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 Saviour Baldacchino)
vs
Steve Matthew Grima

Kumpilazzjoni 87/2016
Illum 5 ta' Ottubru 2018

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat **Steve Matthew Grima** detentur tal-karta tal-identita' bin-numru 124586 (M) billi huwa akkuzat talli nhar is-17 ta' Novembru 2015 ghall-habta tas-sitta neqsin ghaxra (17:50) gewwa Triq il-Mithna, Balzan;

1. Ikkommetta serq ta' vettura tal-ghamla Kia u oggetti ohra ghad-dannu ta' Victor Muscat u/jew persuni ohra liema serq huwa kkwalifikat bil-valur li mhux izjed minn €2329.27 u bix-xorti tal-haga misruqa skond artikoli 261(c) (g), 267, 271 (g), 279 (a) u 280(1).

2. Kiser l-ordni tal-Probation mghotija lilu mill- Magistrat Dr. Natasha Galea Sciberras LL.D nhar l-24 ta Mejju 2013 ghall perjodu ta' (3) tlett snin liema sentenza hija definittiva u ma tistax tigi

mhassra jew mibdula skond Artiklu 7 tal-Kap 446 tal-ligijiet ta' Malta;

Il-Qorti giet mitluba trendi operattiva s-sentenza ta' prigunerija sospizali kienet inghatat lilu mill- Magistrat Dr. Natasha Galea Sciberras LL.D nhar is-16 ta Settembru 2013, liema sentenza hija definittiva u ma tistax tigi mhassra, mnaqqsa jew mibdula.

Il-Qorti giet mitluba wkoll titratta ma Steve Matthew Grima bhala ricediv ta' sentenzi mghotija lilu mill-Qorti tal-Magistrati (Malta) liema sentenzi saru definittivi u ma jistghux jinbidlu u dan i termini ta'Artikolu 49,50 u 289 tal-kap 9 tal-Ligijiet ta' Malta.

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*.

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

> Din il-Qorti kellha okkażjoni 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 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.*

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.*

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 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.

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-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.*

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.

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'.

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.

XHIEDA

F'dan il-process xehdu sitt (6) xhieda kif gej:

WPS 301 Lorenne Vella (*a fol* 36 et. seq.); Brian Muscat (*a fol* 45 et. seq.); Victor Muscat (*a fol* 48 et. seq.); Stephen Cachia (*a fol* 55 et. seq.); Emanuel Felice (*a fol* 64 et. seq.); Marylin Attard (*a fol* 99 et. seq.).

KONSIDERAZZJONIJIET DWAR L-IMPUTAZZJONIJIET

<u>Is-serq</u>

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.

Ikkunsidrat;

Il-Qorti invista ta' dak li rrizulta fil-process u x-xhieda tad-derubat taghmilha cara li hadd m'ghandu jhalli vetturi mhux imsakkra u wisq aktarbic-cavetta fihom biex jaghmluha tant facli lil min ikollu intenzjoni hazina.

Il-Qorti giet infurmata li fil-25 ta' Settembru 2018 gie ssentenzjat dwar il-ksur tal-Probation Order u ghalhekk il-Qorti se tastjeni milli tiehu aktar konjizzjoni ta' dik l-akkuza.

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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.* Enfasi ta' din il-Qorti

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** 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, 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).*

DECIDE

Ghal dawn il-motivi l-Qorti, wara li rat l-artikoli 261(c) (g), 267, 271 (g), 279 (a) u 280(1) tal-Kapitolu 9 tal-Ligijiet ta' Malta, issib lill-imputaat hati tal-ewwel imputazzjoni migjuba fil-konfront tieghu, izda fid-dawl tal-kunsiderazzjonijiet hawn fuq maghmula u b'applikazzjoni tal-Artikolu 22 tal-Kapitolu 446 tal-Ligijiet ta' Malta, il-Qorti qed tillibera lill-imputat bil-kundizzjoni li ma jikkommettiex reat iehor fi zmien tliet snin millum.

Il-Qorti twissi lill-hati bil-konsegwenzi skont il-Ligi jekk huwa jikkommetti reat iehor matul dan il-perijodu ta' liberta' kundizzjonata.

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DR JOSEPH MIFSUD
MAGISTRAT