Qorti tal-Appell Kriminali

Onor. Imhallef Dr. Edwina Grima LL.D.

Appell Nru: 514 / 2017

Il-Pulizija

Vs

Maximilian Ciantar

Illum s-27 ta' Frar 2019

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellant Maximilian Ciantar detentur tal-karta tal-identita` Maltija bin-numru 75690M akkuzat quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli:

> Fis-27 ta' Marzu, 2016 ghall-habta tal-4:15 ta' filghodu f' Had-Dingli bil-hsieb li jikkommetti r-reat ta' serq kwalifikat bil-vjolenza, bil-hin, bil-mezz kif ukoll bil-valur li ma jeccedix l-elfejn tliet mija disgha u ghoxrin euro mill-fond Xmun Farmhouse, Triq ir-Rabat, Had-Dingli wera' dan il-hsieb billi b'atti esterni ta bidu ghall-ezekuzzjoni ta' dan id-delitt liema delitt ma giex ezegwit minhabba xi haga accidentali u indipendenti mill-volonta' tieghu;
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> U aktar talli sar recidiv ai termini tal-Artikoli 49 u 50 tal-Kodici Kriminali b' diversi sentenzi moghtija mill-Qorti u li huma definittivi u li ma jistghux jinbidlu.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, tad-29 ta' Novembru, 2017, fejn il-Qorti wara li rat 1-Artikoli 17(h), 41(1)(a), 49, 50, 261(a)(b)(c)(f), 262(1)(b)(c)(2), 263(b), 267, 270, 276 u 277(b) tal-Kodici Kriminali, il-

Qorti sabet lil Maximilian Ciantar hati tal-imputazzjonijiet migjuba kontra tieghu u ikkundannatu ghall-piena ta' disa' xhur prigunerija.

Rat ir-rikors tal-appell tal-appellant Maximilian Ciantar, pprezentat fir-registru ta' din il-Qorti fil-5 ta' Dicembru, 2017, fejn talab lil din l-Qorti sabiex tirrevoka s-sentenza appellata u tilliberah minn kull htija u piena.

Rat illi l-aggravju huwa car u manifest u jikkonsisti f' dan li gej.

> "L-Ewwel Onorabbli Qorti minkejja l-istatement illi tant ibbazat fuqu ma setghetx tasal ghall-ebda konkluzjoni dwar xi rejita hlief ghall-fatt illi Maximillian Ciantar kien fuq il-post.
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> Sabitha difficli ghaliex m' hemm l-ebda ammissjoni ta xi tentattiv ta' serq minn naha tal-istess Maximillian Ciantar. Lanqas ix-xhieda ma qalu illi Maximillian Ciantar ghamillhom xi haga. Kull ma qalu kien li gharfuh minn ghajnejh ghax skur. B' dak il-kriterju in-nies li jigu identifikati b' dan il-mod f' MaIta, ikun hawn iktar minn nofs il-popolazzjoni.
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> Imbaghad sar zbaIl mill-Pulizija wkoll meta hadu lix-xhieda u wrew lil Maximillian Ciantar quddiemhom. Ma kien hemm l-ebda Identity Parade, illi ghalkemm m' hijiex obbligatorja, hija gurisprudenza tal-Qorti tal-Appell fil-kas - Pulizija kontra Stephen Zammit, fejn il-Qorti tal-Appell qalet li mhux kuntent bil-mod kif issir l-identifikazzjoni meta l-persuni jigu murija lix-xhieda li se jixhdu kontrihom il-Qorti. Pero' l-akbar zball bir-rispett kollu huwa tal-Qorti. Meta giet biex titkellem fuq dak li sejhitlu "motiv" qalet li Maximillian Ciantar ma tax wisq informazzjoni fuq il-mottiv u l-Qorti setghet tasal ghal dak il-motiv minn dak illi kien qal Daryl Anderson li kien fuq il-post u li gie arrestat.
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> Illi bir-rispett kollu, kontra dan hemm id-divjet assolut tal-Artiklu 661 tal-Kodici Kriminali illi jghid li kwalunkwe konfessjoni u kwalunkwe dikjarazzjoni ma tistax tiswa hlief favur jew kontra l-persuna li ghamlitha, Imma ma tistax tkun ta' pregudizzju ghall-ebda persuna ohra. Hawnhekk manifestament il-Qorti wzat id-dikjarazzjonijiet ta' Daryl Anderson kontra l-appellanti u dan f' cirkostanzi meta l-istess Maximillian Ciantar certament ma kellux l-opportunita' illi jaghmel kontro - ezami lil Daryl Anderson.
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> Lanqas kieku kellu dak id-dritt il-ligi taghna ma tippermettix illi jkun hemm dak li t-Taljani jsejhulu chiamata di correo.
>
> Ghaldaqstant l-esponenti jindika illi ma kienx hemm provi legali bizejjed biex huwa jinstab hati tar-reat ta' tentattiv ta' serq.

Rat l-atti u d-dokumenti kollha.

Rat il-fedina penali aggornata tal-appellant esebita mill-prosekuzzjoni fuq ordni tal-Qorti.

Semghet trattazzjoni.

Ikkunsidrat:

L-appellant fil-aggravji minnu intentati jilmenta illi l-Ewwel Qorti malament strahet fuq l-identifikazzjoni maghmula mill-vittmi tal-persuna tieghu bhala wiehed mill-aggressuri taghhom u dan ghaliex din ma hijiex wahda b'sahhitha u ma saritx skont il-ligi. Mhux biss izda jikkontendi illi dak li jistqarr l-komplici tieghu fil-kummissjoni tar-reat ma jista' qatt jiswa bhala prova kontra tieghu, u l-Ewwel Qorti ma kellhiex tistrieh fuq il-mottiv wara l-presenza tal-appellant fuq ix-xena tar-reat sabiex issib htija ghar-reat lilu addebitat. Jishaq l-appellant illi huwa ma ikkometta l-ebda att materjali li ta bidu ghall-esekuzzjoni tar-reat tas-serq.

Illi apparti l-addebitu tar-reċidiva, l-appellant jinsab akkużat bil-komplicita fir-reat tat-tentattiv ta' serq aggravat. Dan meta nhar is-27 ta' Marzu 2016 għall-ħabta tal-erbgħa u nofs ta' filgħodu żewġ persuni mgħammda daħħlu fir-razzett tal-parti leza Raymond u Angie Azzopardi waqt li dawn kienu qedgħin jaħilbu il-baqar tagħhom u dan bil-ghan li jisirquhom. Is-sinjuri Azzopardi spjegaw kif wieħed mil-malviventi kien liebes *crash helmet* u l-ieħor kellu speċi ta' xalla sewda ma rasu fejn dan ta' l-aħħar kellu biss għajnejħ jidru u kellu sikkina kbira f'idejħ ukoll. Dan mar dritt għal fuq Raymond Azzopardi li kif raħ sejjer lejħ armat bis-sikkina ħarab minn fuq il-post b'dan id-delinkwent telaq jigri warajħ. L-ieħor liebes il-*crash helmet* dar fuq Angie Azzopardi, ordnalha tinża l-qalziet, fejn taha daqqiet bil-ponn u ordnalha wkoll sabiex taghtih it-telefown cellulari tagħha jew flus, iżda hi qaltlu li ma kellha xejn fuqha allavolja kienet taf li żewġha kellu elf u mitt Euro fi flus kontanti fuq il-persuna tieghu. Il-vittmi igharrfu lill-appellant minn għajnejħ u mis-sura tiegħu filwaqt li dan kien miżmum għand il-pulizija meta nsertaw marru hemm

b'kumbinazzjoni. Jidentifikawh ukoll fil-qorti meta jitilghu jaghtu ix-xiehda taghhom.

L-appellant fl-istqarrija rilaxxjata minnu lill-pulizija jpoggi lilu nnifsu fuq il-post tal-inċident bħala wieħed mill-aggressuri. Hu filfatt jispjega li kien irċieva messaġġ mill-persuna l-oħra li akkumpanjatu u li kien spjegalu x'kienu l-intenzjonijiet tiegħu. Hu filfatt akkumpanjaħ allavolja ma kienx jaf fejn kien ser jieħdu peress li qatt ma kien mar qabel u filfatt ikkonferma u kkorrobora dak li stqarru l-vittmi quddiem l-Ewwel Qorti, kif meta daħħlu fuq il-vittmi, dawn kienu qed jahilbu il-baqar u Raymond Azzopardi ħarab jiġri u hu telaq jiġri warajħ, filwaqt li sieħbu kien mar fuq Angie Azzopardi. Hu jiddeskrivi din l-esperjenza bħala 'ċuċata' u 'avventura' li mhux ser jerġa' jikkometti.

Ikkunsidrat:

Issa l-appellant jikkontesta l-identifikazzjoni tieghu maghmula mill-vittmi ta' dan ir-reat. Ighid illi din ma kenitx b'sahhitha bizzejjed sabiex twassal lill-Ewwel Qorti issibu hati tar-reat lilu addebitat. Mhux biss izda jishaq illi din kienet ikkontaminata minn influwenza ezercitata fuq il-vittmi mill-pulizija stess meta dawn indikawlhom l-agressuri taghhom meta kienu fl-ghassa tal-pulizija.

Il-Qorti moghnija bir-regoli illi tfasslu fil-kawza **R vs Turnbull** fl-Ingilterra, li ghalkemm ma jikkostitwixxu l-ebda regola taht il-ligi Maltija, ghandha linji gwida imfassla fil-kaz tal-identifikazzjoni tal-persuna akkuzata. Illi dana gie ukoll sottolinjat f'sentenza moghtija minn din il-Qorti (kif diversament ippresjeduta) fl-ismijiet **Il-Pulizija vs Stephen Zammit** (deciza 16 ta' Lulju 1998) u iccitata mill-appellant, 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 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."

Dan ghaliex l-identifikazzjoni jew ir-rikonoxximent maghmul mix-xhud jibqa' dejjem suxxettibbli ghall-imperfezzjonijiet tal-osservazzjonijiet umani u ghall-possibbilitajiet kollha ta' zball genwin illi ifisser allura illi min hu imsejjah biex jiggudika irid japplika dik il-kawtela specjali qabel ma jasal ghal kundanna ibbazata fuq dik l-identifikazzjoni.

Illi din il-Qorti tqies illi l-osservazzjoni maghmula mill-konjugi Azzopardi tal-aggressuri taghhom kienet wahda preciza. Ibda biex, ghalkemm Raymond Azzopardi ighid li gharaf lill-appellant minn ghajnejh biss u mill-istatura tieghu, madanakollu osserva mhux biss kif kien mghotti u x'kellu f'idejh, izda innota ukoll li l-malvivent l-iehor kien liebes *crash helmet*. Ighid li qabel ma harab minn fuq il-post osserva li wiehed mill-malviventi kien irqiq u naqra twil u l-iehor kien naqra mibni iktar. Jidher ukoll minn dak li jixhed illi osserva dak li kien liebes l-appellant tant illi meta l-ghada huwa identifikah fl-ghassa tal-pulizija seta' josserva li dan ma kienx

baqa' liebes l-istess hwejjeg. Angie Azzopardi minn naha taghha tghid hekk meta tara l-aggressuri:

> "dahal ragel wiehed bil-crash helmet u l-iehor kellu wiccu mghammad bix-xalla, kellu ghajnejh biss jidhru."

Tkompli tghid li dak li kien liebes ix-xalla kien twil u rqiq, filwaqt li anke il-persuna li kien liebes il-*crash helmet* kellu ghajnejh u imniehru mikxufin, u kien iktar qawwi mill-istatura u ftit iqsar. Ghalkemm zewgha jitlaq jigri minn fuq il-post hija tibqa' wieqfa fejn kienet tant illi osservat anke l-ghamla tas-sikkina li wiehed mill-malviventi kellu f'idejh. Tghid li hija giet aggredieta mill-aggressur li kien liebes il-*crash helmet* tant illi osservat illi kellu ghajnejh homor u kien liebes ingwanti suwed. Kif wasslu l-pulizija fuq il-post tghid li lil dawn in-nies ma rathomx iktar.

Illi fix-xiehda taghha Azzopardi tghid illi l-pulizija kienu sabu il-karta tal-identita` ta' wiehed mill-malviventi gewwa vettura tal-ghamla Peugeot lewn abjad, uzata minnhom sabiex wasslu fuq il-post, fejn hija gharrfitu bhala l-aggressur taghha u cioe' dak li kien liebes il-*crash helmet.* Din il-persuna giet identifikata bhala certu Darryl Anderson li kien l-istess persuna li flimkien mieghu l-appellant erhilha lejn ir-razzett tal-konjugi Azzopardi f'dik l-ghodwa tas-27 ta' Marzu 2016.

Illi ezaminati l-atti tal-kawza jirrizulta illi s-sejbien ta' htija mill-Ewwel Qorti gie imsejjes mhux biss fuq din l-identifikazzjoni izda ukoll fuq dak mistqarr mill-appellant fl-istqarrija minnu rilaxxjata fejn id-dettalji li jaghti dwar dak li sehh f'dik l-ghodwa jikkombacjaw perfettament mal-verzjoni tal-fatti moghtija miz-zewg vittmi. L-appellant ma jiċħadx li kien fuq il-post fil-kumpanija ta' persuna oħra. Li ma jsemmiex hu li kien armat b'sikkina u li kien mgħotti b'xalla sewda b'għajnejħ biss jidru, ċirkostanzi li ġew ikkonfermati mill-vittmi.

Mhux biss izda l-appellant fl-istqarrija tiegħu jindika ċar li kien jaf ir-raguni għalfejn kien sejjer fir-rażżett ta' Azzopardi u dan peress li Daryl Anderson kien infurmaħ qabel iltaqghu f'dik il-lejl li kienu sejrin gewwa razzett f' Had Dingli, sabiex jakkwistaw xi flus sabiex b'hekk tfassal 'l hekk imsejjah *common design* u cioe' il-ftehim pre-ordinat bejniethom mehtieg sabiex ikun hemm il-komplicita' fil-kummissjoni ta' reat. Fil-fatt kien hemm miftiehem bejniethom il-modalita' ta' kif kellu jigi kommess is-serq peress illi l-hallelin ipprezentaw rwiehhom mghammda

wiehed b'*crash helmet* u l-iehor b'xall iswed ma' rasu u armati. Mhux biss izda kien l-appellant, u mhux siehbu, li kellu is-sikkina f'idejh. Ma jistax allura l-appellant jikkontendi illi huwa ma kienx jaf il-mottiv wara it-talba maghmula minn Anderson sabiex jakkompanjah f'dik l-ghodwa. Il-Qorti ma tistax ma tistaqsix għalfejn l-appellant kien mgħammad u armat jekk ma kienx jaf b'dak li kien ser isir u jekk hu wkoll ma kienx mar hemmhekk volontarjament bl-għarfien tal-att li kien ser jiġi kommess.

Finalment l-ilment vventilat mill-appellant dwar il-mod kif l-Ewwel Qorti wasslet għall-movent tal-appellant f'dan il-każ, ghandu jinghad illi l-movent mhuwiex relevanti ai fini ta' sejbien ta' ħtija u fi kwalunkwe kaz ma jirrizultax illi Daryl Anderson, l-allegat komplici xehed f'dawn il-proceduri sabiex b'hekk ma hemmx l-applikabilita' tal-artikolu 661 tal-Kodici Kriminali kif jikkontendi l-istess appellant. Dan ghaliex l-Ewwel Qorti straħet biss fuq it-testimonjanza tal-vittmi u l-istqarrija tal-appellant sabiex wasslet ghas-sejbien ta' htija.

Ikkunsidrat,

Illi stabbilit kwindi illi l-appellant kien prezenti fuq ix-xena tar-reat bl-intenzjoni li jikkometti r-reat tas-serq jifdal biex jigi investit l-ilment imqanqal illi l-azzjonijiet maghmula mill-appellant ma kenux tali li jammontaw ghall-att materjali tar-reat tas-serq u wisq anqas jissodisfaw l-elementi mehtiega sabiex ikun hemm it-tentattiv ta' kummissjoni tal-istess reat.

Illi jibda biex jinghad illi l-ghan wara l-presenza tal-appellant fuq il-post tad-delitt kien unikament sabiex jikkometti serqa. Issa l-ligi titkellem dwar it-tentattiv ta' reat fl-artikolu 41 tal-Kapitolu 9 li jiddisponi illi:

> **"Kull min bil-hsieb li jaghmel delitt juri dana il-hsieb b'atti esterni u jaghti bidu ghall-esekuzzjoni tad-delitt, jehel meta jinsab hati …. jekk id-delitt ma jkunx gie esegwit minhabba xi haga accidentali u indipendenti mill-volonta tal-hati, il-piena stabbilita ghad-delitt ikkunsmat imnaqqsa grad jew zewg gradi."**

Mela allura mill-qari tad-disposizzjoni tal-ligi, johorgu tlett elementi essenzjali li jikkostitwixxu it-tentattiv u cioe':

1. Atti esterni li juru l-intenzjoni tal-persuna li tikkometti reat.
2. Bidu tal-esekuzzjoni tad-delitt.
3. In-nuqqas ta'esekuzzjoni tad-delitt minhabba cirkostanzi indipendenti mill-volonta tal-hati.

Illi ghalhekk l-ewwel u qabel kollox l-intenzjoni tad-delinkwent trid tigi manifestata permezz tal-hekk imsejjha atti preparatorji. Bilfors illi irid ikun hemm xi azzjoni, liema azzjoni trid tkun saret bl-intenzjoni specifika li jigi komess delitt, b'tali mod li ma thalli l-ebda dubbju dwar liema reat ikun qed jigi ikkontemplat. Madanakollu dawn l-atti preparatorji fihom infushom u wahedhom ma jistghu qatt iwasslu ghat-tenttativ u ghalhekk ghal xi htija fil-kamp penali, jekk l-hati ma ikunx ta bidu ghall-esekuzzjoni tad-delitt.

Kif ighid il-Professur Mamo fin-noti tieghu:

> **"To intend to commit a crime is one thing; to get ready to commit it is another; to try to commit it is a third. We may say indeed that every intentional crime involves four distinct stages – Intention, Preparation, Attempt and Completion. Action in pursuance of the intent is not commonly criminal if it does no more than manifest the *mens rea*, nor if it goes no further than the stage of preparation."**

Madanakollu kif ikompli ighid il-Professur Mamo, huwa difficli sabiex wiehed jigbed linja ta' demarkazzjoni bejn dak li jikkostitwixxi atti preparatorji biss u dawk l-azzjonijiet li jistghu imbaghad jigu ikklasifikati bhala l-bidu tal-esekuzzjoni tad-delitt. X'distinzjoni hemm bejn il-preparazzjoni sabiex wiehed jikkometti id-delitt u it-tentattiv tal-istess?

Il-Professur Mamo, isostni u dana fid-dawl ta' dak li ighidu diversi gurisiti prominenti fosthom il-Cararra, Maino u Liugi Masucci:

> **"So long as an overt act, whether in itself or by reason of the circumstances surrounding it, does not clearly show that it is directed to a criminal purpose, it cannot be regarded as an act of execution of a crime, because no act which in itself and in appearance is or can be innocent can be considered as a commencement of another offence. When, however, it**

appears clear that such act was directed to a criminal purpose, then, in order to decide whether such act represents a commencement of the execution of the crime it must be seen whether it forms part of that series of acts which, in their natural completeness would constitute the actual commission of the crime. If the act forms an integral part of this series of acts which in their completeness would consummate the crime, that act is one of execution. If, on the contrary, the act merely precedes the criminal action, to which it was directed and is such that, however much repeated, it could never accomplish the consummation of that crime, the act is not an act of execution."

Illi kif inghad l-appellant jipprezenta ruhu fuq ix-xena tad-delitt mghammad b'xalla iswed u armat b'sikkina. Kif inghad il-pjan mahsub minn qabel bejnu u bejn l-komplici tieghu kienet illi jikkomettu serqa ta' flus. Ghalkemm l-appellant jikkontendi illi huwa ma kienx gie mgharraf minn qabel minn Anderson fejn kienu sejrin, madanakollu meta wasal fuq il-post huwa ipproceda ghall-aggressjoni tal-parti leza. Maghmula dawn l-atti preparatorji, ghalhekk, l-appellant imbaghad bi vjolazzjoni tad-dritt ta' proprjeta' inoltra ruhu fil-fond tad-derubati u ipproceda ghall-agressjoni taghhom, bil-komplici tieghu sahansitra jaggredixxi lil Angie Azzopardi u jitlobha il-flus u l-*mobile*. L-appellant izda ma irnexxielux fl-intenzjoni tieghu mhux biss ghaliex il-vittma Raymond Azzopardi harablu izda ukoll ghaliex ftit tal-hin wara wasslu l-pulizija fuq il-post u harab hu ukoll. Ighid hekk fl-istqarrija tieghu:

"Ahna qbizna cint baxx li hemm, dhalna u morna fuq in-naha ta' wara tar-razzett fejn kien hemm zewg persuni, ragel u mara jehilbu il-baqar. Jien mort fuq ri-ragel u kif dan rani telaq jigri. Il-persuna l-ohra li kienet mieghi mar fejn il-mara."

Dan ifisser illi l-appellant mhux biss hejja l-pjan sabiex jigi kommess is-serq, izda ta bidu ghall-esekuzzjoni tad-delitt, liema delitt gie sfrattat minhabba ragunijiet indipendenti mill-volonta tieghu.

Illi gjaldarba l-Qorti ser tghaddi biex tikkonferma d-decizjoni appellata u kwindi anke dik il-parti fejn l-Ewwel Qorti sejset ir-reita' ukoll fuq l-istqarrija rilaxxjata mill-appellant, hija tal-fehma li ghandha taghmel is-segwenti osservazzjonijiet, ghalkemm l-appellant qatt ma ikkontesta l-valur probatorju tal-istqarrija rilaxxjata minnu lill-pulizija. Dan ghaliex il-qrati ta' kompetenza penali taghna, u dan abbazi tad-

decizjonijiet tal-Qorti Kostituzzjonali[1] u d-direzzjoni hemmhekk moghtija, qed jiehdu il-linja illi dawk l-istqarrijiet rilaxxjati mill-persuna suspettata u sussegwentement akkuzata wara l-emedni li dahhlu fis-sehh fil-ligi fis-sena 2010, kienu qed jigu skartati bhala prova in atti, u dan ghaliex ghalkemm moghtija il-jedd li jiehdu parir minn ghand avukat qabel jigu interrogati, izda ma kellhomx il-jedd li ikollhom l-avukat prezenti maghhom matul it-tehid tal-istqarrija u dan wara l-emendi li dahhlu fis-sehh ghal Kodici Kriminali permezz tal-Att LI tal-2016 li inkorporaw fil-ligi taghna dak imfassal bid-Direttiva 2013/48/UE tal-Parlament Ewropew u tal-Kunsill tat-22 ta' Ottubru 2013 dwar id-dritt tal-aċċess għal avukat fi proċeduri kriminali u fi proċeduri tal-mandat ta' arrest Ewropew. Dan ghad-differenza ta' dawk l-istqarrijiet fejn il-persuna akkuzata ma kenitx tigi moghtija dan il-jedd ghal kollox fejn allura hemmhekk il-lezjoni tirrizulta inkonfutabbilment.

Illi din il-Qorti hassbet fit-tul qabel ma wasslet ghad-decizjoni taghha f'dan il-kaz u dan ghaliex l-appellant ghalkemm ikkonsulta mal-avukat tal-fiducja tieghu Dr. Joseph Brincat, madanakollu dan l-avukat ma kienx prezenti mieghu imbaghad meta giet rilaxxjata l-istqarrija ghaliex il-ligi f'dak iz-zmien dan ma kenitx tippermettieh. Illi ghalkemm il-qrati, inkluza din il-Qorti kif diversament ippresjeduta, qed jiehdu il-linja li jiskartaw tali prova mill-atti u dan anke meta dan ma jigix mitlub minn ebda wahda mill-partijiet u dan sabiex b'hekk ma tinsorgiex il-biza' ta' xi lezjoni ghad-dritt ta' smigh xieraq, din il-Qorti madanakollu hija tal-fehma illi ghandha timxi b'iktar kawtela u cirkospezzjoni iktar u iktar wara decizjoni moghtija mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fil-kaz - **Philippe Beuze vs Belgium (71409/10)** deciza mill-Grand Chamber recentement fid-09 ta' Novembru 2018 li regghet qallbet il-kriterji imfassla fid-decizjoni ta' *Salduz* u ohrajn u dan ghalkemm sabet li f'dan il-kaz kien sehh vjolazzjoni tal-artikolu 6 tal-Konvenzjoni. Illi f'din id-decizjoni il-Qorti Ewropeja regghet addottat il-kriterju tal-"*overall fairness of the proceedings*" sabiex jigi mistharreg jekk sehhitx xi lezjoni ghad-dritt tas-smigh xieraq. Il-Qorti ser tirriproduci *in extenso* din id-decizjoni u dan sabiex jigi imfisser ahjar il-konkluzjonijiet milhuqa minnha. Qalet hekk il-Qorti Ewropeja f'din id-decizjoni:

[1] Ara Bartolo Christopher vs Avukat Generali et deciza 05/10/2018, u il-Pulizija vs Aldo Pistella – deciza

"(a) Preliminary comments

114. The Court observes, by way of introduction, that the Grand Chamber has already had occasion, in a number of cases, to rule on the right of access to a lawyer under Article 6 §§ 1 and 3 (c) of the Convention (see, as recent examples, *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015; *Ibrahim and Others*, cited above; and *Simeonovi*, cited above).

115. In the present case, as can be seen from paragraphs 3 and 90 above, the applicant complained first that he had not had access to a lawyer while in police custody and, in addition, that even once he had been able to consult with a lawyer, his lawyer could not assist him during his police interviews or examinations by the investigating judge or attend a reconstruction of events.

116. The applicant's complaints concern statutory restrictions on the right of access to a lawyer, the first alleged restriction being of the same nature as that complained of in the*Salduz* judgment. It should be pointed out that, further to that judgment, the Grand Chamber provided significant clarification on the right of access to a lawyer in its *Ibrahim and Others* judgment, even though the restriction complained of in the latter case was not one of a general and mandatory nature. The present case thus affords the Court an opportunity to explain whether that clarification is of general application or whether, as claimed by the applicant, the finding of a statutory restriction is, in itself, sufficient for there to have been a breach of the requirements of Article 6 §§ 1 and 3 (c).

117. The present case also raises questions concerning the content and scope of the right of access to a lawyer. The Court observes that, since the *Salduz* judgment, its case-law has evolved gradually and that the contours of that right have been defined in relation to the complaints and circumstances of the cases before it. The present case thus affords an opportunity to restate the reasons why this right constitutes one of the fundamental aspects of the right to a fair trial, to provide explanations as to the type of legal assistance required before the first police interview or the first examination by a judge. It also allows the Court to clarify whether the lawyer's physical presence is required in the course of any questioning or other investigative acts carried out during the period of police custody and that of the pre-trial investigation (as conducted by an investigating judge in the present case).

118. Those questions will be examined in the light of the general principles set out below.

(b) General principles

(i) Applicability of Article 6 in its criminal aspect

119. The Court reiterates that the protections afforded by Article 6 §§ 1 and 3 (c), which lie at the heart of the present case, apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Ibrahim and Others*, cited above, § 249, and *Simeonovi*, cited above, §§ 110-11, and the case-law cited therein).

(ii) General approach to Article 6 in its criminal aspect

120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *Ibrahim and Others*, cited above, § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings ……

121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Salduz*, cited above, § 50;*Al-Khawaja and Tahery*, cited above, § 118; *Dvorski*, cited above, § 76; *Schatschaschwili*, cited above, § 100; *Blokhin*, cited above, § 194; and *Ibrahim and Others*, cited above, § 251).

122. Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others*, cited above, §§ 251 and 262, and *Correia de Matos*, cited above, § 120).

(iii) Right of access to a lawyer

123. The right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz*, cited above, § 51, and *Ibrahim and Others*, cited above, § 255).

(α) Starting-point of the right of access to a lawyer

124. Where a person has been taken into custody, the starting-point for the right of access to a lawyer is not in doubt. The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law (see paragraph 119 above) and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see *Simeonovi*, cited above, §§ 111, 114 and 121).

(β) Aims pursued by the right of access to a lawyer

125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-

54; *Blokhin*, cited above, § 198; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

126. The Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and ill-treatment of suspects by the police (see *Salduz*, cited above, § 54; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

127. The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (see *Salduz*, cited above, § 54, and *Ibrahim and Others*, cited above, § 253).

128. Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see *Salduz*, cited above, § 54; *Dvorski*, cited above, § 77; and *Blokhin*, cited above, § 198) and for his right to remain silent.

129. In this connection, the Court has considered it to be inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence", within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed would not be practical and effective (see *Ibrahim and Others*, cited above, § 272, and *Simeonovi*, cited above, § 119; the complementarity of these rights had already been emphasised in*John Murray v. the United Kingdom*, 8 February 1996, § 66, *Reports of Judgments and Decisions* 1996-I; *Brusco v. France*, no. 1466/07, § 54, 14 October 2010; and *Navone and Others*, cited above, §§ 73-74). Consequently, Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see *Simeonovi*, cited above, § 119).

130. In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see *Ibrahim and Others*, cited above, § 273, and case-law cited therein).

(γ) Content of the right of access to a lawyer

131. Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to

guarantee rights that are practical and effective (see *Öcalan v. Turkey* [GC], no. 46221/99, § 135, ECHR 2005-IV; *Salduz*, cited above, § 51; *Dvorski*, cited above, § 80; and *Ibrahim and Others*, cited above, § 272).

132. Assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see *Öcalan*, cited above, § 135; *Sakhnovskiy v. Russia*[GC], no. 21272/03, § 95, 2 November 2010; and *M v. the Netherlands*, no. 2156/10, § 82, 25 July 2017), and to that end, the following minimum requirements must be met.

133. First, as the Court has already stated above (see paragraph 124), suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. **It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview** (see *Brusco*, cited above, § 54, and *A.T. v. Luxembourg*, cited above, §§ 86-87), or even where there is no interview (see *Simeonovi*, cited above, §§ 111 and 121). **The lawyer must be able to confer with his or her client in private and receive confidential instructions** (see *Lanz v. Austria*, no. 24430/94, § 50, 31 January 2002; *Öcalan*, cited above, § 135; *Rybacki v. Poland*, no. 52479/99, § 56, 13 January 2009; *Sakhnovskiy,* cited above, § 97; and *M v. the Netherlands*, cited above, § 85).

134. Secondly, the Court has found in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (see *Adamkiewicz v. Poland*, no. 54729/00, § 87, 2 March 2010; *Brusco,* cited above, § 54; *Mađer v. Croatia*, no.56185/07, §§ 151 and 153, 21 June 2011; *Šebalj v. Croatia*, no. 4429/09, §§ 256-57, 28 June 2011; and *Erkapić v. Croatia*, no. 51198/08, § 80, 25 April 2013). **Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract** (see *A.T. v. Luxembourg*, cited above, § 87), and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see *John Murray*, cited above, § 66, and *Öcalan*, cited above, § 131).

135. The Court has found, for example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may undermine the fairness of the proceedings:

(a) a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation (see *Moiseyev v. Russia*, no. 62936/00, §§ 217-18, 9 October 2008; *Sapan v. Turkey*, no. 17252/09, § 21, 20 September 2011; and contrast *A.T. v. Luxembourg*, cited above, §§ 79-84);

(b) the non-participation of a lawyer in investigative measures such as identity parades (see *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 67, 20 April 2010) or reconstructions (see *Savaş v. Turkey*, no. 9762/03, § 67, 8 December 2009; *Karadağ v. Turkey*, no. 12976/05, § 47, 29 June 2010; and *Galip Doğru v. Turkey*, no. 36001/06, § 84, 28 April 2015).

136. In addition to the above-mentioned aspects, which play a crucial role in determining whether access to a lawyer during the pre-trial phase has been practical and effective, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation

for questioning, support for an accused in distress, and verification of the conditions of detention (see *Hovanesian v. Bulgaria*, no. 31814/03, § 34, 21 December 2010; *Simons*, cited above, § 30; *A.T. v. Luxembourg*, cited above, § 64; *Adamkiewicz*, cited above, § 84; and *Dvorski*, cited above, §§ 78 and 108).

(iv) Relationship between the justification for a restriction on the right of access to a lawyer and the overall fairness of the proceedings

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the *Salduz* judgment (cited above, § 55) as follows:

> "... 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 each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... 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."

138. The *Salduz* judgment also demonstrated that the application on a "systematic basis", in other words on a statutory basis, of a restriction on the right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 57-58).

139. The stages of the analysis as set out in the *Salduz* judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.

140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan*, cited above, § 33, and *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010). Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form (see, among other authorities, *Çarkçı v. Turkey (no. 2)*, no. 28451/08, §§ 43-46, 14 October 2014), and sometimes in greater detail (see, among other authorities, *A.T. v. Luxembourg*, cited above, §§ 72-75).

141. **Being confronted with a certain divergence in the approach to be followed, in *Ibrahim and Others* the Court consolidated the principle established by the *Salduz* judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them** (see *Ibrahim and Others*, cited above, §§ 257 and 258-62).

(α) Concept of compelling reasons

142. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Salduz*, cited above, §§ 54 *in fine* and 55, and *Ibrahim and Others*, cited above, § 258). A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.

143. The Court has also explained that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see *Ibrahim and Others*, cited above, § 259, and *Simeonovi*, cited above, § 117).

(β) The fairness of the proceedings as a whole and the relationship between the two stages of the test

144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer (see paragraph 97 above) to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. **However, as can be seen from the *Ibrahim and Others* judgment, followed by the *Simeonovi* judgment, the Court rejected the argument of the applicants in those cases that *Salduz* had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the *Dayanan* case and other judgments against Turkey** (see paragraph 140 above).

145. **Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment**. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific

circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, cited above, § 265).

146. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 273 *in fine*).

147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention (see the case-law on Article 6 § 1 cited in paragraph 120 above).

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

149. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3(c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case.

(γ) Relevant factors for the overall fairness assessment

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see *Ibrahim and Others*, cited above, § 274, and*Simeonovi*, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice."

Issa maghmula allura dawn il-konsiderazzjonijiet fejn gew imfassla il-kriterji li ghandhom jigu ezaminati f'kull kaz ghalih u dan anke fejn allura tezisti restrizzjoni generali fil-ligi dwar id-dritt tal-access ghall-avukat, bil-Qorti Ewropeja titbieghed mill-insenjament tramandat fil-kaz ta' *Salduz*, din il-Qorti taghmel is-segwenti osservazzjonijiet fuq il-kaz taht il-lenti taghha.

Illi ghalkemm illum kif inghad il-ligi regghet giet emendata u dan sabiex jigi fis-sehh fil-ligi domestika d-dritt komunitarju fir-rigward u sabiex ukoll ir-restrizzjoni sistematika dwar id-dritt ghall-avukat jigi regolat, madanakollu fiz-zmien meta giet rilaxxjata l-istqarrija tal-appellant kien hemm dritt, ghalkemm wiehed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiducja taghha fil-hin precedenti l-interrogatorju mill-pulizija. Illi allura din il-Qorti fid-dawl tal-pronunzjament surriferit tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ma tistax *a priori* tiskarta stqarrija ta' persuna li tkun inghatat l-jedd tikkonsulta ma' avukat qabel ma tigi interrogata, izda fejn l-avukat taghha ma kienx prezenti filwaqt tal-interogazzjoni, u dan ghaliex allegatament jista' jkun hemm lezjoni tad-dritt taghha ghal smigh xieraq, billi kif mistqarr f'dan il-pronunzjament kull kaz irid jitqies ghalih u cioe' allura billi jigi mistharreg f'kull kaz individwalment jekk bil-fatt illi l-persuna akkuzata ma kellhiex l-avukat prezenti waqt it-tehid tal-istqarrija dan setax impinga fuq is-smigh xieraq iktar 'il quddiem tul il-proceduri penali istitwiti kontra taghha.

Din il-Qorti ma ghandhiex funzjonijiet kostituzzjonali u allura ma ghandhiex il-poter tistharreg jekk ikunx sehh lezjoni tad-dritt ta' smigh xieraq jew jekk potenzjalment dan jistax isehh u dan f'kaz fejn xi forma ta' assistenza legali tkun giet moghtija. Ma tistax il-Qorti ta' kompetenza penali tiddeciedi *a priori* illi bil-fatt wahdu illi fiz-zmien li l-persuna akkuzata tkun giet interrogata ma kellhiex il-jedd ikollha l-avukat

prezenti maghha dan awtomatikament kien vjolattiv tal-jedd taghha ghal smigh xieraq meta l-Qorti Ewropeja issa qed tidderigi il-qrati domestici jindagaw jekk il-proceduri fl-intier taghhom kenux gusti fil-konfront tal-akkuzat bit-test allura li irid jigi segwiet fuq zewg binarji u cioe':

1. *the existence of compelling reasons for the right to be witheld*
2. *the overall fairness of the proceedings.*

Jinghad biss f'dan il-kaz illi l-appellant kien abbilment assistit tul dawn il-proceduri kriminali istitwiti kontra tieghu. Fl-ebda mument tul il-proceduri ma jqanqal il-kwistjoni dwar il-valur probatorju tal-istqarrija minnu rilaxxjata biex b'hekk il-Qorti ghandha quddiemha prova li qatt ma giet ikkontestata. Illi maghdud dan madanakollu l-Qorti tosserva li l-appellant kien ikkonsulta mal-avukat tal-fiducja tieghu qabel ma gie interrogat. F'dak iz-zmien huwa kellu sitta u ghoxrin sena u diga` kellu irregistrati kontra tieghu hdax-il kundanna biex b'hekk ma jistax jitqies li kien bniedem vulnerabbli. L-appellant qatt ma jikkontendi illi hu jew l-avukat tieghu ma gewx mgharrfa mill-pulizija dwar in-natura tal-akkuzi migjuba fil-konfront tieghu jew tal-provi li l-pulizija kellhom f'idejhom. Fuq kollox dak mistqarr mill-appellant fl-istqarrija minnu rilaxxjata huwa biss korroborazzjoni ta' dak li jikkontendu l-vittmi billi dawn kienu x-xhieda ewlenija f'dan il-kaz meta jistqarru li gharfu lill-appellant bhala wiehed mill-hallelin.

Illi finalment ghalkemm il-ligi f'dak iz-zmien ma kenitx tippermetti lill-avukat li jkun prezenti waqt it-tehid tal-istqarrija, madanakollu ghandu jinghad illi l-ligi kif inhi illum ma tantx toffri dik l-assistenza effettiva bil-fatt illi l-avukat ikun prezenti mal-persuna suspettata waqt li din tkun qed tigi interrogata bil-*proviso* ghall-artikolu 355AUA (8)(c) tal-Kodici Kriminali jiddisponi hekk:

> **"Id-dritt tal-avukat li jipparteċipa b'mod effettiv ma għandux jinftiehem bħala dritt tal-avukat li jostakola l-interrogazzjoni jew li jissuġġerixxi tweġibiet jew reazzjonijiet oħra għall-interrogazzjoni u kull mistoqsija jew rimarka oħra mill-avukat għandha, ħlief f'ċirkostanzi eċċezzjonali, issir wara li l-Pulizija Eżekuttiva jew awtorità oħra investigattiva jew awtorità ġudizzjarja jkunu ddikjaraw li ma għandhomx aktar mistoqsijiet."**

Fil-fatt minn qari tad-Direttiva tal-Unjoni Ewropeja dwar id-Dritt tal-assistenza legali, ghalkemm din giet tramandata kwazi kelma b'kelma fil-ligi taghna, madanakollu dana l-*proviso* ma jirriaffigura imkien fl-artikolu 3 tad-Direttiva, li gie trasportat fl-artikolu 355AUA tal-Kodici Kriminali.

Maghmula dawn il-konsiderazzjonijiet ghalhekk din il-Qorti ma issib l-ebda mottiv li jista' igieghlha titbieghed mill-fehma milhuqa mill-Ewwel Qorti li strahet fuq ix-xiehda tal-vittmi f'dan il-kaz abbinata mal-istqarrija rilaxxjata mill-appellant u dan sabiex sejset is-sejbien ta' htija fil-konfront tieghu.

Għal dawn il-motivi din il-Qorti, taqta' u tiddeċiedi billi tiċħad l-appell ta' Maximilian Ciantar u konsegwentement tikkonferma l-ewwel sentenza mogħtija mill-Qorti tal-Maġistrati (Malta) nhar id-29 ta' Novembru 2017 fl-intier tagħha.

(ft) Imhallef

Vera Kopja

Joyce Agius
Deputat Registratur