



COURT OF CRIMINAL APPEAL

**HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 7th November, 2005

Criminal Appeal Number. 296/2005

The Police

v.

Geryl Serge

The Court,

Having seen the request made to the Court of Magistrates as a Court of Criminal Inquiry (in this case referred to as a Court of Committal) to proceed against the said Geryl Serge according to the provisions of the Extradition Act, Chapter 276 Laws of Malta and Legal Notice 320 of 2004;

Having seen the Court of Committal's decision of the 26th October 2005 whereby it ordered that the requested person Geryl Serge be kept under custody to await his extradition to Belgium and furthermore informed the same person that he will not be extradited before seven (7) days

commencing from the date of said order and that he can appeal to the Court of Criminal Appeal and that if he feels that his human rights have been, are being, or are going to be infringed, he has a right to seek a remedy or redress under Article 46 of the Constituion of Malta or under Chapter 319 of the Laws of Malta;

Having seen the said Geryl Serge's application of appeal presented on the 31st October 2005 whereby he requested the annulment, revocation and cancellation of the said order given on the 26th October 2005 and instead order the immediate release of appellant under those dispositions which it regards suitable and appropriate;

Having heard submissions by counsel for the parties;

Having examined the records of the case and the documents exhibited;

Having considered:

Appellant's grievances are based on the condition stipulated in article 23(1) of Legal Notice 320/2004. This states:

"If the court is required to proceed under this article by virtue of article 13(4) it must decide whether the person was convicted in his presence."

Appellant submits that the prosecution did not adduce concrete proof that he was in fact present for the proceedings when he was convicted and the scope of the aforementioned provision is to eliminate the possibility that he be convicted in proceedings *in absentia* as is possible in some foreign jurisdictions. Appellant contends as follows:

"That the appellant humbly submits that it is the obligation of the prosecution in these proceedings to produce concrete (not ambiguous) evidence that the proceedings did take place in the presence of the accused and that the

conviction occurred in the presence of the same accused, that is in this case, the appellant.

That the First Court concluded that such a proof was brought forward by the prosecution on the basis of balance of probabilities in two ways, that is, firstly that the appellant in his statement stated 'ex admissis' that: "*... On the 9th of October 2000 I was sentenced to 10 years imprisonment. After the sentence as the other accused were walking out of the court room they uttered some words such as Dead man walking. I appealed from this judgement and both the Prosecutor and the Commissioner came to testify on my behalf. This judgement was confirmed on appeal and the Court still send me home without any conditions.*

Secondly, the first court stated that from the EAW itself it transpires that the words 'in absentia' were struck off and instead the words 'judgement after trial' were used.

That the appellant humbly submits that the proof brought forward by the prosecution in this regard is not concrete proof as required by Section 23(1) [stated above] but equivocal proof. With all due respect the first court could not as proof rest on the statement of the appellant or on the EAW form filled in by the Belgian authorities themselves but had to present more concrete and unequivocal proof in this regard such as formal copies of the judgements both of the first Belgian court and of the appellate court from which it would transpire that appellant was present for the proceedings against him and that he was 'convicted in his presence' or 'viva voce' evidence confirming the appellant's presence during the trial and during the appeal proceedings.

That the appellant further points out that from his same statement it is not even clear that he was physically present for the appeal proceedings wherein his conviction was confirmed by the Belgian appellate court and in the worst hypothesis and without any prejudice to the above such a statement can only be interpreted as referring to the judgement before the first Belgian court."

During the oral hearing held on the 4th November 2005, learned counsel for appellant appeared to concede that appellant was in fact present for the proceedings before the first Belgian Court. The evidence indeed cannot be interpreted in any other way. And here this Court is referring specifically to appellant's statement to the Police (at p. 7 and 8) and to the evidence tendered by Kristien Vande Voorde given before the Court of Committal on the 14th October 2005 when she stated, in relation to the threats uttered in the Belgian Court against appellant, "the Police surrounded my boyfriend in Court in order to protect him".

Moreover, the European Arrest Warrant in question has been certified by the Attorney General as having been issued by an authority which has the function of issuing arrest warrants in Belgium, and this with reference to the Court of Appeal in Ghent. This official document should therefore be taken as evidence of its contents unless the contrary is proved.

The European Arrest Warrant in question states at paragraph (d) that decision was rendered by "judgement after trial" and the words "in absentia" and the two paragraphs relating to different situations leading to the delivery of a decision in absentia, have been struck off. Clearly this means that judgement was delivered in appellant's presence.

Now, the document in question, in referring to the decision on which the warrant is based, makes reference to the judgement delivered by the Court of Appeal in Ghent on the 26th June 2001. Appellant maintains that the prosecution has not produced concrete evidence to show that he was present at the appellate stage.

But what the aforesaid article 23(1) of Legal Notice 320/2004 requires is that the Court decides whether a requested person "was convicted in his presence". This is to be understood as to be referring to the stage when a

person is convicted by a trial court, as a Court of Appeal does not “convict” but only confirms, modifies, annuls or reverses a conviction. Consequently - although, it must be said, this Court is fully satisfied that the only way in which appellant’s statement can be interpreted is that he was also present at the appellate stage - appellant’s absence during appellate proceedings would have been inconsequential.

For these reasons:

The Court dismisses the appeal, confirms the decision given by the Court of Magistrates as a Court of Committal on the 26th October 2005 that the requested person, appellant Geryl Serge, be kept in custody to await his return to Belgium and informs the same person that he will not be extradited until after the expiration of seven days from today, and that if he thinks that any provision of the Constitution of Malta or of the European Convention Act is, has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of the Court's order of committal, he has the right to apply for redress in accordance with the provisions of article 46 of the said Constitution or of the European Convention Act (Chapter 319), as the case may be.

< Final Judgement >

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