



MALTA

CRIMINAL COURT

**THE HON. CHIEF JUSTICE
VINCENT DE GAETANO**

Sitting of the 3rd March, 2006

Number 4121/2006

**The Police
(Superintendent Neil Harrison and
Inspector Norbert Ciappara)**

v.

Mark Charles Kenneth Stephens

The Court:

This is a decision pursuant to an application filed on the 27 February 2006 by Mark Charles Kenneth Stephens in terms of Section 412B of the Criminal Code. Applicant is requesting this Court to order his release from custody on the ground that “his continued detention is not in accordance with the law”¹. He is basing his claim that “his

¹ Section **412B (1)**: “Any person in custody for an offence for which he is charged or accused before the Court of Magistrates and who, at any stage other than that to which article 574A applies, alleges that his continued detention is not in accordance with the law may at any time apply to the court demanding his release from custody...” (3) Where the application is filed in connection with proceedings pending before the Court of

continued detention is not in accordance with the law” on the ground that the presiding Magistrate in the Court of Magistrates (Malta) as a Court of Criminal Inquiry failed to abstain, when challenged, from delivering the decision of the 23 February 2006 in terms of which it was decided that there were sufficient grounds for an indictment to be filed against him (Section 401(2) of the Criminal Code). Basically, applicant is claiming that since the same Magistrate had already delivered such a decision on the 29 September 2005, she should have abstained from delivering (again) the decision on the 23 February. That decision – of the 29 September 2005 – had been annulled by a judgment of the Constitutional Court of the 14 February 2006 in the names **Mark Charles Kenneth Stephens v. Avukat Generali** on the ground that the Court of Criminal Inquiry had specifically ruled that it had no competence to decide, at the stage contemplated in Section 401(2) of the Criminal Code, whether the charges as preferred against Stephens disclosed an offence within the jurisdiction of the Courts of Criminal Justice for the Island of Malta and its Dependencies. The Constitutional Court had, as indicated above, annulled the decision of the 29 September 2005, ordered that Mr Stephens be placed in the same position he was in immediately prior to that decision, and ordered that the Court of Criminal Inquiry decide anew whether there were sufficient grounds for an indictment to be filed against him, this time, however, after taking due account of Mr Stephens’ plea as to jurisdiction.

In its decision of the 23 February 2006, the Court of Criminal Inquiry first dismissed the challenge to the presiding Magistrate and then proceeded to consider the plea as to the jurisdiction (which it had previously specifically abstained from considering), and ultimately again decided that there were sufficient grounds for an indictment to be filed.

Magistrates as a court of criminal inquiry before a bill of indictment has been filed and the record of the inquiry is with the Attorney General in connection with any act of the proceedings the application shall be filed in the Criminal Court...”

This Court heard oral submissions by learned counsel for the applicant (Dr Joseph Brincat) and for the respondent Attorney General (Ass. Attorney General Dr Anthony Barbara) at the sitting of the 1 March 2006, and also examined the notes (and in the case of applicant's note, the attachments thereto) filed yesterday by both parties.

Now the purpose of the relatively new Section 412B² of the Criminal Code is to provide, together with the provisions of Sections 409A and 574A of the said Code, not only clear provisions for the remedy equivalent to that which in English law was derived from the old "prerogative" writ of *habeas corpus*, but also to transpose into the Criminal Code, possibly in a manner clearer than hitherto, the mechanisms required by subsections (3) and (4) of Article 5 of the European Convention on Human Rights and Fundamental Freedoms. In the instant case, the applicant is claiming that "his continued detention is not in accordance with the law" on the sole basis that the committing Magistrate erred when she refrained from abstaining after being challenged. Reduced to simple terms the question therefore is: assuming, for the sake of argument, that the Magistrate did err and that she should have abstained, does this necessarily render the continued detention of applicant "not in accordance with the law" (or, to use the Maltese version of the law, "ma tkunx skond il-ligi") for the purpose of Section 412B? Put otherwise, does any and every error of judgment of a judge or magistrate (or of a court) necessarily bring about the "illegality" of a person's detention (for the purpose of Section 412B) pursuant to that decision?

It is this Court's considered opinion that the answer to both questions is in the negative. The decision of the 23 February 2006 was delivered by a judicial authority pursuant to proceedings which appear to have been regularly initiated and conducted. The judgment of the Constitutional Court (a copy of which is inserted in the record of the these proceedings at page 445 *et seq.*), above referred to, does not appear to have altered or

² This section, together with Sections 409A and 574A, was introduced into the Criminal Code by Act III of 2002.

affected either the authority of the magistrate or the regularity of the proceedings – it was only the regularity of the decision of the 29 September 2005, because of the express refusal to consider the plea of jurisdiction, which was addressed by that judgment, and even then the Constitutional Court does not appear to have put in doubt the legality of the continued detention up till then of Mr Stephens. Subsequent to the judgment of the Constitutional Court, those proceedings appear also to have been regularly concluded afresh for the purposes of Section 401(2) of the Criminal Code as required by the Constitutional Court. It is pertinent to point out also in this connection that Mr Stephens' application of the 27 February 2006 came before this Court – that is before the Criminal Court – not because this Court acts, for the purpose of Section 412B, as a court of revision or appeal from decisions of the Court of Magistrates as a Court of Criminal Inquiry, but simply because the record of the proceedings happened to be with the Attorney General on the 27 February and no bill of indictment appears to have been filed. A careful reading of subsection (3) of Section 412B (the relevant part is reproduced in footnote no. 1, above) would show that had the Attorney General remitted back the record to the Court of Criminal Inquiry on or before the 27 February, this application would have been heard by that Court – that is the same Court of Criminal Inquiry which delivered the decision of the 23 February. The logical conclusion to be drawn from this is that, for the purposes of Section 412B, both the Court of Magistrates (whether as a Court of Criminal Judicature or as a Court of Criminal Inquiry) and this Court (the Criminal Court), have to examine the legality of the continued detention of the applicant principally in the light of circumstances other than those emanating directly from the exercise of the Courts' lawful judicial authority. Any other way of examining the question under Section 412B would simply lead to vicious circles.

This is not to say that applicant may not have other remedies if he believes that the Magistrate who delivered the decision of the 23 February 2006 should have allowed his challenge; what the Court is saying is that for the

Informal Copy of Judgement

purposes of Section 412B, which is being invoked by applicant, his claim that “his continued detention is not in accordance with the law” is unfounded. Finally the Court points out that, after having carefully read the two judgments of the European Court of Human Rights of **Duinhof and Duijf v The Netherlands** and **Labita v. Italy**, copies of which were filed together with applicant’s note of the 2 March 2006, the Court does not see how these two cases can be of any assistance in connection with the issue raised by Mr Stephens’ application of the 27 February 2006.

For these reasons, the Court dismisses the application.

< Final Judgement >

-----END-----