Qorti tal-Appell Kriminali

Onor. Imhallef Dr. Edwina Grima LL.D.

Appell Nru: 387/2015

Il-Pulizja

Assistent Kummissarju Norbert Ciappara

Vs

Louis Lia

Illum 22 ta' Settembru, 2016

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellant, Louis Lia detentur tal-karta tal-identita Maltija bin-numru 182470M, akkuzat quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli:

Fit-13 ta' Gunju, 2007 u matul iz-zmien ta' qabel cioe' f'dawn l-ahhar tliet xhur ta' qabel din id-data, b'diversi azzjonijiet maghmulha minnu anke jekk fi zminijiet differenti izda li jiksru l-istess dispozizzjoni tal-ligi, u li kienu maghmula b'rizoluzzjoni wahda kkoltiva l-pjanta Cannabis, u dan bi ksur tal-Artiklu 8(c) tal-Kap. 101 Ordinanza dwar il-Kontroll ta' Medicini Perikoluzi tal-Ligijiet ta' Malta.

Ukoll talli fl-istess data hin zmien u cirkostanzi kellu fil-pussess tieghu l-pjanta Cannabis, kollha jew bicca minnha, bi ksur tal-Artikli 8(d) tal-Kap 101 Ordinanza dwar il-Kontroll ta' Medicini Perikoluzi tal-Ligijiet ta' Malta, liema droga nstabet f'tali cirkostanzi li juru li ma kienitx ghall-uzu esklussiv tieghu.

U akkuzat ukoll talli kkommetta dawn ir-reati f'post, fi jew gewwa centru u jew f'distanza ta' mitt metru mill-parametru ta' post fejn jiltaqghu z-zaghzagh bi ksur ta' l-Ordinanza dwar il-Professjoni Medika u Professjonijiet li ghandhom x'jaqsmu maghhom.

Il-Qorti hija mitluba sabiex barra milli tapplika l-piena skont il-ligi tordna lill-imputat ihallas l-ispejjez li ghandhom x'jaqsmu mal-hatra ta' l-esperti skont l-artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta.

Rat is-sentenza tal -Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, tas-16 ta' Lulju, 2015, fejn il-Qorti wara li rat l-Artikolu 18 tal-Kapitolu 9 tal-Ligijiet ta' Malta, l-Artikolu 8(c) u 8 (d), it-Taqsimiet 4 u 6, l-Artikoli 22(1)(a), 22 (2) (b) (i) u t-tieni proviso tal-Artikolu 22(2)(b) tal-Kapitolu 101 tal-Ligijiet ta' Malta u r-Regolamenti 4 u 9 tal-G.N. 292/1939 sabet lill-imputat hati tal-imputazzjonijiet kollha dedotti kontrih, u ikkundannatu ghal piena ta' tlett snin prigunerija effettivi u multa ta' tlett elef Euro (€3,000), li bl-applikazzjoni tal-Artikolu 14(2) tal-Kapitolu 9 tal-Ligijiet ta' Malta tista' tithallas b'rati mensili u konsekuttivi ta' mitt Euro (€100.00). L-ewwel pagament ghandu jsir mhux akar tard minn xahar mid-data li fiha l-hati jiskonta l-piena karcerarja li qed tigi b'din is-sentenza erogata, u ghal dan il-fini r-Registratur ghandu jivverifika mal-awtoritajiet karcerarji din id-data. Pero jekk il-hati jonqos li jhallas pagament wiehed, il-bilanc jigi dovut minnufih u jigi konvertit fi prigunerija bir-rata ta' gurnata habs ghal kull hamsa u tletin Euro (€35.00) dovut.

Inoltre, il-Qorti ordnat lill-hati ihallas l-ispejjez li ghandhom x'jaqsmu mal-hatra tal-esperti skont l-Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta, liema spejjez jammontaw ghas-somma ta' tminn mija u wiehed u sebghin Euro (€871.00), li ghandhom jithallsu fi zmien sitt (6) xhur mil-lum, b'dan li jekk il-hati jonqos li jhallas dan l-ammont jew parti minnu fiz-zmien lilu preskritt, l-ammont jew il-bilanc jigi dovut minnufih u jigi konvertit fi prigunerija bir-rata ta' gurnata habs ghal kull hdax-il Euro u hamsa u sittin centezmu (€11.65) dovut.

Il-Qorti ordnat li d-droga u l-affarijiet konnessi maghha ezebiti jigu distrutti taht is-supervizjoni tar-Registratur.

Rat ir-rikors tal-appell tal-appellant Louis Lia, pprezentat fir-registru ta' din il-Qorti fit-28 ta' Lulju, 2015, fejn talab lil din l-Onorabbli Qorti tirriforma s-sentenza appellata billi filwaqt li tikkonferma s-sejbien ta' htija tal-ewwel akkuza, tirrevokaha in kwantu sabithu hati tat-tieni u t-tielet akkuzi kontrih u konsegwentement tilliberah minn kul htija u piena imposta fil-konfront tat-tieni u t-tielet akkuzi, u f'kaz li din l-Onorabbli Qorti joghgobha tikkonferma s-sentenza appellata, l-esponent jitlob li tigi mposta piena hafna iktar ekwa u gusta ghall-kaz in dizamina, dan dejjem salv provvediment iehor li din l-Onorabbli Qorti jghogobha timponi.

Rat l-atti u d-dokumenti kollha.

Rat il-fedina penali aggornata tal-appellant esebita mill- prosekuzzjoni fuq ordni tal-Qorti.

Rat illi l-aggravji tal-appellant Louis Lia huma s-segwenti w cioe':-

1. Illi bir-rispett kollu, l-Ewwel Onorabbli Qorti ghamlet apprezzament hazin tal-fatti u applikazzjoni hazina tal-ligi ghall-akkuza in ezami.

L-ewwel Qorti rriduciet il-promulgazzjoni tas-sentenza, specjalment il-parti dwar il-konsiderazzjoni dwar il-piena, f'kalkolu matematiku, impersonali, nieqes minn kull kunsiderazzjoni tal-hajja umana, ippruvata, tal-akkuzat in kwistjoni u distakkat mir-realta.

Illi fir-rigward tat-tieni akkuza, l-appellant dejjem kien konsistenti u dejjem sostna li huwa jpejjep madwar seba' (7) sigaretti tal-haxixa kuljum u dan kien ilu jaghmlu ghal perjodu twil hafna qabel id-data tal-akkuza. Dejjem sostna li kkultiva l-cannabis ghall-uzu personali tieghu. Bir-rispett dovut, zbaljat l-Ewwel qorti meta qalet li heavy user ma jkollux bzonn ikabbar 8 pjanti tal-cannabis fi qsari pjjuttost kbar. Illi fl-istqarrija tieghu, a fol 18 tal-process, l-appellant ammetta li kien akkwista z-zerrigha hu stess pero' meta mistoqsi mill-Ispettur:

M: Kemm tuza'

T: Jiena nuza madwar sebgha sigaretti tal-haxixa kuljum

M: X'kont sejjer taghmel bil-pjanti li kellek?

T: Kont sejjer naqta u npejjep jiena

Illi dawn il-kazijiet mhux l-ewwel darba li jipprezentaw certa diffikolta' biex wiehed jiddetermina jekk id-droga li tkun instabet kienitx intiza ghall-uzu personali jew biex tigi spaccjata.

Illi fis-sentenza fl-ismijiet Il-Pulizija vs Marius Magri deciza mill-Qorti tal-Appell Kriminali datata 12 ta' Mejju, 2005 il-Qorti qalet illi:

Il-principju regolatur f' dawn il-kazijiet hu li l-Qorti trid tkun sodisfatta lill hinn minn kull dubju dettat mir-raguni w a bazi tal-provi li jingabu mill-prosekuzzjoni li l-pussess tad-droga in kwistjoni ma kienx ghall-uzu esklussiv (jigifieri ghall-uzu biss) tal-pussessur. Prova, ossia cirkostanza wahda f' dan ir-rigward tista', skond ic-cirkostanzi tal-kaz , tkun bizzejjed . (Ara App. Krim. "Il-Pulizija vs. Carmel Degiorgio" **[26.8.1998]) . Meta l-ammont tad-droga ikun pjuttost sostanzjali, din tista' tkun cirkostanza li wahedha tkun bizzejjed biex tissodisfa lill-Qorti li dak il-pussess ma kienx ghall-uzu esklussiv tal-hati. (Ara. Appell Kriminali :** "Il-Pulizija vs. Carmel Spiteri" **[2.9.1999].)**

Illi pero' kif gie ritenut minn din il-Qorti, kif preseduta, kull kaz hu differenti mill-iehor u jekk jirrizultawx ic-cirkostanzi li jwasslu lill-gudikant ghall-konvinzjoni li droga misjuba ma tkunx ghall-uzu esklussiv tal-akkuzat, fl-ahhar mill-ahhar, hija wahda li jrid jaghmilha l-gudikant fuq il-fattispecji li jkollu quddiemu w ma jistax ikun hemm xi *"hard and fast rule"* x' inhuma dawn ic-cirkostanzi indikattivi. Kollox jiddependi mill-assjem tal-provi u mill-evalwazzjoni tal-fatti li jaghmel il-gudikant u jekk il-konkluzzjoni li jkun wasal ghaliha il-gudikant tkun perfettament raggungibbli bl-uzu tal-logika w l-buon sens u bazata fuq il-fatti, ma jispettax lil din il-Qorti li tissostitwiha b'ohra anki

jekk mhux necessarjament tkun l-unika konkluzzjoni possibbli. (App. Krim . "Il-Pulizija vs. Brian Caruana" **[23.5.2002])**

Illi bid-dovut rispett, il-prosekuzzjoni ma gabitx prova wahda li jindikaw illi l-cannabis in kwistjoni ma kienx ghall-uzu esklussiv tal-appellant – fir-residenza tal-appellant, apparti l-pjanti tal-cannabis, ma nstab xejn relatat mal-abbuz jew it-traffikar tad-droga. Ma kien hemm l-ebda indizji jew fatturi li juru li dik id-droga ma kienitx ghall uzu esklussiv tal-appellant!

Tant kemm il-motivazzjoni u r-ragunar tal-Ewwel Onorabbli Qorti hu monk ghax kien ragunar ridott ghall-ezercizzju purament matematiku u robotiku, li fis-sentenza tal-istess Qorti (diversament preseduta) fl-ismijiet Il-Pulizija (Spettur N. Grixti) vs Nicholas Abela Ayling tal-24 ta' Gunju, 2010, fejn l-akkuzi kienu kwazi identici, il-Qorti qalet mod car u tond li *'il-mera ezistenza ta' ammont konsiderevoli ta' droga wahdu ma jwassalx ghall-prova soda u kategorika ta' pussess aggravat'*, u dan f'kaz fejn kien hemm nofs kilo raza tal-cannabis fil-pussess tal-akkuzat li kien gie lliberat mill-akkuza tal-pussess aggravat. Ahseb u ara fejn ghandna akkuzat hawn li jistqarr li ilu jpejjep 7 sigrattetti tal-kannabis kuljum u ghax jinstabulu 8 pjanti allura jigi akkuzat u misjub hati li kkultivhom mhux ghall-uzu esklussiv tieghu.

Fl-istess waqt li l-Qorti kienet qed issib htija fuq it-tieni imputazzjoni fil-kaz odjern, u cioe' dik tal-pussess mhux ghall-uzu esklussiv, kienet qed tghid kontradizzjoni ma' dak li hija stess kienet ghadha kemm qalet ftit qabel fl-istess sentenza. Dan peress li filwaqt li f'pagna 7 tas-sentenza appellata, il-Qorti qalet li kienet ser taghti l-beneficcju tad-dubju lill-imputat u tikkonsidra li hu kien ipejjep medja ta' seba' (7) sigaretti kuljum, l-istess Qorti ikkundannat lill-istess akkuzat talli dak li kellu fil-pussess tieghu ma kienx ghall-uzu esklussiv! Kwazi kwazi l-Ewwel Qorti fis-sentenza taghha ippretendiet li l-akkuzat li jpejjep 7 sigaretti kuljum, u huwa heavy uer, joqghod bil-imqass attent halli l-pjanti kif jaqbzu certu gholi, jizborhom jew iqassqashom halli ma jaqbzux dak l-gholi li jiskatta l-pussess aggravat. Ragunar bhal dan, bir-rispett dovut huwa assurd u nieqes mill-logika.

2. Illi fir-rigward tat-tielet akkuza minkejja illi l-ewwel Qorti kienet hatret lill-espert Mario Cassar sabiex jirrelata u jkejjel id-distanza mir-residenza tal-appellant sa fondi frekwentati minn zaghzagh, ghalkemm l-espoert irrelata li fid-distanza ta' 100 metru kien hemm St. Thomas Football Club, ma hemm l-ebda prova fl-atti dwar jekk tali club huwiex miftuh u qieghed jopera u jekk fil-fatt huwiex ffrekwentat minn zaghzagh o meno. Illi l-fond ta' St. Thomas Football Club ma kellux x'jaqsam xejn mal-kaz in kwistjoni.
3. Illi minghajr pregudizzju ghas-suespost, fi kwalunkwe kaz, il-piena inflitta hija eccessiva meta huwa ammess li l-akkuzat huwa heavy user tal-cannabis.

Illi apparti minn hekk, meta wiehed iqis it-trapass esagerat ta zmien minn meta sehhew il-fatti li taw lok ghal dawn l-akkuzi u d-data tas-sentenza, ma jistax ikun li l-akkuzat ma jhossx ruhu aggravat bil-piena inflitta. It-trapass wahdu, anke fuq skorta ta' kazistika tal-Qrati taghna, kellu jgib mieghu riduzzjoni tal-piena. Illi fir-rigward tat-trapass taz-zmien, l-imputat jaghmel referenza ghal kawza fl-ismijiet Il-Pulizija vs. Mario Zammit deciza mill-Qorti tal-Appell Kriminali fl-24 ta' Novembru, 2004 per Onor. Imhallef David Scicluna. Illi f'din is-sentenza din l-Onorabbli Qorti kienet ghamlet referenza ghal kawza fl-ismijiet Il-Pulizija vs. Nikola Farrugia et deciza fit-2 ta' Ottubru, 2002 u applikat il-principju segwenti:

> *'Issa apparti li kif gje spjegat aktar il fuq f' din is-sentenza l-appellanti jew uhud minnhom kienu huma stess il-kagun ta' parti miz-zmien li fih twal il-process , il-fattur tat-trapass taz-zmien ma jnaqqas xejn mir-responsabbilta' kriminali tal-hati. Jista' pero ' f'xi kazi jigi konsidrat ghall-fini tal-piena kif gie ritenut fil-kazijiet appena citati u kif gie ritenut minn din il-Qorti diversament preseduta fil-kawza "Il-Pulizija vs. Geoffrey Azzopardi" (29.1.2001) ghalkemm f'din l-ahhar sentenza l-konsiderazzjonijiet ta' din il-Qorti biex varjat il-piena ma kienux limitati biss ghal dik tat-trapass taz-zmien imma kienu ukoll bazati fuq motivazzjoni ohra.'*

Rat il-verbal tas-seduta tat-18 ta' Mejju 2016 fejn l-appellant issolleva lanjanza ohra ghall-appell minnu intavolat u dan in segwitu ghad-decizjoni moghtija mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fil-kaz ta' "Borg vs Malta" fejn allura talab lil din il-Qorti sabiex meta tigi biex tikkonsidra l-ewwel aggravvju minnu interpost

marbut ma'l-apprezzament tal-fatti maghmul mill-Ewwel Qorti hija ghandha tiskarta l-istqarrija moghtija mill-appellant fil-kors ta'l-investigazzjonijiet kondotti mill-pulizija u dan billi huwa ma kellux jedd ghall-assistenza legali meta ghamel dan.

Ikkunsidrat,

Illi qabel ma tinoltra ruhha biex tezamina serjatim l-aggravvji imressqa mill-appellanti, din il-Qorti necessarjament trid tinvesti il-kwezit dwar l-inammissibilita ta'l-istqarrija rilaxxjata mill-appellanti meta kien gie arrestat u interrogat mill-pulizija lura fit-13 ta' Gunju 2007, liema lanjanza giet sollevata minnu fil-kors tat-trattazzjoni ta' dan l-appell.

Ikkunsidrat,

Illi id-dritt ghal smiegh xieraq kif sancit fl-artikolu 6(1) u l-artikolu 6(3)(c) tal-Konvenzjoni Ewropeja gie estiz mill-gurisprudenza ewropeja mhux biss ghal jedd li ghalih hija intitolata l-persuna akkuzata matul il-proceduri penali fil-qorti izda ukoll ghal hekk imsejjah *pre-trial stage* u cioe' ghall-istadju meta persuna tkun giet arrestata u ser tigi interrogata. Dina l-fehma ghalhekk tfisser illi l-artikolu 6(3)(c) li jipprovdi dwar l-assientenza legali ghandu isib applikazzjoni anke fl-istadju ta'l-interrogazzjoni tal-persuna suspettata. Dana ghaliex huwa principju stabbilit fis-sistema penali taghna illi persuna ghandha titqies li hija innocenti sakemm ma tigix misjuba hatja minn qorti gudizzjarja. Kwindi hija ghandha dritt illi ma tinkriminax ruhha bl-ebda mod u dana sa mill-istadju inizjali ta'l-interrogazzjoni. Sabiex dana id-dritt jigi salvagwardjat ghalhekk kull persuna ghandha d-dritt li tikseb l-assistenza legali u dana sabiex tkun fl-ahjar pozizzjoni illi thejji id-difiza taghha. Dana huwa vitali billi fis-sistema penali taghna il-konfessjoni tal-persuna akkuzata hija prova ewlenija fil-process gudizzjarju istitwit kontra taghha.

Il-Qorti Kostituzzjonali, madanakollu kienet recentement ziedet linji gwida ohra ghal gudikant li ikollu f'idejh id-decizjoni dwar jekk ghandux jiehu kont ta' stqarrija tal-interrogat bhala prova in atti sabiex jasal ghal gudizzju tieghu. Gie deciz illi fuq kollox ghandu jittiehed kont tal-fattispecje ta' kull kaz fost ohrajn il-vulnerabbilita tal-persuna li tkun qed tigi interrogata (fosthom l-eta, il-precedenti penali) l-jedd li l-persuna interrogata kellha biex tibqa' siekta u ma twegibx ghal dawk il-mitoqsijiet li jistghu jinkriminawh, l-inattivita da parti ta'l-akkuzat milli jipprova jattakka l-validita ta'l-istqarrija tieghu mill-bidunett tal-proceduri, l-provi l-ohra li hemm fl-atti, fost ohrajn, liema decizjonijiet saret referenza ghalihom fid-decizjoni impunjata.

Illi f'decizjoni recenti[1] moghtija mill- Qorti Ewropeja Dwar id-Drittijiet tal-Bniedem gew affermati il-principji generali li ghandhom jigu sewgieti mill-qrati meta inghad:

"Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction,

[1] Mario Borg vs Malta 37537/13 12/01/2016

Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6."

Il-Qorti iddecidiet illi l-fatt wahdu illi l-ligi domestika ma kenitx tipprevedi d-dritt ghall-assistenza legali meta l-persuna suspettata kienet tinsab fil-kustodja tal-pulizija hija bizzejjed sabiex ikun hemm vjolazzjoni ta'l-artikolu 6:

"**60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example,** ***Salduz*****, cited above, § 56;** ***Navone and Others v. Monaco,*** **24 October 2013;** ***Brusco v. France*****, October 2010; and** ***Stojkovic v. France and Belgium*****, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example,** ***Dayanan v. Turkey*****, no. 7377/03 §§ 31-33, 13 October 2009;** ***Yeşilkaya v. Turkey*****, no. 59780/00, 8 December 2009; and** ***Fazli Kaya v. Turkey*****, no. 24820/05, 17 September 2013).**

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see ***Salduz*****, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).**

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see ***Salduz*****, cited above, §§ 52, 55 and 56).**

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

Illi gie deciz illi l-qrati ma kellhomx jaghtu interpretazzjoni stretta tad-decizjoni Salduz vs Turkey kif sehh fil-kaz ta' Charles Steven Muscat fost ohrajn. L-Imhallef Pinto De Albuquerque[2] ighid hekk fl-opinjoni tieghu:

"the interpretation of *Salduz* by the Constitutional Court of Malta is in breach of the "constitutional instrument of European public order" and its "peremptory character". …. Be that as it may, in the light of the repetitive findings of violations of Article 6 § 3 (c) of the Convention by this Court, the Maltese Constitutional Court should correct its trajectory and return to its initial Convention-friendly interpretation of *Salduz*."

Imbaghad fil-kawza Aleksandr Vladimirovich Smirnov vs Ukraine (13.06.2014) gie deciz: **–**

"The Court reiterates the principles developed in its case-law, according to which the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, although not absolute, is one of the fundamental features of the notion of a fair trial. As a rule, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there were compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008). The right to mount a defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction (ibid.). While a defendant in criminal proceedings may, under various circumstances, waive his right to legal representation, such a waiver may not run counter to any important public interest, must be unequivocally established, and

[2] Ara partly concurring and partly dissenting opinion of Judge Pinto De Albuquerque fid-decizjoni Mario Borg vs Malta

must be attended by minimum safeguards commensurate with the waiver's importance."

Maghdud dan allura jidher illi r-regola hi li l-Artikolu 6(1) abbinat ma'l-artikolu 6(3)(c) jitlob li jkun hemm dritt ta' avukat fl-istadju tal-investigazzjoni tal-pulizija, sakemm ma jigix ippruvat li hemm ragunijiet impellenti ghaliex dan id-dritt ghandu jigi ristrett. Illi allura meta l-ligi domestika teskludi dan il-jedd u dan b'mod sistematiku billi ma ikunx hemm disposizzjoni *ad hoc* li taghti dan il-jedd lil persuna arrestata, ikun hemm il-periklu li isehh lezjoni tad-dritt tal-persuna akkuzata ghal smiegh xieraq anke f'dawk il-kazijiet estremi fejn ma ikun hemm l-ebda dikjarazzjoni inkriminanti f'dawn l-istqarrijiet. Illi fil-kaz deciz quddiem il-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fl-ismijiet Navone vs Monaco, nstab li kien hemm lezjoni billi l-akkuzat ma kellux jedd ghall-assistenza ta'l-avukat matul l-interrogazzjoni similment billi l-ligi tal-pajjiz ma kenitx tippermettieha. (ara ukoll Yesilkaya vs Turkey – 59780/00 08/12/2009, Fazli Kaya vs Turkey – 24820/05 17/09/2015).

Dan il-jedd gie anke estiz fil-kaz fejn l-akkuzat kien gie moghti il-jeddijiet kollha vigenti skont il-ligi ta' pajjizu inkluz allura il-jedd tieghu ghas-silenzju u fil-fatt huwa kien ezercita dan il-jedd u ma wiegeb ghall-ebda mistoqsija lilu maghmula. Il-Qorti xortwahda sabet li kien hemm vjolazzjoni ta'l-artikolu 6(3)[3] u dan ghaliex ma kienx ikkonsulta ma avukat biex ifissirlu il-jeddijiet tieghu skont il-ligi dwar id-dritt tieghu ghas-silenzju u id-dritt li ma jinkriminax ruhu b'dan ghalhekk illi l-Qorti implikat illi t-twissija moghtija mill-ufficjali investigattiv ma hijiex bizzejjed.

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"31. The Court is of the view that the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted

[3] Dayanan vs Turkey – 7377/03 deciza 13/10/2009

access to legal assistance from the moment he is taken into police custody or pre-trial detention.

32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see *Salduz*, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.

33. In the present case it is not disputed that the applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see *Salduz*, cited above, §§ 27 and 28). A systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, <u>notwithstanding the fact that the applicant remained silent when questioned in police custody</u>." (sottolinjar tal-Qorti)

Fil-fatt fid-decizjoni Brusco vs Franza[4] gie deciz:

"La Cour constate également qu'il ne ressort ni du dossier ni des procès-verbaux des dépositions que le requérant ait été informé au début de son interrogatoire du droit de se taire, de ne pas répondre aux questions posées, ou encore de ne

[4] 1466/07 – 14/10/2010 The Court also notes that it does not follow either the file or the minutes of evidence that the applicant had been informed at the beginning of his examination of the right to remain silent, not to respond to questions, or to not answer the'questions he wanted. It further notes that the applicant had been assisted by a lawyer twenty hours after the start of the custody period provided for in Article 63-4 of the Code of Criminal Procedure (see paragraph 28 above) . The lawyer was therefore unable either to provide information on his right to remain silent and not to incriminate before his first interrogation or assist during the deposition and during those which followed, as required by Article 6 of the Convention

répondre qu'aux questions qu'il souhaitait. Elle relève en outre que le requérant n'a pu être assisté d'un avocat que vingt heures après le début de la garde à vue, délai prévu à l'article 63-4 du code de procédure pénale (paragraphe 28 ci-dessus). L'avocat n'a donc été en mesure ni de l'informer sur son droit à garder le silence et de ne pas s'auto-incriminer avant son premier interrogatoire ni de l'assister lors de cette déposition et lors de celles qui suivirent, comme l'exige l'article 6 de la Convention."

Illi allura hija fis-setgha ta' din il-Qorti u dan qabel ma jigi determinat il-process gudizzjarju kontra l-appellanti illi twarrab dik l-evidenza illi tmur kontra il-garanziji moghtija kemm fil-Kostituzzjoni kif ukoll il-Konvenzjoni ghal harsien tal-jedd ghal smiegh xieraq tal-persuna akkuzata. Fil-fatt dan il-jedd gie indikat fid-decizjoni tal-Qorti Ewropeja fil-kaz Dimech vs Malta[5] fejn f'dak il-kaz ghalkemm il-Qorti ma setatx tasal biex tistabbilixxi jekk kienx sehh lezjoni ta'l-artikolu 6 tal-Konvenzjoni billi l-proceduri penali kienu ghadhom ma intemmux, madanakollu sahhqet:

".... it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legal-assistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose."

Illi mill-ezami tal-atti probatorji u minn qari tad-decizjoni impunjata huwa bil-wisq evidenti illi fl-istqarrija rilaxxjata minnu, l-appellanti jammetti illi t-tmin pjanti tal-cannabis li instabu fir-residena tieghu kien ikkoltivhom hu u li dan ghamlu ghall-uzu personali tieghu billi jpejjep madwar seba joints kuljum. Illi l-Ewwel Qorti hadet in konsiderazzjoni dawn id-dikjarazzjonijiet meta giet biex tistabilixxi r-reijta fl-

[5] 02/07/2015 – 34373/13

appellanti u dan meta qabblet l-ammont li l-appellanti iddikjara li kien jokkonsma kuljum mal-kwantita ta' pjanti li instabu ghandu.

Illi dan l-Ewwel Qorti ma setatx taghmlu u allura din il-Qorti ser tilqa' dan l-aggravvju imressaq 'il quddiem mill-appellanti u ghalhekk ser tiskarta l-istqarrija ta'l-appellanti rilaxxjata fit-13 ta' Gunju 2007 bhala prova u dan fid-dawl tad-decizjonijiet hawn fuq iccitati, billi l-appellanti ma kienx gie moghti l-jedd jikkonsulta ma' avukat qabel ma irrilaxxja l-istess.

Ikkunsidrat,

Illi allura skartata dina l-prova regina li tinsab fl-atti, l-Qorti sejra tghaddi sabiex tara jekk l-Ewwel Qorti setatx ragjoneveolment u legalment tasal ghal sejbien ta' htija meta ghamlet l-apprezzament taghha tal-provi. Illi mill-atti probatorji issa jirrizultaw is-segwenti fatti inkontestati:

1. Illi meta l-pulizija ghamlu tfitxxija fir-residenza ta'l-imputat sabu tmien pjanti kbar tal-*cannabis* fil-bitha ta' din ir-residenza.
2. Illi kien l-appellanti illi ta access lil pulizija ghal dan il-fond.
3. Illi minghajr iz-zkuk u l-gheruq l-pjanti kellhom piz nett totali ta' 28.63 grammi.
4. Illi minn dan l-ammont jinhargu madwar 143 *reefers*.
5. Illi r-residenza ta'l-imputat tinsab 25 metru 'il boghod mis-St. Thomas Football Club.
6. Illi persuna tikkonsma medja ta' bejn tlieta u erba' *reefers* kuljum.

Issa skartata l-istqarrija ta'l-appellanti, ma jirrizultax mill-atti allura jekk huwa jabbuzax minn dina d-droga u f'liema kwantita jabbuza minnha biex b'hekk din il-Qorti hija biss rinfaccjata bil-fatt ikonfutabbli illi fil-pussess ta'l-appellanti u cioe' fid-dar fejn huwa jirrisjedi u li hu kellu access ghaliha (mill-provi jirrizulta illi l-pulizija

kellhom jistennew lill-appellanti jasal id-dar sabiex huwa jiftah il-bieb ta' barra biex b'hekk jiksbu access ghal bitha tieghu) instabu tmien pjanti imdaqqsin tal-*cannabis*. Ma hemm l-ebda prova ohra in atti dwar x'uzu l-appellanti kien ser jaghmel bihom tant allura illi din il-Qorti necessarjament ikollha tasal ghal konkluzjoni illi ammont mhux hazin ta' dina l-pjanta, meta wiehed jikkonsidra illi l-konsum medja huwa ta' bejn tlieta u erba' *joints* kuljum, huwa wisq kbir sabiex l-istess ikun ghal konsum personali tal-pussessur taghhom, kif osservat tajjeb l-Ewwel Qorti. Illi lanqas ma tista' allura din il-Qorti tilqa' l-lanjanza imressqa mill-appellanti marbuta mal-aggravvju ghar-reat addebitat lilu dwar il-vicinanza tal-*football club* ghar-residenza tieghu. Illi l-Qorti innominat espert appozitament biex jistabbilixxi jekk fid-distanza meqjusa fil-ligi tal-mitt metru jinstabx xi post frekwentat miz-zghazagh. Illi l-espert ikkonkluda illi fil-fatt madwar 25 metru 'il boghod minn din ir-residenza jinsab is-St. Thomas Football Club kif jindikaw ukoll ir-ritratti mehudin mill-istess espert u annessi mar-rapport tieghu. Kwindi il-Qorti ma tistax tikkondividi dak mistqarr mill-appellanti illi ma hemmx prova illi dan il-post huwa fil-fatt qed jopera u jigi iffrekwentat miz-zghazagh ghaliex altrimenti l-espert innominat appozitament biex jistabbilixxi dan il-fatt kien jindika dan fir-rapport minnu imhejji. Ghal dawn il-motivi anke dan l-aggravvju qed jigi rigettat.

Illi jifdal biex jigi ikkunsidrat l-aggravvju marbut mal-piena erogata mill-Ewwel Qorti. Illi gie stabbilit b'mod kopjuz fil-gurisprudenza illi qorti ta' revizjoni bhala regola ma tirrimpjazzax il-piena moghtija mill-ewwel Qorti b'dik li kieku hija – cioe` din il-Qorti – kienet taghti f'dawk ic-cirkostanzi kemm-il darba ma jkunx jirrizulta li l-piena moghtija mill-ewwel Qorti kienet b'xi mod "*wrong in principle*" jew "*manifestly excessive*". Illi fil-kaz indizamina ghalkemm l-piena erogata taqa' fil-parametri tal-ligi, madanakollu din il-Qorti tqies illi l-istess kienet wahda eccessiva tenut kont tal-fatt illi kif stqarret l-Ewwel Qorti fid-decizjoni impunjata l-fedina penali tal-appellanti ma hijiex xi wahda allarmanti. Illi ghalkemm ma hemmx dubbju illi l-ammont ta' tmien pjanti tal-cannabis ma huwiex xi ammont negligibbli, madanakollu il-Qorti ma tistax ma izzomx quddiem ghajnejha l-linji gwida stabbiliti

fir-raba skeda ghal-Kapitolu 101 tal-Ligijiet ta' Malta li jaghtu direzzjoni lil Qorti fejn il-massimu indikat ta' 300 gramma qanneb indjan ghandu jaqa' fil-kompetenza tal-qrati inferjuri u allura f'dan il-kaz l-ammont misjub kien ixaqleb lejn il-minimu iktar milli lejn il-massimu[6]. Il-Qorti lanqas ma tista' tinjora it-trapass taz-zmien minn meta sehh dan ir-reat ta' kwazi ghaxar snin. Dawn il-fatturi jimmilitaw sabiex l-appellanti jinghata piena li tqarreb iktar lejn il-minimu stabbilit fil-ligi u allura din il-Qorti sejra tghaddi biex tvarja l-piena karcerarja inflitta.

Ghal dawn il-motivi il-Qorti qed tilqa' l-aggravvju sollevat mill-appellanti fis-seduta tat-18 ta' Mejju 2016 u allura tordna l-isfilz tal-istqarrija rilaxxjata mill-appellanti fit-13 ta' Gunju 2007 mill-atti billi hija prova inamissibli skont il-ligi, izda tichad l-ewwel u it-tieni aggravvji sollevati minnu, tikkonferma ir-reit'a kif deciza fis-sentenza impunjata, izda tirrevoka l-piena karcerarja inflitta u minflok dik ta' tlett snin prigunerija tikkundanna lill-appellanti ghal perijodu ta' sena prigunerija u tikkonferma l-piena fil-kumplament.

(ft) Edwina Grima

Imhallef

VERA KOPJA

Franklin Calleja

Deputat Registratur

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[6]**"L-ammont li ġejjin involuti fir-reat, meta l-imsemmija ammonti huma magħrufa, jistgħu jittieħdu bħala indikazzjoni sabiex persuna ma tiġix riferita għall-kawża quddiem il-Qorti Kriminali:**
cannabis **(qanneb indjan): anqas minn 300 gramma."**