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 Godwin Scerri)

vs

Jeffrey Cassar
Omissis
Omissis

Kumpilazzjoni numru 270/2017

Illum 4 ta' Ottubru 2018

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputati **Jeffrey Cassar** detentur tal-karta tal-identita' bin-numru 258584 (M), **Omissis** detentur tal-karta tal-identita' bin-numru 138395 (M) u **Omissis** detentrici tal-karta tal-identita' Maltija bin-numru 102635 (A) billi huma akkuzati talli:

1. Lil **Jeffrey Cassar** u lil **Omissis** talli:

Nhar il-11 ta' Mejju 2017, għall-ħabta tal-10:15 ta' filghaxija , ġewwa stabilliment kummercjali bl-isem ta Eat , Drink and Play sitwat f'San

pawl il-Bahar, bil-hsieb li jikkomettu d-delitt ta' serq aggravat bil-vjolenza, mezz, valur u hin urew dan il-hsieb b'atti esterni u taw bidu ghal ezekuzzjoni tad-delitt u li tali delitt ma'giex ezegwit minhabba xi haga accidentali u ndipendenti mil-volonta taghhom bi ksur ta' l-Artikolu 41(1) (a), 262(b) 263, u 270 tal-Kapitolu 9 tal-ligijiet ta' Malta;

2. Lil **Omissis** talli :

Fl-istess data, lok, hi u cirkostanzi imsemmija fil-paragrafu ta' qabel xjentament ghenet u assistiet lil awturi biex jigi kkunsmat id-delitt ta' serq aggravatu dan bi ksur ta' l-Artikolu 41(1) (a), 42(d) tal-Kapitolu 9 tal-ligijiet ta' Malta;

3. Lil **Jeffrey Cassar** u lil **Omissis** talli:

Fix-xahar ta' Mejju tal 2017 minn gewwa l-Qawra Palace Hotel sitwat fi Triq il-Qawra San Pawl-il-Bahar ikkomettew serq ta' flus kontanti, liema serq huwa aggravat bil-valur, bil-mezz u hin, bi ksur tal-Artikolu 263, 267 u 270 tal-Kapitolu 9 tal-ligijiet ta' Malta;

Il-Qorti giet mitluba li f'kaz ta htija tikkonsidra lil **Jeffrey Cassar** bhala ricediv , b'sentenzi li huma definittivi u jistghux jigu mhassra u dan ai termini tal-Artikoli 49, 50 u 289 tal-Kapitolu 9 tal-ligijiet ta' Malta;

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

Rat in-Nota ta' Sottomissjonijiet tal-Prosekuzzjoni pprezenta fil-5 ta' Lulju 2018 (*a fol.* 254 *et seq.*) u n-Nota ta' sottomissjonijiet tal-imputat prezentata fid-9 ta' Awwissu 2018 (*a fol.* 257 *et seq.*)

XHIEDA

F'dan il-process xehdu ghaxar (10) xhieda kif gej:

PS 1026 Brandon Gauci (*a fol* 53 et. seq.); Massimo Abela (*a fol* 61 et. seq.); Chris Gatt (*a fol* 67 et. seq.); PS 343 Glenn Carabott (*a fol* 73 et. seq.); Joseph Grima (*a fol* 97 et. seq.); Spettur Godwin Scerri (*a fol* 100 et. seq.); Dr Martin Bajada (*a fol* 137 et. seq.); Dylan Cardona (*a fol* 173 et. seq.); Spettur Godwin Scerri (*a fol* 180 et. seq.); Maryln Formosa (*a fol* 206 et. seq.);

IL-FATTI SPECIE TAL-KAZ

Nhar il-11 ta' Mejju 2017, ghall-habta tal- 11 ta' filghaxija, il-pulizija gew infurmati li kien hemm persuni li kienu qeghdin jippruvaw jisgassaw xi magni tal-loghob. Il-Pulizija mil-ghassa tal-Qawra marru immedjatament fl-istabbiliment **Tal-Pjazza – Eat, Drink and Play**[1] u assiguraw li l-persuni koncernati jinzammu u l-ghodda li instabet f'idejhom tigi elevata ghal aktar investigazzjonijiet. Wara li l-Pulizija semghet il-verzjoniet tal-kwerelanti intalbet kopja tal-filmati mis-sistema ta' CCTV biex jigi ikkonfermat dan ir-rapport. Mill-filmati presentata fl-atti, Jeffrey Cassar jidher ma' persuna ohra qeghdin f'pozizzjoni baxxuti jissieltu biex jifthu wahda min dawn il-magni.

[1] Fl-imputazzjoni l-Prosekuzzjoni halliet barra l-ewwel parti tal-isem tal-hanut u r-rapprezentanti tal-istabbiliment irreferew ghal isem tal-post bhala Eat, Drink and Play. Id-difiza qeghda targumenta li f'Bugibba ma jezistiex stabbiliment bl-isem ta' Eat, Drink and Play. Dan il-punt il-Qorti se tindirizzah aktar 'l quddiem f'din is-sentenza.

Fit-2 ta' Mejju 2017, il-Pulizija kienet irceviet rapport minghand il-*management* tal-lukanda Qawra Palace sitwata f'San Pawl il-Bahar fejn huma irrapurtaw serq u hsarat min gewwa l-*games room* tal-lukanda. Investigazzjonijiet min fuq il-*cameras* tas-sigurta provduti lil-Pulizija mil-*management* tal-lukanda jikkonfermaw li Jeffrey Cassar u Albina Ryabinina flimkien ma' persuna femminili (li sakemm intemm dan il-process il-Pulizija ghada ma tafx min hi izda tqisha bhala komplici f'dan ir-reat) dahlu gewwa r-*reception* tal-lukanda biex isaghrfu xi flus u marru gewwa l-*games room* fejn kif diga ikkonfermat mil-kameras tas-sigurta' Jeffrey Cassar flimkien ma' Albina Ryabinia irnexielhom jifthu/jkissru il-magni biex jisirqulhom il-flus mil-kompartiment taghhom. Fil-fatt huma irnexxielhom jakkwistaw ammont ta' flus min gewwa l-magni u wara hargu mil-lukanda u rikbu f'vettura ta' kulur ahmar b'persuna ohra komplici fuq l-*isteering* li kienet qieghda tistennihom quddiem il-lukanda.

Nhar it-13 ta' Mejju 2018 Dylan Cardona ammetta l-akkuzi kollha migjuba fil-konfront tieghu u fis-17 ta' Mejju 2018 Qorti diversament preseduta poggitu taht Probation ai termini tal-artikolu 7 tal-Kapitolu 446 ghal perjodu ta' tletin xahar minhabba li ammetta fi stadju bikri tal-proceduri u dakinnhar kellu fedina penali netta. Nhar it-12 ta' Gunju 2017 Albina Ryabinina wkoll ammettiet l-akkuzi kollha migjuba fil-konfront taghha u hija inghatat sentenza ai termini tal-Artikoli 22 tal-Kapitolu 446 jigifieri kienet liberata bil-kundizzjoni li ma taghmilx reat iehor ghal perjodu ta' 3 snin. Hija kellha fedina penali netta u ghalkemm m'ammettietx fil-bidu tal-proceduri, hija ghamlet dan b'mod bikri.

KUNSIDERAZZJONIJIET LEGALI GENERALI

Illi qabel il-Qorti tghaddi biex taghmel il-kunsiderazzjonijiet taghha rigward l-imputazzjonijiet, il-Qorti ser tghaddi biex taghmel numru ta' konsiderazzjonijiet generali.

<u>Livell ta' prova</u>

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li sabiex l-akkuzat jigi misjub hati l-akkuzi migjuba fil-konfront tieghu dawn 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 vs 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-cirkustanzi 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."

Fil-kawza fl-ismijiet **Il-Pulizija vs Graham Charles Ducker** (Qorti tal-Appell Kriminali - deciza fid-19 ta' Mejju, 1997) gie ritenut illi:

"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."

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 v Martin Mark Ciappara** fejn spjegat x'jigri meta gudikant ikun rinfaccjat b'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 ghall-piena jew ghal xi provvediment iehor.

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.

Illi ghalhekk m'hemmx dubju li kollox jiddependi fuq il-kredibilita` tax-xhieda u dan billi bhala Gudikant, il-Qorti sejra taghti qies l-imgieba, il-kondotta u l-karattru tax-xhieda, tal-fatt jekk ix-xhieda ghandiex mis-sewwa jew hix kostanti, u ta' fatturi ohra tax-xhieda u jekk ix-xhieda hix imsahha minn xhieda ohra, u tac-cirkostanzi kollha tal-kaz, u dan ai termini tal-Artikolu 637 tal-Kap 9 tal-Ligijiet ta' Malta.

Huwa principju baziku pprattikat mill-Qrati taghna fil-procediment kriminali, li biex l-akkuzat jigi ddikjarat hati, l-akkuzi dedotti, ghandhom jigu ppruvati oltre kull dubju ragjonevoli, cioe' oltre kull dubju dettat mir-raguni.

Hawnhekk il-Qorti taghmel referenza ghal sentenza moghtija mill-Qorti tal-Appell Kriminali nhar s-sebgha (7) ta' Settembru, 1994 fl-ismijiet '**Il-Pulizija v Philip Zammit et**' u tghid pero' li mhux kull l-icken dubju

huwa bizzejjed sabiex l-imputat jigi ddikjarat liberat, hemm bzonn li '*dubbju jkun dak dettat mir-raguni.*'

L-ghodda biex tiddeciedi

Il-Gudikant li jkun se jiddeciedi kif se jaghzel is-sikkrana mill-qamh? It-twegiba nsibuha f'decizjonijiet li taw il-Qrati taghna:

> *Il-Gudikant għandu jezamina bir-reqqa l-provi rilevanti li jkollu quddiemu u mbagħad jiddeciedi l-kawza abbazi tal-ligi applikabbli, tal-gurisprudenza, u tal-provi li fl-opinjoni tiegħu huma konsistenti, konvincenti u korroboranti.*[2]

F'Decizjoni tal-Qorti tal-Appell Kriminali moghtija fit-23 ta' Jannar, 2007 fil-kaz **Il-Pulizija *vs* Charles Bianco**[3] l-Imhallef Giannino Caruana Demajo kkummenta dwar meta jkun hemm deskrepanzi fix-xhieda:

> Din il-Qorti kellha okkazjoni tisma' x-xhieda u – ħlief forsi għal ftit ecitament li jħossu xi xhieda meta jsibu ruħhom fl-ambjent ta' awla tal-Qorti, ukoll jekk ikunu familjari ma' dak l-ambjent iżda jkunu qegħdin jixhdu *in rebus suis*, u aktar meta jkunu qegħdin jirrakkontaw episodju li għalihom kien trawmatiku – ma rat xejn "nevrasteniku" jew isteriku fix-xhieda ta' John Bonello. Id-diskrepanzi żgħar bejn ix-xhieda ta' John Bonello u dik tal-Avukat Irene Bonello, li baqgħu għalkemm, kif jgħid l-appellant fir-rikors tiegħu, "żgur kellhom ħafna opportunitajiet li jitkellmu bejniethom dwar il-każ u jfakkru lil xulxin x'gara dakinhar tal-allegat incident", aktar milli sinjal illi x-xhieda ma tistax toqgħod fuqha huma

[2] Appell Civili Numru. 140/1991/2 - **Norbert Agius v. Anthony Vella et., deciz** fil-25 ta' April, 2008 mill-Prim Imhallef Vincent De Gaetano u l-Imhallfin Joseph D. Camilleri u Joseph A. Filletti.

[3] Appell Kriminali Numru. 115/2006

sinjal illi x-xhieda ma kinitx orkestrata, u illi t-tnejn xehdu dak li ftakru u kienu onesti biżżejjed biex ma "jikkorregux" il-verżjonijiet biex igibuhom jaqblu ma' xulxin, għalkemm kellhom okkażjoni jagħmlu hekk u għalkemm setgħu jobsru illi d-diskrepanzi x'aktarx kien sejjer jaqbad magħhom l-appellant biex joħloq argument. Differenzi ta' dettal fil-mod kif xhud jara episodju trawmatiku huma ħaga normali u, sakemm fis-sostanza x-xhieda tkun taqbel, ma jfissrux illi dik ix-xhieda għandha tigi skartata.

Artikolu 637 tal-Kapitolu 9 jipprovdi gwida cara lill-Gudikant kif ghandu japprezza xhieda ta' xhud:

id-deċiżjoni titħalla fid-diskrezzjoni ta' min għandu jiġġudika l-fatti, billi jittieħed qies tal-imġieba, kondotta u karattru tax-xhud, tal-fatt jekk ix-xiehda għandhiex mis-sewwa jew hix konsistenti, u ta' fattizzi oħra tax-xiehda tiegħu, u jekk ix-xiehda hix imsaħħa minn xiehda oħra, u taċ-ċirkostanzi kollha tal- każ.

***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.[4]

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.[5]

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

[4] 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

[5] 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.[6]

Huwa minnu li fl-**Artikolu 638(2) tal-Kap. 9** ix-xhieda ta' xhud wiehed biss, jekk emmnut 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-imputat u l-allegati reati. 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-reati u hadd iktar, anzi l-akkuzat biss, li huma l-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-

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

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.[7]

Illi din hija ezattament il-pozizzjoni 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 bhall-katina li tintrabat minn tarf ghal tarf, b'sensiela ta' ghoqiedi li jaqblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni[8].

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 per ezempju d-difiza tal-insanita'.

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

[8] 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

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...*"

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 jrid 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-reati 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.

Il-filmat esebit

Fil-ktieb *Electronic Evidence*[9], Stephen Mason jispjega li:

> *"Surveillance cameras are very much part of life in the twenty-first century, the foundations of which began in the latter decades of the twentieth century. Evidence of images from security cameras can be very helpful in identifying the perpetrators of crime, and the enhancement of the images, together with the use of more advanced techniques such as facial mapping, can help to identify parties to an offence."*

Il-Qorti taghmel referenza ghal dak li jghid il-**Blackstone** fl-edizzjoni tal-2016 fejn meta jitkellem dwar ritratti, video recordings u films jghid li:

> *"A photograph (or film) the relevance of which can be established by the testimony of someone with personal knowledge of the circumstances in which it was taken (or made), may also be admitted*

[9] Ippubblikat minn LexisNexis U.K. t-tieni edizzjoni ppubblikata fl-2010 pg. 345 para. 10.91

to prove the commission of an offence and the identity of the offender."[10]

Il-Qorti se tghaddi biex tanalizza l-prova il-filmat esbiet in atti. Illi fir-regoli illi tfasslu f'kawza **R vs Turnbull** fl-Ingilterra, li ghalkemm ma jikkostitwixxu l-ebda regola taht il-ligi Maltija, huma linji gwida fil-kaz ta' l-identifikazzjoni tal-persuna akkuzata. Illi dana gie ukoll sottolinjat f'sentenza moghtija mill-Qorti ta'l-Appelli Kriminali fl-ismijiet Il-**Pulizija vs Stephen Zammit** (deciza 16 ta' Lulju 1998) fejn il-Qorti tat esposizzjoni tar-regoli Turnbull fid-decizjoni taghha:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing

[10] Pg. 2545 f'*Real Evidence* F8.58

traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

Illi fil-ktieb tieghu Cross, **On Evidence** (6th edition) huwa jaghti definizzjoni ta' dak imsejjah bhala real evidence:

> ***'Things are an independent species of evidence as their production calls upon the court to reach conclusions on the basis of its own perception and not on that of witnesses directly or indirectly reported to it ...***
>
> ***Although it was devised by Bentham and adopted by Best, 'Real evidence' is not a term which had received the blessing of common judicial usage. There is general agreement that it covers the production of material objects for inspection by the judge or jury in court, but it is debatable how much further the term should be extended'.***

Cross imbaghad jghaddi sabiex jaghti diversi ezempji ta' dak illi jikkostitwixxi "real evidence" u fost dawn l-ezempji huwa jinkludi automatic recordings u ighid:

> ***'Most discussion has hitherto centred on the admissibility of tape-recordings, but this has now been supplemented by a thin trickle of authority on the admissibility of other media such as film, video-tape and computer output. In all of these cases the evidence is real evidence when it is tendered to show what it was that was recorded'.***

L-awtur Murphy, imbaghad fil-ktieb tieghu 'A Practical Approach to Evidence' (3rd Ed) jaghti dina id-definizzjoni ta' 'Real evidence' (fol. 7):

> ***'A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses.***

The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person or animal, the demeanour of witnesses (which may or may not be offered or presented to the court by design), views of the locus in quo or of any object incapable of being brought to court without undue difficulty and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum total of their contents as such ... What is of importance in each case is the visual, aural or other sensory impression which the evidence, by its own characteristics produces on the court, and on which the court may act to find the truth or probability of any fact which seems to follow from it'. ...

'The court may look at and draw any proper conclusions from its visual observation of any relevant material object produced before it ... The tribunal of fact is entitled to act on the results of its own perception, even where it conflicts with other evidence given about the object ...'.

Ikompli:

'The court must, before admitting recordings as evidence be satisfied that the evidence which may be yielded is relevant and that the recording produced is authentic and original ... The above principles apply to the use of film produced by hidden, automatic security cameras installed in banks and elsewhere for the purpose of recording robberies and other incidents. The jury are entitled to consider the film as

identification evidence of the persons recorded on it, subject to the foundational requirements stated above" see eg 'R v Dodson; R v Williams [1984] Crim LR 489; see "Taylor v Chief Constable of Cheshire [1986] 1 WLR 1979'.

Fil-kawza **Taylor vs Chief Constable of Cheshire** (1986), Ralph Gibson LJ ighid:

'Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident, and the study may affect greatly both his ability to describe what he saw and his confidence in an identification. When the film or recording is shown to the court, his evidence and the validity of his increased confidence, if he has any, can be assessed in the light of what the court itself can see'"

Illi fil- kaz fl-Ingilterra **R vs Murphy and Maguire** (1990) l-Qorti stqarret:

"We consider that the Turnbull guidelines should be applied and adopted as far as appropriate by a judge in a Diplock court to his assessment of the weight to be given to visual identification made from a video film, whether that identification purports to be made by a witness or witnesses, or by the judge himself. We see nothing in principle to justify a distinction between the consideration of the identification evidence of a bystander and that of a witness or judge who identifies from a video film screen. The imperfections of human observation, the dangers of suggestibility and the possibilities of honest mistake even by a plurality of witnesses still arise and justify the need for special caution before convicting."

Illi fil-kaz in dizamina ma tqumx il-kwistjoni dwar l-identifikazzjoni tal-persuna ta' Jeffrey Cassar fil-filmat esebiet (d-difiza tqajjem dubju dwar il-kwalita tieghu). Il-Qorti ezaminat dana il-filmat bir-reqqa biex tara dan jistax jghinha fid-deliberazzjoni taghha biex tiddeciedi dan il-kaz.

L-isem ta' wiehed mill-istabbilimenti

Id-difiza qajmet il-punt fejn fl-ewwel imputazzjoni dedotta fil-konfront tal-imputat fejn huwa qieghed jigi mixli b'attentat ta' serq aggravat bi vjolenza, mezz, valur u hin gewwa l-istabbiliment Eat, Drink and Play sitwat f'San Pawl il-Bahar.

Madankollu, fix-xhieda tieghu Massimo Abela jirreferi ghall-istabbiliment bhala Tal-Pjazza, u l-istess jaghmel Chris Carabott.

Il-Qorti zaret l-inhawi indikati fil-process u fil-fatt ma jezisti ebda stabbiliment bl-isem ta' **Eat Drink and Play** sitwat f'San Pawl il-Bahar, jezisti **Tal-Pjazza bis-sub titlu Eat, Drink and Play**.

Jirrizulta b'mod car, li l-isem indikat fl-akkuza, m'huwiex l-isem korrett tal-istabbiliment. Ezempju li se taghti l-Qorti huwa ghandek persuna jisimha Joseph Borg, wiehed jaccetta li xi hadd jirreferi ghalih bhala Joe Borg jew Guzeppi Borg u jkun car ghal min qieghed jirreferi, imma jekk issir referenza ghal Borg f'rahal partikolari kif se tkun taf ghal min qieghed jirreferi?

Fl-akkuza mhux indikat l-isem tat-triq, b'mod li l-Qorti kienet tista' tiggustifika tali nuqqas.

Fil-kawza fl-ismijiet il-**Pulizija vs John Paul Azzopardi**[11], l-Qorti tal-Appell Kriminali sahqet illi:

> *'il-Qorti qatt ma tista' issib htija dwar il-kummissjoni ta' xi reat li ikun sehh mhux biss fi zmien iehor, izda ukoll f'xi post iehor mhux dak indikat fl-akkuza, cirkostanza li hija tant materjali u sostanzjali fil-kaz imressaq 'il quddiem mill-Prosekuzzjoni. Dan ghaliex l-artikolu 360 stess ifisser kif ghandha tigi redatta ic-citazzjoni u liema huma dawk l-indikazzjonijiet mehtiega sabiex il-persuna imharrka tkun tista' thejji id-difiza taghha tajjeb u dan bil-fatti kif indikati lillha f'dik ic-citazzjoni. Issa jekk dawk il-fatti ikunu gew indikati hazin, allura il-binarji ta'l-azzjoni ma ikunux gew definiti jew ikunu gew definiti hazin. Issa f'dan il-kaz l-appellanti qatt ma jista' jigi misjub hati ta' reat li twettaq f'post jew f'lok fejn huwa ma kienx jinstab fil-hin indikat fl-akkuza ghaliex jidher illi f'dak il-hin huwa kien jinstab gewwa Triq il-Ferrovija u mhux fi Triq il-Kappillan Mifsud. Illi x'aktarx illi l-Prosekuzzjoni giet indotta f'dan l-izball mill-parti leza Elizabeth Azzopardi li ghamlet ir-rapport dwar l-allegat vjolazzjoni minn naha ta'l- appellanti u dan billi l-ufficjal tal-pulizija li investiga dan il-kaz ma kienx prezenti fuq il-post meta sehhew l-allegati fatti. Madanakollu il-Prosekuzzjoni ghalkemm kellha kull opportunita titlob il-korrezzjoni mehtiega fl-akkuza, baqghet inattiva.'*

[11] Deciza mill-Qorti tal-Apell, nhar it-30 Novembru tas-sena 2017, Appell Numru 506/2016

Konsegwentement, l-Qorti ma tistax issib lill-imputat hati tal-ewwel imputazzjoni. Il-Qorti tappella biex ikun hemm aktar attenzjoni meta jkunu mhejjija l-imputazzjonijiet ghaliex nuqqasijiet bhal dawn ikunu ta' dizappunt kemm ghal min wettaq l-istharrig kif ukoll ghal persuni derubati. U f'dan il-kaz kien hemm koperazzjoni shiha bejn il-pubbliku u l-pulizija biex kien solvut attentat ta' serq u serq, li kieku ma kienx indirizzat, min jaf kemm-il serqa ohra kienet issir.

KONSIDERAZZJONIJIET DWAR L-IMPUTAZZJONIJIET

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.

Serq ikkwalifikat bil-valur

Dwar l-aggravju tal-valur il-Qorti taghmel referenza ghal dak li jiddisponi l-ligi u cioe' l-Artikolu 267 tal- Kapitolu 9 tal-ligijiet ta' Malta li jiddisponi s-segwenti:-

> *"Is-serq huwa kkwalifikat bil-"valur", meta l-haga misruqa tkun tiswa aktar minn mitejn u tnejn u tletin ewro u erbgha u disghin ċentezimu (232.94)".*

Illi, tenut kont ta' dak li ghadu kemm inghad hawn fuq maghdud mal-provi mressqa mill-Prosekuzzjoni, ma jirrizultax li l-aggravju tal-valur fl-imputazzjoni migjuba fil-konfront tal-imputat jekk tinstab htija tirrizulta ghaliex l-flus misruqa m'hemmx prova li kienu aktar minn "*mitejn u tnejn u tletin ewro u erbgha u disghin ċentezimu (232.94)".*

Serq ikkwalifikat bil-hin

Skont l-artikolu 270 tal-Kodiċi Kriminali, is-serq huwa kkwalifikat bil-"ħin" meta jsir "*bil-lejl, jiġifieri bejn inżul u t-tlugħ ix-xemx*".

Din il-Qorti eżaminat bir-reqqa l-provi u sabet li s-serqa mill-Qawra Palace Hotel sehhet bejn id-20.45 u 21.35. Hemm prova ċara u inekwivoka li l-flus ittiehdu wara nżul ix-xemx.

<u>Serq ikkwalifikat bil-mezz</u>

Dwar l-aggravju tal-mezz il-Qorti taghmel referenza ghal dak li jiddisponi l-ligi u cioe' l-Artikolu 263 tal- Kapitolu 9 tal-ligijiet ta' Malta li jiddisponi s-segwenti:-

> *Is-serq huwa ikkwalifikat bil-"mezz" –*
>
> *(a) meta jsir bi ksur ta' gewwa jew ta' barra, b'imfietah foloz, jew bi skalata;*
> *(b) meta l-halliel jizbogh wiccu, jew jilbes maskra jew ghata ohra tal-wicc, jew jaghmel xi tibdil iehor ilbies jew fis-sura, jew meta, sabiex jaghmel is-serq, jiehu t-titolu jew il-libsa ta' ufficjal civili jew militari, jew jippretendi li ghandu ordni mahrug minn awtorità pubblika li jkun falz, ukoll jekk dawn il-mezzi qarrieqa ma jkunux fil-fatt swew biex jghinu s-serq, jew biex ma jikxfux il-halliel.*

Illi fl-atti tal-kawza irrizulta li saret il-hsara biex sar is-serq u dan huwa msahhah ukoll bil-filmat esebit, fejn anke l-pulizija rnexxielha tirkupra l-ghodda li ntuzat ghal dan il-ghan.

Illi, tenut kont ta' dak li ghadu kemm inghad hawn fuq maghdud mal-provi mressqa mill-Prosekuzzjoni, jirrizulta li l-aggravju tal-mezz fl-

imputazzjoni migjuba fil-konfront tal-imputat giet sodifacentament pruvata.

Ricediva

L-imputat qieghed ikun akkuzat ukoll li sar recediv b'diversi sentenzi tal-Qorti tal-Magistrati (Malta), liema sentenzi saru definittivi.

Skont gurisprudenza kostanti, il-prova tar-recidiva – sakemm ma jkunx hemm ammissjoni – hija;

> *"billi tigi esibita kopja ufficjali tas-sentenza relattiva u wara ssir il-prova tal-identita'. L-obbligu tal-prosekuzzjoni li tesibixxi dawk is-sentenzi jibqa' dejjem minkejja l- ezenzjoni moghtija mill-akkuzat li tipproduci prova tal- identita'. Jekk ma tigix esebita jew prodotta tali prova permezz tal-kopja ufficjali tas-sentenza li tissemma fl-akkuza, allura wiehed ma jistax jghid li saret l-ahjar prova dwar jekk verament precedentement l-akkuzat kienx ikkommetta xi reat iehor li tieghu gie misjub hati.*
>
> *Ghalkemm il-fedina penali tista' tittiehed in konsiderazzjoni mill-Qrati ta' Gustizzja Kriminali biex ikunu jistghu jikkalibraw il-piena, l-imputazzjoni tar-recidiva dejjem tinnecessita li ssir il-prova tal-kundanna jew kundanni precedenti."* [12]

[12] **Pulizija versus Carmelo Fenech** – Qorti tal-Appell Kriminali 8 ta' Frar 2005 Volum' LXXXIX Part IV paġna 287 et.

Ma' din is-silta mis-sentenza li ghaliha saret riferenza l-Qorti qed izzid "*li l-prova tar-recidiva, barra mill-ammissjoni tal-imputat innifsu tista' ssir ukoll billi tkun prodotta kopja tas-sentenza li jkun hemm indikat fiha n-numru tal-identita'. Dan in-numru jkun jista' jitqabbel ma' dak li jkollu l-imputat jew l-akkuzat. Ma jistax ikun hawn zewg persuni li jkollhom l-istess numru tal-identita'*".[13]

Il-prosekuzzjoni fil-konfront ta' Jeffrey Cassar esebiet sentenzi moghtija 11 ta' Settembru 2014 – mill-Magistrat Dr. Consuelo Scerri Herrera LL.D. (Dok GSX2 *a fol*. 106) **Il-Pulizija vs Jeffrey Cassar** fejn gie kkundannat sena prigunerija u ghalhekk tirrizulta.

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 u rapprezentanti tal-istabilimenti, l-filmat tas-cctv esebit u l-ghodda elevata u esebita f'dawn il-proceduri. F'dar-rigward tfakkar, din il-Qorti, li l-artikolu 638(2) tal-Kodiċi

[13] Appell Kriminali Il-**Pulizija Vs Joseph Darmanin** deċiż mill-Imħallef Lawrence Quintano fid-9 ta' Lulju, 2012

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"**.

Ghalhekk il-Qorti se ssib lill-imputat hati tat-tielet (3) imputazzjoni ta' serq mill-Qawra Palace Hotel, liema serqa hi kwalifikata bil-mezz u l-hin biss.

KONSIDERAZZJONIJIET OHRA DWAR IL-PIENA

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.*[14] Enfasi ta' din il-Qorti

[14] Ref Ir-**Republika ta' Malta vs Rene sive Nazzareno Micallef**: Appell Kriminali deciz 28.11.2006.

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**[15] 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 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,*

[15] Deciza fit-13 ta' Novembru 2009.

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).

Ghin ruhek biex Alla jghinek

Fil-fehma tal-Qorti fic-cirkostanzi tal-kaz, ladarba l-imputat stess ma kienx ha l-opportunita mogħtija lilu, l-imputat jrid jifhem li jrid jgħin ruħhu biex Alla jgħinu. **F'dan il-kaz hareg car li hu kien il-mohh wara dan il-kaz li dahhal mieghu lil Albina Ryabinia l-mahbuba tieghu u lil Dylan Cardona, t-tnejn kellhom fedina penali netta.**

L-imputat ma jistax jippretendi li l-Qorti tagħlaq għajnejha għal dan il-fatt. L-imputat jekk irid l-għajnuna jrid ikun huwa l-ewwel li jxammar il-kmiem. L-għajnuna ta' ħaddieħor mingħajr impenn serju tieghu ma huma ser iwasslu mkien.

Illi in rigward tal-piena l-Qorti kkunsidrat in-natura repettitiva tar-reati mwettqa mill-imputat, in-nuqqas tieghu li jottempera ruhu mal-ligi u tal-karattru refrattiv tieghu.

Is-socjeta` jixirqilha protezzjoni minn persuni bhal l-imputat li jahseb li jista' jibqa jghaddi biz-zmien lis-socjeta' inkluz il-Qrati. Ma jistax ikun li jkollna min jisraq u johloq alarm bla bzonn fis-socjeta'.

Il-Qorti ma tistax tibqa' cassa quddiem min l-opportunitajiet li jinghata jinjorhom

Il-piena idonea li ghandha tigi nflitta fic-cirkostanzi fil-konfront tal-imputat hi **piena karcerarja effettiva**.

DECIDE:

Ghal dawn il-mottivi l-Qorti ma ssibx lill-imputat hati tal-ewwel imputazzjoni (1) u minnha tilliberah, u wara li rat Artikoli 49, 50, 263, 267, 270 u 289 tal-Kap 9 tal-Ligijiet ta' Malta issibu hati tat-tielet (3) imputazzjoni addebitata lilu minghajr il-kwalifika tal-valur u wara li qieset li huwa ricediv, tikkundannah ghal piena ta' erbatax (14)-il xahar prigunerija.

_____

Dr. Joseph Mifsud
Magistrat