Criminal Procedure

Controversial Amendments to the Maltese Criminal Code

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On writing this paper I was still debating (in the Committee for the Consideration of Bills in the Maltese Parliament) amendments to the Bill to amend the Criminal Code (Chapter 9 of the laws of Malta), in particular the revolutionary provisions that are going to cause procedural earthquakes in Criminal Proceedings. I may sound extreme - however, the debate in parliament about the various amendments drew concerns from both sides of the House. It is true that at present the Maltese Parliament has quite a handful of Criminal lawyers as members and this in itself is healthy when debating the Criminal Code, and this doesn't occur often in the Maltese Parliament. In fact, one may safely say that except for some cosmetic amendments in the last few years the Criminal Code has remained quite a conservative piece of legislation for a number of years, except for recent amendments[249].

The Bill's main objectives were based primarily on implementing measures which according to the present government should "*ensure a better and more expeditious administration of justice as outlined in the January 2005 Government White Paper, such as introducing restrictions to the immediate granting of bail to repeat offenders, the payment in criminal proceedings of judicial costs to the State and of damages to the crime victim; the removal of the mandatory requirement of corroboration of the evidence of an accomplice; the elimination of the punishment of imprisonment in*

[248] The Author is a practicing Criminal lawyer, the main spokesman for Opposition on Justice, and a member of the Committee for Consideration of Bills in Parliament.
[249] The Criminal code since 1996 was amended by the following acts; XXXII of 1997, II and X of 1998, VII of 1999, X of 2000, III and VI of 2001, III, XIII, XXIV and XXXI of 2002, IX of 2003, III of 2004, and I, V, VI, XIII, XX and XXII of 2005.

criminal libel actions under the Press Act; and the removal of mandatory imprisonment in cases of sharing in drug offences". Truly enough, some of the measures were consensually agreed by both parties in Parliament. A case in point is the amendment to the Medical and Kindred Professions Ordinance (Chapter 31) where the proposed amendment focused on particular procedural injustices that were reflected in court judgments when the consumer of drugs was punished because he somehow shared his consumption. The definition of "sharing" within this Ordinance is still considered as trafficking and it was high time that the Social Committee within the House of Representatives came out with the proposal where there are special circumstances (such as the offender being person of 'good character') where he will benefit from the amendment and in the judgment will *not* be given an effective prison sentence. The amendment reads as follows; The Medical and Kindred Professions Ordinance, hereinafter in this article referred to as "the Ordinance", shall be amended as follows:

(a) in sub-article (7) of article 120A thereof, for the words 'or (b)(i).' There shall be substituted the words 'or (b)(i):' and immediately thereafter there shall be inserted the following new provisos:

"Provided that where, in respect of any offence mentioned in this sub-article, after considering all the circumstances of the case including the amount and nature of the drug involved, the character of the person concerned, the number and nature of any previous convictions, including convictions in respect of which an order was made under the Probation Act, the court is of the opinion that the offender intended to consume the drug on the spot with others, the court may decide not to apply the provisions of this sub-article:

Provided further that an offender may only benefit once from the provisions of the above proviso"; and

(b) in sub-article (11) of article 121E thereof, for the words "receives a request made by a judicial or prosecuting authority"

there shall be substituted the words "receives, or is informed about, a request made by or on behalf of a judicial, prosecuting, law enforcement or other competent authority".

This amendment was accepted without question but with the provision that - as clearly indicated in the amendment the offender can only benefit once from such offence.

However, the amendments that caused havoc were mainly three and for the purpose of this paper I am listing them one by one. The first is the amendment to article 546(4) of the Criminal Code. In the first draft amendment, the new sub-article reads as follows: "*(4A) Where a report, information or complaint is made to a Magistrate under this article by a person other than the Attorney General or a police officer, the Magistrate shall hold the inquest only after having obtained the authority of the Chief Justice who shall give his authority after having established that the necessary pre-requisites for the holding of such an inquest exist".* This amendment is very strange as for the first time in such procedure of an inquiry to be held by a magistrate, the magistrate is first to seek authority from the Chief Justice which sounds as if the magistrate is not able enough to decide the parameters of the working of article 546 of the Criminal Code which treat the established procedure for years relating to the "*in genere*". The only two main principles that the magistrate on receipt of the report is to consider when deciding whether or not to hold an inquest are; that the alleged offence is liable to the punishment of imprisonment exceeding three years and if the crime is not one of breaking in i.e. theft[250]. The decision of the magistrate not to hold an inquest, will not preclude the person who originally filed the report to press for criminal proceedings to take place.

[250] Vide. Article 564(2) of Chapter 9 where "the holding of an inquest may be dispensed with by the magistrate to whom the report, information or complaint referred to in the last preceding sub-article is made, if the fact to be investigated is breaking for the purpose of article 263(a) as defined in the first paragraph of article 264(1) and if the theft to which the breaking relates or may relate, is in respect of things whose value does not exceed ten liri, although it may be aggravated as mentioned in article 261(a),(b),(d),(e),(f) and (g), or any amongst them, even if the fact is likely to constitute an offence liable to the punishment of imprisonment exceeding three years".

So the strangeness to this amendment is twofold. One is that a magistrate is capable as an independent judge to decide the criteria under article 546 on whether or not to hold an inquest and the other questioning his capability which directly addresses his independence. The other alternative reason is simply lack of trust on the present collegiate of magistrates. The Chief Justice under the present amendment is more than a watchdog but is also the decision-maker for the usual decisions that are supposed to be taken by others[251].

During the writing of this article when this amendment was being debated in the Parliamentary Committee for the Considerations of Bills, after this amendment was heavily criticized, (in the part of the amendment where the magistrate will hold the inquest after having obtained the authority of the Chief Justice), another amendment was introduced where the magistrate responsible for the inquest will be the one *"who conducts the inquiry {and} shall be chosen by lot from among all the magistrates and shall hold the inquest"*. There is nothing wrong that this latter amendment be made to Article 546(4) of Chapter 9 as the independence of the judiciary should also be respected and any possible forum shopping eliminated. Still the best way to respect the intention of the legislator in assuring both the right of any person to file directly a report to the magistrate and also the right of any alleged person under a possible enquiry be both entertained is to leave the right of the magistrate to decide alone whether or not to hold an inquest and to give the right of the alleged person or persons under an inquiry to appeal to a judge sitting in the Criminal Court to decide whether the procedure established under Article 546 of Chapter 9 has been followed for such persons to sit under such inquiry. This will solve the shadow of doubt that could have been put on the magistrate by putting them under the thumb of the Chief Justice in their usual role of duty.

[251] The magistrates.

The other controversial amendment is that of 575A of the Criminal Code which is an addition to Article 575 of the Criminal Code[252]. According to this new amendment the person charged, who applies for bail from custody, who is charged with a scheduled offence, and who within the period of ten years immediately preceding the date of the offence charged, and who is shown to the satisfaction of the court to have been convicted of a scheduled offence, cannot be bailed. The only special circumstances where he can be released prior to the three months mandatory arrest after arraignment is upon an application to the Criminal Court where the presiding judge may bail the person charged if he is satisfied that there are grave and exceptional reasons which warrant the person's release.

There are two particular reasons for objecting to this amendment. First, when a person is charged there is the presumption of innocence and hence the arbitrary refusal of bail for a period of three months is in itself a breach to the right of the accused where a presumed innocent person is already convicted for three months detention. The other reason is the way that the magistrate is treated yet again in this amendment - as if he is not capable of seeing what a judge in the Criminal Court can consider as being exceptional and grave reasons for bailing a person charged.

Incidentally this amendment has been re-amended once again as presented before the Parliamentary Committee for the Consideration of Bills and currently, it reads as follows: *575A. (1) Saving the provisions of sub-article (6) of article 574A but notwithstanding any other provision of this Code or of any other law, where the Court of Magistrates at any time orders the temporary release from custody of a person who*

[252] Article 575 of the Criminal Code is a lengthy Article having eleven sub-articles where the procedure is established with regards to crimes for which bail is granted or not, including when the bail may be refused and when the Attorney General may also appeal to the granting of bail by the magistrates as indicated in Article 575(4A) which reads "Where the Court of Magistrates, whether as a court of criminal judicature or as a court of criminal inquiry, grants bail to the person in custody or subsequently amends the bail conditions, the decision of the court to that effect shall be served on the Attorney General by not alter than the next working ay and the Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates".

(a) is charged with a scheduled offence and with being a recidivist in terms of articles 50 and 51; and

(b) has been previously found guilty of a scheduled offence by means of a judgement which has become res judicata,

the order of the Court shall be given in open court on a date previously notified to the prosecution and the person charged and shall be served on the Attorney General by not later than the next working day.

(2) The Attorney General may, not later than the next working day following the date of service of the order of the Court of Magistrates, apply to the Criminal Court for the revocation or amendment of the order and the Criminal Court shall appoint the application for hearing not later than two working days from the filing of the application. The Criminal Court shall give its decision on the application with urgency.

(3) the execution of the order of the Court of Magistrates ordering the temporary release of the person charged shall be suspended during the period allowed to the Attorney General to apply to the Criminal Court under this article and, following such application, until the Criminal Court gives its decision thereon.

(4) the provisions of sub-article (1) of article 575 shall apply also in the case of a person charged with a scheduled offence.

(5) For the purposes of this article "scheduled offence" means any offence listed in the Schedule D to this Code".

This latter amendment offers greater relief than the previous amendment to Article 575 of the Criminal Code as at least the accused, technically, still enjoys the right to be bailed by the Court of Magistrates without the three month delay period, and the Attorney General can exercise the power of appeal as already

enjoyed under 575(4A)[253] and the present amendment, 575A(2) which is more or less the same procedure adopted. In fact the Attorney General may appeal from such granting of bail by the Court of Magistrates the next working day before the Criminal Court, where the latter shall appoint the hearing not later than two working days from the filing of the application. Until the writing[254] of this article this amendment was still before the committee for the consideration of Bills in the House of Representatives. Interesting is the reaction of Chamber of Advocates (Malta) to the amendments under Article 575A which concentrated mainly on the abolition of the three months automatic detention and the first right of the magistrate to decide the bail[255].

The remaining controversial amendment was that addressed to Article 639 of the Code where in its sub-article 3, it is till now

[253] The recent decision under such application was given by the Criminal Court as per Hon. Chief Justice Vincent DeGaetano in the case Police vs. Steven John Lewis Marsden where following a case of an English resident in Malta who was charged with the importation of drugs and was released on bail on arraignment which decree was revoked by the Court of Appeal and the re-arrest and continued detention of the accused was ordered. In this judgement the Court said that "the procedure under subsection (4A) of Section 575 of the Criminal Code whereby the Attorney General applies to this Court for the re-arrest and continued detention of the person released on bail by the inferior Courts, was not intended so that invariably and in every case where bail is granted to see whether it(i.e. this Court) agreed with it or not, and if it did not agree with it, revoke that decree granting bail. Upon a proper construction of this granting bail. Upon a proper construction of this subsection, the procedure was introduced so that where the Inferior Court exercises its discretion in a manner which is manifestly wrong, the position can be rectified by a Superior Court upon an application filed by the Attorney general (The Attorney General having, under our system, a general supervisory role in matters concerning bail). The same is, of course, true in respect of the procedure under subsection (9) of Section 574A (the provision which is being invoked in the instant case)".

[254] This amendment was approved during one of the sittings of the committee for the consideration of bills after the writing of this article late in July 2006.

[255] In their report the special committee of the Chamber of Advocates namely "Il-pozizzjoni tal-Kamra ta' l-Avukati dwar abbozz ta' ligi imsejjah "Att biex jemenda l-Kodici Kriminali"", the following observation was made which is being quoted verbatim in the language of the report "Artiolu 11 – Il-Kamra tqis din l-emenda suggerita fid-dawl ta' sentenza gia moghtija kemm mill-Qrati taghna kif ukoll minn Qrati barranin fir-rigward tal-limitazzjonijiet imqeda fuq l-ghoti tal-helsien mill-arrest u f'dan il-kuntest thoss illi tali emenda twassal ghal sitwazzjoni simili ghal dawk gejn gia fie dikjarat vjolazzjoni tad-dritt tal-helsien mill-arrest. Il-Kamra tistaqsi ukoll ghaliex l-istess Magistrat li qed jigi mitlub jiddeciedi fuq il-mertu tal-akkuzi m'ghandux ikollu ukoll, fl-ewwel tlett xhur jekk mhux ukoll f'kull waqt tal-proceduri il-kompetenza li jezercita d-diskrezzjoni tieghu fi zmien tlett xhur f'kull waqt tal-proceduri jiddeciedi dwar l-ghoti jew meno tal-helsien mill-arrest?"

imperative that if the only witness is an accomplice, and the evidence is not corroborated with any circumstances then the Court can never rely on such sole witness. The amendment is abolishing completely this important principle of corroboration and is in short saying that even if the only witness is an accomplice the Court may still direct the jury to convict the accused. The original amendment to article 639(3) during the second reading in the House of Representative a few months ago read as follows: *"Where the only witness against the accused for any offence in any trial by jury is an accomplice, it shall be in the discretion of the Court, after taking into account the character and demeanour of the witness, the nature of the offence and its circumstances and any improper motive which the witness might have which could induce him not to tell the truth, to give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused".* This was criticized practically by both sides of the House of representatives mainly by myself, members of the opposition and also particular back-benchers from the Government side[256] and also from the same Chamber of Advocates which insisted that it would be much better that this amendment will be retracted[257].

In fact, this amendment was redrafted once again and a new amendment was presented before the Committee for the Consideration of Bills in Parliament. It now reads, *"Where the only witness against the accuses for any offence in any trial by jury is an accomplice, the Court shall give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused".* Still this amendment is in complete clash with the principle of corroboration of the evidence of the

[256] Hon. Jason Azzopardi and Hon. Mario Demarco

[257] Ibid. report by Chamber of Advocates, "F'dan ir-rigward il-Kamra filwaqt illi segwit id-diversi interventi maghmulin fil-Kamra tar-Rapprezentanti matul it-Tieni Qorti ta' dan l-Abbozz, il-Kamra ta' l-Avukati hija mhassba dwar il-mod mghaggel li permezz tieghu qed titressaq l-emenda f'dan ir-rigward. L-emenda proposta fir-rigward tal-korroborazzjoni hija tali li ser taffettwa prattikament il-proceduri gudizzjarji kollha fil-kamp penali. Ghalhekk il-Kamra tahseb li jkun ferm ahjar li din l-emenda tigi irtirata sabiex isir studju dettaljat minn kummissjomi ad hoc dwar il-htiega o meno taghha u dwar il-konsegwenzi li tali emenda ggib fil-process gudizzjarju".

accomplice. The abolition of corroboration of the evidence of an accomplice is dangerous as it presumes the guilt of the accused rather than the innocence. This in itself will certainly give rise to injustices and could be the reason for possible future frame-ups. Both amendments - irrespective of the mildness in the second amendment - go against the established principle of innocence as after all claimed by various jurists including the famous Beccaria[258].

The same line of thought was followed in the Human Rights case delivered in Strasbourg 1988 in the case **Barbera, Messegue and Jabardo vs. Spain** where the Court in its judgement stated that *"When carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused... ".*

The principle of corroboration of an accomplice is the only protection that the accused may have when the prosecution is to rely on such evidence. This is in line with the principle of *audi alteram partem* which is protected under the doctrine of the Rule of Law that is, the prosecution should have the same weight as the defence in any proceedings. This amendment is a clear sign that a political minister is strengthening the prosecution's weight to the extent that the dividing line of correctness in any criminal procedure may bend towards a police state.

I hope that when you read this article a clear reflection will prevail and this amendment to section 639(3) will not come into force...[259].

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[258] Dei Diritti e Delle Pene – P. Calamandrei – Firenze 1945 – page 213, "un uomo non puo chiamarsi reo prima della sentenza del giudice, ne' la societa' puo' toglerli la pubblica protezzione, se non quando sia deciso ch' gli abbia violato I patti, co qualigli fu accordata".
[259] omissis.