QORTI KOSTITUZZJONALI

IMĦALLFIN

S.T.O. PRIM IMĦALLEF SILVIO CAMILLERI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar il-Ġimgħa 27 ta' Jannar 2017

Numru 9

Rikors Kostituzzjonali Numru 192/2013

John Camilleri
v.
Avukat Ġenerali

1. B'rikors magħmul fid-19 ta' Ġunju 2013 taħt l-art. 6 tal-Att dwar il-Konvenzjoni Ewropea ["Kap. 319"] ir-rikorrent qiegħed jitlob l-esekuzzjoni ta' sentenza mogħtija mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fit-22 ta' Jannar 2013 (u li saret definittiva fis-27 ta' Mejju 2013) fl-ismijiet John Camilleri *v.* Malta.

2. Il-fatti relevanti seħħew hekk: ir-rikorrent kien mixli illi kellu fil-pussess tiegħu droga bi ksur tad-disposizzjonijiet tal-Ordinanza dwar il-Pro-

fessjoni Medika u l-Professjonijiet li għandhom x'jaqsmu magħha ["Kap. 31"], u f'ċirkostanzi li juru li dak il-pussess ma kienx għall-użu esklussiv tiegħu.

3. Kif kienet tippermetti l-liġi dak iż-żmien, l-Avukat Ġenerali għażel li l-proċess kontra r-rikorrent isir quddiem il-Qorti Kriminali. B'sentenza tas-16 ta' Novembru 2005 il-qorti, wara li rat il-verdett tal-ġurati li bi tmien voti kontra wieħed sabu lir-rikorrent ħati, ikkundannatu għal piena ta' ħmistax-il sena priġunerija, multa ta' ħmistax il elf lira ta' Malta [Lm15,000.00] konvertibbli fi tnax-il xahar priġunerija, il-konfiska favur il-Gvern ta' Malta tal-oġġetti kollha li dwarhom sar ir-reat, u ta' kull flejjes u proprjetà oħra mobbli jew immobbli tal-ħati, kif ukoll il-ħlas tal-ispejjeż tal-perizji li saru matul il-proċess.

4. B'sentenza tal-24 ta' April 2008, il-Qorti tal-Appell Kriminali ċaħdet l-appell tar-rikorrent u ikkonfermat is-sentenza tal-Qorti Kriminali.

5. Ir-rikorrent sussegwentement fetaħ proċeduri quddiem il-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fejn talab rimedju għax deherlu illi seħħ ksur, *inter alia*, tad-dritt tiegħu taħt l-art. 6 tal-Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali [""il-Konvenzjoni Ewropea"] bl-għażla li l-liġi dak iż-żmien kienet tagħti lill-Avukat Ġenerali li seta' jibgħat lir-rikorrenti jew quddiem il-Qorti tal-Maġistrati jew quddiem il-Qorti Kriminali fuq l-istess fatti fejn però l-piena minima kif ukoll dik massima li setgħet timponi fuq ir-rikorrent il-Qorti Kriminali kienet ferm ogħla minn dik li

setgħet timponi l-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali.

6. Bis-sentenza tagħha tal-14 ta' Lulju 2009, il-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) ċaħdet it-talbiet tar-rikorrent, bl-ispejjeż. Ir-rikorrent ressaq appell minn din is-sentenza iżda dan l-appell ġie miċħud, ukoll bl-ispejjeż, minn din il-qorti b'sentenza tat-12 ta' Frar 2010.

7. Ir-rikorrent ressaq l-ilment tiegħu quddiem il-Qorti Ewropeja tad-Drittijiet tal-Bniedem u din, bis-sentenza tagħha tat-22 ta' Jannar 2013 (li saret definittiva fis-27 ta' Mejju 2013), li tagħha r-rikorrent qiegħed issa jitlob l-esekuzzjoni, ikkunsidrat illi:

> »39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of the law was sufficiently clear and satisfied the requirements of accessibility and foreseeability at the material time.
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> »40. The Court finds that the provision in question does not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that section 120A(2) of the Medical and Kindred Professions Ordinance provided for the punishment applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A(2) of the above-mentioned Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of foreseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried.
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> »41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government, the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

»42. The Court considers relevant the cases of G. and M. mentioned by the applicant. It observes that although these cases were not totally analogous (in that G., unlike M., was a recidivist), they were based on the same facts, offences in relation to which guilt was found, and a similar quantity of drugs. However, G. was tried before the Criminal Court and eventually sentenced to nine years' imprisonment whereas M. was tried before the Court of Magistrates and sentenced to fifteen months' imprisonment. More generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable. It would therefore appear that the applicant would not have been able to know the punishment applicable to him even if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court.

»43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court noted that there existed no guidelines which would aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards. Neither could such a decision be seen only or mainly in terms of abuse of power, even if, as the Government suggested without however substantiating their view, this might be subject to constitutional control. The Court is not persuaded by the Government's argument to the effect that it was possible that the minimum punishment before the Criminal Court would not be handed down. The Court considers that the domestic courts were bound by the Attorney General's decision as to which court would have been competent to try the accused. The Court observes that article 21 of the Criminal Code provides for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons. However, section 120A of the Medical and Kindred Professions Ordinance, which provides for the offence with which the applicant was charged, specifically states in its subsection (7) that article 21 of the Criminal Code shall not be applicable in respect of any person convicted of the offence at issue. On an examination of the provision, the Court finds that it would not be possible to interpret the wording of that provision otherwise. Moreover, this interpretation has been confirmed by the domestic courts, the most recent decision being that of 2008 in the above-mentioned case of The Republic of Malta v. Stanley Chircop, in which the Criminal Court considered that the application of article 21 to the relevant offences was excluded and therefore the court could not impose a sentence below the minimum established by law. Furthermore, the Government have not provided any examples of decisions showing that a domestic court had actually done so. Thus, a

> lesser sentence could not be imposed despite any concerns the judge might have had as to the use of the prosecutor's discretion.
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> »44. In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.
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> »45. It follows that there has been a violation of Article 7 of the Convention.«

8. Dwar ir-rimedju, il-Qorti Ewropeja qalet hekk:

> »50. As to the applicant's request for his sentence to be reduced, the Court reiterates that it has no jurisdiction to alter sentences handed down by the domestic courts (see, *mutatis mutandis*, Findlay v. the United Kingdom, 25 February 1997, § 88, Reports 1997-I, and Sannino v. Italy, no. 30961/03, § 65, ECHR 2006-VI). Further, the Court cannot speculate as to the tribunal to which the applicant would have been committed for trial had the law satisfied the requirement of foreseeability. Indeed, the present case does not concern the imposition of a heavier sentence than that which was applicable at the time of the commission of the criminal offence or the denial of the benefit of a provision prescribing a more lenient penalty which came into force after the commission of ce (see, inter alia, Alimuçaj v. Albania, no. 20134/05, 7 February 2012; Scoppola (no. 2), cited above, and K v. Germany, no. 61827/09, 7 June 2012) and therefore the Court does not consider it necessary to indicate any specific measure.
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> »51. However, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage.«

9. Il-qorti għalhekk ordnat lill-Gvern ta' Malta jħallas elf euro (€1,000) lir-rikorrent bħala danni non-pekunjarji. Madankollu, f'għajnejn ir-rikorrent dan il-kumpens ma huwiex rimedju effettiv. Għaldaqstant, qiegħed jitlob lil din il-qorti tordna l-esekuzzjoni tas-sentenza tal-Qorti Ewropeja billi "tagħti rimedju effettitv u mhux sempliċement dikjatorju". Igħid illi rimedju li jkun xieraq fiċ-ċirkostanzi tal-każ tallum "huwa dak tar-riduzzjoni tal-piena saħansitra għall-massimu ta' dak li kien ikun passibbli għalih quddiem il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali".

10. L-Avukat Ġenerali wieġeb għar-rikors tar-rikorrent fit-22 ta' Lulju 2013 u osserva illi "l-Qorti Ewropea ma tatx rimedju speċifiku *oltre* dak monetarju" u illi "fil-paragrafu 50 tad-deċiżjoni nsibu li l-istess rikorrenti kien diġà talab lill-Qorti Ewropea sabiex titnaqqas il-piena inflitta fuqu mill-qrati kriminali, liema talba ma ntlaqgħetx mill-Qorti Ewropea".

11. L-art. 6(1) tal-Kap 319, li taħtu qiegħda tintalab l-esekuzzjoni tas-sentenza tal-Qortu Ewropea, igħid hekk:

> »**6.** (1) Kull deċiżjoni tal-Qorti Ewropea tad-Drittijiet tal-Bniedem li għaliha tkun tapplika dikjarazzjoni magħmula mill-Gvern ta' Malta skont l-Artikolu 46 tal-Konvenzjoni, tista' tiġi esegwita mill-Qorti Kostituzzjonali f'Malta, bl-istess mod bħal deċiżjonijiet mogħtija minn dik il-qorti u jiġu esegwiti minnha, b'rikors li jsir fil-Qorti Kostituzzjonali u notifikat lill-Avukat Ġenerali, li jkun fih talba li tiġi ordnata l-esegwibbiltà ta' dik iddeċiżjoni.«

12. L-Avukat Ġenerali ma jikkontestax illi sentenza li tagħha qiegħda tintalab l-esekuzzjoni hija waħda li għaliha tapplika d-dikjarazzjoni magħmua mill-Gvern ta' Malta taħt l-art. 46 tal-Konvenzjoni Ewropea.

13. Ir-rimedju li ordnat il-Qorti Ewropea fil-parti dispositiva tas-sentenza huwa dan:

> » For these reasons, the Ccourt
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> »1. Declares unanimously the application admissible;
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> »2. Holds by six votes to one that there has been a violation of Article 7 of the Convention;
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> »3. Holds by five votes to two that there is no need to examine the complaint under Article 6 of the Convention;
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> »4. Holds by six votes to one
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> »(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
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> »(i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

»(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

»(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

»5. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.«

14. Taħt l-art. 6.1 tal-Kap. 319 is-sentenza għandha tiġi esegwita fit-termini li fihom ingħatat. Imkien fis-sentenza ma ġie ordnat tnaqqis fil-kundanna li ngħata r-rikorrent; anzi, kif sewwa osserva l-Avukat Ġenerali, il-qorti fil-para. 50 tas-sentenza speċifikament qalet illi ma hija sejra tordna ebda reviżjoni tas-sentenza mogħtija mill-qrati ta' ġurisdizzjoni kriminali. Din il-qorti ttenni dak li qalet fil-provvediment mogħti fit-28 ta' Settembru 2012 fil-każ ta' Raphael Aloisio *et v.* Avukat Ġenerali (rikors numru 173/2012) illi "Li kieku l-Qorti Ewropeja riedet illi jingħata r-rimedju speċifiku … … …, kienet tgħid hekk espressament. Il-kompitu ta' din il-qorti f'dawn il-proċeduri huwa illi tordna l-esekuzzjoni ta' dak li tordna sentenza tal-Qorti Ewropeja u mhux li tara jekk hemmx xi rimedju 'implikat' f'xi parti tas-sentenza li ma hijiex il-parti dispositiva". Il-Qorti Ewropea ma ordnat ebda rimedju fis-sens li ghandha titnaqqas il-piena; anzi espressament cahdet tali rimedju.

15. B'riżoluzzjoni tas-17 ta' Settembru 2014 il-Kumitat tal-Ministri tal-Kunsill tal-Ewropa (li hu l-organu responsabbli li jara li jitwettqu s-sentenzi tal-Qorti Ewropea), wara li ra li r-rimedju effettivament ordnat mill-qorti ngħata, qies il-każ magħluq.

16. Billi għalhekk ma għad fadal xejn x'jiġi esegwit – għax il-parti esegwibbli tas-sentenza ġà ġiet esegwita – il-qorti tiċħad it-talba tar-rikorrent. L-ispejjeż ta' dawn il-proċeduri għandu jħallashom ir-rikorrent.

Silvio Camilleri President	Giannino Caruana Demajo Imħallef	Noel Cuschieri Imħallef

Deputat Registratur
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