CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 51760/99
by Carmel CAMILLERI
against Malta

The European Court of Human Rights (Second Section), sitting on 16 March 2000 as a Chamber composed of

Mr C.L. Rozakis, *President*,
Mr M. Fischbach,
Mr B. Conforti,
Mr G. Bonello,
Mrs V. Strážnická,
Mrs M. Tsatsa-Nikolovska,
Mr E. Levits, *judges*,
and E. Fribergh, *Section Registrar*,

Having regard to the above application introduced on 10 September 1999 and registered on 12 October 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Maltese national, born in 1953 and living in Valletta, Malta. He is represented before the Court by Dr J. Herrera and Dr J. Giglio, lawyers practising in Malta.

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was charged before the Court of Magistrates with possession of and trafficking in heroin while in prison.

The prosecution case relied on a signed statement which one of the prisoners, G.F., made under caution to a police inspector on 30 November 1991 accusing the applicant of having supplied him with drugs in the confines of the prison. G. F. confirmed his statement under oath before an investigating magistrate who came to the prison to interview him on 1 December 1991.

G.F. later retracted the incriminating statement in an affidavit sworn in prison before a notary and in the presence of the applicant on 7 January 1992. Part of the affidavit was made in reply to questions put to him by the applicant's lawyer.

At the applicant's trial G.F. confirmed that he had revoked the statement made to the investigating magistrate. He stated that he was under the influence of drugs at the time and could not reason properly. G.F. was cross-examined as to his statement by the applicant's counsel. A copy of the impugned statement was produced in court.

Counsel for the applicant requested the Court of Magistrates to rule G.F.'s statement inadmissible. The request was rejected. With reference to the provisions of the Criminal Code, the Court of Magistrates decided that G.F.'s statement to the investigating magistrate could be admitted in evidence given that it took the form of a properly drawn up *procès verbal* containing the deponent's allegations against the applicant. With respect to G.F.'s testimony in court, the Court of Magistrates found:

> "[That] the presence of the accused when the affidavit was drawn up indicates that [the applicant] wanted to feel assured that what [G.F.] had previously declared in his absence was going to be revoked by [G.F.] by means of the affidavit. The words of [G.F.'s] companions: 'What have you done to [the applicant]' were indicative of what is considered among prison circles as lack of 'camaraderie' on the part of [G.F.] who had revealed what was going on in prison. By his testimony in court, by his willingness to revoke his original testimony, [G.F.] continued to reveal that his only interest lay in trying to repair the harm he had caused. He maintains that on the day he made the statement he was not conscious of what he was saying; he said that he did not even remember that he testified before the Inquiring Magistrate and that he was under the influence of pills he was taking. This Court cannot believe him in any way: the testimony which he made before the Inquiring Magistrate was very detailed. A person who is not conscious of what he says, who does not

> know what he says, would not provide all the details which [G.F.] gave when he testified. The Court can understand [G.F.'s] preoccupation since it is well-known that it is very difficult to testify in the presence of the person who has supplied him with certain illicit drugs regarding some fact. And what had originally prompted him to denounce the [applicant] was the fact that he had gone to hospital and left [G.F.] without heroin."

In its judgment of 7 April 1994 the Court of Magistrates found the applicant guilty as charged and sentenced him to a term of imprisonment of 5 years and a fine of 2000 Maltese Liras.

The applicant appealed to the Court of Criminal Appeal. Before the Court of Criminal Appeal the applicant's counsel contended that G.F. was not a credible witness since he had been found guilty of perjury on two occasions back in 1991 and was barred from giving evidence, as prescribed by the Civil Code. Counsel further asserted that G.F.'s statement to the investigating magistrate should not have been admitted in evidence at the trial on account of the fact that G.F. had testified before the investigating magistrate in the applicant's absence. In counsel's submission, and with reference to section 646(1) of the Criminal Code, a witness' statement must be given orally to the trial court as a condition of its admissibility.

On 2 February 1996 the Court of Criminal Appeal dismissed the applicant's appeal. The court observed that G.F. had in fact appeared before the Court of Magistrates and was cross-examined as to the content of the impugned statement which he had confirmed before the investigating magistrate. The court further observed that G.F.'s evidence was properly ruled admissible since it was a declaration within the meaning of the Dangerous Drugs Act. In addition, the bar on G.F. giving testimony did not extend to the giving of testimony before a court of law including before an investigating magistrate.

The applicant appealed to the First Hall of the Civil Court, which rejected his appeal in a judgment dated 27 June 1997. According to the First Hall of the Civil Court, and with reference to Convention case-law, the criminal proceedings against the applicant and in the way in which the testimony of G.F. were given were fair.

The applicant subsequently appealed to the Constitutional Court, arguing that his right to be present throughout the whole of the criminal proceedings against him had been violated on account of his absence at the time when G.F. deposed before the investigating magistrate. Counsel for the applicant referred the court to Article 39 of the Maltese Constitution and to the case-law pertaining to the Strasbourg's Court's interpretation of Article 6 of the Convention.

In its judgment of 31 May 1999 the Constitutional Court dismissed the applicant's appeal. The court ruled that G.F.'s statement to the investigating magistrate had been legally obtained and was admissible in evidence against the applicant. Moreover, G.F. had appeared before the trial judge and his evidence was open to challenge by the defence. The Court of Magistrates properly exercised its discretion to admit G.F.'s statement in evidence, it being noted that the court had weighed in the balance the fact that G.F. has retracted the incriminating statement before a notary. In the opinion of the Constitutional Court:

> "It is not within [its] competence to interfere in the appreciation of the evidence as long as it is satisfied that the proceedings were carried out correctly and that they respected the principle of 'equality of arms' and granted [the applicant] the right to an 'adversarial trial' during which , at every moment, prosecution and defence would have every opportunity to control all the evidence produced and the submissions made during the proceedings ... In the case under examination the Court does not perceive anything which might counter its conviction that [the applicant] had every opportunity to verify every piece of evidence adduced against him and in particular to cross-examine the person who had made his depositions elsewhere .... .

COMPLAINT

The applicant complains that he was denied a fair trial, in breach of Article 6 of the Convention.

THE LAW

The applicant maintains that he was denied his right to a fair hearing in breach of Article 6 of the Convention, which provides in relevant part:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
> (...)
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (...)
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (...)"

In the applicant's submission, he was convicted solely on the basis of an incriminating statement made by G.F. in his absence. That statement was in fact retracted by G.F. and the latter again dissociated himself from its contents in open court. Notwithstanding, the Court of Magistrates chose to give credence to the statement. In effect, his right to cross-examine G.F. had been rendered illusory and his right to a fair trial violated in consequence.

The Court observes that the guarantees of paragraph 3(d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of that Article. It will thus consider the applicant's complaint under the two provisions taken together (see, among many other authorities, the Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to

whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see the Doorson v. the Netherlands judgment of 26 March 1996*, Reports of Judgments and Decisions* 1996-II, p. 470, § 67; the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34). Furthermore, the Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict (see the above-mentioned Doorson judgment, p. 472, § 78).

The Court further recalls that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings (see the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43; the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 51).

With these principles in mind the Court notes that the applicant was able to call G.F. at his trial before the Court of Magistrates and to cross-examine him as to the reasons which led him to make the incriminating statement. In the Court's opinion the opportunity allowed to the applicant to undermine the probative value of that statement more than compensated for any alleged disadvantage which may have resulted from the fact that the statement was made in circumstances in which he was unable to challenge its veracity. It cannot be maintained therefore that the rights of the defence were not secured at the trial.

The Court does not accept the applicant's submission that the decision of the Court of Magistrates to convict him solely on the strength of the impeached statement in reality curtailed his defence rights. It is to be noted that the court had to make a choice between competing versions of the truth. It had the advantage of hearing the oral testimony of G.F. and observing at first hand his demeanour in the witness box under cross-examination. The court gave detailed reasons for its decision to attach weight to G.F.'s accusatory statement before the investigating magistrate, which reasons were reviewed and upheld on appeal. The Court for its part notes that G.F. first gave his statement on 30 November 1991 of his own volition and under caution to a police inspector. The following day he confirmed the content of that statement under oath before the investigating magistrate. G.F.'s consistency of approach over this period would strongly argue against his assertion that he was not lucid at the material time. Moreover, the Court of Magistrates could properly have regard to the fact that the applicant himself was present when G.F. retracted his statement before the notary on 7 January 1992, implying that some pressure may have been brought to bear on G.F. to withdraw the earlier statement.

The Court considers therefore that the verdict of the Court of Magistrates cannot in the circumstances be deemed arbitrary or manifestly unreasonable, all the more so since it was affirmed by three instances on appeal.

Having regard to the above considerations, the Court concludes that the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Christos Rozakis
President