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

Magistrat Dr. Joseph Mifsud B.A. (Legal & Int. Rel.), B.A. (Hons), M.A. (European), LL.D.

Il-Pulizija
(Spettur Bernard Charles Spiteri)

vs.

Salvinu Parnis

Numru: 344/2018

Illum 11 ta' Dicembru 2018

Il-Qorti,

Rat l-imputazzjoni migjuba kontra l-imputat **Salvinu Parnis,** ta' sitta u hamsin (56) sena, iben Paul u Mary neé Farrugia, imwieled ir-Rabat, Ghawdex, nhar it-2 ta' Awwissu 1962, residenti fil-fond 98, Triq l-Arcisqof Pietru Pace, Rabat, Ghawdex u detentur tal-karta tal-identita' bin-numru 36462(G), akkuzat talli nhar l-10 ta' Lulju 2018 u fiz-zmien ta' qabel gewwa r-Rabat, Ghawdex;

1. Wettaq jew halla li jitwettqu xoghlijiet ta' zvilupp minghajr permess tal-Awtorita' tal-Ippjanar, li permezz taghhom twaqqghet

il-binja/struttura 1, Triq l-Arcisqof Pietru Pace, Rabat, Ghawdex, liema binja/struttura hija mharsa b'Ordni ta' Emergenza ghall-Konservazzjoni li ggib ir-riferenza ECO296/18 u ppubblikata fil-harga tal-Gazzetta tal-Gvern ta' Malta nhar it-13 ta' Marzu 2018 u dan kollu bi ksur tal-provediment tal-Att dwar l-Ippjanar tal-Izvilupp (Kapitolu 552 tal-Ligijiet ta' Malta);

Rat id-dokumenti esebiti u l-atti processwali kollha.

Semghet il-provi;

Semghet waqt is-seduta tas-6 ta' Novembru 2018 lill-Prosekuzzjoni tiddikjara li m'ghandhiex aktar provi xi tressaq f'dan il-kaz u b'hekk taghlaq il-provi taghha;

Semghet waqt is-seduta tal-lum lid-Difiza tiddikjara li qed taghlaq il-provi taghha;

Preliminari[1]

Din hija Qorti ta' Gudikatura Kriminali. Quddiemha persuna jew persuni jigu mixlija li wettqu reati kriminali. Il-Qorti hija adita bl-imputazzjonijiet li jingiebu quddiemha u li jkunu maghmula mill-Prosekuzzjoni. Hemm limitu kemm il-Qorti tista' tkun flessibbli fir-rigward tal-interpretazzjoni tal-imputazzjonijiet li jingiebu quddiemha.

[1] Il-Qorti qeghda tibbaza dan fuq l-ispjega li ta l-kollega l-Magistrat Aaron Bugeja fil-kawza il-**Pulizija vs Joseph Calleja et**. deciza fil-5 ta' Frar 2016

Għalkemm verament li l-komparixxi li fuqha hemm l-imputazzjonijiet hija ritenuta bħala *un avviso a comparire*, l-imputazzjonijiet huma dejjem ta' indoli penali. Ir-regoli tal-procedura ma jistgħux jigu interpretati b'mod wiesa' tali li l-parametri tal-azzjoni penali jigu spustati jew mibdula. Altrimenti d-difiza ma tkunx tista' tiddefendi ruħha kif jixraq.

Quddiem din il-Qorti jekk persuna tinstab ħatja teħel piena. Jekk ma tinstabx ħatja tigi meħlusa mill-imputazzjonijiet dedotti. Il-valutazzjoni dwar jekk persuna tkunx ħatja jew le tiddependi dejjem fuq il-provi li jingiebu quddiemha (u quddiem ebda post jew *medium* ieħor) u l-istess valutazzjoni hija marbuta mal-imputazzjonijiet kriminali li jkunu gew miktuba u prezentati quddiemha mill-Pulizija Ezekuttiva jew skont kif ikunu gew mizjuda jew mibdula fl-istadju opportun – u dejjem mhux aktar tard minn meta l-Prosekuzzjoni tkun iddikjarat il-provi tagħha magħluqa. Altrimenti jekk ma jkunx hekk l-akkuzatur ikun jista' jbiddel il-parametri tal-azzjoni penali skont meta jidhirlu u skont l-andament ta' dak li jkun qed iseħħ jew li jkun irrizulta matul il-kors tal-process penali.

Għalkemm hemm element ta' flessibilita' provdut minn certu gurisprudenza fir-rigward tal-procedimenti quddiem dawn il-Qrati ta' gurisdizzjoni limitata, din il-flessibilita' trid tkun tali li ma tkunx ta' pregudizzju għall-proceduri penali u għad-drittijiet tad-difiza.

Is-setgħat ta' din il-Qorti u r-rimedji li din il-Qorti tista' tagħti f'kull kaz huma limitati u ristretti għal dawk li huma previsti mil-Ligi u fil-Ligi. Din il-Qorti ma għandiex is-setgħa, ossia *carte blanche* li tiddeciedi kif trid u tipprovdi kull rimedju li jidħlilha f'moħħha jew li trid jew li tkun

tixtieq tagħti. Il-provvedimenti tagħha huma limitati għal dawk provduti fil-Kodici Kriminali.

Din il-Qorti ma tistax tieħu post jew tissostitwixxi l-Qorti Civili kompetenti jew tagħti rimedji ta' natura civili li mhumiex previsti mill-Kodici Kriminali bħala li jistgħu jigu emanati minn Qorti ta' Gudikatura Kriminali.

F'kull kaz pero', stante li din hija Qorti ta' Gudikatura Kriminali hija marbuta bit-termini tal-imputazzjoni skont kif spjegat aktar 'il fuq. Aktar minn hekk, quddiemha, huwa dmir tal-Prosekuzzjoni li tipprova l-kaz tagħha skont kif proferit fl-imputazzjoni kontestata sal-grad ta' konvinciment morali u sufficjenza probatorja lil hinn minn kull dubju dettat mir-raguni. Mill-banda l-oħra, jekk id-difiza tagħzel li tressaq xi provi jew sottomissjonijiet kif sar f'dan il-kaz, huwa bizzejjed għad-difiza li tikkonvinci lill-Qorti bit-tezi tagħha fuq bazi ta' konvinciment morali li jistrieħ fuq bilanc ta' probabilita' u f'kaz li dan iseħħ, u l-Qorti ma tħosshiex moralment konvinta li l-Prosekuzzjoni laħqet il-grad ta' prova rikjesta minnha, allura l-Qorti trid tillibera lill-imputat.

Dawn huma principji kardinali li jsawru l-procediment penali Malti. Jogħgbuna jew ma jogħgbuniex, dawn huma wħud mir-regoli bazilari li jistrieħ fuqhom il-procediment penali Malti.

Biss din il-Qorti ma tistax tieqaf hawnhekk. Hija marbuta li tiggudika dan il-kaz skont l-akkuza li giet magħmula mill-Prosekuzzjoni kontra l-imputat u ma tistax tbiddel hi bis-setgħa tagħha stess il-parametri tal-

kawza intrapriza mill-Prosekuzzjoni u tiddeciedi kif jiftlilha jew tmur lil hinn mill-imputazzjoni prezentata lilha mill-Prosekuzzjoni.

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 diskrepanzi 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-

[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

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-verzjonijiet biex igibuhom jaqblu ma' xulxin, għalkemm kellhom okkażżjoni 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-xhieda għandhiex mis-sewwa jew hix konsistenti, u ta' fattizzi oħra tax-xhieda tiegħu, u jekk ix-xhieda hix imsaħħa minn xhieda oħra, u taċ-ċirkostanzi kollha tal- kaz.

***Presumption of facts* u provi cirkostanzjali**

Il-Qorti qabel tghaddi biex tanalizza l-imputazzjoni migjuba kontra l-imputat 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.

[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.

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.[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

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

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.[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 perezempju 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 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 kkunsidrata li ma ppruvatx il-kaz taghha ta' htija u ghalhekk il-Qorti hija obbligata li tillibera.

Ikkunsidrat:

Illi ma jirrizultax mill-provi li l-imputat wettaq jew halla li jitwettqu xoghlijiet ta' zvilupp bla permess;

Illi rrizulta waqt is-seduta li l-binja/struttura li kienet dikjarata ta' periklu u li l-Qorti kienet tat ordni sabiex jitnehha dan il-periklu fi zmien xahar, waqghet. Madankollu fil-Qorti ma ngabitx prova biex din il-binja/struttura waqghet, min waqqaghha jew kif waqghet. Illi l-Qorti ma dahlilhiex xi rapport li kien hemm xi terremot f'dak il-perijodu;

Illi l-Qorti tirringrazzja lill-Mulej li meta l-binja/struttura msemmija waqghet ma gew ikkawzati l-ebda mwiet lill-persuni li jkunu ghaddejjin minn hemmhekk, dawk li jiffrekwentaw il-Konservatorju: ghalliema, genituri u tfal, dawk li juzaw is-servizz tal-POYC liema ufficini jinsabu qrib hafna l-istruttura li kienet ta' periklu u dawk kollha li jkunu sejrin lura lejn darhom wara li jkunu marru l-Isptar Generali ta' Ghawdex.

DECIDE:

Illi l-imputazzjoni migjuba fil-konfront tal-imputat ma gietx sodisfacentement pruvata u b'hekk l-imputat ser jigi liberat mill-imputazzjoni migjuba fil-konfront tieghu.

Ghal dawn il-motivi, il-Qorti, ma ssibx lill-imputat Salvinu Parnis hati tal-imputazzjoni migjuba fil-konfront tieghu u b'hekk tilliberah minnha.

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Dr. Joseph Mifsud
Magistrat