyond the scope of Article 6, multo magis would be the admissibility of grounds of appeal;

One of the principal submissions not admitted for consideration by the Criminal Court of Appeal centred upon the alleged illegality of the conviction by the accused upon the evidence of an accomplice. This issue has been addressed by the European Court of Human Rights: "Issues of fairness may arise where an accomplice, who has been granted immunity, gives evidence against an applicant. However, where the fact was known to the defence and the court, and the accomplice extensively examined as to his reliability and credibility, no unfairness was found". As already stated, the Court of Criminal Appeal, notwithstanding its decision not to take cognizance of additional grounds of appeal, did in fact address this issue, finding that the jury was properly directed by the presiding judge on this point, and that they had enough insight to weigh the evidence".

Appellant's complaint.

3. In his appeal application, the appellant complains that:

"A Court is in fact required to decide, and to give reasons for its decision. In doing so, a Court must consider all the relevant arguments which have been brought before it for its due consideration; so much so that Article 6 of the Convention places an affirmative duty on a Court to provide reasoned judgements, specifically a judgement that adequately outlines the legal and factual basis of the decision. Although a Court is not required to proveide detailed answers to every argument raised by the parties, yet the Court's judgement should provide, at a minimum, sufficient reply to the foundational elements of

the facutal or legal claim.... A Court must address the main arguments submitted by the parties.

In addition to the above consideratins, even the very function of the Court of Criminal Appeal as laid down in Article 498(4) of the Maltese Criminal Code vests that Court with full powers to determin any questions necessary to be determined for the purpose of doing justice in the case before the court.

That entails an underlying feature of equity which the Court is in duty bound to adopt in the supreme interests of true justice in the case.

By absolving itself so conveniently of any responsibility to investigate the manner in which the Court of Criminal Appeal conducted itself in regard to the Appellant, the First Hall of the Civil Court in its Constitutional jurisdiction regrettably only functioned to perpetuate the grave injustice which the Appellant had already suffered at the hands of the Court of Criminal Appeal.

The right to a fair hearing requires a Court to appreciate all the matters of fact and of law submitted to it by both parties with reference to the parcitular issue which is is called upon to decide .....

The Appellant also made it abundantly clear that the Application which he had filed before the First Hall of the Civil Court in its Constitutional jurisdiction on the 5th September 2019 in the case in the aforementioned names is to be consdiered in the nature of an appeal. The Appellant in fact did not request that Court to address on their merits the various legal submissions, as compelling and completely fatal to the prosecution's case as they might be even on a prima facie review thereof.

However, in order to assess and determine whether there was any breach of the Appellant's fundamental right to a fair hearing, that Court ought to have of necessity considered whether as a matter of fact the court of Criminal Appeal outrightly ignored a fundamental defence which had been clearly put before it and which, if successful, would have discharged the Appellant from criminal liability; or, put in other words whether those legal submissions, if accepted, could have been decisive to the outcome of the case and therefore reuqired a specific and express reply by the Court in its judgement".

<u>Reasons</u>.

4. From the acts it transpires that during the sitting of the 1st March 2019, the Court of Criminal Appeal heard counsels verbal submissions.

The sitting was recorded. However, part of it is missing due to a technical fault.

5. The appellant claims that in the final judgement, the Court of Criminal Appeal failed to deal with legal arguments made during that sitting. In his application he refers to the fact that:-

i. The witness Attila Somylai was not entitled to benefit from a reduction in punishment in terms of article 29 of Chapter 101 of the Laws of Malta since he did not help the Police to apprehend *"the person or persons who supplied him with the drug"*;

ii. The statements made by Attila SomyLai were not admissible as evidence against the applicant, by application of Article 661 of the Criminal Code (and Article 30A of Chapter 101 of the Laws of Malta.

iii. The Criminal Court failed to inform the jurors to approach the testimony of Attila Somylai with caution, and this in breach of Article 639(3) of the Criminal Code which deals with the case where the only witness against the accused is an accomplice.

iv. The operation conducted by the police does not qualify as a controlled delivery in terms of Article 30B of Chapter 101 as Attila Somylai was not in possession of any drugs.

6. Since part of the recording of the sitting of the 1st March 2019 is missing, there is no record of the full submissions made by the defence counsel on behalf of the appellant. What is certain is that all the above were not mentioned as a ground of appeal in the appeal application filed before the Court of Criminal Appeal. All of them are points of law whereas the grounds of appeal in the appeal application were limited to points of fact concerning the credibility of the prime witness (Attila Somylai).

7. In the judgement delivered by the Court of Criminal Appeal, reference was made to complaints raised by counsel to the appellant during the verbal submissions. The Court held:-

> *"**11.** The reasons that sustain appellant`s grievance are defined in the application of appeal. Appellant goes into further detail in his oral submissions before this Court. However the Court also notes that in these submissions, the appellant refers to matters that were not identified as a grievance in the application of appeal. The Court is referring in particular to criticism levelled at the address of the judge presiding the trial to the jurors with regard to the benefit that Attila Somlyai ("**Somlyai**") obtained when Sec 29 of Chapter 101 was applied in his favour. It is to be remarked that although in his grievance as detailed in the application of appeal, the appellant did point out the benefit obtained by Somlyai as a primary reason for rejecting his version, the appellant in the application of appeal did not mention as a grievance the legality of the manner how the presiding judge addressed this matter.*
>
> ***12.**This issue merits a direction from this Court.*
>
> ***13.**In article 505(1), the Criminal Code directs the appellant from a judgement by the Criminal Court as to the contents of the application. The provision states that :- Besides the indications common to judicial acts, the application shall contain a brief but clear statement of the facts of the case, the grounds of the appeal and the relief sought.*
>
> *The issue that is being addressed by this Court is the extent of the meaning of the term : the grounds of the appeal.*

The Court refers to a similar, though not identical, provision that regulates appeals from judgements of the Court of Magistrates as a Court of Criminal Judicature, that is, ***article 419(1****) of the Criminal Code which states :- Besides the indications common to judicial acts, the application shall, under pain of nullity, contain : (a) a brief statement of the facts ; (b) the grounds of the appeal; (c) a demand that the judgement of the inferior court be reversed or varied.*

Through an exercise of "compare and contrast" between the two provisions, one finds a common denominator, namely the grounds of the appeal.

With regard to the significance of the term the grounds of the appeal, there are judgements on the matter given by this Court in its Inferior Jurisdiction.

*In a judgement given on the 3rd September 2001 in re "****Il-Pulizija vs Darren Attard****" the following was stated:-*

> *Hija gurisprudenza kostanti li galadarba tigi specifikata r-raguni, jew jigu specifikati r-ragunijiet, ta` l-appell, l-appellant ikun marbut b`dik ir- raguni jew dawk ir-ragunijiet, fis-sens li tkun biss dik ir-raguni jew dawk ir-ragunijiet li jistghu jigu kkunsidrati minn din il-Qorti, salv, naturalment aggravju jew aggravji li jistghu jitqiesu li huma komprizi u nvoluti fl-aggravju jew aggravji kif specifikati.*

This jurisprudential direction, valid for the inferior courts, is applicable, without reserve, mutatis mutandis to this court as well, essentially because the two provisions of appeal insofar as relates to the grounds of appeal are identical. Therefore there is no reason at law which precludes the application of what was decided with regard to the courts of inferior jurisdiction to this court once the issue in question is identical. This Court endorses this position and will therefore limit its considerations on the ground of appeal stated in the application and to matters related and involved".

8. The Court of Criminal Appeal refused to consider the grounds of appeal mentioned in paragraph 5 of this judgement, since none of them were included in the appeal application.

9. Appellant contends that he had a right to raise fresh grounds of appeal during the final verbal submissons made by counsel to the parties. Evidently the Court of Criminal Appeal did not agree with that argument.

10. He also claims that the submissions of a legal nature brought to the attention of the Court of Criminal Appeal during the sitting when final submissions were heard, *"(3)(ii)..... were in any case intrinsically related to the grounds of appeal as contained in the written Application of Appeal in consequence of which they were to have been considered to be comprised and involved in the grievance or grievances as specified in the Application of Appeal"*. However, the appellant failed to explain how the new grounds of appeal were intrinsically related to the ground of appeal contained the appeal application. In the Court's opinion there is absolutely no connection between the point of fact dealing with the credibility of the prime witness, and the points of law raised during oral submissions.

11. Article 505(1) of the Criminal Code provides that:

> *"Besides the indications common to judicial acts, the application shall contain a brief but clear statement of the facts of the case,* ***the grounds of appeal*** *and the relief sought".*

12. The law is very clear that the grounds of appeal and relief sought are to be expressly mentioned in appeal application. The fact that Article 505(1) does not expressly provide for the nullity of the application if any of those requisites are missing, does not mean that the appellant (whether the accused or the Attorney General) can choose to mention

the grounds of appeal at any subsequent stage of the appeal proceedings.

13. Furthermore, there is no provision of law in the Criminal Code (Chapter 9) that permits the filing of fresh grounds of appeal during the oral submissions stage of the appeal. The convicted individual has a time period of twelve working days to file an appeal, and the grounds of appeal have to be stated in the appeal application. If the accused or Attorney General are permitted to raise fresh grounds of appeal at the stage when oral submissions are made, that would imply an extension of the time limit to appeal the judgement of the Criminal Court. There is no provision of law which provides for such a possibility under Maltese law.

14. The appellant gave no valid reason why the new grounds of appeal mentioned during submissions at the appeal stage, were not raised when proceedings were still pending in front of the Criminal Court. During that stage of the proceedings the appellant was assisted by two lawyers, and he had ample and sufficient opportunity to raise such pleas. The Court is referring to the pleas numbered 1, 2, and 4 mentioned in the appeal application from the first court's judgement (vide pages 6 to 8 of the application filed by the appellant in the Civil Court). His default to raise such pleas before the Criminal Court and in the appeal application, cannot be remedied at a later stage of the appeal proceedings.

Furthermore, with respect to plea number 3, it does not transpire that the witness or the appellant were accused of complicity.

15. The appellant also referred to Article 498(4) of the Criminal Code which states:

> *"The Court of Criminal Appeal shall **for the purposes of and subject to the provisions of this Title** have full power to determine, **in accordance with this Title**, any questions necessary to be determined for the purpose of doing justice in the case before the court"*.

16. However, that provision of law is subject to the provisions of Book Second Part I of Title V of the Criminal Code of which Article 498(8) is part of. By application of Article 505 of the Criminal Code, which is also in Book Second Part I of Title V, the grounds of appeal are evidently the ones declared in the appeal application.

17. In the judgement delivered on the 12th June 2019 the Court of Criminal Appeal considered whether according to Maltese law, a ground of appeal can be raised during oral submissions. The Court concluded that it is not permissible. The application and interpretation of local legislation falls within the jurisdiction of the Court competent to decide the case. This is what the Court of Criminal Appeal did (pages 6 to 8 of the judgement).

18. In his note of submissions the appellant referred to Article 419(1) of the Criminal Code and the amendment introduced by Act I of 2018 whereby the words *'under pain of nullity'* were deleted. That provision of law applies to appeals from judgements of the Court of Magistrates, and now reads:-

> *"Besides the indications common to judicial acts, the application shall, contain -*
> *(a) a brief statement of the facts;*
> *(b) the grounds of the appeal;*
> *(c) a demand that the judgement of the inferior court be reversed or varied"*;

19. However, the judgement (**Il-Pulizija v. Darren Attard** of the 3rd September 2001) referred to by the Court of Criminal Appeal did not deal with a plea of nullity of the appeal. In that judgement the Court of Criminal Appeal confirmed that local case-law established that the appellant is bound by the grounds of the appeal mentioned in the appeal application and not new grounds of appeal mentioned at a later stage of the appeal proceedings. In this respect reference is also made to the judgement **Ir-Repubblika ta' Malta v. Mark Pace** delivered on the 7th November 2002. The Court of Criminal Appeal confirmed:-

> *"Qabel xejn din il-Qorti ma tistax ma tirrimarkax dwar il-hames paragrafu ta' l-aggravji li permezz tieghu l-appellant ippretenda li seta' jittratta aggravji ohra li ma semmiex fir-rikors ta' l-appell. Hija gurisprudenza ormai pacifika li l-Qorti ta' l-Appell ma tistax tiehu konjizzjoni ta' ragunijiet ta' l-appell, ossia aggravji, li ma jkunux gew imsemmija fir-rikors ta' appell. Dan johrog car minn dak li jipprovdi s-subartikolu (1) ta' l-artikolu 505 tal-Kodici Kriminali li tali rikors "ghandu jkun fih il-fatti tal-kawza fil-qosor imma cari, ir-raguni ta' l-appell (enfazi tal-Qorti) u t-talba ta' l-appellant". Ghalhekk il-Qorti se tghaddi biex tikkunsidra l-aggravji li huma specifikati fil-paragrafi numri (1) sa (4)"*.

20. The Court concludes that the reasoning of the Court of Criminal Appeal was not unreasonable and the proceedings as a whole were fair as required by Article 39 of the Constitution and Article 6(1) of the Convention

For these reasons the Court rejects the appeal filed by the appellant and confirms the judgement delivered by the court of first instance on the 16th June 2020.

All judicial costs are at the charge of the appellant.

Mark Chetcuti Chief Justice	Giannino Caruana Demajo Judge	Anthony Ellul Judge

Deputy Registrar
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