MALTA

COURT OF CRIMINAL APPEAL

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

Sitting of the 31 st August, 2006

Criminal Appeal Number. 278/2006

The Police
(Inspector Raymond Cutajar
Inspector Raymond Aquilina)

v.

Lewis Muscat

The Court:

1. This is a decision on two points both raised by appellant Muscat in the course of the sitting of the 14th instant.

2. Lewis Muscat, a Maltese citizen, is sought by the judicial authorities of the State of California in the United States of America to answer to eighteen charges of "lewd act upon a child under 14 using force/violence in violation of the California Penal Code section 288(b)(1)", one charge of possessing or controlling "obscene matter depicting person under 18 in violation of Penal Code

section 311.11" and one count of distributing or exhibiting "lewd material to minor in violation of Penal Code section 288.2(a)" [1]. On the strength of documents submitted to her, Magistrate Dr Consuelo Scerri-Herrera issued, on the 2 March 2006 a provisional arrest warrant against Muscat in terms of article 14 of the Extradition Act, Cap. 276 ("the Act"). Lewis Muscat was arraigned before the Court of Committal[2] on that same day (2/3/06), and the Minister's "Authority to Proceed" in terms of article 13 of the Act was issued on the 9 March 2006. The Authority to Proceed was issued only in respect of the eighteen counts of violation of section 288(b)(1) of the Penal Code of California.

3. On the 4 April 2006 the Court of Committal[3] gave a preliminary ruling on the admissibility of a number of documents submitted by the prosecution, to wit Document MB1 "and attachments (4) and (5)". Counsel for Muscat had requested that these documents be removed from the record of the proceedings. In its decree of the 4 April 2006 the said court dismissed this request.

4. On the 10 May 2006 that Court delivered a further preliminary ruling on two further points namely, the plea of insanity at the time of the alleged offence and a further plea which was registered as follows: "The defence will be exhibiting documents and other material released by reputable non-governmental organisations, manifesting mistreatment of prisoners and mental patients in California prisons and mental institutions, in the context of various international conventions prohibiting torture, inhuman or degrading treatment or punishment" [4]. In this second preliminary decision, the Court of Committal declared itself not competent to decide whether the person to be extradited was insane at the time of the alleged offences. As to the second issue, that Court ruled as follows: "In regard to the second plea, this Court

[1] See the document at fol. 13 of the 21 February 2006 under the signature of the Governor of California and the copy of the indictment, fol. 49 to 63.
[2] Magistrate Dr Abigail Lofaro as Duty Magistrate.
[3] Magistrate Dr Joseph Apap-Bologna.
[4] See minute of the 4 April 2006, fol. 126-127, as reproduced in the preliminary decision at fol. 232 *et seq*.

examined all the documents to be found on page 134 *et seq ibid* and it seems that all these documents refer to matters of a Constitutional nature which are outside the competence of this Court. However the same court will allow these documents to be annexed to these acts should the person charged, at the end of these proceedings, feel that he should seek a remedy or remedies under article 16 of Chapter 276 of the Laws of Malta." [5]

5. On the 4 August 2006 the Court of Committal delivered its final decree on the extradition proceedings. The Court sanctioned the extradition (obviously within the parameters of the Authority to Proceed) and ordered that Lewis Muscat be kept in custody to await his return and his extradition to the United States of America. That Court further informed Muscat that he cannot be extradited before the lapse of fifteen days from its order and that he could appeal from the decision allowing the extradition to the Court of Criminal Appeal. It also informed him that if he felt that any of the provisions of articles 10(1) and (2) of the Act have been contravened or that any provision of the Constitution of Malta or of the European Convention Act 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 had the right to apply for redress in accordance with the provisions of article 46[6] of the said Constitution or of the corresponding provision of the European Convention Act, Cap. 319, as the case may be.

6. Lewis Muscat duly filed an appeal before this Court – the Court of Criminal Appeal – on the 10 August 2006, requesting this Court "…to accede to and accept this appeal by cancelling, revoking and reversing the decisions of the Court of Committal of the 4th April 2006 and 4th August 2006 by means of which the Court of Committal ordered that the appellant be kept in custody in order to await his return and his extradition to the United

[5] Fol. 234.
[6] Erroneously referred to in the decision of the Court of Committal as article 41.

States of America, and by consequently ordering that the appellant be discharged in accordance with article 18(4) of Chapter 276 of the Laws of Malta".

7. During the sitting of the 14 August 2006 before this Court, appellant requested a correction in the dates mentioned in the application of appeal, particularly in the final paragraph, that is in the demand for the reversal, to the effect that instead of the date 4th April 2006 there be inserted the date 10th May 2006. Counsel for the respondent Attorney General, Dr Donatella Frendo-Dimech, objected to this correction and cited article 419 of the Criminal Code relating to the contents of the application of appeal. During the same sitting counsel for appellant registered also the following minute: "Dr Chris Soler for appellant for all intents and purposes after being requested by the Court to clarify, [clarifies] that with reference to what is currently being said on pages 10 and 11 of the application [of appeal], appellant is requesting the Court to refer the issues under grievances 3, 4, 5 and 6 to the First Hall of the Civil Court in terms of Section 46(1) of the Constitution and [the] corresponding provision of Chapter 319".

8. The parts of pages 10 and 11 of the application of appeal to which reference is made in the minute of the 12 August 2006, state as follows:

"In this context reference must be made to Article 16 of Chapter 276 of the Laws of Malta and to Article 46(1) of the Constitution of Malta and Article 4(3) of Chapter 319 of the Laws of Malta. The latter legal provisions stipulate that in matters of a constitutional nature (such as grievances 3, 4, 5 and 6) it is enough if the applicant shows that the extradition itself will have effects and/or consequences that ***may amount to and/or constitute and/or create a breach of any of the fundamental human rights*** *safeguarded by the provisions of the Constitution or by those of the European Convention Act. In fact the reference procedure contemplated in Article 46 of the Constitution covers circumstances where a person alleges that any provision of the Constitution protecting*

*his human rights '**is being or is likely to be contravened in relation to him**'. This request may be made before any court, such as this Honourable Court. This will also enable the appellant to produce further documentation and evidence in furtherance of these questions/issues/matters (grievances) before a court enjoying constitutional jurisdiction. Proceedings before this Honourable Court should thus be stayed until these questions/issues/matters of a constitutional nature are decided upon conclusively."*

9. Counsel for both parties made oral submissions on these two points, i.e. the requested correction in the application of appeal and on the requested reference to the First Hall of the Civil Court, during the sittings of the 14 and 16 August 2006, and the case was put off to to-day for a ruling on both points.

10. As for the first point, it is true, as counsel for the respondent Attorney General observed, that article 419 of the Criminal Code provides, with regard to applications of appeal like the one under examination, that "…the application shall, under pain of nullity, contain (a) a brief statement of the facts, (b) the grounds of the appeal; and (c) a demand that the judgment of the inferior court be reversed or varied" (emphasis added). It is also true that this provision is a special provision, providing for the nullity of the judicial act, in the event of any omission mentioned, and to that extent it must be regarded as overriding the general provision contained in article 175 of the Code of Organisation and Civil Procedure (rendered applicable to acts filed before a Court of Criminal Justice by virtue of article 520(1)(c) of the Criminal Code), including sub-article (2) thereof which states: "Any court of appellate jurisdiction may also order or permit, at any time until judgment is delivered, the correction of any mistake in the application by which the appeal is entered or in the answer, including any mistake in the indication of the court which delivered the decision appealed from, in the name or character of the parties, or in the date of the judgment appealed from" (emphasis added). Clearly what is null by express provision of the law – article 419 of the

Criminal Code – cannot be rectified by invoking article 175 of Chapter 12. Thus one cannot invoke article 175 when the "brief statement of the facts" are left out, or when the "grounds of the appeal" are omitted from the application of appeal, or when the demand for reversal or variation is left out. Likewise, if the demand should have been for the variation of the judgment and instead the reversal of the judgment is requested – which amounts to the total absence of the appropriate demand – no correction can be effected under the said article 175. Similarly no new grounds of appeal may be added by invoking article 175, as this would clearly change the substance of the appeal and of the reply thereto on the merits (article 175(1)). In the instant case, however, the requirements of article 419 of the Criminal Code have all been complied with, and in particular there is the demand for the reversal (revocation) of the decisions which are being appealed. The only problem is that, through an evident oversight, the wrong date of one of the preliminary decisions has been indicated. From the contents of the application of appeal – the grounds of the appeal – it is clear that what appellant is requesting is the reversal not only of the final decision of the 4 August 2006 but also that of the 10 May 2006, which, however, he erroneously indicated as having been delivered on the 4 April 2006. It is this Court's considered opinion that the requested correction is clearly within the parameters of sub-article (2) of article 175 of Cap. 12, and in no way detracts from the rigour of article 419 of the Criminal Code. Consequently appellant's request as recorded in the minutes of the sitting of the 14 August 2006 is acceded to, and therefore the court orders that in the application of appeal for the date 4th April 2006 wherever it appears, including in the final demand, there shall be substituted the date 10th May 2006.The Deputy Registrar is to see to the corrections as soon as may be.

11. We now turn to the other question. Basically what appellant is requesting is that this court refer to the First Hall of the Civil Court, in terms of article 46(3) of the Constitution and of article 4(3) of Cap. 319 the question of whether, should he be extradited to the United States, his fundamental rights guaranteed by Article 3 of the

European Convention ("the Convention") (and presumably also by Article 36 of the Constitution) – prohibition against inhuman or degrading treatment – by Article 6 of the Convention (and presumably Article 39 of the Constitution) – the right to a fair trial – by Article 13 of the Convention – the right to an effective remedy for breach of the Convention – and by Article 8 of the Convention – respect for one's private and family life, and correspondence – would be violated.

12. Now there is no doubt that fundamental human rights have in recent years assumed greater importance also in the context of extradition. This is evidenced by the wording of article 16 of the Extradition Act, no less than by the restriction imposed upon the Minister of Justice by paragraphs (a), (b) and (c) of article 21(2) of the said Act. As Ivor Stanbrook and Clive Stanbrook point out in their work ***Extradition Law and Practice*** [7]:

"The European Convention can justly claim to be the most effective international institution [8] *for the development and protection of human rights. Unlike many multilateral treaties, which are often based on reciprocal obligations, the ECHR establishes objective standards for the conduct of States – "High Contracting Parties" – towards individuals and the right of individuals to seek redress from misuse of state power. The absence of a requirement for reciprocity means that relevant provisions of the Convention will apply in the case of extradition or deportation from party-States to third countries which are not party to the Convention…where as a consequence of extradition, or the proceedings that give rise to extradition, an applicant is prevented from exercising his Convention rights, and the consequences are not too remote, those Convention rights will become pertinent to extradition proceedings."* [9]

[7] Second Edition, OUP, 2000.
[8] Recte: "instrument"?
[9] *Ibid*. pp. 97, 99.

More recently Alun Jones and Anand Doobay in their work on extradition and mutual assistnce[10] observed that "…the case of *R. (Ramda) v. Secretary of State for the Home Department* [11] established that the ability to bring proceedings after extradition before the European Court of Human Rights to complain of a breach of Art. 6(1), or by extension any other article of the European Convention of Human Rights [ECHR], cannot be used to overcome any objection to extradition due to the risk of a breach of the ECHR"[12]. With particular reference to the possibility of a violation of Article 3 of the Convention these two authors point out the following:

"The prohibition in Article 3 is absolute and is not limited by exceptions, regardless of reprehensible conduct on the part of the victim, the aims of a state, or the difficulties faced by states in investigating organised crime or terrorism. There is no balancing exercise to be performed. Not all mistreatments will be sufficient to fall under Art. 3. The assessment of the required level is relative and dependent on matters including the duration of the treatment and its physical or mental effects. It also depends on the age, sex, vulnerability and state of health of the victim. In ***Soering v. UK*** *the European Court of Human Rights held that it would be a breach of Art. 3 to extradite the applicant to the USA on charges of capital murder having regard to the long detention on 'death row' to which he would be subject before execution. The Court held that the decision by 'a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of the State under the Convention where* substantial grounds *have been shown for believing that the person concerned, if extradited, faces a* real risk *of being subjected to torture or degrading treatment or punishment in the requesting country.' [emphasis added]. The European Court of Human Rights has also said that if physical force is used which is not strictly necessary by reason of the applicant's own*

[10] ***Jones and Doobay on Extradition and Mutual Assistance*** Sweet & Maxwell (London), 2005.
[11] [2002] EWHC 1278 at para. 27.
[12] pp. 229-230.

conduct, there is in principle a breach of Art. 3. The standards of treatment in detention may also give rise to a breach of Art. 3." [13]

13. Article 4(3) of Cap. 319 provides that if "in any proceedings in any court, other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the Human Rights and Fundamental Freedoms, that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this sub-article and, subject to the provisions of sub-article (4), the court in which the question arose shall dispose of the question in accordance with that decision." This wording is identical, but for the reference to the Constitution instead of the Convention, to that of article 46(3) of the Constitution. As was observed by the Constitutional Court [14] in its judgement of the 16 May 2006 in the names **Lawrence Grech v. Avukat Generali et**, a court not being either the First Hall of the Civil Court or the Constitutional Court must be extremely careful not to usurp the jurisdiction which pertains exclusively to the First Hall (and by way of appeal, to the Constitutional Court) in matters regarding alleged violations or likely violations of fundamental human rights. Such other court, like this Court, that is the Court of Criminal Appeal, must limit itself to determining whether the question raised is merely frivolous or merely vexatious (or, obviously, both):

"S'intendi, dan ma jfissirx li qorti, li ma tkunx il-Prim Awla jew il-Qorti Kostituzzjonali, jekk tkun tal-fehma li t-tqanqil tal-kwistjoni tkun semplicement frivola jew semplicement vessatorja m'ghandhiex taghti r-raguni jew ragunijiet, anke jekk fil-qosor, ghal dan; ifisser biss li meta tigi biex taghti dawk ir-ragunijiet m'ghandhiex tinvadi l-gurisdizzjoni tal-Prim Awla."

[13] p. 233
[14] Degaetano CJ, Camilleri and Filletti JJ.

14. This Court, having carefully examined the record of the case and counsels' submissions, without the slightest hesitation finds that the raising of the question by appellant of the possible violation of articles 6, 13 and 8 of the Convention (and possibly of the corresponding provisions of the Constitution, where applicable, that is Article 39) is merely frivolous. No serious argument or evidence has been brought forward by appellant which even remotely suggests that these provisions are likely to be contravened in relation to him if he is extradited to the United States to face charges in the State of California. The raising of the question, therefore, with regard to these provisions is being declared to be merely frivolous in terms of article 46(3) of the Constitution of Article 4(3) of Cap. 319.

15. The same cannot be said – that is that it is merely frivolous (or merely vexatious) – with regard to the question of the risk of appellant being subjected to inhuman or degrading treatment if extradited to the State of California. Some evidence has been produced and some arguments have been put forward which prevent this Court from branding the question as merely frivolous. Whether or not in effect there are "substantial grounds" for believing that Muscat will face "a real risk" of violation of Article 3 of the Convention (or of Article 36(1) of the Constitution) if extradited to the State of California is a matter into which the First Hall of the Civil Court (and possibly after it the Constitutional Court) will have to delve.

16. The Court, therefore, having seen Articles 46(3) and 4(3) of the Constitution and of Cap. 319 respectively, as well as rule 5 of the Court Practice and Procedure Rules [15] refers the following question to the First Hall of the Civil Court, that is to say **whether in view of all the circumstances of the case and in particular of the physical and mental state of appellant, Article 3 of the Convention and Article 36(1) of the Constitution are likely to be contravened in relation to the said Lewis**

[15] Legal Notice 35/1993.

Muscat if he is extradited to the State of California and whether therefore the extradition should proceed in the event of his appeal to this Court being dismissed on other grounds. The Registrar is enjoined to comply fully with paragraph (2) of the said rule 5.

17. Until the determination of this question by the competent court or courts, appellant is to remain in custody in terms of article 15(3) of the Act.

< Final Judgement >

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