

**Magistrate
Dottor Consuelo Scerri Herrera LL D**

**The Police
Police Inspector Ivan Portelli
Police Inspector Sandro Zarb
V**

MOHAMMED MAKHLOUF

Today, 22nd January, 2001

The Court;

Having seen that the accused **MOHAMMED MAKHLOUF** son of Ali and Khalim, born in Baghdad, Iraq on the 7th February, 1973 was arraigned before her and charged with having on the 14th August, 2000 and on the previous days in Malta, forged, altered or tempered with or used or had in his possession a Hungarian passport bearing number PF260147 which he knew to be forged, altered or tempered with.

He was also charged with having on the 14th August, 2000 as a person who embarked or disembarked from Malta made or caused to be made a false return, false statement or false representation and/or furnished the Principal Immigration Officer with false information, by presenting the Principal Immigration Officer with a false Hungarian passport bearing number PF260147.

He was also charged with having on the same date and circumstances in Malta, knowingly made use of forged documents being a Hungarian passport bearing number PF260147.

He was also charged with having during the past months without having been granted a residence permit, landed or was in Malta without leave from the Principal Immigration Officer.

He was also charged with exporting out of Malta foreign currency that is the sum exceeding 12,000 US dollars, without the permission of the Minister.

On behalf of the Comptroller of Customs for having on the 14th August, 2000 at the Malta International Airport, prior to departing

from these Islands, to Milan as per flight AZ885, he was found in possession and/or under his control of a quantity of foreign currency without the necessary documentation and also for having furnished false information.

The Court was requested that besides awarding the punishments according to law, orders the forfeiture of the seized foreign currency and to declare the above mentioned person as a prohibited immigrant and to issue a removal order against him.

The Court saw the relevant documents including the fiat from the Attorney General dated 16th August, 2000 so that proceedings could be taken according to the Exchange Control Ordinance, Chapter 233 of the Laws of Malta marked as document IP 4, the consent of the Attorney General dated 16th August, 2000 so that these proceedings will be dealt with summarily marked as document IP 5, the fiat of the Controller of Customs dated 16th August, 2000, authorizing the executive police to take court action against the accused in terms of the Customs Ordinance, Chapter 37 of the Laws of Malta.

The Court noted that the accused did not object to this case being dealt with summarily.

The Court heard all the witnesses brought forward by the Prosecution and the accused giving evidence voluntarily.

Considerations:

On the 23rd August, 2000 the accused appeared before the Court as presided by the undersigned Magistrate, who immediately felt that the accused was not completely normal in the sense that he was not in a position to understand the nature of the charges brought forward against him. The Court felt it necessary to appoint a Psychiatrist to examine the accused and consequently relate back to the Court with his findings.

On the 1st September, 2000 there appeared Dottor Anthony Cutajar who was appointed by the Court as a Legal Aid Attorney to the accused who informed the Court that the accused was an in patient at Mount Carmel Hospital.

On the 4th September, 2000 Doctor Joseph Spiteri who was nominated by the Court as a Psychiatrist and who subsequently examined the accused stated that the accused was suffering from a

psychotic disorder that renders him unfit to appear in Court and thus prescribed him a certain amount of medication to help him with his mental disorder. He also considered that the accused was unfit to appear in Court and would be in a position to understand the nature of the charges brought forward against him at a later stage.

On the 5th October, 2000 Doctor Joseph Spiteri appeared in Court and besides presenting his report, stated that the accused was suffering from an acute state of Psychosis and thus at the time of his arraignment he was not fit to pleas. He also stated that at present he was modestly controlled on medication and would have to carry on with this medication.

The Psychiatrist presented a report in the Maltese language so for the benefit of the accused the Court nominated Dottor Christian Cardona to make a faithful translation of this document.

On the 6th December, 2000 Dottor Christian Cardona gave evidence and presented a copy of the report in the English language. It appears from an examination of this report that the accused was suffering from a mental condition, whereby he felt that he was capable of flying and visiting the moon, and that a computer was controlling

his actions. He also felt that people were speaking to him while left alone in the cell. The medical expert concluded that the accused was suffering from hallucinations resulting from his mental disturbances. Thus the Psychiatrist felt that the accused should remain under medical treatment.

The accused had been discharged from the mental hospital on the 13th September, 2000, in other words, six weeks after his arraignment in Court and the Psychiatrist ordered that whilst in jail he should carry on with his medication. Later on, whilst still in jail, it was reported that the accused was not taking proper medication and thus was sent to Mount Carmel Hospital for a further period of time.

The Psychiatrist also stated that the accused was in control of his volitional and intellectual powers on the 5th October, 2000 that is after having been given medical treatment. In other words, prior to that date the accused was so mentally disturbed that he was unaware of what he was doing and was unable to appreciate and understand the consequences of his actions.

The Prosecution went on to bring forward its witnesses in relation to the incident of the 14th August, 2000. On the

23rd November, 2000, John Azzopardi, Emanuel Bonnici, Sebastian Zammit, all employed as Customs Officers, all gave evidence in the sense that the accused was leaving the island on the 14th August, 2000 at about sixteen hours wearing a pouch which contained an amount of foreign currency. He was asked whether he had declared this amount of money on his arrival and the accused replied in the negative and thus the money was kept by the officials and consequently the accused handed over to the police for further investigation.

Whilst before the police, the accused released two statements which were exhibited by the Police Inspector Ivan Portelli whilst giving evidence on the 16th August, 2000 which statements were marked as documents IP 2 and IP 3.

From an acute examination of these two statements, the following facts result:

1. Primarily, the accused states that he used to work in a discotheque in Hungary then subsequently says that he used to live in Iraq and Tunis;
2. He first states that the Hungarian passport which he presented to the Malta Police portrayed two images of

himself and then gave an explanation how he acquired this passport in Tunis for the price of one million Italian lire.

3. He first states that he came to Malta on vacation and was supposed to go to Italy, he then states that he came to Malta hoping to settle down and find a job, but once in Malta found the country too expensive and he decided to go to Bulgaria.

The accused states a number of contradictions in his statements.

The accused gave evidence on the 11th January, 2001, and from his evidence it appears that the accused used to live in Tunis and he sold all his cattle to try and make a future in Europe. He thus came to Malta on holiday with US Dollars 15,000 and tried to settle here. He found the island too expensive and thus was leaving the country with what was left of these US Dollars, which were seized by the authorities on the 14th August, 2000. A detailed list of the foreign denomination of money found in his possession was exhibited by Martin Debattista, a Customs Official on the 23rd November, 2000. The accused admitted to having obtained a passport not through the proper channels in that he admitted he had no passport duly

authorized but one which he bought for the price of one million Italian lire from a third person whilst in Tunis.

The Court however although is faced with the admission of the accused in relation to what exactly happened is also faced with the medical report issued by the Psychiatrist indicating that when the accused arrived in Malta he was suffering from mental disturbances which made him incapable of his volitional and intellectual powers. The psychiatrist said that the accused was unfit to plead at the moment the charges were brought forward against him and that today he is stable on account of the medication he is being given.

The Court too had the opportunity to examine the accused regard being taken to his demeanor conduct, character consistency and other features of his statements in the light of what the Psychiatrist stated and feels that the accused is a genuine and consistent person and has no reason to doubt what the Psychiatrist said about him in that at the time of the offences he was not of sound mind and consequently not capable of having the necessary *mens rea*.

The Court, as was decided in the judgment given by the *Court of Appeal on the 2nd August, 1999* in the names **The Police v**

Raymond Vella, held that our law does not accept and recognize any form of diminished responsibility which excuses one and all from criminal responsibilities. The concept of diminished responsibility is indirectly incorporated in certain dispositions of our law which serve only as an excuse. In other words, whilst the wrong doer remains legally responsible for what he has committed or omitted to do, the punishment to be awarded is decreased because of diminished responsibilities at the time of commission or omission. Two clear exceptions of such cases are that of the crime of infanticide as envisaged in section 245, and the crime committed under the heat of sudden passion as envisaged in section 227(c) of chapter 9 of the Laws of Malta. In other words, in our law the concept of diminished responsibility means that the accused knew what he was doing - *capacita di intendere* or *capacita di conoscere* and would also be capable of choosing right from wrong, the capability of committing or omitting - *capacita di volere*, thus on account of certain circumstances for example a psychiatric condition of infanticide nature the law considers that the wrong doer is less guilty for what he has done or failed to do than in other circumstances where diminished responsibility was not present. The concept of diminished responsibility has no general application in our law, except for the

purposes of awarding punishment but is incorporated only in specific dispositions.

This Court in this case does not contemplate a case of diminished responsibility but a case of insanity at the moment of the commission of the alleged crimes, as seen in section 33 of the Criminal Code.

This Court feels that it has to make reference to a similar case it had before her in the names **The Police v Janusz Tomaszczuk** which was decided on the 25th June, 1998, wherein which case the accused was sent to Mount Carmel Hospital after having declared him insane at the time of the commission of the crime. In that case the accused too had hallucinations and was imagining he was being followed by kidnappers. The accused like in this case had lost control with reality.

In Malta, we have no legal definition of such insanity but the mental attitudes which exempt a criminal offender from punishment is contained in section 33, which also deals with intoxication.

Our criminal code distinguishes between insanity at the time of the commission of the crime and insanity at the time of trial.

Insanity at the time of commission of the crime not only excludes any punishment but it also excludes any guilt in the agent. In this connection in fact **Falzon** in his book *Annotazione alle Leggi Criminali* under the pseudonym of **Un Giovane Avvocato Maltese** - page 219 says

"che la clemenza o il furore, come pure la forza, contemplato nei degli articoli sono cause di giustificazione del reato, ed hanno per effetto non già d'attenuarlo ma di fatto sparire del tutto o di escludere ogni reità nell'agente, la dichiarazione del Jury nei detti casi dev'essere di non reità dell'accusato".

Thus the law looks upon the offender who was insane at the time of the commission of the offence as if he had never violated the relative proviso of the Penal Code, the reason being that the formal element of crime is absent in the insane offender.

The intellect and the free will are the two supporting pillars on which the edifice of criminal responsibility rests. If one of these pillars crumbles down, the whole edifice will follow suit.

Our criminal code was promulgated on March 1st of 1884, as Ordinance 1 of that year. The present section 33 was debated in the Council of Government on the sittings of the 14th, 21st and 23rd February, 1850. From these debates it resulted that this section was copied in substance from the Code of the Two Sicilies which in its turn was based on the French Code.

The **Codice delle Due Sicilie** mentions in this regard *dementia* and *furore*, the **French Code** mentions only *dementia*.

It was held that the provision had exactly in both codes the same effect, both in substance as well as in the extent of application as in the Maltese code. In fact, both words are to be found in the previous drafts of the Maltese Criminal Code that is of 1836 (article 60) and of 1842 (article 32) and 1848 (article 30). An examination of the debate in Parliament carried out on the discussion of this section of the code, reveals that the Chief Secretary Mr. Henry Lushington upheld *dementia o furore* to mean to be comprehensive words and inclusive of every kind of mental disease. In fact, the President of the Court, Sir Ignatius Bonavita, said that since our article 33 was based on the article of the Codice delle Due Sicilie and French Code,

insanity carries the wider term that is every state of that mental disorder (in the man who commits the act prohibited or omits those ordained by the law) by which he is recognized as being deficient in those facilities of 'knowing' and 'willing' which are indispensable elements to the constitution of the crime and for rendering a person accountable for his actions. Moreover, he stated that the question whether an individual had acted 'knowingly' and 'willfully' is a question of fact, the resolution of which can never be regulated or suggested other than by the circumstances of each particular case.

There is a further explanation of this requirement in italics, which in the Court's opinion means:

"The person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable man was wrong."

The word *wrong* does not mean contrary to law but means *wrong having regard to the standards of reasonable people*. The critical factor being the capacity to distinguish right and wrong.

With the word *willing* the Court understands that the accused is deprived of any power to resist an impulse - the capacity to control his actions - naturally as a result of the mental disease.

The court feels that it should make reference to the address of Judge Vincent Degaetano to the jurors in the case **The Republic of Malta v Charles Degiorgio** (Bill of indictment No 17/94). He states that although our law does not define the term insanity, it means that the state of mind which results from a sick mind - a disease of the mind, which has as its nature and grade the faculty of depriving the accused individual either from the capacity of recognizing and knowing the nature and quality of his act or of depriving him of the capacity to know whether the act is wrong or not; in other words depriving him of his freedom of choice - *la capacita di intendere e volere*. In his opinion it is not necessary that both elements are absent at the same time. It is enough if one element of the above is lacking. It is not even necessary according to our law to know what type of illness was the accused suffering from at the moment of the commission of the act, in other words whether he had a break down, sub normality, abnormality, paranoia, psychosis or feeble mildness. Irrespective of the nomenclature, what is necessary is the effect of

such illness, in other words the effect to render one of the above-mentioned elements missing.

For example in the case **Police v Karmenu Bugeja**, decided by the Court of Criminal Appeal on the 13th January, 1947, it was held that delusions, or false perceptions of the accused did not leave him in control of himself in such a way as to be able to perceive the falsity of the perception and correct them, but they made him lose the power of cognition which amounts to the loss of the sense of proper individuality - perception that became like a psychic ferment that brings about the disintegration of personality - so the plea of insanity was upheld.

Thus our law lays down no a priori test in respect of insanity. Every case is treated by itself and section 33 comprises all terms of insanity and thus this system is more advantageous than the system of classification of the various forms of mental classes as cited in the *Digestivo Italiano* - Vol XII - parte seconda, pagina 229 –

"Evidentemente il sistema che offre maggiori inconvenienti, e' quella che procede all'enumerazione delle varie forme d'alienazione mentale " and this

because " *gli aspetti che puo assumere la pazzia, sono tanti e cosi vari che difficile riesce una precisa e completa loro classificazione*".

Manzini in his book *Trattato di Diritto Penale* - Vol II, pagna 92 "- defines insanity as

'una forma clinica d'infermita mentale e non ad una mera stato passionale.'"

It results from a close look at a journal named *The International Journal of Law and Psychiatry*, in particular to the paper named "*The Reformulated Defense of Insanity in the Australian Criminal Code* - Act 1955 - Bernardette McSherry - that the term *insanity* as based on the McNaughton Rules, has been replaced in their code with the following section 7:3(1). It states:

"A person is not criminally responsible for an offence if at the time when he or she carried out the conduct constituting the offence, he or she was suffering from a mental impairment that had the effect that:

- a. *The person did not know the nature or quality of his or her conduct;*

- b. *He or she did not know that his or her conduct was wrong (that is the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people was wrong) or*

- c. *The person was unable to control his or her conduct. In the light of the above, this seems to be an appropriate classification to the definition of insanity mentioned in our code."*

Now coming back to the facts of this case the Court surprisingly was not faced with a plea of insanity from the defense but felt that it should investigate the matter itself ex officio after hearing the psychiatrist.

In *Police v Ruggero Sultana decided by the Criminal Court of Appeal on the 10th April, 1937*, Judge J. Harding held that the opinion of the expert psychiatrist cannot be neglected, but such opinion cannot

be held to be decisive and the conscience of the Judge cannot be substituted by that of the expert. Therefore the question must be decided by the Judge after studying and reflecting on the circumstances and the facts of the alleged crime in particular if such circumstances corroborate the medical expert advice given to the court.

In this case the Court feels that from the evidence of Doctor Joseph Spiteri, two constituent elements of legal responsibility in the commission of the crimes committed are lacking that is;

1. the capacity of the intellect; and
2. the freedom of the will.

The Court thus after having seen article 5 of Chapter 61 of the Laws of Malta, sections 3, 14, 15, 32(1)(c) of Chapter 217 of the Laws of Malta, section 189 of Chapter 9, sections 16 and 42 of Chapter 233 of the Laws of Malta and section 525(3) and 623(1) of Chapter 9 of the Laws of Malta, **orders that the accused MOHAMMED MAKHLOUF be held at Mount Carmel Hospital and is to remain there under their care and custody according to the disposition of part IV of Act 1976 of Chapter 262 of the Laws**

of Malta – an act related to the Mental Health and according to any other disposition of law or legislation applicable to the case and orders that this judgment is notified to the Superintendent of Mount Carmel Hospital and to the Director of Prisons.

In the circumstances the Court shall not order the confiscation of the money found in the possession of the accused as indicated in the seizure note exhibited in Court as document CSH 1.

**Consuelo Scerri Herrera LL D
Magistrate**