



COURT OF CRIMINAL APPEAL

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

Sitting of the 9th April, 2007

Criminal Appeal Number. 278/2006

In the Extradition Proceedings
in the names:

**The Police
(Inspector Raymond Cutajar
Inspector Raymond Aquilina)**

v.

Lewis Muscat

The Court:

1. This is the final decision pursuant to Lewis Muscat's appeal filed on the 10 August 2006. The decision of the Court of Committal from which Muscat is appealing was delivered on the 4 August 2006. After the initial decision of this Court of the 31 August 2006, the case went before the First Hall of the Civil Court and then before the Constitutional Court. It would be appropriate to

recapitulate briefly the rather tortuous *iter* of these extradition proceedings.

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 Committal² 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 Committal³ 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 request⁴.

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

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 Fol. 128 – 130 of the record of the proceedings.

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”⁵. 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 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.”⁶

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 46⁷ of the said Constitution or of the

⁵ See minute of the 4 April 2006, fol. 126-127, as reproduced in the preliminary decision at fol. 232 *et seq.*

⁶ Fol. 234.

⁷ Erroneously referred to in the decision of the Court of Committal as article 41.

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 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 in support of the objection 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. By a preliminary judgment delivered on the 31 August 2006, this Court allowed the correction as requested by appellant; and with reference to grievances 3, 4, 5 and 6 held that the raising of the question by appellant of the possible violation of articles 6, 13 and 8 European Convention on Human Rights and of article 39 of the Constitution was merely frivolous, but at the same time

referred to the First Hall of the Civil Court in terms of articles 46(3) and 4(3) of the Constitution and of European Convention Act (Cap. 319) respectively the question of a possible violation of article 3 of the said Convention or of article 36(1) of the Constitution if Muscat were to be extradited to the State of California.

9. On the 8 January 2007 the First Hall of the Civil Court⁸ (in its Constitutional and Conventional jurisdiction) ruled in the negative with regard to the question referred to it by this Court, and held that if the extradition were to proceed there would be no violation of the aforementioned articles of the Constitution and the Convention. Muscat appealed to the Constitutional Court. On the 9 March 2007 the Constitutional Court⁹ dismissed the appeal and confirmed the judgment of the 8 January 2007.

10. The case was therefore set down for the continuation of the hearing of the appeal for Monday 2 April 2007. At that sitting learned counsel for appellant, Dr Chris Soler, confirmed that the only two outstanding grievances were those marked 1 and 2 in the application of appeal of the 10 August 2006, namely (i) that the offences for which appellant is being requested are not extraditable and (ii) that appellant's plea of insanity at the time of the alleged offences is a bar to the extradition. At the sitting of the 2 April 2007 Dr Soler for the appellant and Dr Donatella Frendo-Dimech for the Attorney General made their final submissions on these two points.

11. Regarding the first question, namely whether the offences for which appellant is being requested are extraditable, appellant's grievance as expounded in that part of his appeal application under number 1, is based on a totally wrong premise. In fact appellant begins by referring to the Schedule to Chapter 276, points out that the list in this schedule does not include any reference to the offence of "defilement of minors" and concludes that in effect "this is an exhaustive list of extraditable

⁸ The Hon. Mr Justice Jeffrey Valenzia presiding.

⁹ De Gaetano CJ, Camilleri and Filletti Jj.

offences...and consequently any offence which does not fall within the parameters of those listed in the said Schedule, is, *ipso jure*, non-extraditable.” What appellant seems to fail to grasp is that the said Schedule refers to article 5 of the Act and therefore applies only to extradition requests emanating from a designated Commonwealth country. Now, even though the United States of America may have, notwithstanding the events in Boston harbour on the 16 December 1773, reconciled itself to importing tea and even drinking it, it is not a member of the Commonwealth, formerly known as the British Commonwealth, and therefore much less a designated Commonwealth country¹⁰. This Court could actually stop here, since it is patently evident that appellant’s request for this Court to “examine whether those offences which are extraditable satisfy or not the requirement of article 5(1)(a) of Chapter 276” is irrelevant for the purposes of the appeal under examination. This notwithstanding, this Court is going to examine the extraditable nature of the offences for which Muscat is being requested (and for which the Authority to Proceed has been issued) in terms of the proper provisions of the law which apply to them.

12. Appellant’s extradition is being requested in terms of the Extradition Treaty signed in London on the 22 December 1931 between the United States of America and the United Kingdom, and which came into force between those two countries on the 24 June 1935. This treaty was applicable also to Malta¹¹. After Independence in 1964, it was “inherited” by the newly independent State in virtue of the exchange of letters between the Government of Malta and the Government of the United Kingdom of the 31 December 1964¹². Article 3 of the Treaty provides that extradition shall be reciprocally granted for the crimes or offences, *inter alia*, of rape, unlawful carnal knowledge or attempt to have such carnal knowledge, of a girl under sixteen years of age, and

¹⁰ See the Extradition (Designated Commonwealth Countries) Order, 1982 (L.N. 12/1982).

¹¹ See in this respect the decision of the Constitutional Court (Said Pullicino CJ, Agius and Camilleri Jj) **Anthony Satariano v. L-Avukat Generali et** 28/11/1997.

¹² See *Treaty Series no. 5*.

“indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended”. The United States of America is a designated foreign country for the purposes of the present case in virtue of the proviso to sub-article (1) of article 7 of the Act when read in conjunction with article 30¹³. Under article 8(1) of the Act – it is this article which is relevant, not article 5 referred to by appellant – an offence of which a person is accused in a designated foreign country is extraditable if it fulfils two conditions: (i) if it is an offence in respect of which a fugitive criminal may be returned (in this case to the United States of America) in accordance with the arrangement in force and is punishable under the foreign law with a term of imprisonment of 12 months or more, and (ii) the act or omission constituting the offence or the equivalent act or omission, would constitute an offence against the law of Malta if it took place within Malta. Sub-article (2) of article 8 than goes on to specify: **“In determining for the purposes of this section whether an offence falls within the requirements of [i and ii, above] the description of the offence shall not be regarded as material if the offences under the law of Malta and that of the requesting country are substantially of the same nature.”**

13. Now it is true that the Treaty does not mention “defilement of minors” *ut sic*. The effect, however, of article 8(2) is to shift the emphasis from the mere nomenclature to the substance of the offence. As has been observed by G. V. La Forest in his book ***Extradition to and from Canada***¹⁴

“...an exact correspondence between offences in two countries cannot be expected. It is therefore not necessary that the crime concerned bears the the

¹³ Article 30: “Any arrangement with a foreign state applicable to Malta under the provisions of the Acts of Parliament of the United Kingdom entitled the Extradition Acts 1870 to 1932, on the day immediately preceding the date of the commencement of this Act, shall, subject to the other provisions of this Act, continue so to apply until it is revoked.”

¹⁴ Canada Law Book Limited, Toronto, 1977; quoted with approval by this Court in its judgment of the 7 December 2001 in the extradition proceedings **II-Pulizija v. Ronald Agius**.

same name in both countries. It is sufficient if the acts constituting the offence in the demanding state also amount to a crime in the country from which the fugitive is sought to be extradited even though it may be called by a different name...it is the essence of the offence that is important.”¹⁵

In a number of Common Law jurisdictions the offence which in Malta is known as “defilement of minors” generally falls under the nomenclature of “indecenty” or “indecent assault”. The 1926 edition of ***Stephen’s Digest of the Criminal Law***¹⁶ cites by way of an example of an assault and battery or an assault the cases reported in **R. Lock** (1872) 2 C.C.R. 10 and **R. v. Barrat** (1873) 2 C.C.R. 81, with the note: “A touches B, a boy of eight, in a grossly indecent manner, B acquiescing in ignorance of the nature of the act.”¹⁷ In defining an indecent assault, the authors further state (under article 340): “It is no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of indecenty.”¹⁸ The 1966 edition of ***Kenny’s Outlines of Criminal Law***¹⁹, under “indecent assault” states:

“By the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecenty...An assault becomes indecent only if it is accompanied by circumstances of indecenty towards the person assaulted.”²⁰

For the present position under English Law as regards indecent assault upon a child, reference is made to

¹⁵ *Op. cit.* p. 55.

¹⁶ Edited by Sir Herbert Stephen and Sir Harry Lushington Stephen; Sweet & Maxwell, London.

¹⁷ *Op. cit.* p. 249.

¹⁸ *Op. cit.* p. 248.

¹⁹ Edited by J. C. Cecil Turner; Cambridge University Press.

²⁰ *Op. cit.* para. 146, p. 203.

Blackstone's Criminal Practice 2004²¹, paras. B3.83-84. Likewise, under Scots law it has been held, with reference to the offence of "lewd practices" under common law, that:

"It is a crime at common law to indulge in indecent practices towards children under the age of puberty, with or without their consent. Such practices may include performing sexual acts in presence of a child. A woman may be convicted of using lewd practices towards a girl, and presumably also towards a boy. There is some authority for the view that lewd practices towards consenting boys 'about' the age of puberty may constitute the crime of 'lewd, indecent and libidinous practices and behaviour' at common law, but the question is unlikely to arise now, since indecent behaviour between males of any age is now a statutory offence [Sexual Offences (Scotland) Act 1976] and is probably also punishable at common law as an example of 'shameless indecency'."²²

It is true that under Maltese law, the offence of defilement of minors under article 203 of the Criminal Code requires also the effective defilement of the child victim²³, which is not required in the case of the offence of violent indecent assault under article 207 – the defilement is a circumstance which the Courts, in any case, have held in many cases to be an almost natural consequence of the defiling nature of the lewd act²⁴. This circumstance is, however, irrelevant for the purpose of the extradition in

²¹ O.U.P.

²² Gerald H. Gordon **The Criminal Law of Scotland**, Green & Son (Edinburgh), 1978. See also T. H. Jones and M. G. A. Christie **Criminal Law [of Scotland]** Sweet & Maxwell (Edinburgh), 1996, paras. 9-19, 9-20, pp. 191-193.

²³ See in this connection the following decisions of this Court: **The Police v. Thomas Wiffen** 8/1/1996, **Il-Pulizija v. Joseph Micallef** 13/11/1998, **Il-Pulizija v. James Demanuele** 2/10/2000 and **Il-Pulizija v. A.B.** 11/5/2005.

²⁴ *"In other words, if the acts in question are lewd acts in the sense above defined, that is are apt to bring about a lesion of the moral integrity of the passive subject in respect of sexual matters, then, in the absence of any indication that the said passive subject has not been affected by those acts – for example, because he or she was, to some degree, already depraved – whoever has to judge the facts may reasonably conclude that there was actual or effective defilement."* – **The Police v. Thomas Wiffen** *supra*. This Court has also rejected the suggestion that the fact that a minor had previous sexual relations or had been previously subjected to lewd acts necessarily meant that subsequent lewd acts could not bring about a defilement – see **Il-Pulizija v. John Demanuele** *supra*.

hand. What is relevant is that the offence under section 288(b)(1) of the California Penal Code (see the description of the offence, fol. 42 of the record of these proceedings) is an offence for which appellant Muscat may be extradited to the United States of America in accordance with the Treaty above mentioned (it falls under Article 3, item 6 of that Treaty), it is an offence which is punishable in the requesting State with imprisonment for twelve months or more, and is an indictable offence in Malta (both the corresponding offence of defilement of minors, article 203, and the offence of violent indecent assault, article 207, are indictable since the punishment exceeds in both cases six months imprisonment). Therefore condition (i) mentioned in para. 12, above, of this judgment is satisfied. Condition (ii) is also satisfied because the act constituting the offence under the said section 288(b)(1) of the California Penal Code would, in substance, constitute the offence of defilement of minors if it took place in Malta – indeed it would also be aggravated in terms of paragraphs (a), (b) and (c) of sub-article (1) of Article 203. Appellant's first grievance is therefore being rejected.

14. As to the second outstanding grievance – namely that in view of his plea of insanity at the time of the commission of the alleged offence he should be remanded to Mount Carmel Hospital so that the procedure prescribed in article 402 be followed – this grievance is manifestly frivolous. Such a plea involves an examination of the evidence which goes well beyond the function of a Court of Committal in extradition proceedings. As the Court of Committal quite rightly pointed out in its decree of the 10 May 2006 (fol. 232 *et seq.*) if it were to decide upon such a plea – by appointing psychiatric experts and eliciting from them a report, to be followed, in the case of an affirmative opinion, by the procedure outlined in sub-articles (4) and (5) of article 402 of the Criminal Code – it would be deciding upon the merits of the case, something which is reserved exclusively to the court or courts of the requesting State. This grievance is therefore also dismissed.

15. Finally, this Court has also examined article 20 of Cap. 276 and declares that there is no reason whatsoever under paragraphs (a), (b) or (c) of that article to revoke the order for appellant to be remanded in custody to await his return to the requesting State.

16. For the above reasons, this Court dismisses the appeal, confirms both the decree of the 10 May 2006 and the decision of the 4 August 2006, and orders that appellant be kept in custody to await his return to the United States of America to be dealt with in that country in respect of the offences mentioned in the Authority to Proceed of the 9 March 2006 and in compliance with Article 7 of the Treaty. The Court orders that a copy of this judgment be forthwith communicated to the Minister responsible for Justice.

< Final Judgement >

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