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Prof. Ian Refalo

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Constitutional Court
1988
13th January, 1988
Joseph Mary Vella et
vs
Commissioner of Police et

Evidence –
Witnesses – Hearsay – Evaluation of – Admissibility – Plea concerning same – Professional Secret

Section 37 of the Constitution
Section 598(1) – Chapter 21

This is an appeal from an interlocutory decree on the admissibility of a witness. In the course of proceedings pending before the First Hall of the Civil Court concerning an alleged breach of the fundamental rights of applicants, by their illegal arrest and subjection to threats, beatings and torture, these prayed to produce as a witness a legal procurator to give evidence on certain relevant facts which he had heard from a third party in the course of the exercise of his professional activity, without actually revealing such person's identity. The Court of First Instance allowed this witness to give evidence; the Constitutional Court confirmed this decree.

The witness could not reveal the name of the person who had given him the information since he was bound by professional secret. He was only allowed by that person to give evidence on the facts as related to him. The evidence is "hearsay". However the rule that prohibits such evidence is not an absolute one but is subject to various exceptions. The Court may, according to circumstance, allow evidence on what was said by others and take note of it when the evidence in itself has substantial bearing on the merits of the case or part thereof, or when such other person cannot be brought to give evidence and the facts would be such that they cannot be proved with certainity in any other way. Therefore, the witness in this case was admissable.

17th February, 1988

Adv. Tonio Borg et
vs
The Minister of Foreign Affairs and Culture AND the Director of Museums

Judgement – Nullity of – Plea – Absence of decision of – Discrimination – Protection from – Fundamental Rights of a moral entity – Physical person – Fundamental Rights, and Award of Remedy

Section 45 of the Constitution

Applicants had asked for permission to be able to organise an exhibition on the Movement they represented in the Museum of Archeology and such was refused. Applicants alleged that this was discriminatory in their respect, and that consequently they were entitled to a remedy.

The first Hall of the Civil Court upheld their request by declaring the behaviour of the respondents discriminatory in respect of the applicants; but decided that there was no other remedy to be provided. Respondents appealed on the main issue whilst the applicants appealed incidentally. The Constitutional Court rejected the appeals and confirmed the first judgement.

The absence of a decision on some of the pleas in the dispositive part of the judgement does not lead to its nullity when such a decision results in a clear and univocal way from the judgement itself.

The respondent, the responsible Minister, had asked to be non suited as he was not the proper defendant. The Court decided that the Minister in question was a proper defendant in the proceedings and this, since the decision not to hold the proposed exhibition by the applicant, depended on him.

Moreover, the respondents had also pleaded that the applicants, as an association, did not enjoy the fundamental right claimed as such only pertained to them individually. This plea was also turned down.

The right for protection against discrimination pertains not only to physical persons but also to any association of which such physical persons form part.

On the merits, the Court found that there was discrimination against the applicants when these were not granted the permit to hold the proposed exhibition, especially when other political entities were granted such permit. Moreover, it resulted that there was no factual justification for the denial of such a permit.

With respect to the incidental appeal filed by the applicants regarding the absence of a remedy, the Court rejected this appeal since it found that in the special circumstances of the case it should not disturb the discretion of the court of First Instance.

20th April, 1988

The Police (Inspector A. Borg Caruana)
vs.
Victor Caruana et.

Evidence
Witnesses – Admissibility of
– Court of First Instance – Discretion of – Fair Hearing – Absence of law
– Protection of the – Fundamental Human Rights

Sections 89(6), 40(6), 46(3) of the Constitution
Section 513(b) – Criminal Code
Section 627 – Chapter 21

An appeal from a judgement about the admissibility of a witness.

The case was referred to the The First Hall of the Civil Court by the Magistrate's Court on an alleged breach of the right to a "fair-hearing" by the accused. The accused wanted to produce witnesses to prove what had taken place before the Magistrate's Court. The Court of First Instance turned down such a request; the Constitution Constitutional Court confirmed this decree.

The witnesses were not needed to give evidence in connection with the matter being contested since no lack of agreement existed between the parties about what had happened before the Magistrate's Court. Moreover, the Court observed, in such matters the discretion of the Court of First Instance should not be disturbed except for grave reasons and when there is prejudice to the parties; this was not the case.

13th June, 1988

Rose Anne Galea
vs
The Hon. Prime Minister et.

Fundamental Human Rights – Violation of – Remedy for – Discrimination – Fair Hearing – Board of Inquiry – Impartiality of – Independence of the Disciplinary Board – Public Service Commission

Sections 39(1), (2), (3), (6), (7), (8), (9), (10), 45(1), (2) and (3), 46 (2), 115 of the Constitution
Sections 4, 6(1), 9, 10, 11, and 14 of the 1st Schedule of Act XIV of 1987
Act XIX of 1977
Section 589 of Chapter 12
Sections 643 and 647(3) of Chapter 9
Legal Notice 37 of 1988

The facts which led to this case were as follows: on the 21 July 1987, a Board of Inquiry was set up to investigate certain allegations about the behaviour of the applicant, an administrative nurse at Craig Hospital, Gozo.

As a result it was decided that disciplinary measures should be taken against her and she was given ten days within which to state in writing her defence. The applicant was informed that the first sitting of the Board of Discipline was going to be held on December 28, 1987.

The applicant alleged that her fundamental rights had been violated as the said Board of Inquiry was neither independent nor impartial, and it had

not given the applicant a fair hearing. Moreover, she alleged, the questions put to her by the Board could incriminate her, and such had been put without here even being informed of her right to choose, in the circumstances, not to give evidence. She also alleged that she had been politically discriminated against.

Therefore, she requested that the procedures, the decisions and the conclusions of the Board of Inquiry be annulled and that the respondents be inhibited from continuing with their actions against her.

The First Hall of the Civil Court disposed of the case by declining to exercise its jurisdiction as the applicant had other remeides available and therefore stopped short of dealing with the application, each party bear his own costs.

The applicant appealed and the respondent appealed incidentally from the order regarding the costs. The Constitutional Court rejected the incidental appeal, declared insufficient the remediès available to the appellant and sent back the case to the Court of First Instance to deal with the merits.

The duty of the Disciplinary Board is to investigate the case and submit its conclusion to the Public Service Commission. The fact that the Board could ignore the conclusions of the Board of Inquiry does not mean that in this way it is not allowed to take them into consideration, whilst the purpose of the action was to prevent the Disciplinary Board from being able to take same into consideration since these could be annulled on the basis of the alleged reasons.

21st June, 1988

Darryl Francis Grima pro et noe
vs
The Hon. Prime Minister et noe.

Fundamental Human Rights – Right to Life – Neutrality – Maltese Constitution and Decree – Precautionary Warrant – Inhibition – Appeal from – Form of – Nullity of.

Sections 1(3), 33(1), 95(2) (d) and (f), and 116 of the Constitution.
Section 2 of the First Schedule of Act XIV of 1987
Act VIII of 1981
Sections 846, 873, 876 of Chapter 12

Applicants requested the issue of warrant of prohibitory injunction against the respondents so that these would not allow the entry of foreign naval vessels into the harbours of Malta. Such entry, it was alleged, constituted a breach of Malta's neutrality and of the fundamental right to life of the applicant. The First Hall of the Civil Court rejected the request of applicants. Applicants appealed. The Constitutional Court declared the appeal null and void.

The decision of the Court of First Instance was neither a judgement nor an interlocutory decree. Infact, the decision by which the request for the issue of a prohibitory injunction is turned down, is neither an interlocutory nor a definitive order, and therefore, an appeal from such a decision cannot be entertained. The order could only be questioned by way of writ in front of the same Court delivering it.

26th Setempber, 1988

The Police (Ass. Commissioner Anthony Mifsud Tommasi L.P.)
vs
The Hon. Michael Falzon B. Arch., A&CE., M.P.

In Criminal proceedings pending in front of the Magistrate's Court, the accused was assisted by a lawyer who was also a Member of Parliament. The court decided that the accused could not be so assisted since this would be in breach of section 79 of the Code of Organisation and Civil Procedure. The accused raised the matter of the constitutionality of this section since he felt that this violated his fundamental right to a fair hearing; the Magistrate's Court referred the matter to the First Hall of the Civil Court for its decision.

The Court of First Instance disposed of the merits by holding that there existed no conflict between Section 79 of the Code of Organisation and Civil Procedure and Section 39 of the Constitution. On appeal, the Constitutional Court revoked and found that Section 79 mentioned above was unconstitutional.

The Court held that the Constitution gives the accused the right to choose himself his legal representatives. The words "by a legal representative" as found in the Constitution cannot but mean the same as the words "through legal assistance of his own choosing" as found in the European Convention.

After what has been said, the Court dealt with the issue whether Section 79(2) of the Code of Organisation and Civil Procedure violates Section 39(6) (c) of the Constitution. Section 39(6) of the Constitution, like Section 6 (3) (c) of the European Convention, deals with persons who are only accused of a criminal offence. The Court concluded that under no circumstances, can one say that Section 39(6) (c) is in conflict with the cases mentioned in Section 79 (3) (a) since these do not expressly deal with criminals proceedings. Indeed, in the judgement ARTICO vs. ITALY, the European Commission held that Section 6(3) (c) of the European Convention "guarantees a right recognized as an essential feature of the concept of a fair trial. That provision guarantees to an accused person that proceedings against him will not take place without an adequate representation of the case for the defence. It guarantees the right to an effectual defence either in person or through a lawyer....."

The Court was of the opinion that the principles above quoted, as established by the European Commission, apply to criminal matters even in

the case of Section 39 (1) of the Constitution of the Republic of Malta. Whosoever is accused of a criminal offence, has the right to a fair hearing under Section 39 (1) and hence, he has the right for "adequate representation"; he has the right "to an effectual defence", and if such a right is being denied by legislation, such legislation would be violative of the Constitution."

In this way, the Court arrived at the conclusion that the said Section 79 (2), as far as it effects the choice of a lawyer in criminal proceedings in the circumstances indicated in the following sub Section (i.e. 3(b) (c)), is in violation of the Constitution.

The Court emphasised that it is well known that the number of the members of the legal class practicing as lawyers is somewhat small and amongst such lawyers, few are those who practice in crimincal proceedings, especially in cases of a grave nature like those mentioned in Section 79 (3) (b) (c). It is also noted that most of these lawyers who practice in criminal cases of this kind and gravity, are members of the Maltese Parliament.

A consequence of this is that as an effect of Section 79 (2) as far as it concerns the Criminal cases contemplated in Section 79 (3) (b) (c), the right of choice of a lawyer given to the accused by Section 39 (b) (c) as interpreted above, is restricted in such a way that in the court's opinion, he can in effect, not have an adequate and effective legal representation, which is so necessary in order to have that fair hearing which our Constitution in Section 39 (1) as well as the European Convention in Article 6 (1), wants to guarantee to him.

26th September 1988

Doris, wife of Emmanuel Spiteri
vs
The Commissioner of Police

Fundamental Human Rights – Protection from Discrimination.
Decree – Interlocutory – Prohibitory Injunction – Appeal from – Form of – Nullity of.

Sections 36, 37, and 45, k 46(2) of the Constitution
Section 873 of Chapter 12
Sections 14 and 3 of the First Schedule of Act XIV of 1987

The applicants alleged in the First Hall of the Civil Court that an order given by the respondent so that these close down a kiosk maintained by them, was discriminatory in their respect and went against their fundamental rights. The applicants requested the issue of a warrant of prohibitory injunction, as well as a remedy for the breach of their fundamental rights. The Court of First Instance upheld the request for the issue of a warrant of prohibitory injunction

and ordered that the hearing of the case continue according to law. The respondent appealed; the Constitutional Court declared the appeal null and void.

The decision of the Court of First Instance was a decree for the issue of a precautionary warrant and as such it was neither definitive nor interlocutory; therefore such a judgement could only be attacked by means of a writ brought before the same court that ordered the issue of the warrant in question.

5th October 1988

Charles Spiteri
vs
The Minister for Public Works
and the Director of Public Works

Fundamental Human Rights – Freedom of Expression – Freedom of Association – Protection from Discrimination

Section 41, 42(1), 45(2) and 47 of the Constitution
Section 18(4) Act regarding Industrial Relations

Case concerning an allegation of a breach of the fundamental rights of the applicant, amongst which those of freedom of association, expression and protection from discrimination. The First Hall of the Civil Court upheld the request of the applicant. The Constitutional Court confirmed the judgement on appeal.

The facts which gave rise to this case were the following: the applicant, a Gozitan was employed with the Public Works; since a long time the Gozitan governmental employees had a concession that every Friday they could leave earlier from work and every Monday report a bit late for work. After Industrial action was taken by these governmental employees such a concession was withdrawn. After two days the same concession was again granted to these employees with the exclusion of the applicant, who was the President of one of the unions which took part in the industrial action.

The Court held that this amounted to a breach of sections 42(1) and 45(2) of the Constitution in respect of the applicant, and that is, a breach of his right to freedom of association and protection from discrimination. The exclusion of the concession above mentioned with respect to the applicant, was hindering him in the enjoyment of his right to freedom of association. The word "hindering" as used by the law contains in itself a broad not a restricted meaning.

17th October, 1988

Antonio Pace
vs
The Minister of Housing et.

Fundamental Human Rights – Property – Protection from Inhuman or Degrading Treatment – Requirements of – Privacy – House, of – Protection of – Reasonably Justifiable in a democratic society

Requisition – Order of – Housing Secretary

Sections 32, 36, 38, 46(a) of the Constitution
Article 4 of Act II of 1949

The applicant had a property which was taken away from his possession by the Housing Secretary by means of a requisition order. The applicant alleged that this order was unjust and senseless since the property in question not only was his only habitation but also his means of livelihood. Therefore, he alleged that Sections 36, 38 and 32 of the Constitution were breached in his respect and requested a remedy. The First Hall of the Civil Court refused the request of the applicant; the Constitutional Court upheld the appeal, revoked the first judgement, declared the applicant's request legally sustainable and sent back the case to the Court of First Instance for its continuation according to law.

Section 36(1) of the Constitution which prohibits punishment or inhuman or degrading treatment, does not have a punitative connotation. The words ''punishment'' and ''treatment'' have distinct connotations. So as to have inhuman treatmnent there needs to be: 1. ''severe suffering'', 2. ''minimum level of suffering dependant on the circumstances of each case, and 3. the suffering can be either mental or physical. The removal of a family from its only house which constitutes its place of living, certainly amounts to inhuman treatment.

About the protection of the privacy of the applicant's house it was argued by the respondents that the requisition in force under Act II of 1949 could not have been in breach of the Constitution since it fell under one of the exceptions contemplated under Article 38 and that is, that it was made in the public interest according to law.

The Court however observed that in order for such an order not to have been in breach of the Constitution, it is necessary that the order not only was made in the public interest according to law but also that such a behaviour be reasonably justifiable in a democratic society.

The behaviour in question, if the allegations mentioned in the application are proved correct, was not justifiable in a democratic society.

19th October 1988

Adv. Dr. Lawrence Pullicino
vs
Commander-in-Chief of the Armed Forces noe et

Appeal Nullity Mistake - Note - Application - Correction

Section 175(2) of Chapter 12
Section 789(1) of Chapter 12
Sections 184, 174, 176, 178 - Chapter 12

A case concerning the nullity of an appeal.

The appeal application was corrected in such a way that the word "note" at the heading, was substituted with the word "application" without the Court Registrar's authorisation being sought. The Constitutional Court rejected the plea of nullity and ordered the correction.

The violation of such a form leads to the nullity of the act if such a violation brought prejudice to the party requesting the nullity. In this case no prejudice was suffered by the other party. Moreover, such a mistake could in any case be corrected and the court ordered such.

19th October 1988

Superintendent Carmel Bonello et.
vs
The Hon. Prime Minister et.

Constitutional Application - Form of - Nullity of - Facts, Description of - Fundamental Human Rights - Discrimination

Section 45 of the Constitution - Reg. 3(2) of Legal Notice 48 / 1964
Section 14 of the First Scheme of Act. No. XIV of 1987

The applicants employees with the Police Corps, had recourse to the First Hall of the Civil Court because they alleged that they had suffered discrimination as a result of their political belief when disciplinary measures were taken against them before the Public Service Commission and not against others. In a judgement "in parte" the Court of First Instance rejected the plea of the respondents of nullity of the procedure commenced by the applicants. On an appeal by the Prime Minister, the Constitutional Court confirmed the first judgement.

The application briefly contained a list of the facts on which the constitutional remedy was being sought; there was no need for the same facts to be put down in detail but a generic indication of same was sufficient.

31st October 1988

Martin Fenech
vs
The Commissioner of Police

Appeal – Application for – Error – Correction of – Wrong Indication of the Court – Constitutional Court

Legal Notice 49 / 1964
Section 175(2) of Chapter 12

This was an appeal from an application for the breach of the fundamental human rights. In the appeal application the court was indicated as the Court of Appeal and the person against whom the appeal is being made claimed this as a ground of nullity.

The person making the appeal requested a correction in the sense that the words "Court of Appeal" be susbstituted by the words "Constitutional Court".

The Court upheld the request, ordered the correction, and refused the plea of nullity. Such a correction was within the power of the court to make. The court had the power to correct any mistake in appeal.

4th November 1988

Adv. Silvio Camilleri noe
vs
Comptroller of Customs

Fundamental Human Rights – Property – Right to – Confiscation – Temporary Importation – Duty, exclusion from – Comptroller of Customs.

Section 16(2) (d)(ii) – Act XI of 1964
Act XLIII of 1974
Sections 37 and 37(2)(a) of the Constitution

The applicant had imported a car in Malta under a 'temporary import licence'. The Comptroller of Customs confiscated this car under Section 16(2)(d)(ii) of Act XI of 1964 when the same person failed to re-export it. The applicant alleged that the said section breached her fundamental rights as protected under section 37 of the Constitution and therefore was unconstitutional.

The First Hall of the Civil Court rejected applicant's request. The

Constitutional Court found that the alleged breach subsisted and declared the section in question unconstitutional.

According to Section 16(2) (d) (ii) of Act XI of 1964 the Comptroller of Customs can confiscate objects imported to Malta temporarily when such are not exported from Malta within the expected period. This provision is of a confiscatory nature and does not contemplate the removal of objects for which custom duty must be paid. This confiscation takes place without the need of any judicial process. Therefore it breaches the fundamental right to property of the applicant as protected under Section 37 of the Constitution and such is not safeguarded by the exception in Section 37(2)(a) of same.

9th November 1988

Lucien Stafrace noe
vs
Acting Registrar of the Courts et.

Constitutional case – Reasonable time – Fair Hearing – Fundamental Right to – Legitimate Defence – Registrar of Courts – Minister – Commissioner of Police – Separation of Powers – Judge – Independence of Judiciary.

Sections 41, 42, 39(2), 46(1)(2) of the Constitution.
Reg. 4 of 48 / 1964
Section 6(1) of the First Schedule – Act XIV of 1987
Section 4(1) – Section 57(1)(2) – Chapter 12.

The applicants requested a remedy before the First Hall of the Civil Court since, in their opinion, the procedures pending before the same court concerning the breach of their fundamental rights had been pending for an unreasonable length of time. The First Hall of the Civil Court upheld the applicants' request by declaring that the length of time of the procedures mentioned breached the relevant sections of the Constitution and of the European Convention, but rejected the request of the applicants for a just financial satisfaction.

On appeal both of the applicants as well as of the respondents the Constitutional Court revoked the first judgement and non-suited the respondents, the Registrar of Courts, the Minister of Justice and the Commissioner of Police since such were not the legitimate respondents in such proceedings.

The Registrar of Courts was not the proper person to reply to applicants' claim since as a head of department he represents the government in matters which relate to the ordinary running of public administration connected with that department, and the present matter was not such.

The Minister represents his department, but the present case was not one which dealt with the duties of the Minister of Justice or of Internal Policy. The same thing could be said for the Commissioner of Police.

14th December 1988

Martin Fenech
vs
The Commissioner of Police

Witness – Compellibility of – Self-Incrimination of – Presidential Pardon – Fundamental Human Rights – Protection of the Law

Section 39(10) of the Constitution

The applicant was summoned to give evidence in criminal proceedings against third persons. He was given a conditional pardon by the President of the Republic so that he could give evidence.

The applicant had recourse to the First Hall of the Civil Court since he alleged that he was being forced to give evidence in such a way that could incriminate him. The First Hall of the Civil Court rejected the request. The Constitutional Court, on appeal of the applicant, confirmed the judgement of first instance.

The right pertaining to an individual not to give his evidence exists only in those criminal cases pending against him. In other cases against third persons, the witness does not enjoy a fundamental right to refuse to give evidence on the basis that in this way he could incriminate himself.