Qorti tal-Appell Kriminali

Onor. Imhallef Dr. Antonio Mizzi LL.D., Mag. Juris (Eu Law)

Appell Numru: 578/2016

Il-Pulizija

vs

Chris Pisani

iben Paul Anthony, imwieled Pieta', fil-15 ta' Lulju, 1997, detentur tal-karta ta' l-identita' bin-numru 280497(M).

Illum, 7 ta' Marzu, 2018

Il-Qorti,

Rat l-akkuzi kontra l-appellant Chris Pisani quddiem il-Qorti tal-Magistrati (Malta):

Talli f'xi zmien bejn Frar u Marzu tas-sena 2015 f'dawn il-Gzejjer:

1. Permezz ta' network jew apparat ta' komunikazzjoni elettronika għamel użu mhux xieraq bih;

2. Talli fl-istess data, hin, lok u cirkostanzi, uza kliem jew imgieba ta' theddid, abbuzivi jew

insolenti, jew esibixxa xi materjal miktub jew stampat li jkun ta' theddid, abbuziv jew insolenti, jew xort'oħra gab ruħu b'dak il- mod, bil- ħsieb li b'hekk iqajjem vjolenza jew mibegħda razzjali kontra xi persuna oħra jew grupp ta' persuni fuq bazi ta' generu, identita' tal-generu, orjentazzjoni sesswali, razza, kulur, lingwa, origini etnika, religjon jew twemmin jew opinjoni politika jew opinjoni oħra jew b'hekk ħoloq il-probabbilita li, meta wieħed iqis ic-cirkostanzi kollha, titqajjem vjolenza jew mibegħda razzjali.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tad-29 ta' Novembru, 2016 fejn il-Qorti wara li rat l-Artikolu 49(c) tal-Kapitolu 399 tal-Ligijiet ta' Malta, stante l-ammissjoni mill-akkuzat kif dedotti kontrih u l-konferma ta' tali ammissjoni mill-istess imputat, wara li nghata zmien opportun sabiex ikun jista' jirregola ruhu, u stante illi t-tieni (2) akkuza hija assorbita fl-ewwel akkuza, sabet lill-imputat Chris Psiani hati ttal-akkuzi kif dedotti kontrih u ikkundannatu multa ta' tlett telef euro (€3,000).

Rat ir-rikors tal-appellant Chris Pisani pprezentat fil-5 ta' Dicembru, 2016 fejn talab li din il-Qorti joghgobha tibdel is-sentenza appellata billi tikkonferma s-sejbien ta' htija taht l-ewwel u t-tieni imputazzjonijiet u li tvarja l-piena mposta b'piena aktar ekwa u gust ghall-kaz odjern.

Rat l-aggravji tal-appellant u cioe':-

A. <u>Dwar il-piena</u>

L-Artikolu 49(c) tal-Att Biex Jirregola Kommunikazzjonijiet Elettronici jistipula li:

"Kull min permezz ta' xi *network* jew apparat ta' komunikazzjonali elettronika:
(c) jaghmel uzu iehor mhux xieraq bih, ikun hati ta' reat that dan l-Att u jista', meta jinstab hati, jehel multa ta' mhux izjed minn tlieta u ghoxrin elf, mitejn u tlieta u disghin euro u tlieta u sebghin centezmu (€23,293.73)u, fil-kaz ta' reat permanenti, multa ohra ta' mhux izjed minn erba' mija u hamsa u sittin euro u sebgha u tmenin centezmu (€465.87) ghal kull jum li matulu jkompli r-reat."

Ghaldaqstant, stante li l-ligi tipprovdi *maximum* izda mhux *minimum*, referenza ghandha ssir ghall-artikolu 11(1) tal-Kapitolu 9 tal-Ligijiet ta' Malta li jsostni li:

"Fejn il-ligi ma tghidx espressament xort'ohra, il-*maximum* tal-multa huwa elf mija u erbgha u sittin euro u disgha u sittin centezmu (1,164.69) u l-*minimum* tlieta u ghoxrin euro u disgha u ghoxrin centezmu (23.29)."

Di piu' artikolu 82A(1) tal-Kodici Kriminali jistipula li:

"Kull min juza kliem jew imgieba ta' theddid, abbuzivi jew insolent, jew jesebixxi xi materjal miktub jew stampat li jkun ta' theddid, abbuziv jew insolent, jew xort' ohra jgib ruhu b'dak il-mod bil-hsieb li b'hekk iqajjem mibeghda jew vjolenza razzjali jew religjuza kontra xi persuna ohra jew grupp ta' persuni fuq bazi ta' generu, identita' ta-generu, orjentazzjoni sesswali, razza, kulur, lingwa, origini etnika, religjon jew twemmin jew opinjoni politika jew opinjoni ohra jew b'hekk johloq il-probabbilita' li, meta wiehed iqis ic-cirkostanzi kollha, titqajjem vjolenza jewmibeghda razzjali jew religjuza, jehel, meta jinstab hati, l-piena ta' prigunerija minn sitt xhur sa tmintax -il xahar."

Fid-dawl ta' dawn l-artikoli, l-esponenti jikkonkludi li l-minimu li setgha kien ordnat ihallas f'dan il-kaz kien dak ta' €23.29 fil-waqt li l-massimu kien dak ta €23.293.73. Illi fl-umli fehma tal-esponenti, tenut kont ic-cirkostanzi kollha ta' dan il-kaz, il-piena mposta fuqu ma hijiex wahda ekwa u gusta ghal kaz odjern u b'hekk timmerita temperament.

Kenny fil-ktieb tieghu *'Outlines of Criminal Law'* jghallem li:

"As regards the offence, account must be taken: (1) of the greatness or smallness of the evil likely to result from acts of its class; (2) of the facility and difficulty with which it can be committed or, again with which it can be detected; (3) of the frequency or rarity with

which, at the particular time concerned, acts of this class are being committed; (4) of the aggravating or extenuating circumstances which accompanied this particular act…
As regards the offender himself, account must be taken: (1) of his age, health and sex; (2) of his rank, education, career and disposition; (3) of his motive; (4) of any temptation, or intoxication under the influence thereof he acted; (5) of his susceptibility to punishment…"

Primarjament dina l-Onorabbli Qorti ghandha tikkunsidra li l-appellant huwa ta' fedina penali relattivament netta u qatt ma kellu kazijiet ohra simili. Fil-fatt, kif jikkonferma l-esponenti stess fl-istqarrija tieghu, huwa ma jiffrenkwentax il-profil tieghu fuq is-sit ta' Facebook b'mod regulari. Dan kien kaz ta' darba u sabiex jintghogob man-nies (sic!) ghadda dak il-kumment minghajr ebda hjiel ta' razzizmu. Fil-fatt l-esponenti stess jikkonferma fl-istqarrija minnu rilaxxata lill-Pulizija, illi huwa ghandu hbieb gewwa Malta li originarjament kienu immigrant illegali.

L-esponenti minghajr ma jipprova jnaqqas xejn mis-serjeta` tal-kaz, qieghed permezz tal-presenti jistieden lil dina l-Onorabbli Qorti sabiex tikkunsidra l-fatt li dan l-izball kien frott l-"bluha taz-zghozija" stante li l-esponenti ghad ghandu biss l-eta' ta' tmintax-il sena. Fatt maghruf li ma jfissirx li ghaliex *ex lege* persuna huwa meqjus adult mal-gheluq ta' 18-il sena, kull persuna malli taghalaq 18 hija matura.

Di piu' l-esponenti, fl-istess stqarrija rilaxxata minnu stess nhar it-12 ta' Mejju, 2016, jsostni li lil hinn mid-dinja virtwali huwa ghandu hbieb immigrant u kieku kellu jiltaqa' ma sitwazzjoni simili fid-dinja reali, ma kien jasal qatt li jghaddi dak il-kumment li huwa ghadda minn wara l-*iscreen* tal-kompjuter tieghu. Tant hu hekk li l-appellanti minn jeddu stess jitlob sabiex jiltaqa' mal-persuna inkwadrata fl-immagini li fuqha l-esponenti kkummenta sabiex personalment jiskuza ruhu tal- kumment dispregjattiv li huwa ghadda dwaru.

Tenut kont tas-suespost, il-*buon sens* jissuggerixxi illi dawn ic-cirkostanzi kollha ghandhom jitqieghdu fil-kfief tal-mizien. Jinghad ukoll li filwaqt li l-gudikant, fil-ghoti tal-piena ghandu jiehu kont tal-impatt tar-reat fuq is-socjeta' u tar-reazzjoni tal-istess socjeta' madanakollu l-

gudikant mhux qieghed hemm biex jissodisfa l-ghajta tal-pubbliku in generali. Kif sostna Lord Justice Lawton fil-kaz R v Sargeant[1]:

"Society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand they must not disregard it. Perhaps the main duty of the court is to lead public opinion."

L-appellant jaghmel referenza ghal sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fl-ismijiet "Julia Farrugia vs Daphne Anne Caruana Galizia"[2] fejn l-Onorabbli Qorti ghamlet referenza ghal dak illi qal Il-Kumitat tal-Ministri tal-Kunsill tal-Ewropa, li taghha Malta hija Membru, f'rakkomandazzjoni intitolata '*Declaration on Freedom of political Debate in the Media'* fejn l-istess Kumitat kiteb li:

"**damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies...."**

Fid-decizjoni *supra* citata dik il-Qorti sostniet li:

"tali ambivalenza legislattiva hija kwistjoni illi ghandha tigi kkunsidrata u deciza mil-Legislatur u l-Parlament ta' Malta, li huwa elett mill-poplu kull hames snin **sabiex jipprovdi ghad-drittijiet u htigijiet tal-poplu, izda thoss illi wasal iz-zmien illi tali kwistjoni tigi kkunsidrata serjament sabiex id-dikjarazzjonijiet illi saru hafna snin ilu minn Awtoritajiet eminenti bhalma huma l-Kunsill tal-Ewropa u il-*United Nations* jigu mhaddna mil-legislazzjoni nostrana wkoll."**

[1] (1974) 60 Cr. App. R. 74.

[2] Deciza nhar id-19 ta' Ottubru, 2015 per Mag. Dr. F. Depasquale

Din l-istess linja ta' hsieb giet mhaddna wkoll mill-Qorti tal-Magistrati (Ghawdex) bhala Qorti ta' Gudikatura Kriminali fejn fil-kawza fl-ismijiet 'Il-Pulizija vs Mario Degiorgio'[3] b' refernza ghad-dokument tad-Dipartiment tad-Drittijiet tal-Bniedem u Affarijiet Legali tal-Kunsill tal-Ewropa tal-2012 bl-isem *'Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality'* gie spjegat li:

"The laws must also include the necessary procedural safeguards to provide proper protection for the exercise of the right to freedom of expression. In other terms "(…) any regulation should itself comply with the requirements set out in Article 10 of the European Convention on Human Rights and the standards that stem from the relevant case law of the European Court of Human Rights".
As to the courts, the alignment process requires them to exercise considerable restraint in the application of provisions which restrict freedom of expression and to <u>apply the principle of proportionality with due rigour."</u>

Dan il-principju ta' proporzjonalita' nghata l-importanza li tixraqlu anki mill-Qorti tal-Appell Kriminali fejn fis-sentenza fl-ismijiet "Il-Pulizija vs Bernard Borg et.", l-Onor. Imhallef V. DeGaetano jaghmel referenza ghall-awtur David Thomas, fejn fil-ktieb tieghu *'Principles of Sentencing'* jispjega li:

"….the sentencer is bound by the normal principle requiring proportionality between offences and sentence."

Smith & Hogan fil-ktieb taghhom, *'Smith & Hogan Criminal Law 8th edition'* jghallmu li:

"The sentence must be proportionate to the offence. The business of the court is to do justice… It is difficult to say, in absolute terms, that a particular sentence of imprisonment is proportionate to a particular rape or wounding – just as in civil law it is difficult to put a

[3] Deciza nhar it-2 ta' Dicembru, 2015 per Mag. Dr. J. Mifsud

cash value on the plaintiff's arm when it has been lost through the defendant's negligence. We are not weighing like against like. The courts have to do the best they can. In relative terms, the notion of proportionality is more practicable."

Fuq l-istess punt, Maguire, Morgan & Reiner, permezz tal-ktieb taghhom *'The Oxford handbook of Criminology 4th Edition'* jghallmu:

"In so far as the principle of proportionality holds sway, it places some limits on the use of state power over those who offend. Even approaches that are critical of desert theory, such as the republicanism of Braithwaite and Pettit (1990) and the communitarianism of lacey (1988), argue in favour of some limits to state power at the sentencing stage, although without great detail."

Ghalkemm l-esponenti jifhem li zbalja, madanankollu, fl-umli fehma tieghu, l-multa mposta fuqu hija wahda sporporzjonata u ghanda tigi mnaqqsa. L-appellant, filwaqt li jaghmel referenza ghal dak li ddecidiet il-Qorti tal-Appell Kriminali fl-ismijiet, "Il-Pulizija vs Rittmar Hatherly et."[4]:

"Anke fil-kaz ta' persuna ta' eta` mhux zghira u li forsi hu recidiv, tista' titfacca fil-hajja ta' dik il-persuna a window of opportunity li permezz taghha jkun jista' jinkiser ic-ciklu ta' kundanni u ta' prigunerija."

L-esponenti jistaqsi jekk din l-Onorabbli Qorti f'kazijiet fejn l-akkuzat ma jkunx ta' eta' zghira bhalu u ma jkun recidiv, li dan mhux il-kaz f'dan l-appell, tasal biex toffri lill-akkuzzat opportunita' li jbiddel hajtu minghajr ma tghabbih b'pieni esagerati li kapaci jwasslu ghal reati ohrajn, ghalfejn fil-kaz tieghu le?

Dan kollu huwa relevanti ghall-dak li l-Qrati taghna sejhulu *a window of opportunity* fejn il-piena tkun mibdula ghal wahda aktar miti f'cirkostanzi li juru li l-imputat jew l-appellant ghamel

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[4] Deciza nhar id-9 ta' Ottubru, 2008 per Onor. Imhallef V. DeGaetano

progress fil-hajja tieghu u ddemostra sinjali cari ta' allontanament mill-hajja refrattarja tieghu.[5] Meta jkun hemm disponibiltà u rieda tajba l-Qorti dejjem izzomm miftuhin it-twieqi ghall-bidla u ghall-progress li dik il-persuna tkun tixtieq timmanifesta. Fil-kaz *de quo* dan l-allontament u l-bidla huwa car specjalment fid-dawl tal-fatt li l-esponenti ried jiskuza ruhu personalment immedjatament.

Ghaldaqstant l-esponenti jemmen illi fid-dawl ta' dawn ic-cirkustanzi kollha, specjalment fid-dawl tal-fatt illi huwa ghadu hiereg mid-dinja tal-edukazzjoni, ghalkemm jifhem li dak li ghamel huwa hazin u ta' dan huwa ddispjacih u jixtieq li jitlob skuza personalment, ihoss illi l-piena mposta fuqu hija wahda esagerata u jehtieg tigi kkontrollata.

Dan kollu huwa relevanti ghall-dak li l-Qrati taghna sejhulu *a window of opportunity* fejn il-piena kienet mibdula ghal wahda aktar miti f'cirkostanzi fejn kien muri li l-imputat jew l-appellant ghamel progress fil-hajja tieghu u ddemostra sinjali cari ta' allontanament mill- hajja refrattarja tieghu

Rat l-atti kollha tal-kawza.

Semghet it-trattazzjoni tal-partijiet.

Rat il-fedina penali aggornata tal-appellant ezebita mill-prosekuzjoni fuq ordni tal-Qorti.

Ikkunsidrat,

Illi din il-Qorti taqbel perfettament mar-rikors tal-appellant u il-kontenut tieghu u ghalhekk kwalunkwe kumment iehor hu zejjed.

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[5] Vide Il-Pulizija vs Nathalie Felive deciza nhar l-4 ta' Dicembru, 2014 mill-Qorti tal-Appell Kriminali per Onor. Imhallef M. Mallia

Ghaldaqstant, tilqa l-appell ta' Chris Pisani. Thassar u tirrevoka s-sentenza appellata dwar il-piena u minflok tikkundanna lill-appellant ghal hlas ta' multa ta' elf u hames mitt euro.