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

MAGISTRAT NATASHA GALEA SCIBERRAS B.A., LL.D.

Kawza Nru: 293/2010

Illum: 28 ta' Novembru 2018

Il-Pulizija
(Spettur Jesmond J. Borg)

vs

Adrian Zammit
(ID 41180(M))

Il-Qorti,

Wara li rat l-imputazzjonijiet migjuba fil-konfront tal-imputat Adrian Zammit ta' 30 sena, iben Joseph u Jane nee` Borg, imwieled il-Pieta` nhar it-28 ta' Dicembru 1979, residenti 9, Triq it-Trinita` Mqaddsa, Marsa u detentur tal-karta tal-identita` numru 41180(M);

Akkuzat talli f'dawn il-Gzejjer, nhar id-29 ta' Novembru 2009, kif ukoll f'dawn l-ahhar granet, f'hinijiet differenti u fi bnadi ohra f'Malta:

1. Kellu fil-pussess tieghu d-droga eroina specifikata fl-ewwel skeda tal-Ordinanza dwar il-Medicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, meta ma kienx fil-pussess ta' awtorizzazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skont id-disposizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta ma kienx bil-

licenzja jew xort'ohra awtorizzat li jimmanifattura jew li jforni d-droga msemmija u meta ma kienx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tieghu u naqas li jipprova li d-droga msemmija giet fornuta lilu ghall-uzu tieghu skont ir-ricetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-regoli tal-1939 dwar il-Kontroll Intern tad-Drogi Perikoluzi (GN 292/1939) kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, liema droga nstabet f'tali cirkostanzi li juru li ma kinitx ghall-uzu esklussiv tieghu;

2. Aktar talli kkommetta reat waqt li kien taht Ordni ta' *Probation* moghtija mill-Qorti ta' Malta, preseduta mill-Magistrat Dr. L. Quintano LL.D. nhar is-6 ta' Frar 2009, liema sentenza saret definittiva u ma tistax tigi mibdula.

Il-Qorti giet mitluba sabiex barra milli tapplika l-piena skont il-ligi, tordna lill-imputat ihallas l-ispejjez li ghandhom x'jaqsmu mal-hatra tal-esperti, skont l-Artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta.

Rat l-atti kollha tal-kaz u d-dokumenti ezebiti, inkluz l-Ordni tal-Avukat Generali ai termini tas-subartikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Medicini Perikoluzi (Kap. 101), sabiex din il-kawza tinstema' minn din il-Qorti bhala Qorti ta' Gudikatura Kriminali;

Rat ukoll illi fis-seduta tal-15 ta' Ottubru 2014, il-partijiet iddikjaraw illi kienu qeghdin jezentaw lill-Qorti kif preseduta, milli terga' tisma' l-provi mressqa sa dakinhar, quddiem il-Qorti kif diversament preseduta;

Semghet trattazzjoni finali tal-partijiet.

Ikkunsidrat:

Illi l-fatti li taw lok ghal dan il-kaz kienu s-segwenti: In segwitu ta' diversi rapporti li saru gewwa l-Ghassa tal-Pulizija tal-Hamrun dwar allegat abbuz ta' droga fil-fond bin-numru 9, Triq it-Trinita` Mqaddsa, Marsa u b'mod partikolari wara rapport anonimu lill-pulizija nhar id-29 ta' Novembru 2009, il-pulizija ossia PS 1195, PC 519, PC 507 u PC 283 accedew fil-fond imsemmi, fejn sabu lill-imputat odjern flimkien ma' tliet persuni ohrajn, fosthom certu Robert Spiteri. Minn tfittxija li saret fil-fond, instabu oggetti relatati mal-uzu tad-droga, kif ukoll qartas bi trab kannella suspettat eroina fuq il-persuna ta' wiehed minn dawn il-persuni – skont l-Ispettur Joseph Agius, fuq il-persuna tal-imputat odjern u skont

PS 1195 Conrad Debattista, fuq il-persuna ta' Robert Spiteri. L-imputat flimkien mat-tliet persuni l-ohrajn gew arrestati sabiex isiru investigazzjonijiet ulterjuri.

L-imputat irrilaxxja stqarrija nhar id-29 ta' Novembru 2009 u dan wara li huwa nghata s-solita twissija skont il-ligi, ossia illi ma kienx obbligat li jwiegeb ghad-domandi li kienu ser isirulu, izda dak kollu li jghid kien ser jitnizzel bil-miktub u seta' jingieb bhala prova. Sussegwentement, fl-istess jum, l-imputat ikkonferma din l-istqarrija tieghu bil-gurament quddiem il-Magistrat Inkwirenti ai termini tal-Artikoli 24A(12) u (13) tal-Kap. 101 tal-Ligijiet ta' Malta.

Kif tajjeb tissottometti l-abbli difensur tal-imputat fit-trattazzjoni finali taghha, din l-istqarrija giet rilaxxjata mill-imputat fi zmien meta l-ligi Maltija ma kinitx tipprovdi lill-persuna arrestata d-dritt li tottjeni parir legali qabel l-interrogatorju taghha, liema dritt dahal fis-sehh fl-10 ta' Frar 2010, permezz tal-Avviz Legali 35/2010. F'dan ir-rigward il-posizzjoni legali llum hija wahda cara. Bizzejjed illi l-Qorti taghmel referenza ghas-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tat-12 ta' Jannar 2016 fil-kaz **Mario Borg v. Malta**, kif ukoll ghas-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet **The Republic of Malta vs Chukwudi Samuel Onyeabor** tal-1 ta' Dicembru 2016, fejn hemmhekk il-Qorti ghamlet referenza ghal diversi sentenzi tal-Qorti Kostituzzjonali ossia **Carmel Saliba vs Avukat Generali** tas-16 ta' Mejju 2016, **Stephen Nana Owusu vs Avukat Generali** tat-30 ta' Mejju 2016, **Malcolm Said vs Avukat Generali et** tal-24 ta' Gunju 2016 u **Aaron Cassar vs Avukat Generali et** tal-11 ta' Lulju 2016 u ghaddiet sabiex tiddeciedi illi "*the denial of the right to legal assistance at the pre-trial stage as a result of a systematic restriction applicable to all accused persons must today be held to be in violation of the conditions for the admissibility of an accused's statement.*"

Kif inghad, jirrizulta wkoll illi l-imputat ikkonferma din l-istqarrija tieghu bil-gurament quddiem il-Magistrat Inkwirenti, li wkoll wissa lill-imputat bid-dritt tieghu li jibqa' sieket u illi ma jwegibx ghal ebda domanda li ssirlu. Naturalment, ma jirrizultax illi l-imputat inghata d-dritt ghall-assistenza legali mill-Magistrat Inkwirenti qabel din ix-xhieda, li nghatat fl-istess jum li giet rilaxxjata l-istqarrija. Dak li trid tikkunsidra l-Qorti ghalhekk huwa jekk il-posizzjoni legali u prevalenti llum dwar l-istqarrija rilaxxjata minn persuna suspettata jew arrestata lill-Pulizija Ezekuttiva hijiex applikabbli wkoll fir-rigward ta' stqarrija li tigi kkonfermata bil-gurament quddiem Magistrat Inkwirenti u ta' xhieda quddiem tali Magistrat Inkwirenti, meta tali persuna lanqas ma tkun inghatat d-dritt ghall-assistenza legali qabel din ix-xhieda.

Din kienet il-kwistjoni deciza mill-Prim'Awla tal-Qorti Civili (sede Kostituzzjonali) fl-10 ta' Mejju 2017, fir-referenza Kostituzzjonali li saret lilha minn din il-Qorti, fis-sentenza fl-ismijiet **Il-Pulizija (Spettur Josric Mifsud) vs Josianne Azzopardi**, liema sentenza ghaddiet in gudikat. F'dak il-kaz, Azzopardi kienet irrilaxxjat stqarrija lill-Pulizija Ezekuttiva fi Frar 2004, fiz-zmien ghalhekk meta hija ma kellhiex jedd fil-ligi illi tottjeni parir legali qabel l-interrogatorju taghha, u ftit tal-hin wara, hija dehret quddiem il-Magistrat Inkwirenti, fejn mhux biss ikkonfermat din l-istqarrija, izda kompliet tixhed b'mod dettaljat. Ghal darb'ohra, Azzopardi ma nghatatx id-dritt li tikkonsulta ma' avukat ghaliex kif inghad, din ma kellhiex dan il-jedd fiz-zmien in kwistjoni. F'din is-sentenza, il-Qorti ghamlet referenza *inter alia* ghas-sentenza tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fil-kaz **A.T. v Luxembourg** tad-9 ta' April 2015, f'liema kaz ir-rikorrenti kien gie interrogat mill-pulizija minghajr l-assistenza ta' avukat, minkejja li talab tali assistenza u l-ghada gie interrogat mill-gdid minn Imhallef Investigattiv, inghata d-dritt li jkun assistit minn avukat u effettivament gie assenjat avukat u sussegwentement gie interrogat fil-presenza tieghu, izda r-rikorrenti lmenta illi ma nghatax il-possibilita` li jikkomunika mal-avukat qabel u waqt dan l-interrogatorju u in oltre illi s-semplici presenza tal-avukat, meta dan seta' biss jibqa' sieket, ma kinitx tikkostitwixxi assistenza reali u effettiva.

Dwar il-principji ta' dritt applikabbli f'dak il-kaz, dik il-Qorti sostniet hekk:

"*62. The Court reiterates that although the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial before a "tribunal" competent to determine "any criminal charge", it may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see Salduz, cited above, § 50, and Panovits v. Cyprus, no. 4268/04, § 64, 11 December 2008). Furthermore, the right set out in paragraph 3 (c) of Article 6 is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph 1 (see Imbrioscia v. Switzerland, 24 November 1993, § 37, Series A no. 275, and Brennan v. the United Kingdom, no. 39846/98, § 45, ECHR 2001-X).*

63. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see Krombach v. France, no. 29731/96, § 89, ECHR 2001-II). In order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict

that right. The Court specifies that even in such cases, denial of access to a lawyer must not unduly prejudice the rights of the accused under Article 6, and that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz, cited above, § 55). The Court found a violation of Article 6 §§ 1 and 3 (c) notwithstanding that the applicant had subsequently benefited from legal assistance and adversarial proceedings, having noted, in particular, that the restriction in question on the right to a lawyer had been based on the systematic application of legal provisions (see Salduz, cited above, §§ 56 and 61).

64. The fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or otherwise remanded in custody, whether interrogations take place or not. The Court emphasises in that respect that the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance, pointing out that discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence which the lawyer must be able to exercise freely (see Dayanan, cited above, §§ 31-33). Moreover, an accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself (see Pavlenko v. Russia, no. 42371/02, § 101, 1 April 2010).

65. The Court has had occasion to reiterate that, first of all, a person "charged with a criminal offence" within the meaning of Article 6 of the Convention is entitled to receive legal assistance from the time he or she is taken into police custody or otherwise remanded in custody and, as the case may be, during questioning by police or by an investigating judge; secondly, while a restriction of this right may in certain circumstances be justified and be compatible with the requirements of that Article, any such restriction that is imposed by a systemic rule of domestic law is inconsistent with the right to a fair trial (see Simons v. Belgium (dec.), no. 71407/10, § 31, 28 August 2012, and Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, § 80, 24 October 2013).

66. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000, and Ananyev v. Russia, no. 20292/04, § 38, 30 July 2009). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Salduz, cited above, § 59, and Yoldaş, cited above, § 51).”

F’dak il-kaz, dwar il-fatt illi r-rikorrenti gie mcahhad mid-dritt ta’ assistenza legali waqt l-interrogatorju tieghu mill-pulizija, il-Qorti nnutat li fiz-zmien in kwistjoni, il-ligi vigenti kienet tipprekludih minn tali assistenza. Ghalkemm huwa nnega l-akkuzi migjuba kontra tieghu u m’ghamel l-ebda dikjarazzjoni inkriminanti f’dan l-istadju, biss il-Qorti enfasizzat li l-istadju investigattiv ta’ proceduri kriminali huwa ta’ importanza krucjali stante li l-provi li jingabru f’dan l-istadju jiddeterminaw il-qafas li fih tigi kkunsidrata l-akkuza li talvolta imputat jew akkuzat jigi mixli biha. Il-Qorti tal-Appell li ggudikat u kkonfermat il-htija tar-rikorrenti f’dak il-kaz, kienet espressament irreferiet ghall-istqarrijiet li kien irrilaxxja r-rikorrenti waqt l-interrogatorju tieghu mill-pulizija u sabet li ma kienx konsistenti fihom. Ghalhekk, qalet il-Qorti, certament illi ma jistax jinghad illi dawn ma kellhom l-ebda influwenza fuq id-decizjoni finali. Fid-dawl ta’ dan kollu, ghaddiet biex issib vjolazzjoni tal-Artikolu 6(3)(c) tal-Konvenzjoni, flimkien mal-Artikolu 6(1) u dan “*on the grounds that the applicant did not benefit from the assistance of a defence lawyer during his police hearing and that the courts failed to provide redress for the consequences of such lack of assistance*.”

Dwar l-ilment tar-rikorrenti li huwa ma nghatax il-possibilita` li jikkomunika mal-avukat assenjat lilu qabel l-interrogatorju tieghu mill-Imhallef Investigattiv, il-Qorti wkoll sabet ksur tal-Artikolu 6(3)(c) flimkien mal-Artikolu 6(1) tal-Konvenzjoni u dan wara li osservat is-segwenti:

“*86. The Court notes the importance of consultations between the lawyer and his client upstream of the first interrogation by the investigating judge. This is an opportunity for holding crucial exchanges, if only for the lawyer to remind his client of his relevant rights. That is especially true where, as in the present case, the applicant was questioned by the police the day before without counsel and a lawyer had just been officially appointed on the morning of the interrogation by the investigating judge.*

87. The lawyer must be able to provide effective and practical assistance, not just abstract backing via his presence, during the first interrogation by the investigating judge. Accordingly, the consultation between the lawyer and his client upstream of the interrogation must be unequivocally enshrined in legislation. However, that is not the case in Luxembourg. Article 84 of the Code of Criminal Procedure does not provide that accused persons can consult their lawyers before the first interrogation by the investigating judge, as in fact recommended by Article 3 of Directive 2013/48/EU ... On the contrary, the actual wording of the provision in question gives the impression that no communication is possible before the first interrogation. Such a legislative position might suggest to accused persons that there is no point in demanding discussions with their lawyer before the first interrogation."

Il-Qorti ghalhekk tinnota illi skont din id-decizjoni, minkejja li r-rikorrenti gie assenjat avukat qabel it-tieni interrogatorju tieghu, din id-darba minn Imhallef Investigattiv, la darba huwa ma nghatax l-opportunita` li jikkomunika mal-istess qabel tali interrogatorju, tali assistenza ma kinitx wahda effettiva, bir-rizultat li gie ddikjarat illi d-dritt tieghu ghal smiegh xieraq kien gie lez.

Fis-sentenza taghha **Il-Pulizija vs Josianne Azzopardi**, fuq indikata, il-Qorti ghamlet referenza ghal diversi sentenzi ohrajn tal-Qorti Ewropea, fosthom **Mario Borg v Malta** (12 ta' Jannar 2016), fejn dik il-Qorti osservat *inter alia* illi "*no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see Salduz, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law…*" [sottolinear ta' din il-Qorti] u illi l-fatt illi r-rikorrenti ma nghatax id-dritt ghall-assistenza legali fl-istadji inizjali qabel il-proceduri (*pre-trial stage*) bhala rizultat ta' restrizzjoni sistematika applikabbli ghall-persuni akkuzati kollha m'huwiex konformi mar-rekwiziti tal-Artikolu 6 tal-Konvenzjoni.

Dik il-Qorti ghamlet referenza wkoll ghal sentenza ohra tal-istess Qorti diversament preseduta fl-ismijiet **Raymond Bonnici vs Avukat Generali** deciza fid-29 ta' Marzu 2017, fejn inghad hekk:

"*1. Huwa ormai inkontestabbli li l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni jipprotegu d-dritt ta' persuna suspettata li titlob l-assistenza ta' avukat sa mill-ewwel interrogatorju li jsirilha mill-pulizija, ghajr ghal cirkustanzi mpellenti li jippermettu r-restrizzjoni ta' dan id-dritt;*

2. Fi kwalunkwe kaz, kull restrizzjoni ghal dan id-dritt m'ghandhiex tippregudika rrimedjabilment id-drittijiet tal-akkuzat taht il-Kostituzzjoni u l-Konvenzjoni;

3. It-thaddim ta' dawn il-principji huwa partikolarment necessarju f'kazijiet fejn persuna tkun iffacjata b'akkuzi serji ghaliex huwa fl-isfond tal-pieni l-aktar iebsa li r-rispett tal-Istat lejn id-dritt ghal smiegh xieraq ghandu jkun garantit sal-oghla grad f'socjeta` demokratika;

4. Id-dritt tal-akkuzat jigi pregudikat b'mod irrimedjabbli meta huwa jirrilaxxja stqarrijiet minghajr assistenza legali, anke jekk b'mod volontarju u wara li nghata s-solita twissija mill-Pulizija, liema stqarrijiet jintuzaw kontrih fil-proceduri kriminali li jinfethu kontra tieghu;

5. Inoltre, ghalkemm <u>ic-cahda ta' dan id-dritt hija wahedha leziva rrispettivament mill-vulnerabilita' o meno tal-persuna ndagata,</u> jekk jigi muri li fl-istadju tal-interrogazzjoni l-persuna nvestigata tkun fi stat fragli, dan ukoll ikollu mpatt negattiv fuq id-dritt ghas-smiegh xieraq ta' dik il-persuna fil-proceduri li jkunu tmexxew kontriha.

Stabbiliti dawn il-principji din il-Qorti però ma tistax ma tiehux in konsiderazzjoni gurisprudenza aktar ricenti li fil-fehma taghha sahhet dak minnha enfasizzat fid-decizjonijiet surriferiti, cioè <u>kemm kienet incisiva u determinanti l-istqarrija mehuda qabel l-emendi msemmija tas-sena 2010, allura bla dritt ta' assistenza legali senjatament waqt l-interrogazzjoni, fil-process kriminali innifsu u l-aktar il-piz moghti lilha mill-Qorti fid-decizjoni taghha, jekk instabet htija</u>. Dan ghaliex ebda stqarrija hekk mehuda ma tista tigi apprezzata jekk mhux fid-dawl tal-proceduri kriminali fl-intier taghhom u b'mod partikolari l-impatt taghha fuq il-gudizzju finali." [sottolinear tal-Qorti]

Wara li fis-sentenza taghha **<u>Il-Pulizija vs Josianne Azzopardi</u>**, il-Qorti rreferiet ukoll ghas-sentenza tal-Qorti Kostituzzjonali fl-ismijiet **<u>Il-Pulizija vs Clayton Azzopardi</u>** deciza fit-13 ta' Frar 2017, fejn il-Qorti ghamlet distinzjoni bejn dawk il-kazijiet fejn il-proceduri kriminali jkunu ntemmu u dawk li jkunu ghadhom pendenti u fejn fir-rigward ta' dan l-ahhar kaz, sostniet illi la darba l-proceduri jkunu ghadhom pendenti ma jkun sehh ebda ksur tal-jedd ghal smiegh xieraq, izda jkun hemm dan il-ksur jekk isir uzu mill-istqarrija (mehuda minghajr il-jedd ghall-assistenza legali) fil-process kriminali, kompliet hekk:

"*Din il-Qorti taqbel perfettament mal-insenjament tal-Qrati fid-deċiżjonijiet ċitati. L-Avukat Ġenerali ma ġab l-ebda ġustifikazzjoni għaliex kien hemm restrizzjoni għall-aċċess tar-rikorrenti għall-avukat ħlief li l-liġi kif kienet ma kinitx tipprovdi*

għal tali dritt favur persuna arrestata. B'applikazzjoni ta' dawn il-prinċipji, il-Qorti ssib illi minkejja li d-dritt tar-rikorrenti għal smigħ xieraq ma ġiex leż f'dan l-istadju, ċertament illi sseħħ leżjoni f'każ illi l-istqarrija li tat lill-pulizija fit-13 ta' Frar 2004 u dik li għamlet aktar tard dak inhar quddiem il-Maġistrat Inkwerenti jibqgħu jagħmlu parti mill-proċeduri kriminali pendenti quddiem il-Qorti referenti. Il-Qorti ma tistax ma tikkunsidrax ukoll illi r-rikorrenti kellha biss tmintax-il sena meta seħħ dan l-episodju u kienet l-ewwel darba li ġiet arrestata u tressqet il-Qorti, fejn mhux biss ikkonfermat l-istqarrija tagħha kif kienet minghaliha li ser tagħmel, iżda effettivament irrilaxxat stqarrija oħra pjuttost dettaljata u dan kollu mingħajr ma kienet ingħatat xi forma ta' assistenza legali, bir-riżultat illi, kif jikkonferma wkoll l-Ispettur Josric Mifsud, hija kienet aġitata waqt li kienet qiegħda tirrilaxxa l-istqarrija tagħha." [sottolinear tal-Qorti]

Jirrizulta ghalhekk illi a bazi tas-sentenzi minnha citati, f'dan l-ahhar kaz, il-Qorti qieset bl-istess mod l-istqarrija li giet rilaxxjata mir-rikorrenti lill-Pulizija Ezekuttiva u x-xhieda taghha moghtija quddiem il-Magistrat Inkwirenti u dan stante li fiz-zewg kazijiet, ma kinitx inghatat id-dritt ghall-assistenza legali. Qieset ukoll in oltre il-vulnerabilita` tal-persuna interrogata ossia li kienet ta' eta` tenera u li din kienet l-ewwel darba li kienet giet arrestata u mressqa quddiem il-Qorti.

Il-Qorti tqis ukoll illi l-jedd ghall-assistenza legali gie anke estiz f'dawk il-kazijiet fejn akkuzat gie moghti l-jeddijiet kollha vigenti skont il-ligi ta' pajjizu, inkluz id-dritt tieghu ghas-silenzju u meta huwa kien effettivament ezercita dan id-dritt u ma wiegeb ghall-ebda mistoqsija maghmula lilu. F'tali cirkostanzi, il-Qorti Ewropea ukoll sabet li kien hemm vjolazzjoni tal-artikolu 6(3) u dan ghaliex ma kienx ikkonsulta ma' avukat biex jispjegalu l-jeddijiet tieghu skont il-ligi dwar id-dritt tieghu ghas-silenzju u d-dritt li ma jinkriminax ruhu, b'dan ghalhekk illi l-Qorti implikat illi t-twissija moghtija mill-ufficjal investigattiv m'hijiex bizzejjed. F'**Dayanan v Turkey**, deciza fit-13 ta' Ottubru 2009, il-Qorti Ewropea qalet hekk:

"*33. In the present case it is not disputed that the applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see Salduz, cited above, §§ 27 and 28). A systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, notwithstanding the fact that the applicant remained silent when questioned in police custody.*" [sottolinear tal-Qorti]

Din il-Qorti hija konxja wkoll mis-sentenzi tal-Qorti Kostituzzjonali fl-ismijiet **Il-Pulizija vs Tyrone Fenech** u **Pulizija vs Amanda Agius** decizi t-tnejn fit-22 ta' Frar 2013, fejn il-Qorti sabet illi l-uzu tal-istqarrija rilaxxjata lill-pulizija, minghajr

l-assistenza ta' avukat, ikun bi ksur tal-Artikolu 6 tal-Konvenzjoni u dan ghaliex din ma nghatatx f'cirkostanzi li jiggarantixxu l-legittimita` tal-istess, tenut kont tal-vulnerabilita` tal-istess Fenech u Agius ossia tal-eta` taghhom, fiz-zmien li ttiehdet l-istqarrija. Dik il-Qorti kkonkludiet ukoll li ma jistax jinghad l-istess fir-rigward ta' stqarrijiet mahlufa quddiem Magistrat Inkwirenti ai termini tal-Artikolu 24A(12) u (13) tal-Kap. 101 tal-Ligijiet ta' Malta u dan ghaliex "*Il-preżenza ta' maġistrat, uffiċjal ġudizzjarju indipendenti mill-pulizija, hija garanzija biżżejjed illi l-istqarrija tingħata b'għażla ħielsa, volontarjament, u ma tiġix imgiegħla jew meħuda b'theddid jew b'biża', jew b'wegħdiet jew bi twebbil ta' vantaġġi*."

Biss il-Qorti tinnota illi wara dawn is-sentenzi u wara li sussegwentement, inghatat is-sentenza **<u>Mario Borg v. Malta</u>** mill-Qorti Ewropea, saru zviluppi gurisprudenzjali in linea ma' din l-ahhar sentenza, kif jirrizulta mis-sentenzi citati izjed 'il fuq, inkluz dawk moghtija mill-Qorti Kostituzzjonali. In oltre ricentement, fil-5 ta' Ottubru 2018, fil-kawza fl-ismijiet **<u>Christopher Bartolo vs Avukat Generali et</u>**, f'liema kaz ir-rikorrenti kien inghata l-jedd ghall-parir legali qabel irrilaxxja wahda miz-zewg stqarrijiet tieghu, il-Qorti Kostituzzjonali qalet hekk dwar l-istqarrijiet rilaxxjati mill-istess rikorrenti minghajr il-jedd ta' assistenza legali <u>waqt</u> l-interrogatorji tieghu:

"*36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil-proceduri kriminali, mhux in kwantu ghall-ammissjonijiet, izda in kwantu l-kontenut taghhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan ir-rigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jistax f'dan l-istadju jigi determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk il-proceduri, jekk l-istqarrijiet jithallew fil-process tal-proceduri kriminali, dawn wisq probabbilment ser isir uzu minnhom mill-Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil-kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.*

37. Fid-dawl tal-premess <u>it-tehid tal-istqarrijiet zgur li ser ikollhom impatt fuq l-ezitu tal-process kriminali u, ladarba dan isir, x'aktarx ser isir ksur tad-dritt tal-rikorrent ghal smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mir-rikorrent fl-assenza ta' avukat li jassistih</u>. Ghalhekk huwa xieraq li, filwaqt li f'dan l-istadju ma jistax jinghad jekk kienx hemm lezjoni ta' dan id-dritt fundamentali tar-rikorrent peress li l-proceduri kriminali ghadhom pendenti, dawn ma jithallewx jibqghu fl-inkartament tal-process kriminali." [sottolinear tal-Qorti]

Il-Qorti tqis illi mill-gurisprudenza tal-Qorti Ewropea huwa evidenti li m'huwiex bizzejjed li jigi assigurat li l-persuna suspettata jew arrestata tkun giet mwissija li ghandha d-dritt ghas-silenzju, izda ghandha tinghata wkoll id-dritt ghall-assistenza legali sa mill-bidu nett tal-investigazzjoni tal-pulizija. Il-Qorti Ewropea ma jidhirx li taghmel distinzjoni bejn stqarrija rilaxxjata lill-pulizija u stqarrija guramentata quddiem awtorita` gudizzjarja, minkejja li din tal-ahhar hija indipendenti mill-Pulizija Ezekuttiva. Fil-fehma tal-Qorti, la darba dan id-dritt ghandu jinghata meta persuna arrestata taghmel stqarrija lill-pulizija, anzi mill-fazijiet inizzjali tal-investigazzjoni, l-istess ghandu japplika fir-rigward ta' stqarrija guramentata moghtija quddiem awtorita` gudizzjarja, f'dan il-kaz il-Magistrat Inkwirenti, b'mod partikolari meta wiehed iqis illi stqarrija guramentata, min-natura taghha u proprju ghaliex hija guramentata, ghandha izjed sahha u valur probatorju minn stqarrija rilaxxjata lill-pulizija. F'dan il-kaz, il-Magistrat Inkwirenti, kif diga` inghad, rega' wissa lill-imputat bid-dritt tieghu ghas-silenzju izda oltre minn hekk, ma kienx f'posizzjoni li jaghtih id-dritt ghall-assistenza legali la darba dan ma kienx possibbli taht il-ligi Maltija. Fil-fehma tal-Qorti, minkejja l-indipendenza tal-Magistrat Inkwirenti, dan tal-ahhar m'ghandux il-funzjoni ta' avukat difensur, ma jagixxix ta' sostitut tieghu, anzi certament li m'huwiex tenut u m'ghandux jaghti pariri lill-persuna suspettata jew arrestata li tidher quddiemu biex tigguramenta l-istqarrija taghha jew sabiex tixhed. F'dan il-kaz, diga` kien evidenti minn dak li kien stqarr mal-pulizija, illi l-imputat eventwalment kien ser jigi akkuzat bir-reati li bihom gie mixli f'dawn il-proceduri. Imbaghad, meta wiehed iqis illi fis-sentenza ricenti tal-Qorti Kostituzzjonali li ghaliha saret referenza izjed 'il fuq, minkejja illi r-rikorrenti f'dak il-kaz, kien inghata l-jedd li jikkonsulta ma' avukat qabel l-ewwel interrogatorju tieghu u anke ezercita dan il-jedd, il-Qorti ordnat illi dawn ma jithallewx fl-inkartament la darba kien ser ikollhom impatt fuq l-ezitu tal-process kriminali – f'dak il-kaz, kuntrarjament ghal dan il-kaz, l-ezitu in kwantu l-piena u mhux in kwantu l-htija o meno tal-istess rikorrenti la darba huwa rregistra ammissjoni fil-proceduri – u dan stante illi ma nghatax il-jedd ghall-assistenza legali waqt l-interrogatorji tieghu, izjed u izjed jidhrilha illi ghandha tqis kemm l-istqarrija tal-imputat odjern rilaxxjata minnu lill-Pulizija Ezekuttiva, kif ukoll ix-xhieda tieghu quddiem il-Magistrat Inkwirenti, li kienu certament ta' pregudizzju ghalih, bhala inammissibbli u ghalhekk qeghda tiskartahom. Dan naturalment japplika wkoll u bl-istess mod ghal kwalsiasi referenza li ssir mix-xhieda tal-Prosekuzzjoni ghal dak kollu li stqarr l-istess imputat qabel jew waqt l-interrogatorju tieghu, kif ukoll quddiem il-Magistrat Inkwirenti.

Ikkunsidrat ulterjorment:

Skartati ghalhekk kemm l-istqarrija rilaxxjata mill-imputat lill-pulizija, kif ukoll ix-xhieda tieghu quddiem il-Magistrat Inkwirenti, jehtieg illi l-Qorti tikkunsidra l-imputazzjonijiet odjerni fid-dawl tar-rimanenti provi formanti parti mill-atti processwali.

L-Ispettur Joseph Agius xehed darbtejn f'dawn il-proceduri ossia nhar is-17 ta' Jannar 2012 u nhar it-8 ta' Lulju 2013.[1] Huwa jghid illi dakinhar tad-29 ta' Novembru 2009, wara li l-pulizija rceviet sensiela ta' rapporti fis-sens illi gewwa l-fond numru 9, Triq it-Trinita`, Marsa kien qed ikun hemm grupp ta' zghazagh li kienu qeghdin jiehdu d-droga u wara li fl-istess jum dahal rapport simili, huwa baghat lill-pulizija sabiex jaghmlu tfittxija f'dan il-post. Skont ix-xhud, hekk kif habtu, Adrian Zammit fetah il-bieb u saritlu tfittxija, waqt liema tfittxija, fuq il-persuna tieghu, instab qartas bid-droga eroina. Ix-xhud jghid ukoll x'qal l-imputat lill-pulizija prezenti wara din is-sejba – xhieda din illi hija inammissibbli ghaliex dak li seta' ntqal mill-imputat intqal minnu minghajr il-jedd ghall-assistenza legali u fi kwalunkwe kaz tikkostitwixxi *detto del detto*, bhal *del resto*, il-bqija tax-xhieda tal-Ispettur Agius li ma kienx prezenti ghat-tfittxija in kwistjoni.

Xehed ukoll PS 1195 Conrad Debattista, li kien prezenti ghal din it-tfittxija u effettivament huwa l-unika ufficjal tal-pulizija minn dawk li kienu prezenti, li xehed f'dawn il-proceduri. Jghid illi dakinhar, kienu rcevew rapport fis-sens illi fir-residenza fuq imsemmija, dahlu erba' persuni li kienu qeghdin jabbuzaw mid-droga. Jghid hekk: "*Ovvjament ahna morna fuq il-post, wara li dahlet din it-telefonata, habbatna l-bieb, fejn mit-tieqa tar-residenza li tigi kwazi sular gholi, hareg Adrian Zammit, li qed naghrfu hawnhekk fl-awla u qalilna li niezel u nizel, fetah il-bieb u ahna prattikament bqajna telghin, dhalna fil-kamra tieghu, fejn hemmhekk kien hemm erba' persuni ohra li dawn kienu Nikolina Portelli, Kevin Saliba, Robert Spiteri, fejn dawn dehru mahsudin fil-presenza taghna, fejn dawn saret tfittxija kemm fuqhom u anke fil-kamra, li hi ta' Adrian, fejn hemmhekk instabu diversi oggetti relatati mad-droga, bhalma huma marfa mahruqha, diversi lighters, pakketti tar-Rizla u dawn l-oggetti, fejn imbaghad saret tfittxija fuq Robert Spiteri, fejn hemmhekk instabet sachet kannella li din giet elevata*."[2]

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[1] Ara a fol. 8 sa 10 tal-process u a fol. 54 u 55 tal-process.
[2] Ara a fol. 48 u 49 tal-process.

Huwa evidenti illi la darba skartata l-istqarrija u x-xhieda tal-imputat odjern quddiem il-Magistrat Inkwirenti, ix-xhieda ta' PS 1195 Conrad Debattista hija prova determinanti u dan ghaliex, kif inghad, kuntarjament ghall-Ispettur Joseph Agius, huwa kien wiehed mill-ufficjali tal-pulizija li kienu prezenti fuq il-post meta saret it-tfittxija in kwistjoni. Fil-waqt illi x-xhieda tal-Ispettur Agius fis-sens illi l-qartas in kwistjoni nstab fil-pussess tal-imputat odjern tibqa' biss *detto del detto* u ghalhekk taghmel prova biss tal-fatt illi dak il-kliem intqal, izda mhux tal-veracita` tieghu, mill-banda l-ohra x-xhieda tas-Surgent Debattista, li kif inghad kien prezenti, tipponta mhux lejn l-imputat odjern, bhala l-persuna li kienet fil-pussess tad-droga eroina, izda lejn terza persuna li kienet ukoll prezenti fil-fond in kwistjoni.

F'dawn ic-cirkostanzi, il-Qorti tqis ghalhekk illi ma jirrizultax sodisfacentement ippruvat fil-grad rikjest mil-ligi, illi fil-jum in kwistjoni, l-imputat instab fil-pussess tad-droga eroina u per konsegwenza ma jistax jinstab hati tal-ewwel imputazzjoni kif dedotta fil-konfront tieghu. Fir-rigward tat-tfittxija li wasslet ghall-kaz odjern, la jirrizulta l-pussess 'semplici' u ghalhekk wisq inqas il-pussess aggravat tad-droga eroina. In kwantu l-pussess semplici, reat kompriz u nvolut fir-reat ikkontemplat fl-ewwel imputazzjoni, huwa veru illi fix-xhieda tieghu f'dawn il-proceduri, l-imputat meta mistoqsi mill-avukat difensur "*Dan il-kaz imur lura ghall-2009. Spjega lill-Qorti jekk kellekx xi problema*"[3], huwa jwiegeb illi kellu problema tal-eroina, izda mbaghad mistoqsi kemm kellu zmien fiz-zmien in kwistjoni, huwa jghid illi kellu 25 sena. La darba l-imputat twieled f'Dicembru 1979, isegwi illi huwa kellu 25 sena fis-snin 2004/2005. Veru wkoll illi l-imputat jghid illi kien jiehu d-droga kuljum, izda tenut kont tal-fatt illi x-xhieda tieghu kienet wahda generika, mentri l-imputazzjonijiet odjerni jirreferu specifikatament ghad-29 ta' Novembru 2009 u l-ahhar granet ta' qabel din id-data, a bazi tax-xhieda tal-istess imputat, il-Qorti tista' biss tassumi illi f'dawk il-jiem l-imputat kien fil-pussess tad-droga eroina u ghalhekk, f'dawn ic-cirkostanzi, ma jidhrilhiex li tista', lil hinn minn kull dubju ragjonevoli, tikkonkludi illi l-imputat kien fil-pussess ta' tali droga f'dawn il-jiem.

Ghaldaqstant, il-Qorti tqis illi l-ewwel imputazzjoni fil-konfront tal-imputat ma tirrizultax sodisfacentement ippruvata.

La darba m'hijiex tinstab reita` fl-imputat in kwantu l-ewwel imputazzjoni, isegwi wkoll illi huwa ma jistax jinstab hati tat-tieni imputazzjoni.

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[3] Ara a fol. 82 tal-process u t-twegiba a fol. 83.

Konkluzjoni

Ghal dawn il-motivi, il-Qorti qed issib lill-imputat mhux hati tal-imputazzjonijiet migjuba kontra tieghu u qeghda tilliberah minnhom.

Konsegwentement, lanqas m'hija tordna lill-imputat sabiex ihallas l-ispejjez tal-esperti mahtura f'dawn il-proceduri.

Tordna d-distruzzjoni tad-droga esebita bhala Dokument MB, hekk kif din is-sentenza tghaddi in gudikat u dan taht il-harsien tar-Registratur li ghandu jirredigi *proces-verbal* li jiddokumenta l-procedura tad-distruzzjoni, liema dokument ghandu jigi nserit fl-atti ta' din il-kawza mhux aktar tard minn hmistax-il jum minn tali distruzzjoni.

Natasha Galea Sciberras
Magistrat