QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI

MAGISTRAT DR. JOSEPH MIFSUD
B.A. (LEG. & INT. REL.), B.A. (HONS.), M.A. (EUROPEAN), LL.D.

Il-Pulizija
(Spettur Spiridione Zammit)
(Spettur Hubert Cini)

vs

Omissis

Kumpilazzjoni numru 240/2017

Illum 8 ta' Mejju, 2018

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat **Omissis** detentur tal-karta tal-identita bin-numru 25100 (H) billi huwa akkuzat talli b'diversi atti maghmulin ukoll jekk fi zminijiet differenti, li jiksru l-istess dispozzijonijiet tal-Ligi u li gew maghmula b'rizoluzzjoni wahda, u cioe':-

Talli bejn il-5 ta' Mejju 2017 u it-8 ta' Mejju 2017 f'xi hinijiet bil-lejl mill-iskejjel Primarja St. Thomas Moore u l-iskola Medja St. Thomas Moore li jinsabu fit-Triq Kelinu Cachia, Hal Tarxien u/jew f'dawn il-gzejjer ikkommetta serq ta' €200, zewg camorders u camera tar-ritratti 'FUJI' ghall-valur ta' madwar €800, zewg cekkijiet u/jew oggetti ohra liema serq aggravat bil-mezz, valur li ma jeccedix €2,329.37, u hin, ghad-detriment tal-Gvern ta' Malta u/jew persuni ohra u/jew entitajiet ohra.

Ukoll talli bejn il-11 ta' Mejju u t-12 ta' Mejju 2017 f'xi hinijiet bil-lejl mill-iskola St. Thomas Moore Hal Tarxien fi Triq Kelinu Cachia, Hal Tarxien u/jew f'dawn il-gzejjer ikkommetta serq ta' madwar €163, kamera tar-ritratti u zewg tablets, u/jew oggetti ohra liema serq aggravat bil-mezz, valur liema ma jeccedix €2,329.37, u hin, ghad-detriment tal-Gvern ta' Malta u/jew persuni ohra u/jew entitajiet ohra.

Ukoll talli bejn il-25 ta' Mejju 2017 u s-26 ta' Mejju 2017 f'xi hinijiet bil-lejl mill-iskejjel Primarja St. Thomas Moore u l-iskola Medja St. Thomas Moore li jinsabu fit-Triq Kelinu Cachia, Hal Tarxien u/jew f'dawn il-gzejjer ikkommetta serq ta' madwar €360, kamera tar-ritratti Kodak, 'external hard disk', numru ta' fidget spinners u/jew oggetti ohra liema serq aggravat bil-mezz, valur li ma jeccedix €2,329.37, u hin, ghad-detriment tal-Gvern ta' Malta u/jew persuni ohra u/jew entitajiet ohra.

Ukoll talli bejn is-26 ta' Mejju 2017 u s-27 ta' Mejju 2017 f'xi hinijiet bil-lejl mill-iskola Medja St. Thomas Moore fit-Triq Kelinu Cachia, Hal Tarxien u/jew f'dawn il-gzejjer ikkommetta serq ta' erba' laptops, mobile, pendrive, €20 u/jew oggetti ohra liema serq aggravat bil-mezz, valur li ma jeccedix €2,329.37 u hin ghad-detriment tal-Gvern ta' Malta u/jew persuni ohra u/jew entitajiet ohra.

Ukoll talli fl-istess cirkustanzi u/jew f'dawn il-gzejjer volontarjament hassar jew ghamel hsara jew gharraq hwejjeg haddiehor, mobbli jew immobbli u cioe ghamel hsara fuq ghamara, apparat u/jew oggetti fl-iskejjel Primarja St. Thomas Moore u l-iskola Medja St. Thomas Moore li jinsabu fit-Triq Kelinu Cachia, Hal Tarxien liema hsara ma teccedix il-€250 ghad-detriment tal-Gvern ta' Malta u/jew persuni ohra u/jew entitajiet ohra.

Ukoll akkuzat talli fl-istess cirkustanzi f'dawn il-gzejjer xjentement laqa' ghandu jew xtara hwejjeg misruqa, mehuda b'qerq, jew akkwistati b'reat sew jekk dan sar f'Malta jew barra minn Malta, jew, xjentement kull mod li jkun indahal sabiex ibieghom jew imexxihom liema oggetti misruqa kienu gejjin minn serq bil-mezz, valur liema ma jeccedix €2,329.37, u hin, ghad-detriment tal-Gvern ta' Malta u/jew persuni ohra u/jew entitajiet ohra.

Ukoll talli kiser il-provediment tal-artikolu 7 tal-Kap. 446 moghtija lilu mill-Qorti tal-Magistrati Malta.

U b'hekk irrenda ruhu recidiv ai termini tal-artikoli 49, 50 u 289 tal-Kap. 9 tal-Ligijiet ta' Malta.

Rat l-atti kollha ta' dan il-procediment u d-dokumenti esebiti.

Rat in-Nota ta' Rinviju ghall-Gudizzju tal-Avukat Generali datata 26 ta' April 2018 (esebita a fol. 610 tal-process) fejn huwa dehrlu li tista' tinstab htija (jew htijiet) fil-konfronti tal-imputat taht dak li hemm mahsub;

a. Fl-artikoli 17, 18, 23, 31 tal-Kapitolu 9 tal-Ligijiet ta' Malta;
b. Fl-artikoli 261(b)(c)(f), 263, 264, 265, 267, 270, 278(1)(3), 279(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
c. Fl-artikoli 261(b)(c)(f), 263, 264, 265, 267, 270, 278(1)(3), 279(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
d. Fl-artikoli 261(b)(c)(f), 263, 264, 265, 267, 270, 278(1)(3), 279(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
e. Fl-artikoli 261(b)(c)(f), 263, 264, 265, 267, 270, 278(1)(3), 279(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
f. Fl-artikoli 325(1)(c) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
g. Fl-artikoli 334 tal-Kapitolu 9 tal-Ligijiet ta' Malta;
h. Fl-artikoli 7, 21 tal-Kapitolu 446 tal-Ligijiet ta' Malta;
i. Fl-artikoli 49, 50, 289 tal-Kapitolu 9 tal-Ligijiet ta' Malta;
j. Fl-artikoli 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Rat li waqt l-udjenza tat-8 ta' Mejju, 2018 l-imputat wiegeb li ma kellux oggezzjoni li l-kaz tieghu jigi trattat bi procedura sommarja u deciz minn din il-Qorti fil-kompetenza taghha surreferita.

Xhieda

F'dan il-kaz il-Qorti semghet 33 xhud:

PC813 Clinton Vella u WPS293 Michelle Camilleri *a fol.* 17 *et. Seq.*, PS826 Matthew Parnis u WPS293 Michelle Camilleri *a fol.* 103 *et. Seq.*, PS122 Arthur Borg *a fol.* 203 *et. Seq.*, PS1480 Sandro Mallia *a fol.* 226 *et. Seq.*, PS15 Cyril Butters *a fol.* 238 *et. Seq.*, Spettur Spiridione Zammit *a fol.* 250 *et. Seq.*, George Psaila *a fol.* 297 *et. Seq.*, Emily Spiteri *a fol.* 301 *et. Seq.*, Mario Bezzina *a fol.* 314 *et. Seq.*, Joe Mifsud *a fol.* 325 *et. Seq.*, Spettur Hubert Cini *a fol.* 329 *et. Seq.*, Dr. Martin Bajada *a fol.* 348 *et. Seq.*, Joseph Mallia *a fol.* 397 *et. Seq.*, PC302 Bryan Alken *a fol.* 398 *et. Seq.*, WPC363 Caroline Meilak *a fol.* 414 *et. Seq.*, PS1336 Luke Vella Cassia *a fol.* 470 *et. Seq.*, Spettur Spiridione Zammit *a fol.* 484 *et. Seq.*, Joseph Mallia *a fol.* 495 *et. Seq.*, Caroline Mifsud *a fol.* 536 *et. Seq.*, Andrew Zahra *a fol.* 539 *et. Seq.*, Yanica Borg *a fol.* 542 *et. Seq.*, Kristy Catania *a fol.* 544 *et. Seq.*, Doreen Florian *a fol.* 566 *et. Seq.*, Rachael Seychell *a fol.* 568 *et. Seq.*, Adrian Vella *a fol.* 571 *et. Seq.*, Denise Azzopardi *a fol.* 574 *et. Seq.*, Louis Borg *a fol.* 576 *et. Seq.*, Reuben Bugeja *a fol.* 583 *et. Seq.*, Roderick Bonello *a fol.* 590 *et. Seq.*, Horace Ebejer *a fol.* 592 *et. Seq.*, Spettur Hubert Cini *a fol.* 594 *et. Seq.*

Il-fatti tal-kaz

L-imputat meta sehh il-kaz kellu sitta (16)-il sena u kien jabbuza mid-droga jinsab akkuzat b'numru ta' serqiet minn zewg skejjel, li biex ghamel dan wettaq hsara fuq il-propjeta' u li kellu ghandu oggetti akkwistati minn serq. L-ewwel serqa saret bejn il-5 ta' Mejju 2017 u t-8 ta' Mejju 2017 mill-iskola Primarja St. Thomas Moore u l-iskola Medja St. Thomas Moore li jinsabu fi Triq Kelinu Cachia Hal-Tarxien. Mill-istess skejjel saret serqa ohra bejn il-11 ta' Mejju 2017 u l-ghada. Serqa ohra bejn il-25 ta' Mejju 2017 u s-26 ta' Mejju 2017 u bejn is-26 u s-27 ta' Mejju 2017.

KUNSIDERAZZJONIJIET LEGALI GENERALI

1. Oneru tal-Prosekuzzjoni

Huwa l-oneru tal-Prosekuzzjoni li tressaq l-ahjar provi sabiex tikkonvinci lill-Qorti li l-akkuzi addebitati lill-imputat huma veri u dan ghaliex kif jghid il-Manzini fil-ktieb tieghu **Diritto Penale** Vol. III Kap IV pagna 234, Edizione 1890:-

> *"Il cosi` detto onero della prova, cioe` il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit".*

Huwa minnu, li jekk il-Qorti hija rinfaccjata b'zewg verzjonijiet konfliggenti, ghandha tillibera, stante li tali kunflitt ghandu jmur a beneficcju tal-imputat. Pero' huwa veru wkoll kif gie deciz mill-Qorti tal-Appell Kriminali fid-dsatax (19) ta' Mejju, 1997 fil-kawza fl-ismijiet Il-**Pulizija vs Graham Charles Ducker**:

> *"It is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one".*

Il-Prosekuzzjoni trid tipprova l-kaz taghha lil hinn minn kull dubju ragjonevoli, waqt li d-difiza trid tipprova d-difiza taghha fuq bazi ta' probabbilta'.

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li sabiex l-akkuzat jigi misjub hati l-akkuzi migjuba fil-konfront tieghu ghandhom jigu pruvati oltre kull dubju dettat mir-raguni.

F'dan ir-rigward issir referenza ghas-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-5 ta' Dicembru, 1997 fil-kawza fl-ismijiet Il-**Pulizija v Peter Ebejer**, fejn il-Qorti fakkret li l-grad ta' prova li trid tilhaq il-Prosekuzzjoni hu dak il-grad li ma jhalli ebda dubju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubju. Id-dubji ombra ma jistghux jitqiesu bhala dubji dettati mir-raguni. Fi kliem iehor, dak li l-gudikant irid jasal ghalih hu, li wara li jqis ic-cirkostanzi u l-provi kollha, u b'applikazzjoni tal-buon sens tieghu, ikun moralment konvint minn dak il-fatt li trid tipprova l-Prosekuzzjoni.

Fil-fatt dik il-Qorti ccitat l-ispjegazzjoni moghtija minn Lord Denning fil-kaz **Miller v Minister of Pension** - 1974 - ALL Er 372 tal-espressjoni '*proof beyond a reasonable doubt.*'

> "*Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing shall of that will suffice.*"

Din il-Qorti taghmel ukoll referenza ghas-sentenza moghtija mill-Qorti tal-Appell Kriminali fid-9 ta' Settembru 2002 fil-kawza fl-ismijiet Il-**Pulizija vs Martin Mark Ciappara** fejn spjegat x'jigri meta gudikant ikun rinfaccjat b'zewg verzjonijiet konfliggenti u cioe' jistghu jigru zewg affarijiet u cioe' jew il-gudikant ikun tal-fehma li l-kaz tal-Prosekuzzjoni ma jkunx gie sodisfacentement ippruvat, u allura l-Qorti ghandha tillibera, jew jekk ikun moralment konvint li l-verzjoni korretta hija

wahda u mhux l-ohra, jimxi fuq dik il-verzjoni li jaccetta u jekk dik il-verzjoni tkun timporta l-htija tal-imputat jew akkuzat, allura jiddikjara tali htija u jghaddi ghal piena jew ghal xi provvediment iehor.

2. Apprezzament tal-provi fl-assjem:

Il-Qorti tissottolinea li huwa ben risaput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat u individwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem taghhom sabiex wiehed jara x'inferenzi jew interpretazzjoni ragjonevoli u legali jista' jaghti lil dawk il-provi hekk interpretati. Ma tistax tinstab htija jew nuqqas ta' htija semplicement fuq analizi individwali jew separata tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kif ukoll komplessivament. Dan hu appuntu l-ezercizzju li sejra taghmel din il-Qorti, u cioe' li tezamina bir-reqqa kollha l-provi prodotti f'dan il-kaz.

3. *Presumption of facts* u provi cirkostanzjali

Il-Qorti qabel tghaddi biex tanalizza l-imputazzjonijiet thoss li ghandha taghmel espozizzjoni dwar il-*presumption of facts* u l-provi cirkostanzjali.

Fi kliem Sir Rupert Cross,

> *Presumptions of fact* (praesumptiones hominis*) are merely frequently recurring examples of circumstancial evidence, and instances which have already been mentioned are the presumption of continuance, the presumption of guilty knowledge arising from the possession of recently stolen goods and the presumption of unseaworthiness in the case of a vessel which founders shortly after*

leaving port. These are all inferences which may be drawn by the tribunal of fact.[1]

Bhala ezempju ta' prova indizzjarja li minnha wiehed jista' jigbed konkluzzjoni partikolari, l-istess awtur jaghti l-ezempju tad-drawwa (*habit*):

The fact that someone was in the habit of acting in a given way is relevant to the question whether he acted in that way on the occasion into which the court is inquiring.[2]

U fl-edizzjoni tal-2018 ta' **Archbold** jinghad hekk dwar presunzjonijiet ta' fatt:

These are inferences which the court may draw from the facts which are established, but it is not obliged to draw.

For example where a defendant charged with handling stolen goods is found to be in possession of those goods without any explanation, this circumstantial evidence may give rise to a provisional conclusion that the defendant is the handler of those goods.

In some cases a rebuttable presumption of law imposes a legal burden of proof which must be satisfied to the requisite standard of proof in order to rebut the presumption, whereas some presumptions merely impose an evidential burden. For example, the presumption that a machine was working properly

[1] Cross, R., Cross on Evidence Butterworths (London), 1979, p. 124. Ikkwotat mill-Prim Imhallef Vicent Degaetano fl-Appell Kriminali Inferjuri Il-Pulizija vs Louis Gauci Borda deciz 24 ta' April, 2002: Appell Nru 228/2001

[2] ibid. p. 40.

may be rebutted by merely adducing evidence to the contrary: *Tingle, Jacobs and Co v. Kennedy* [1964] 1 W.L.R. 638. In contrast, in order to rebut the presumption, created by section 74(3) of the Police and Criminal Evidence Act 1984, that the defendant committed an offence of which he was convicted, the Court of Appeal has held that the defence must prove on the balance of probabilities that the defendant did not commit the offence: *Watson* [2006] EWCA Crim. 2308. Similarly, in *Miell* [2008] 1 Cr.App.R. 23, the Court of Appeal treated s.74(3) as shifting the burden of proof onto the accused. In *C*[2011] 1 Cr.App.R. 17, however, the Court of Appeal, without reference to *Watson*, referred, at p.225, to s.74(3) as creating an "evidential presumption" and indicated that "if the defendant does adduce evidence to demonstrate that he is not guilty of the offence, it remains open to the Crown then to call evidence to rebut the denial". In *Clift* [2012] EWCA Crim. 2750 the Court of Appeal indicated that s.74(3) shifts the burden of proof to the defendant and that the prosecution is not required to prove to the criminal standard the matters covered by s.74(3). Equally, in *R. v. O'Leary* [2013] EWCA Crim 1371 the Court of Appeal held at para.19 that, "The effect of section 74(3) is that the defendant bears the burden of proving that he did not commit the offence".

In *Zawadzka* [2016] EWCA Crim 1712, where evidence of a theft conviction committed in Poland by the defendant was admitted in a murder trial, the Court of Appeal accepted that the judge should have directed the jury that if the defendant proved on the

balance of probabilities that she had not committed the offence then the jury should 'dismiss it from their minds'.

Even where a presumption imposes a legal burden of proof, if the imposition of a legal burden of proof upon the defence would give rise to a violation of art. 6(2) of the ECHR it may be necessary to read down the relevant statutory provision under section 3(1) of the Human Rights Act 1998, in line with the principles that were considered at §§ 10-11 and 10-12, *ante*, such that it merely imposes an evidential burden. Indeed, statute may expressly impose the evidential burden of rebutting a presumption upon the defendant. For example, in relation to the evidential presumptions about consent which section 75 of the Sexual Offences Act 2003 created, s.75(1) provides that:

"… the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it."

It appears that the effect of this provision is that the burden of disproving the relevant issue remains on the prosecution provided that evidence that is not merely "fanciful or speculative" has been adduced to raise the issue: *Ciccarelli*[2011] EWCA Crim. 266.[3]

[3] Archbold: Criminal Pleading, Evidence and Practice – 2018 Sweet & Maxwell (London), para. 10-15, p. 617-618.

Huwa minnu li fl-**Artikolu 638(2) tal-Kap. 9** ix-xhieda ta' xhud wiehed biss, jekk emnut minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Ghalhekk jispetta lill-Qorti tara liema hija l-aktar xhieda kredibbli u vero simili fic-cirkostanzi u dan a bazi tal-possibilita'. Huwa veru wkoll li l-Qorti ghandha tqis provi cirkostanzjali jew indizzjarji sabiex tara jekk hemmx irbit bejn l-imputati u l-allegat reat. Dan qed jinghad ghaliex ghalkemm huwa veru li fil-kamp penali l-provi indizzjarji hafna drabi huma aktar importanti mill-provi diretti, pero' hu veru wkoll li provi indizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex il-gudikant jaccerta ruhu li huma univoci.

Fil-fatt il-Qorti hawnhekk taghmel referenza ghal-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-hmistax (15) ta' Gunju, 1998 fil-kawza fl-ismijiet '**Il-Pulizija vs Jason Lee Borg'**, fejn kien gie ritenut li provi jew indizzji cirkostanzjali ghandhom ikunu univoci, cioe' mhux ambigwi. Ghandhom ikunu indizzji evidenti li jorbtu lill-akkuzat mar-reat u hadd iktar, anzi l-akkuzat biss, li huwa hati u l-provi li jigu mressqa, ikunu kompatibbli mal-presunzjoni tal-innocenza tieghu. Illi ghalhekk huwa importanti fl-isfond ta' dan il-kaz li jigi ppruvat li kien l-imputat biss li ghamel dak li gie akkuzat bih u ghalhekk il-Qorti sejra tikkunsidra kwalunkwe prova possibilment cirkostanzjali li tista' torbot lill-imputat b'mod univoku bir-reati addebitati lilu. Fil-fatt kif gie ritenut fis-sentenza moghtija mill-Qorti tal-Appell Kriminali fis-sitta (6) ta' Mejju, 1961 fil-kawza fl-ismijiet '**Il-Pulizija vs Carmelo Busuttil'**,

> "*Il-prova ndizzjarja ta' spiss hija l-ahjar prova talvolta hija tali li ipprova fatt bi precizjoni matematika.*"

Illi huwa veru li fil-kamp penali, il-provi indizzjarji hafna drabi huma aktar importanti mill-provi diretti. Hu veru wkoll li l-provi indizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex wiehed jaccerta ruhu li huma univoci.

Archbold jghid:

> *"Where reliance has been placed by the prosecution on circumstantial evidence the proper approach is to determine whether a reasonable jury properly directed would be entitled to draw an adverse inference from the combination of factual circumstances by dismissing other possible explanations in relation to that evidence: Jabber [2006] EWCA Crim. 2694; G [2012] EWCA Crim. 1756. In London Borough of Haringey v. Tshilumbe, 174 J.P. 41, a senior environmental health practitioner for the local authority had affixed a hygiene emergency prohibition notice to T's premises. After the notice was affixed he returned to the premises and found a group of individuals sitting at a table eating food from plates and drinking from cans. It was alleged that T had failed to comply with the notice as he had continued to operate the premises as a food business. The magistrates held that T had no case to answer as the local authority had produced no evidence that the food and drink that were on the table had been provided to the occupants of the premises by T in the course of a food business. It was held that justices had been wrong to find that there was no case to answer; it could be inferred from the circumstances that the premises were being used for a food business and the defendant should have explained himself at trial.*

Strong circumstantial evidence may be sufficient for the court to find a case to answer: Danells [2006] EWCA Crim. 628.[4]

Illi din hija ezattament il-posizzjoni hawn Malta, kif fil-fatt giet konfermata b'sentenza moghtija mill-Qorti tal-Appell Kriminali nhar id-disgha ta' Jannar, 1998 fil-kawza fl-ismijiet '**Il-Pulizija vs Emanuel Seisun'**.

Din il-Qorti thoss u tghid li provi cirkostanzjali huma bhal katina li tintrabat minn tarf ghal tarf, b'sensiela ta' ghoqiedi li jaqblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni[5].

4. Prezunzjoni tal-innocenza

Ir-rizultat huwa li fi proceduri penali l-onus ta' prova tistrieh fuq il-Prosekuzzjoni matul il-kumpilazzjoni kollha, bhala regola generali u hija l-eccezzjoni li d-difiza trid tipprova xi haga, bhal perezempju d-difiza tal-insanita'.

Huwa principju fundamentali fi proceduri penali li persuna akkuzata hija prezunta innocenti sakemm ippruvata hatja, u dan ai termini tal-Artikolu 40 Subinciz 5 tal-Kostituzzjoni ta' Malta, li jiddisponi is-segwenti:

"*every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty...*"

[4] Ibid. Pg. 533 para 8-119

[5] Il-Qorti fliet fid-dettal l-argumenti migjuba fis-sentenza fl-ismijiet Il-**Pulizija vs Abdellah Berrard et** moghtija mill-Magistrat Consuelo Scerri Herrera fid-19 ta' Mejju 2014

Dan il-principju gie wkoll sanat fis-sentenza moghtija minn Sir Augustus Bartolo fl-ismijiet '**Il-Pulizija v Michele Borg et'** (deciza mill-Qorti tal-Appell Kriminali nhar it-13 ta' Mejju, 1936) fejn intqal:

> "*illi skont il-principju u s-sistema tal-ligi u procedura penali taghna mfassla fuq dak tal-Ingilterra u li huma strettament d'ordine pubblico;* '*the accused is presumed innocent until proved guilty.*' "

U issa ghalhekk wiehed jistaqsi xi tfisser verament prezunzjoni tal-innocenza? Din tfisser li l-akkuzat ma jridx jipprova xejn dwar l-innocenza tieghu - hija l-Prosekuzzjoni li trid tipprova l-htija tieghu. Ghalhekk peress li hija l-Prosekuzzjoni li allegat il-htija tal-imputat, l-onus generali tal-prova, u cioe' tal-prova tal-htija, tistrieh fuq il-Prosekuzzjoni, li ghandha ghalhekk tipprova kull element tar-reat partikolari sabiex tasal ghal din l-istess konkluzjoni.

Il-Prosekuzzjoni trid tipprova l-kaz taghha *beyond a reasonable doubt*, li tipprova kaz dettat bla dubju dettat mir-raguni, li tfisser li l-grad ta' buon sens jew ghaqal li jwassal gudikant sabiex jaqbel mat-tezi taghha u cioe' tal-Prosekuzzjoni.

L-obbligu li tipprova l-htija tal-akkuzat irid ikun assolut, oltre kull dubju dettat mir-raguni u f'kaz li jkun hemm xi dubju ragjonevoli, il-Prosekuzzjoni tigi kunsidrata li ma ppruvatx il-kaz taghha ta' htija u ghalhekk il-Qorti hija obbligata li tillibera.

Ir-rwol tal-Qorti meta jkollha minuri mixlija

Il-Qorti qabel tidhol fil-mertu tal-kaz se tara l-Archbold[6] x'jghid fejn jidhlu l-minorenni jew kif inhu maghruf il-*young offender*:

> A court sentencing a young offender must be aware of obligations under a range of international conventions which emphasise the importance of avoiding "criminalisation" of young people whilst ensuring that they are held responsible for their actions and, where possible, take part in repairing the damage that they have caused. This includes recognition of the damage caused to the victims and understanding by the young person that the deed was not acceptable. Within a system that provides for both the acknowledgement of guilt and sanction which rehabilitate, the intension is to establish responsibility and, at the same time, to promote re-integration rather than to impose retribution.
>
> A court sentencing a person under the age of 18 is obliged to have regard to the principal aim of the youth justice system (to prevent offending by children and young persons) and to the welfare of the offender. As the principal aim of the youth justice system is the prevention of offending by children and young people, the emphasis should be on approaches that seem most likely to be effective with young people.

[6] Magistrates' Courts Criminal Practice 2016, **Sentencing in the Youth Court**, pg. 1867 et. Seq.

> Young people are unlikely to have the same experience and capacity as an adult to realise the effect of their actions on other people or to appreciate the pain and distress caused and because a young person is likely to be less able to resist temptation, especially where peer pressure is exerted.
>
> It is also important to consider whether the young offender lacks the maturity fully to appreciate the consequences of his conduct and the extent to which the offender has been acting on an impulsive basis and the offender's conduct has been affected by inexperience, emotional volatility or negative influences.
>
> In most cases a young person is likely to benefit from being given greater opportunity to learn from mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the young person, and, therefore, on the likelihood of effective integration into society.

Fir-rapport imhejji mill-Ministeru tal-Gustizzja, Kultura u Gvern Lokali dwar in-***National Justice Reform***[7] hemm rappurtat li:

> *Minors over 16 are similarly exempt from criminal responsibility if they act without mischievous discretion. However with regards to offences committed by minors acting with mischievous discretion and those minors who are doli incapax, the parent or any other person*

[7] Mejju 2015 pg.11

charged with the upbringing of the minor may still be subject to legal sanctions since in such cases vicarious responsibility attaches to the person charged with the minor's upbringing.

Il-frażi "eżenzjoni minn responsabbiltà kriminali" tfisser li ma tistax tinsab ħtija f'persuna ta' taħt is-sittax-il sena sakemm ma jiġix ippruvat li dik il-persuna tkun aġixxiet b' "ħażen", fit-test Ingliż, "*mischievous discretion*".

Sir Anthony Mamo fin-noti tieghu jiddeskrivi *Mischievous discretion* bhala "*the consciousness of the wrongfulness of [an] act and of its consequences.*"[8]

Il-Qorti tirreferi ghan-noti tal-Kors tal-Ligi[9] dwar din it-tema:

At this young age, children are considered by law as being incapable of forming a criminal intent which is an essential element in the commission or omission of an offence as clearly stated in the legal maxim:

'actus non facit reum nisi mens sit rea' – the material conduct must be accompanied with a guilty mind.

Even at this age, a minor is still presumed to be incapable of distinguishing between good and evil and of appreciating the consequence of his acts. But this presumption is no longer conclusive as it may be rebutted by evidence, for the capacity to commit a crime and contract guilt is measured by the strength of

[8] Mamo Notes (n 25) 79
[9] Sena akkademika 2000/2001

the delinquent's understanding and judgment**: 'malatia supplet aetatem'.**

However, the mere commission of a criminal act is not sufficient *'prime facie'* proof of guilty mind as in the case of adults. The presumption of innocence is so strong that some clearer proof of mental condition is specifically requested by the law. It must be shown that the minor had the consciousness of the wrongfulness of his act and of its consequence.

Illi dwar ir-responsabbilta' kriminali ta' tfal, il-Professur Sir Anthony Mamo jghallem hekk:

Even at this age a minor is still presumed to be incapable of distinguishing between good and evil and of appreciating the consequences of his acts; but this presumption is no longer conclusive: it may be rebutted by evidence: for the capacity to commit a crime and contract guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgement: malatia supplet aetatem. Yet the mere commission of a criminal act is not, as it would be in the case of an adult, sufficient prima facie proof of a guilty mind. The presumption of innocence is so strong that some clearer proof of the mental condition is necessary. A special proof of mischievious discretion or discernment must be made: it must be shown that the minor had the consciousness of the wrongfulness of his act and its consequences..... The question whether a child has acted with discretion is a question of fact about which no legal rule can be laid down. It depends upon a moral assessment of all the circumstances of each particular case, and it cannot be answered in the affirmative

unless it appears clear that the minor has acted with the conciousness of the wrongful and unlawful character of his deed, or, in other words, with a guilty knowledge that he was doing wrong[10].

L-Imhallef Harper J. fil-kaz **R (A Child) v. Whitty** (1993) 66 A Crim. R. 462, isostni:

"*No civilised society, says Professor Colin Howard in his book entitled* ***Criminal Law*** *(4th ed., 1982) p. 343, 'regards children as accountable for their actions to the same extent as adults.*"

"*The wisdom of protecting children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed.*"

Erle J. fil-kaz **Reg. v. Smith** (1845) 1 Cox C.C. 260 qal li:

"*... a guilty knowledge that he was doing wrong - must be proved by the evidence, and cannot be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it is satisfactorily proved that at the time he fired the rick (if you should be of opinion he did fire it) he had a guilty knowledge that he was committing a crime.*"

Professor Glanville Williams, Q.C. f'[1954] Crim. L.R. 493[11] jghallem li:

"*... the 'common sense' view of moral responsibility and retributive punishment is still widely maintained in respect of the sane adult who commits a crime. Yet in respect of children it is just as generally*

[10] Notes on Criminal Law Vol I pagna 78
[11] *Criminal Law, The General Part*, 2nd ed. pp. 495-496

abandoned. No one whose opinion is worth considering now believes that a child who does wrong ought as a matter of moral necessity to expiate his wrong by suffering. Punishment may sometimes be the best treatment, but if so it is because this is the only way in which the particular child can be made to see the error of his ways. . . In this climate of opinion the 'knowledge of wrong' test no longer makes sense.

… Thus at the present day the 'knowledge of wrong' test stands in the way not of punishment, but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parent, or the approved school. The paradoxical result is that, the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law. "

"It is perhaps just possible to argue that the test should now be regarded as even legally obsolete. The test was designed to restrict the punishment of children and should not be used where no question of punishment arises. This argument has to face the difficulty that the test traditionally protects the child from conviction, whereas the choice between punishment and other treatment is only made after conviction."

Il-Professur Glanville Williams ikompli jispjega li:

"As a matter of policy it is highly desirable that a child who has committed what, for an adult, would be a crime, should be put to answer, even if he is afterwards acquitted on the ground that he did not know his act to be wrong. This desirable result can be reached by drawing a distinction between the burden of proof (or persuasive burden) and the burden of introducing evidence (evidential burden).

The burden of proving the child's knowledge of wrong is on the prosecution, but this only means that, when all the evidence is in, the prosecution must fail if the court is not satisfied beyond reasonable doubt of the child's guilt. The fact that the persuasive burden is on the prosecution does not control the burden of introducing evidence on particular issues, for the law may place an evidential burden on the accused even when the persuasive burden is on the prosecution."[12]

Lord Lowry f'**C v DPP** at 38C:

"A long uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that in doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has variously been expressed, as in Blackstone, 'strong and clear beyond all doubt or contradiction', or in Rex v Gorrie (1919) 83 JP 136, 'very clear and complete evidence' or in B v R (1958) 44 Cr App R1 at 3 per Lord Parker CJ, 'It has often been put this way, that ... "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt' ". (enfazi tal-Qorti)

[12] Ibid p. 498

KONSIDERAZZJONIJIET LEGALI DWAR L-AKKUZI

Il-Qorti se tanalizza r-reati li bihom jinsab mixli l-imputat:

Is-serq

Il-Qorti taghmel referenza ghad-decizjoni fl-ismijiet Il-**Pulizija vs. Anthony Borg Inguanez** moghtija mill-Qorti tal-Appell Kriminali fis-26 ta' Awwissu 1998 fejn inghad:

> *"L-Ewwel Qorti korrettement irriteniet li d-definizzjoni ta' serq komunement abbraccjata fil-gurisprudenza taghna hi dik tal-Carrara u cioé: "La contrettazione [...] dolosa della cosa altrui, fatta "invite dominio", con animo di farne lucro". (ara Il-Pulizija vs. Carmelo Felice, 10/1/42, Il-Pulizija vs. Pawlu Scicluna et, 9/12/44, it-tnejn Appelli Kriminali).*

Din id-definizzjoni hi suggetta ghall-interpretazzjoni dottrinali u gurisprudenzjali. Kif jispjega l-Manzini b'referenza ghad-definizzjoni ta' serq moghtija fl-Artikolu 624 tal-Codice Rocco:

> *"Obiettivamente, possono essere "altrui" soltanto quelle cose che costituiscono attualmente oggetto di proprietà o di altro diritto reale. Soggettivamente, e nel senso della nozione del furto, è "altrui" la cosa che è in proprietà e in possesso di una persona diversa da quella che se ne impossessa, e parimenti la cosa che, pur essendo in proprietà di chi sottraendola se ne impossessa, si trova, di diritto o di fatto, nel potere d'altri che abbia facoltà di usarne o di disporne altrimenti. In questo senso una cosa può essere contemporaneamente propria ed altrui"*

(Manzini, V., Trattato di Diritto Penale Italiano (Nuvolone, P. e Pisapia G.D., ed.), UTET, 1984, Vol. IX, para. 3229)".

Issa huwa pacifiku, kif anke gie accettat mill-Qorti tal-Magistrati fis-sentenzi taghha, li l-lukru mehtieg ghad-delitt ta' serq jista' jikkonsisti anki fi kwalunkwe tgawdija, pjacir jew sodisfazzjon li l-halliel jipprokura lilu nnifsu bil-haga misruqa (b'referenza ghas-sentenza talQorti Kriminali fl-ismijiet Il-**Pulizija v. James Chetcuti**, 3 ta' April 1943 – Kollez. XXXI.iv.500).

Fis-sentenza tal-Qorti Kriminali fl-ismijiet Il-**Pulizija v. Pawlu Scicluna et** (9 ta' Dicembru 1944 – Kollez. XXXII.iv.814) intqal hekk fir-rigward ta' l-*animus furandi* rikjest fir-reat tas-serq:

'Bil-kelma lucro wiehed ma ghandux jifhem biss lokupletazzjoni venali, jew borswali, imma kwalunkwe vantagg, kwalunkwe sodisfazzjon, kwalunkwe utili, pjacir, beneficcju, jew kommodu, li lhati jkollu fi hsiebu li jipprokura' (p.820).

L-istess fis-sentenza tal-Qorti Kriminali fl-ismijiet Il-**Pulizija v. Carmelo Felice** (10 ta' Jannar 1942 – Kollez. XXXI.iv.458) intqal:

'Fuq id-dolo specifiku ghar-reat tas-serq, jigifieri l-iskop tal-lukru, skond id-dottrina huwa bizzejjed li dak il-lukru jkun potenzjali jew possibbli; u l-Impallomeni (Commento al Codice Penale Italiano, Vol. IV, p.14, no. 1843) jghid li 'per lucro e profitto del furto si intende non soltanto il lucro personale che puo` ritrarsi dalla cosa rubata

vendendola, oppure un effettivo aumento del patrimonio del ladro, ma qualunque godimento o piacere, qualunque sodisfazione procurata a se stesso, onde anche chi rubi per denaro o chi sottragga per mero diletto artistico un'opera d'arte, anche lasciando al proprietario il prezzo od altro oggetto di pregio equivalente o superiore, e` responsabile' (p. 460)."

Fit-teorija accettata dwar il-kwistjoni tal-valur tas-serq, anki ammont zghir hafna huwa bizzejjed. Jirreferi ghall-gurista Carrara li jghid li "*purche` un qualche valore ci sia, per quanto minimo, e` sempre furto*".

Il-principju generali f'kaz ta' allegat serq huwa li sakemm mic-cirkostanzi jirrizulta manifestament li l-oggett inkwistjoni ma hux *res nullius* u lanqas *res derelicta*, hemm id-delitt ta' serq.

<u>Ir-ricettazzjoni</u>

Dwar ir-reat ta' riċettazzjoni, l-artikolu 334 tal-Kap. 9 tal-Liġijiet ta' Malta jipprovdi li huwa ħati ta' reat kull min f'Malta, "*xjentement jilqa' għandu jew jixtri ħwejjeġ misruqa, meħuda b'qerq, jew akkwistati b'reat, sew jekk dan isir f'Malta jew barra minn Malta, jew, xjentement, b'kull mod li jkun, jindaħal biex ibiegħhom jew imexxihom*".

Ix-xjenza meħtieġa fir-riċettatur tirrigwarda l-provenjenza kriminuża ġenerika, u ma tirreferix għad-dettalji speċifiċi tar-reat prinċipali tas-serq, fis-sens li hija xjenza li tista' tiġi dedotta miċ-ċirkostanzi tal-każ. Dan l-element intenzjonali jirrikjedi li r-riċettatur kien jaf, jew li miċ-

ċirkostanzi partikolari tal-każ, kien messu raġonevolment jaf li l-oġġett li ser jakkwista ġej minn provenjenza kriminuża.[13]

KONKLUZZJONIJIET

Il-Appell Kriminali **Il-Pulizija v. Brian Caruana** fit-23 ta' Mejju 2002 qalet li: **"Kollox jiddependi mill-assjem tal-provi u mill-evalwazzjoni tal-fatti li jagħmel il-ġudikant u jekk il-konklużjoni li jkun wasal għaliha il-ġudikant tkun perfettament raġġunġibbli bl-użu tal-loġika u l-buon sens u bażata fuq il-fatti, ma jispettax lil din il-Qorti li tissostitwiha b'oħra anki jekk mhux neċessarjament tkun l-unika konklużjoni possibbli."**

Issa, fil-każ in eżami l-kwistjoni tirrisolvi ruħha f'waħda dwar il-kredibilita` tax-xhieda prinċipali l-ufficjali tal-pulizija li marru fuq il-post wara informazzjoni li waslitilhom dwar is-serqiet li saru u x-xhieda tal-impjegati u ghalliema fl-iskejjel li minnhom sar is-serq.

F'dar-rigward tfakkar, din il-Qorti, li l-artikolu 638(2) tal-Kodiċi Kriminali jipprovdi li **"ix-xiehda ta' xhud biss, jekk emmnut minn min għandu jiġġudika fuq il-fatt, hija biżżejjed biex tagħmel prova sħiħa u kompluta minn kollox, daqs kemm kieku l-fatt ġie ippruvat minn żewġ xhieda jew aktar"**.

Din il-Qorti eżaminat bir-reqqa l-provi kollha prodotti u jirrizula li l-akkuzi migjuba kontra l-imputat gew ippruvati. Rigward il-hsara volontarja u r-ricetazzjoni, tal-ewwel kienet il-mezz ghal fini biex twettqu s-srqiet u l-ohra bhala alternattiva ghas-serq.

[13] Ara Appell Kriminali, **Il-Pulizija v. Nazzareno Zarb et**, 16 ta' Dicembru 1998.

KONSIDERAZZJONIJIET DWAR IL-PIENA

Semghet lill-Probation Officer Joseph Mizzi li ilu jsegwi lill-imputat ghal dawn l-ahhar xhur fejn irraporta progress fl-andament tal-imputat kemm kien ilu kkarcerat b'mod provizorju fit-taqsima YOURS fejn anke qieghed ikun segwit minn rapprezentanti tas-SEDQA.

Artikolu 37(2) tal-Kap 9 jipprovdi li f'kaz ta' minuri minn sittax-il sena sa tmintax-il sena, il-piena applikabbli ghal reat ghandha titnaqqas bi grad jew tnejn.

Semghet s-sottomissjonijiet finali mill-Prosekuzzjoni u d-difiza in kwantu jirrigwarda l-piena.

Is-sentenza Rittmar Hatherly u Justine Farrugia[14]

Din il-Qorti tirreferi ghas-sentenza fl-ismijiet il-**Pulizija vs Rittmar Hatherly et**. deciza mill-Prim Imhallef Vincent Degaetano fid-9 ta' Ottubru 2008, fejn huwa tajjeb li wiehed jara l-isfond ta' dik is-sentenza biex ikun aktar infurmat kif il-Qorti dakinnhar irragunat, liema argumenti din il-Qorti taqbel maghhom u thaddanhom.

[Jibda biex jinghad li fil-fehma ta' din il-Qorti dana l-appell ta' l-Avukat Generali, bil-mod kif inhu redatt, jirrazenta l-fieragh. In fatti kullma jinghad fih, ghal dak li hu aggravju, hu s-segwenti:

"Illi l-aggravju hu car u manifest u jikkonsisti filli l-ewwel Qorti ghas-semplici raguni li deherilha li jkun ta' beneficcju ghall-imputati u s-socjeta`,

[14] App Nru 178/08

poggiethom fuq Probation. Illi bir-rispett l-ordni ta' Probation hija intiza biex jinghata f'kazi genwini u mhux f'kazi bhal dawn fejn minkejja kull hniena mill-Qorti l-appellanti baqghu jiksru l-ligi kif jirrizulta mill-fedina penali taghhom. Illi f'dan il-kaz il-piena kellha tkun wahda karcerarja."

Wara din l-esposizzjoni skarna u lakonika ta' l-aggravju, issegwi t-talba ghar-riforma – din il-Qorti qed tintalab tikkonferma s-sejbien ta' htija izda tirrevoka l-Ordnijiet ta' *Probation* u minflok "tinfliggi piena karcerarja effettiva skond il-ligi." F'dan ir-rikors ma sar lanqas l-icken tentattiv da parti tar-rikorrent appellant biex jipprova jinseg xi argument a bazi ta' dak li tghid il-ligi, per ezempju, fis-subartikoli (1) u (2) tal-Artikolu 7 tal-Kap. 446, jew a bazi ta' dak li nsibu fil-gurisprudenza jew fl-awturi. L-appellant donnu isejjes l-appell tieghu unikament fuq il-kuncett ta' "kaz genwin" kontrappost ghal dawk is-sitwazzjonijiet fejn il-Qorti tkun precedentement uriet hniena ma' dak li jkun izda dan ikun baqa' jikser il-ligi. Anqas ma hu l-Avukat Generali jitlob l-applikazzjoni ta' l-Artkolu 23 tal-Kap. 446 – hu qed jitlob biss "piena karcerarja effettiva" fil-konfront taz-zewg appellati.

Issa, ghalkemm huwa veru li qorti ghandha dejjem toqghod attenta li ma tizvalutax il-mizuri mhux karcerarji a disposizzjoni taghha b'applikazzjoni taghhom bl-addocc u minghajr ma tiehu kont xieraq tal-antecedenti penali ta' dak li jkun, mill-banda l-ohra s-semplici fatt li persuna tkun precedentement inghatat *probation* jew *conditional discharge* ma jfissirx necessarjament li ma tkunx tista', jew li m'ghandhiex, fil-kazijiet li jikkwalifikaw terga' tinghata *probation* jew *conditional discharge* jew tigi applikata fil-konfront taghha xi mizura ohra taht il-Kap. 446. F'dan ir-rigward din il-Qorti taghmel referenza ghal dak li nghad fis-sentenza taghha tat-18 ta' Jannar 2001 fl-ismijiet **Il-Pulizija v. George Farrugia:**

> "Issa, huwa veru li l-appellat ghandu fedina penali li ftit din il-Qorti rat bhalha. Bizzejjed jinghad li dina l-fedina penali tiehu xejn anqas minn 42 faccata. L-appellat illum ghandu erbghin sena, u f'dawn l-erbghin sena huwa kellu xejn anqas minn 77 kundanna mill-Qrati ta' Gustizzja Kriminali. Kien hemm xi

okkazzjonijiet fis-snin sebghin u fil-bidu tas-snin disghin meta l-qrati applikaw fil-konfront tieghu sia l-Artikolu 5 kif ukoll l-Artikolu 9 tal-Kap. 152; il-bqija tal-kundanni, pero`, jinvolvu multi u habs. A propositu ta' din il-karriera, l-Avukat Generali, fir-rikors tieghu, jghid hekk:

> ""F'dawn ic-cirkostanzi u f'din is-sitwazzjoni refrattarja u irriversibbli li fiha l-imputat waddab lilu nnifsu, l-esponent bl-akbar umilta` ma jista' qatt jaccetta jew jikkondividi it-tip ta' piena, jew ahjar il-mod kif l-ewwel qorti deherilha li kellha titratta mal-imputat. Hawnhekk ma ghandniex xi kaz ta' xi cittadin Malti ta' eta` tenera li habat difrejh l-ewwel darba mal-ligi u jinstab l-ewwel darba quddiem il-Qorti."

"Apparti li din il-Qorti ma tistax taqbel ma' l-Avukat Generali fejn dan jghid li s-sitwazzjoni ta' l-appellat hija "irriversibbli" – fil-fehma tal-Qorti hija l-mewt biss li ggib stat jew sitwazzjoni ta' irriversibilita` assoluta – anqas ma tista' din il-Qorti tikkondividi l-fehma ta' l-Avukat Generali li Ordni ta' *Probation* hu indikat biss ghal "first offenders" zghazagh. 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. Kif jispjega David Thomas fil-ktieb tieghu ***Principles of Sentencing*** (Heinemann, London, 1979):

> "" The term 'inadequate recidivist' is used to describe an offender, middle aged or older, who has over a long period of years committed numerous offences, not in themselves in the first rank of seriousness, and has served many terms of imprisonment as well as experiencing an extensive selection of other penal measures. Faced with such an offender, the Court will usually grasp any chance of breaking the cycle of offence and sentence, even if the chances of success are obviously limited...As in the case of the intermediate recidivist there must be some prospect of success, however remote" (pp. 22, 23).

"U aktar tard l-istess awtur jghid hekk dwar l-uzu ta' l-Ordni ta' *Probation*:

> ""The probation order is clearly the most important individualized measure available to a sentencer. It is not limited to any one group of offenders; as the discussion in chapter one illustrates, probation is used to deal with recidivists of mature age as well as the young and those of good character" (p. 236).

Minn dan kollu jidher car kemm hi zbaljata l-idea semplicistika ta' l-appellant li ghax persuna kienet inghatat precedentement xi forma ta' *non-custodial sentence* allura hija neccessarjament m'ghandhiex terga' tinghata *probation*. Kif inghad, kollox jiddependi fuq il-fattispeci partikolari tal-kaz, u b'mod specjali fuq il-*prospect of success* ta' dik il-mizura partikolari ghal dik li hija r-riforma tal-hati.]

Kliem il-President tar-Repubblika

Il-Qorti taghmel referenza ghal dak li qalet il-President tar-Repubblika Marie Louise Coleiro Preca fil-gradwazzjoni tal-Caritas fit-23 ta' Gunju 2017 fejn ghaxar persuni li ghelbu l-abbuz tad-droga.

Il-President appellat lill-awtoritajiet, "*biex lil dawn l-għeżież gradwati tagħna llum, u ta' qabilhom, jkomplu jagħtuhom l-appoġġ li għandhom bżonn.*"

Appellat ukoll, biex issa li se jibdew triqithom, jingħataw l-għajnuna li għandhom bżonn, biex jiksbu d-dinjità sħiħa tagħhom.

Il-President qalet li filwaqt li huwa importanti li nirrikonoxxu t-tant u tant bidliet għall-aħjar li l-awtoritajiet diversi tagħna għamlu, fil-liġijiet u fil-policies matul is-snin biex nagħtu aktar support lil dawk li jirrijabilitaw ruħhom mill-vizzju tad-droga, "*jinħtieġ li ma nieqfux hawn, iżda nkomplu ntejbu kemm il-liġijiet, kif ukoll il-policies tagħna, biex dawn l-għeżież ħutna u uliedna, jkunu f'qagħda li jilqgħu għall-isfidi u r-realtajiet tal-ħajja.*"

Bħala eżempju, l-President semmiet diffikultà kbira li ħafna jsibu meta jkollhom każijiet pendenti fil-Qorti wara li jkunu spiċċaw il-programm. Hawn, il-President appellat lill-awtoritajiet tagħna biex

jindirizzaw din id-diffikultà, *"għaliex għandna sitwazzjonijiet li wħud minn dawn ħutna u uliedna, wara li jkunu spiċċaw il-programm, jibqagħlhom każijiet pendenti għax il-Qorti ma titrattax il-każijiet flimkien, u wħud minnhom saħansitra anke jispiċċaw il-ħabs wara li jkunu irrijabilitaw ruħhom fis-soċjetà."*

Il-Qorti tirreferi wkoll ghal dak li stqarret il-President tar-Repubblika fil-11 ta' Lulju 2014 waqt gradwazzjoni ohra tal-Caritas:

> *"Aħna soċjetà li rridu nirriflettu tassew il-valur tal-imħabba u m'għandniex nitilfu lanqas persuna waħda minn fostna, għad-dulur li ġġib il-ħajja fid-droga".*

Illi in linea generali jibda biex jinghad li:

> *l-piena m'ghandiex isservi bhala xi forma ta' vendikazzjoni tas-socjeta` fil-konfront tal-hati. Il-piena ghandha diversi skopijiet. Wiehed minnhom huwa sabiex jigi ripristinat it-tessut socjali li jkun gie mcarrat bil-ghemil kriminali ta' dak li jkun. Taht dan l-aspett jassumu importanza, fost affarijiet ohra, kemm ir-rizarciment tad-dannu da parti tal-hati kif ukoll ir-riforma tal-istess hati. Skop iehor tal-piena huwa dak li tigi protetta s-socjeta`. Dan l-iskop jitwettaq kemm billi fil-kaz ta' persuni li b'ghemilhom juru li huma ta' minaccja ghas-socjeta` dawn jinzammu inkarcerati u ghalhekk barra mic-cirkolazzjoni, kif ukoll billi, fil-kaz ta' reati gravi, is-sentenza tibghat messagg car li jservi ta' deterrent generali. Il-Qrati ta' gustizzja kriminali dejjem*

iridu jippruvaw isibu l-bilanc gust bejn dawn u diversi skopijiet ohra tal-piena.[15]

Illi c-cirkostanzi ta' kull kaz huma partikolari ghal dak il-kaz u normalment ivarjaw radikalment mic-cirkostanzi ta' kull kaz iehor. Huwa impossibbli ghal-legislatur li jipprevedi dawn ic-cirkostanzi kollha u, a priori, jistabilixxi (ghal kull reat) piena specifika ghal kull sensiela ta' cirkostanzi differenti li fihom jista' jitwettaq dak l-istess reat.

Illi huwa propju ghalhekk illi ghal kull reat il-Ligi ma tistipulax piena fissa imma tistipula minimu u massimu; jispetta lill-Qorti biex fid-diskrezzjoni taghha, u entro dawk il-parametri, teroga dik il-piena permezz ta' liema, skont ic-cirkostanzi ta' kull kaz, tipprova ssib dak il-bilanc gust bejn d-diversi skopijiet li ghandhom jintlahqu.

Illi dwar il-varji modi kif il-Qorti tista' titratta ma' persuna misjuba hatja ta' xi reat u x'evalwazzjoni ghandha ssir biex jigi stabbilit liema minn dawn il-modi jservi l-aktar lill-gustizzja, kellha l-opportunita tippronunzja ruhha l-Qorti ta' l-Appell Kriminali. Fis-sentenza mghotija fil-kawza Il-**Pulizija vs Maurice Agius**[16] dik il-Qorti qalet hekk:

Huwa car...., li l-ewwel haga li qorti trid tiddecidi hi jekk il-kaz jimmeritax piena ta' prigunerija, b'mod li jigu eskluzi (jekk kienu talvolta applikabbli u mhux aprioristikament eskluzi mill-ligi stess) mizuri bhal ordinijiet maghmula taht l-Att dwar il-Probation jew multa. Jekk jigi stabbilit, tenut kont tac-cirkostanzi kollha, li l-kaz kien jimmerita prigunerija, il-gudikant irid jghaddi ghat-tieni stadju, u cioe` biex jiddetermina t-tul ta' tali prigunerija. Hawn ukoll il-gudikant ma

[15] Ref Ir-**Republika ta' Malta vs Rene sive Nazzareno Micallef**: Appell Kriminali deciz 28.11.2006.
[16] Deciza fit-13 ta' Novembru 2009.

jridx joqghod ihares lejn is-subartikolu (1) tal-Artikolu 28A u jipprova jara kif ibaxxi l-piena biex igibha ma teccedix is-sentejn. Il-piena ta' prigunerija trid tkun dik il-piena li oggettivament taghmel ghall-kaz, indipendentement minn jekk tkunx tista' tigi sospiza o meno. Huwa biss jekk il-piena hekk oggettivament stabbilita ma tkunx ta' aktar minn sentejn prigunerija li l-gudikant jghaddi ghat-tielet stadju, u cioe`biex jikkonsidra jekk ghandux jissospendi o meno tali piena (ghal periodu ta' mhux anqas minn sena u mhux izjed minn erba' snin). Huwa evidenti li l-ewwel haga li trid issir f'dana t-tielet istadju hi li wiehed jara jekk hemmx xi ostakolu statutorju ghal tali sospensjoni ....; jekk ma hemmx tali ostakoli, allura, u allura biss, tqum il-kwistjoni ta' jekk il-piena ta' prigunerija ghandhiex tigi sospiza u, jekk jkun jidhrilha li l-kaz ikun wiehed li fih sentenza ta' prigunerija ghandha tigi sospiza, x'ghandu jkun il-periodu operattiv taghha (cioe` ghal kemm zmien tibqa' hekk sospiza fuq ras il-hati).

Illi din il-Qorti hasbet fit-tul dwar il-piena idonea li ghandha tigi nflitta fic-cirkostanzi fil-konfront tal-imputat li ilu arrestat provizorjament **mit-30 ta' Mejju 2017** u minhabba c-cirkostanzi specjali tal-kaz illum jidrilha li piena karcerarja effettiva ma tkunx idonea fic-cirkostanzi ghaliex l-imputat ilu ghal dawn l-ahhar xhur miexi fit-triq it-tajba kif jixhdu r-rapporti tal-Probation Officer li zamm lill-Qorti aggornata dwar l-andament tal-imputat.

Il-Qorti taghmel referenza ghall-**Gmiel tar-Riabilitazzjoni**[17]:

Kemm għandna bżonn noffru dejjem aktar lil min jiżbalja l-opportunità li jerġa' jirriabilita ruħu! Fil-familji, fis-soċjetà ... hemm wisq individwi li ġew imqiegħda

[17] Mons. Mario Grech, Isqof ta' Għawdex nhar il-Ħamis 3 ta' Awwissu 2017 f'B'Bugia

fil-ġenb minħabba xi għemil żbaljat tagħhom. Ħafna drabi l-qorti tal-poplu tagħti s-sentenza tal-kundanna, imma mbagħad ma tammettix appell!

Persuni bħal dawn qed jitkarrbu biex jerġgħu jiġu rriabilitati. Mhux qed ngħid li l-ħażin nibdew ngħidulu tajjeb. Żball jibqa' żball; imma persuna li tagħmel l-iżball għandha dejjem tingħata l-possibbiltà li jekk trid u jiddispjaċiha tal-iżball li tkun għamlet, hija ssib l-għajnuna biex terġa' tqum fuq riġlejha u terġa' tibda tikteb paġna ġdida fl-istorja tagħha u tal-familja tagħha.

Inħoss li s-soċjetà tagħna għadha ma temminx biżżejjed fil-qawwa tal-proċess tar-riabilitazzjoni. Ikun ħafna aħjar li s-soċjetà, anki jekk b'ħafna tbatija, tirkupra wieħed mill-membri tagħha li jkun żbalja u tgawdi mill-ħiliet varji tiegħu, milli biex tissodisfa s-sens ta' vendetta, tiskarta u tarmi. Aħjar nirriskjaw li dak li jkun nagħtuh il-fiduċja u jerġa' jagħmilhielna, milli nagħlqu l-bieb għal kulħadd, anki għal nies ġenwini li jiżbaljaw u jixtiequ jitwieldu mill-ġdid!

DECIDE:

Ghal dawn il-mottivi il-Qorti wara li rat Artikoli 17, 18, 49, 50, 289, 334, 261b, c, f, 263b, 264, 270, 279a, 325(1)(c) tal-Kap 9 u Art. 7 tal-Kap 446 tal-Ligijiet ta' Malta issib lill-imputat hati Omissis hati tal-imputazzjonijiet kollha addebitati fil-konfront tieghu u tordna li, ai termini ta' Artikolu 7 tal-Kapitolu 446 tal-Ligijiet ta' Malta, l-imputat jitqieghed taht Ordni ta' Probation ghal tliet (3) snin millum.

Ai termini ta' l-Artikolu 7(7) tal-Kapitolu 446 tal-Ligijiet ta' Malta l-Qorti fissret lill-imputat Omissis bi kliem car u li jinftiehem, l-effetti tal-ordni ta' probation u tal-kundizzjonijiet kollha elenkati fid-Digriet anness ma' din is-sentenza u li f'kaz li jonqos milli jikkonforma ruhu ma' dik l-ordni u dawk il-kondizzjonijiet u/jew f'kaz li jaghmel reat iehor tul

it-terminu tal-ordni ta' probation, jista' jinghata sentenza ghar-reati li taghhom nstab hati b'din is- sentenza.

Ai termini ta' l-Artikolu 7(8) tal-Kapitolu 446 tal-Ligijiet ta' Malta, il-Qorti tordna li kopja ta' din is-sentenza u tal-ordni ta' probation moghtija b'Digriet ta' llum stess ghandhom jigu trasmessi minnufih lid-Direttur tas-Servizzi ta' Probation sabiex jassenja ufficjal tal- probation biex ikun responsabbli ghas-sorveljanza ta' l-imputat Omissis.

In konkluzzjoni l-Qorti qeghda tqieghed lill-hati taht ordni ta' trattament ai termini tal-Artikolu 412D tal-Kodici Kriminali, liema ordni qieghed isir ghal perjodu ta' tliet (3) snin bil kundizzjonijiet elenkati f'l-ordni mghoti kontestwalment.

L-Ufficjal Sorveljanti assenjat għandu jirrapporta bil-miktub lill-Qorti kompetenti bil-progress tal-ħatja kull sitt (6) xhur.

Stante li l-imputat huwa minuri l-Qorti tordna d-divjet tal-pubblikazzjoni tal-isem fuq kull mezz tax-xandir.

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Ft./Dr. Joseph Mifsud
Magistrat

Vera Kopja

Margaret De Battista
Deputat Registratur