MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR. JUSTICE
ANTHONY ELLUL

Sitting of the 29 th April, 2013

Rikors Number. 32/2012

Mark Charles Kenneth Stephens

Vs

Attorney General

By application filed on the 9th May 2012 the applicant has requested the court to:

1. Declare that his right to a fair hearing as guaranteed by Article 6(3)(c) and 6(1) of the Convention and Article 39 of the Constitution have been breached.
2. Revoke the judgment delivered by the Criminal Court on the 5th November 2008 (**Republic of Malta vs**

Mark Charles Kenneth Stephens) and confirmed by the Court of Criminal Appeal on the 24th June 2010.
3. Give all other appropriate remedies.

The applicant's complaints relate to the statement he gave to the police, the testimony of Gregory Robert Eyre, the evidence produced by the prosecution and the principle of equality of arms.

On the 5th June 2012 the Attorney General filed a reply stating that (fol. 35):

1. The applicant is abusing of an extraordinary procedure two years after the judgment delivered by the Court of Criminal Appeal.
2. Article 39 of the Constitution does not apply to the pre-trial stage.
3. Applicant's complaints are ill-founded.
4. In any eventuality the remedy requested by the applicant is not justified.

The court heard the witnesses produced by both parties, and took account of the note of submissions filed by both parties and also the records of the criminal proceedings.

By judgment delivered on the 5th November 2008 applicant was declared guilty of having associated himself with a person or persons in Malta and abroad, to commit crimes in breach of the provisions of the Dangerous Drugs Ordinance (Chapter 101). He was sentenced to twenty five years imprisonment and a fine of sixty thousand euro (60,000). He filed an appeal and by judgment delivered on the 24th June 2010 the appeal was dismissed.

As regards to the facts of the case, on the 11th August 2003 the police stopped and searched Gregory Robert Eyre and Susan Molyneux on their arrival to Malta from London. In one of the bags, three packets containing a total of 2,988.2 grams of cocaine and two packets containing 7,151 ecstasy pills were found. In his first

statement Eyre claimed that he was afraid to mention the person who had instructed him to carry the drugs to Malta, saying that he was Russian. In a second statement he said that it was Mark Stephens.

With regards to the preliminary pleas, the court is of the view that:-

i. The fact that the criminal proceedings have been concluded does not mean that a convicted person has no right to invoke his fundamental rights as guaranteed by Chapter 319 and the Constitution. On the other hand the scope of these extraordinary proceedings is not to be an attempt by the applicant to have his case reappraised on the merits by a different court. As will be highlighted later on in this judgment, a number of the grievances proposed by the applicant are nothing more than a weak attempt so that this court decides on the merits of the criminal proceedings. This court cannot rule on the merits of a specific case.

ii. Article 39 of the Constitution guarantees the right to a fair trial when a person is ***"charged with a criminal offence"***. In **Republic of Malta vs Matthew-John Migneco** (15th November 2011) the Civil Court, First Hall[1] declared that this provision of law does not apply to the pre-trial stage. Although the emphasis is on the words *"charged with a criminal offence"*, this court sees no reason why a similar interpretation to that afforded to Article 6 of the Convention is not adopted with respect to Article 39 of the Constituton to the pre-trial stage[2]. One must remember that the pre-trial stage is an extremely delicate stage as it may affect the rights and interest of the suspect. The guarantees afforded by Article 6 may be relevant before a case is sent to trial if and so far as the

[1] Mr Justice Joseph R. Micallef.

[2] In the judgment ***Eckle v Germany*** (15th July 1982) it was stated: *"Charge, for the purposes of Article 6 par. 1, may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation [suspect] has been substantially affected' (see the above-mentioned Deweer judgment p. 24, par.46)."*.

fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. An interpretation which in the court's view should also apply to Article 39 of the Constitution, taking into account that Article 6 also refers to the *"determination….. of any **criminal charge**…."* [Article 6(1)] and *"Everyone charged with a criminal offence has the following minimum rights….."* [Article 6(3)].
The applicant's complaints are:-

1. **The statement given to the police without having had the opportunity to consult a lawyer**.

On the 10th September 2005 applicant was interrogated by the police. From the evidence it transpires that:-

- Prior to his extradition to Malta, applicant had the opportunity to consult with the same lawyer who assisted him in the criminal proceedings held in Malta.
- Prior to his arrival in Malta, applicant filed constitutional proceedings constesting the extradition order issued by a Maltese magistrate.
- The day before the police interrogation, applicant spoke to his lawyer (vide testimony given by Superintendent Norbert Ciappara during the sitting of the 20th September 2012).

The applicant complains:

"Illi fl-10 ta' Settembru 2005 l-esponent kien gie interrogat in konnessjoni ma' l-akkuzi su riferiti u sussegwentement huwa rrilaxxa stqarrija lill-pulizija minghajr ma kellu d-dritt li qabel jikkonsulta ma avukat u konsegwentement certu affarijiet li qal fl-istqarrija tieghu kienu ta' natura inkriminanti u dan fl-ambitu tal-proceduri li sussegwenetment ittiehdu kontra tieghu." (fol. 2).

It is evident that while in police custody the applicant had access to his lawyer prior to his interrogation. Whatever was said during such contact is irrelevant for the purposes of these proceedings. What is relevant is that he was

given the opportunity to consult a lawyer and was therefore free to seek legal advice. This notwithstanding and although he was duly cautioned he chose to reply to the questions.

Furthemore, during the trial by jury he confirmed on oath (2nd November 2009):

"*Def: What you said to the police was the truth ? The whole truth ?*
Wit: And nothing but the truth.
Def: Do you want to add anything or to explain anything ?
Wit: Anything that the Prosecution wants to ask me or the jurors I will answer.".

Therefore during the trial by jury the applicant chose to give his testimony and he confirmed what he had told the police during his interrogation. Under these circumstances he cannot complain and try to take advantage by contending that he had no access to a lawyer prior to the police interrogation.

Furthemore at no stage of the interrogation did the applicant admit any wrongdoing.

Therefore applicant's first complaint is totally unfounded.

2. **The testimony of Gregory Robert Eyre**.

The applicant complains that in his case the prosecution produced as evidence a statement made by Eyre on the 11th August 2003 and 12th August 2003:

"….. minghajr ma qabel kellu d-dritt li jikkonsulta ma' avukat.".

There is no allegation that these statements were given under duress or ill-treatment. Access to legal counsel is a fundamental safeguard against self-incrimination by the person suspected of having committed a crime. However, the applicant has no right to try and exclude what Eyre said in his statements by invoking the Salduz judgment. A

right which in the court's view was personal to Eyre. Furthermore the witness himself filed a constitutional case[3] contesting the two statements on the basis that prior to the interrogations he had no access to a lawyer. In a judgment delivered on the 27th June 2012 the court dismissed his request.

Notwithstanding what has been stated above, according to Article 661 of the Criminal Code:

"A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person.".
Therefore the statements on their own could not prejudice applicant. What was relevant in this case was Eyre's testimony in front of the duty magistrate on the 13th August 2003. In terms of Article 30A of Chapter 101, any statement confirmed on oath before a magistrate in cases relating to offences against the Dangerous Drugs Ordinance, *"…. May be received in evience against any other person charged with an offence against the said Ordinance, provided that it appears that such statement or evidence was made or given voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour."*.
The applicant also complains that:

"…… wara harget informazzjoni li Gregory Robert Eyre kien taht l-effett tad-droga meta hu rrilaxxa z-zewg stqarrijiet tieghu u anke ftit wara huwa gie rikoverat gewwa l-isptar Monte Karmeli minhabba f'hekk. Dan wahdu jitfa' dubju fuq il-veracita o meno fuq dak li qal Gregory Eyre fl-istqarrijiet.".

The applicant had ample opportunity to raise this grievance during the criminal proceedings. However he did not. Furthermore, there is absolutely no evidence that Eyre was not mentally fit to participate in the police interrogation and to give evidence on oath in front of the duty magistrate. Although Kevin Sammut Henwood

[3] Gregory Robert Eyre vs l-Avukat Generali.

declared that inmates who took drugs had withdrawal symptoms which produced psychological problems and *"under certain circumstances, the inmate tend to become more vulnerable."*. The witness did not give any information regarding Eyre's condition on being admitted to prison and as to whether he was mentally fit to testify in front of the duty magistrate.

It transpires that Eyre gave evidence during the trial by jury. Applicant's claim that he had no opportunity to cross-examine Eyre on the contents of the two statements, is incorrect. The statements were in the court file. During the trial by jury, a copy of Eyre's testimony in front of the duty magistrate (13th August 2003) was also distributed to the jurors after defence counsel to Stephens declared that there was no objection to this. Through his defence counsel Stephens was free to ask questions to Eyre concerning what he told the duty magistrate. Therefore his object is ill-founded.

Although after the sworn declaration of the 13th August 2003 Eyre tried his best to exculpate Stephens, this certainly does not mean that the fact finder had to conclude that what the witness said during the sittings of the 20th September 2005, 17th March 2006 and trial by jury, was the truth. Reading through the testimony of Eyre this court is of the view that the fact finder was fully justified in not believing what the witness said when he gave evidence during the compilation proceedings and the trial by jury. Thus for example:-

- During the sitting of the 23rd September 2005 Eyre refused to reply to any questions;
- During the sitting of the 17th March 2006 Eyre declared for the first time that he was sent to Malta with the drugs by Andrew Woodhouse. However he had not mentioned this name when he testified on the 20th September 2005 and 23rd September 2005. Furthermore he said:

"Pros. So you knew Mr Mark Stephens ?

Witness: No I didn't know him. I knew him as well as I know you. I have seen him when I picked up my girlfriend from work and that's it, and I didn't know it was Mark Stephens I knew him as Mark.".

However Vincent Stivala, an aquaintance of Eyre, confirmed that he was introduced to him by the applicant (sitting of the 23rd September 2005 – fol. 138).

For this court it is evident that Eyre is prepared to say anything to try and save the day for the applicant. Testifying he said: *"While I was in police custody, police headquarters in Floriana, I started feeling sick. I needed drugs and alcohol. So anything the Police told me I agreed with it. I wanted to get out of the Depot at all costs."* (sitting of the 20th September 2012). However during the compilation proceedings he claimed that what he told the police was fabricated *"because Mr Harrison said that I was looking at thirty years imprisonment if I did not cooperate."* (20th September 2005).

3. **<u>Other evidence produced by the Prosecution</u>**.

The applicant claims that:

"Illi t-tielet violazzjoni si tratta dwar l-fatt li l-proceduri fit-totalita' taghhom kienu jiffavorixxu aktar lill-prosekuzzjoni milli lill-akkuzat…… l-kundanna ta' l-esponent kienet wahda sfavorevoli u li kienet unikament ibbazata fuq stqarrijiet ta' xhud …….".

The applicant is clearly expecting this court to undertake a reappraisal of the facts of the case that lead to his conviction. This is certainly not possible. The issue of

identification of the person who instructed Eyre to import drugs into Malta was also dealt with in detail by the Court of Criminal Appeal in the judgment (vide paragraphs 38 and 39). The court gave clear and unequivocal reasons why it believed that Eyre implicated the applicant when he referred to him during the interrogation held on the 12th September 2005 and his testimony in front of the duty magistrate. On the basis of those findings the court concluded:

i. *"From this it is evident that what Eyre was seeking to do when he gave evidence during the compilation proceedings – and later in the trial by jury – was to divert responsibility away from appellant onto another person, whom he eventually referred to as Andrew Woodhouse."* (paragraph 38).

ii. *"From all the above it is therefore abundantly clear that the Mark Stephens originally referred to by Gregory Eyre was indeed the appellant……."* (paragraph 39).

The conclusion reached by the Court of Criminal Appeal cannot be subject to review, as it is based on the appreciation of evidence produced during the criminal proceedings. Applicant also claims that a certain Richard Cranstorm knows the truth. Applicant filed an affidavit of Richard Cranstorm to try and convince this court that he was convicted for a crime committed by another individual. The contents of the affidavit are not relevant to these proceedings. The scope of these proceedings is certainly not to carry out a reappraisal of the merits of the case.

4. **Equality of arms**.

The applicant claims:

"….. il-kundanna ta' l-esponent kienet totalment ibbazata fuq l-istqarrijiet ta' xhud u liema stqarrijiet inghataw fl-istadju ta' qabel il-process innifsu (pre-trial stage). Ghaldaqstant kif diga' intqal l-esponent ma kellu l-

opportunita' li jaghmel il-kontro-ezami ta' dan ix-xhud fuq dak li qal f'dawn l-istqarrijiet peress illi fil-proceduri dan ix-xhud irtira dak kollu li kien qal fihom.".

Everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent. From the acts of the proceedings it is evident that at no stage was the applicant at a disadvantage.

From the acts of the criminal proceedings it is amply clear that applicant was given ample opportunity to present his case.

The applicant claims that the Criminal Court did not give importance to the fact that it transpired that applicant's fingerprints were not found on the packets containing the drugs. In the court's view:-

i. this is a gratuitous assertion;

ii. this submission has nothing to do with the principle of the equality of arms;

iii. this submission should have been dealt with in the appeal stage. These proceedings cannot serve the purpose of reviewing the facts of the case.

The claim by the applicant that the judge presiding the trial by jury directed the jurors to believe what Eyre said in front of the duty magistrate, is untrue. The judge said:

"Once you are satisfied, if you are satisfied that there wasn't this intimidation or promises or whatever and it was done voluntarily, then that statement confirmed on oath will become admissible as evidence. What does that mean? It doesn't mean that it is the Bible truth, it means you can consider it as evidence like all the other evidence which we have here even thought that evidence was given in the absence of the accused during the inkesta, during the magisterial inquiry. The prosecution is asking you to consider that statement confirmed on oath as true. It is also asking you to find the accused's guilt on the bais of that statement confirmed on oath before Magistrate Hayman. Legally he is perfectly entitled to do so, whether you do so or not that is a question of fact which is up to you to decide, but when the prosecution tells you irrespective of what he said here, irrespective of what he

said before the magistrate in the compilation of evidence, if you decide to believe his first statement confirmed on oath before Magistrate Hayman and you accept that as the truth then on the basis of that statement you can convict the accused. Legally he is correct, factually it depends on you whether you are prepared to accept that first statement on oath…..".

The extract quoted by the plaintiff from the summing up of the trial judge cannot be understood as an invitation *"…into accepting the statement which the same Gregory Robert Eyre confirmed on oath in front of the Magistrate"* (vide page 8 of the note of submissions filed by the applicant on the 14th January 2013). The presiding judge simply explained what the law said. Furthermore, the appropriate forum where this grievance should have been dealt with was in the appeal. A reasoning which also applies to the complaint that the trial judge, in his summing up failed to refer to Article 639(3) of the Criminal Code. It is certainly not up to this court to deal with the interpretation of this provision of law and whether it should have been applied in the particular circumstances of this case.

Therefore for these reasons the court:-

1. Dismisses the first two pleas of the respondent with costs against him.

2. Dismisses applicant's demands with costs against him.

< Final Judgement >

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