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

MAGISTRAT DR. JOSEPH MIFSUD
B.A. (LEG. & INT. REL.), B.A. (HONS.), M.A. (EUROPEAN), LL.D.

Il-Pulizija
(Spettur Arthur Mercieca
Spettur Spiridione Zammit)

vs

Amadeo Grima

Kumpilazzjoni numru 81/2018

Illum 24 ta' Mejju 2019

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat **Amadeo Grima** detentur tal-karta tal-identita' bin-numru 259780 (M) billi huwa akkuzat talli:

1. Fil-25 ta' Dicembru 2015 ghall-habta ta' l-04:00 am u /jew hinijiet ta' qabel, gewwa Triq Sammat, Rahat Gdid volontarjament ta n-nar lil dar, mahzen, hanut, dar ta' abitazzjoni, bastiment, bacir jew bini iehor, u cioe ta nar lil bieb ta' barra ta' residenza li ggib in-numru 27 Triq Sammat Rahal Gdid, meta gewwa d-dar kien hemm persuna

filwaqt tal-hruq u dan ghad-dettriment ta' Maria Rita Filippini minn Rahal Gdid u/jew persuni ohra;

2. U aktar talli fl-istess data, lok, hin u cirkostanzi, hassar, ghamel hsara jew gharraq hwejjeg haddiehor mobbli jew immobbli u cioe ghamel hsara fuq il-bieb ta' residenza numru 27 li tinsab fi Triq Sammat , Rahal Gdid liema hsara ma tiskorrix l-€2,500 izda izjed minn €250 ghad-dannu ta' Maria Rita Filippini minn Rahal Gdid u/jew persuni ohra;

3. Finalment akkuzat talli rrenda ruhu recediv ai termini ta' l-artikoli 49, 50 u 289 tal-Kodici Kriminali , b' diversi sentenzi tal-Qorti , liema saru definittivi u ma jistghux jigu mibdula.

Rat in-nota tal-Avukat Generali (*a fol. 187*) datata 29 ta' Ottubru 2018 li permezz taghha baghat lill-imputat biex jigi ggudikat minn din il-Qorti bhala Qorti ta' Gudikatura Kriminali kif mahsub taht:

- Fl-artikolu 316 (a) tal-Kodici Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta;
- Fl-artikolu 325(1) (b) tal-Kodici Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta;
- Fl-artikoli 49 u 50 tal-Kodici Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta;
- Fl-artikoli 17, 31 u 533 tal-Kodici Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta;

- Fl-artikoli 383, 384, 385, 386, 387 u 412C tal-Kodici Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta.

Rat illi, waqt l-udjenza tal-10 ta' Dicembru 2018 (*a fol. 189)* gew moqrija l-Artikoli mibghuta mill-Avukat Generali fid-29 ta' Ottubru 2018, u f'liema seduta l-imputat iddikjara li ma kellux oggezzjoni li l-kaz tieghu jigi trattat u deciz minn din il-Qorti bi procedura sommarja;

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

Rat in-Nota ta' Sottomissjonijiet tal-*prosekuzzjoni* pprezenta fl-14 ta' Marzu 2019 (*a fol.* 191 *et seq*.) u n-Nota ta' sottomissjonijiet tal-imputat Amadeo Grima prezentata fid-29 ta' April 2019 (*a fol.*193 *et seq*.).

IL-FATTI TAL-KAZ

Dan l-incident huwa wiehed serjissimu meta wiehed jikkunsidra l-fatt li l-istess incident ipperikola il-hajja ta mill-inqas sitta minn nies li fil-hin tal-akkadut kienu reqdin ghall-affari taghhom gewwa ir residenza in kwistjoni. Izda l-fatt li dan hu kaz serju hafna.

F'kull kaz pero', stante li din hija Qorti ta' Gudikatura Kriminali hija marbuta bit-termini tal-imputazzjonijiet kif jirrizultaw mill-artikolu mibghuta mill-Avukat Generali. 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, liema sottomissjonijiet saru bil-kitba kif tat il-permess il-Qorti, huwa bizzejjed għad-difiza li tikkonvinci lil 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 tħossiex 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.

Mix-xhieda ta l-**<u>Ispettur Spiridione Zammit</u>**[1] spjega li kif gie nfurmat bl-akkadut acceda fuq il-post fejn gie innutat flixkun b'likwidu flammabbli li gie elevat minn PC 813[2] minn naha tal- forensika. L-istess flixkun ghadda ghand PS 659 Jeffrey Hughes[3] fejn eleva impronti digitali li ikkumparaw ma' dawk tal-imputat Amadeo Grima u dan kien konfermat

[1]a fol 55 u 56
[2] a fol 75 sa fol 89
[3] a fol 65 sa 74

mix-xhieda tal-espert mahtur mill-Qorti Joseph Mallia li jikkonferma li l-impronti digitali misjubha fuq il-flixkun li gie elevat minn fuq ix-xena tad-delitt jaqblu ma' dawk ta' Amadeo Grima l-imputat.

Il-**vittma Maria Rita Filippini**[4] tixhed kif giet infurmata b'dak li gara fejn fil-hin tal-incident kienet rieqda flimkien ma uliedha u t-tfal tat-tifla u r-ragel taghha kif ukoll ikkonfermat il-hsarat sofferti minnha. Tispjega li ma kienx intervent f'waqtu mill-girien in-nar kien jinfirex mad-dar kollha ghaliex il-bieb ta' barra kien diga qabad jiehu in nar. Maria Rita Filippini m'gharfet lil hadd fl-Awla u qatt ma ndikat li kellha suspett fl-imputat. Tkompli tghid illi sa fejn taf hija qatt m'ghamlet hsara lil hadd u qalet illi dment li tghix fil-paci tahfer lil min kien ghamel dan ir-reat.

Fix-xhieda moghtija mix-xhud **Simone Vassallo**[5], gara tal-*parte civile*, tghid illi hi ma lahqitx rat min kienet il-persuna li marret hdejn il-bieb ta' Filippini u li dan kellu barnuza. Hi ma gietx mistoqsija jekk tarafx lil dik il-persuna illi rat dakinhar fl-Awla.

Fl-istqarrija tieghu l-imputat **Amadeo Grima**[6] qatt ma qal li kien involut f'dan ir-reat.

[4] A Fol 95 sa 60

[5] A fol. 119

[6] l-imputat ghazel li ma jikkonsultax ma' avukat jew ikollu l-assistenza ta' avukat waqt l-istqarrija jew li jkollu avukat prezenti mieghu waqt l-interrogatorju kif tawh id-dritt li jaghmel il-pulizija

XHIEDA

F'dan il-process xehdu erbatax (14) -il xhud kif gej:

Spettur Spiridione Zammit (*a fol* 54 et. seq.); Spettur Arthur Mercieca (*a fol* 62 et. seq.); PS 659 Jeffrey Hughes (*a fol* 65 et. seq.); PC 813 Clinton Vella (*a fol* 75 et. seq.); PS 285 Jeffrey Cutajar (*a fol* 90 et. seq.); Maria Rita Filippi (*a fol* 95 et. seq.); Dr Marisa Mifsud (*a fol* 101 et. seq.); Spettur Arthur Mercieca (*a fol* 107 et. seq.); Kevin Farrugia (*a fol* 116 et. seq.); Simone Vassallo (*a fol* 118 et. seq.); Joseph Mallia (*a fol* 124 et. seq.); Dr Martin Bajada (*a fol* 130 et. seq.); Joseph Mallia (*a fol* 136 et. seq.); Dr Martin Bajada (*a fol* 173 et. seq.).

KUNSIDERAZZJONIJIET LEGALI GENERALI

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

<u>Livell ta' prova</u>

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li sabiex l-akkuzat jigi misjub hati l-akkuzi migjuba fil-konfront tieghu dawn ghandhom jigu pruvati oltre kull dubju dettat mir-raguni.

F'dan ir-rigward issir referenza ghas-sentenza moghtija mill-**Qorti tal-Appell Kriminali fil-5 ta' Dicembru 1997** fil-kawza fl-ismijiet **Il-Pulizija vs Peter Ebejer**, fejn il-Qorti fakkret li l-grad ta' prova li trid tilhaq il-

Prosekuzzjoni hu dak il-grad li ma jhalli ebda dubju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubju. Id-dubji ombra ma jistghux jitqiesu bhala dubji dettati mir-raguni. Fi kliem iehor, dak li l-gudikant irid jasal ghalih hu, li wara li jqis ic-cirkustanzi u l-provi kollha, u b'applikazzjoni tal-buon sens tieghu, ikun moralment konvint minn dak il-fatt li trid tipprova l-Prosekuzzjoni. Fil-fatt dik il-Qorti ccitat l-ispjegazzjoni moghtija minn **Lord Denning** fil-kaz ***Miller v Minister of Pension*** - 1974 - ALL Er 372 tal-espressjoni 'proof beyond a reasonable doubt.'

> *"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing shall of that will suffice."*

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

> *"it is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one."*

Din il-Qorti taghmel ukoll referenza ghas-sentenza moghtija mill-Qorti tal-Appell Kriminali fid-9 ta' Settembru 2002 fil-kawza fl-ismijiet **Il-Pulizija v Martin Mark Ciappara** fejn spjegat x'jigri meta Gudikant ikun rinfaccjat b'verzjonijiet konfliggenti u cioe' jistghu jigru zewg affarijiet u cioe' jew il-gudikant ikun tal-fehma li l-kaz tal-Prosekuzzjoni ma jkunx gie sodisfacentement ippruvat, u allura l-Qorti ghandha tillibera, jew jekk ikun moralment konvint li l-verzjoni korretta hija wahda u mhux l-ohra, jimxi fuq dik il-verzjoni li jaccetta u jekk dik il-verzjoni tkun timporta l-htija tal-imputat jew akkuzat, allura jiddikjara tali htija u jghaddi ghall-piena jew ghal xi provvediment iehor.

<u>Apprezzament tal-provi fl-assjem</u>

Il-Qorti tissottolinea li huwa ben risaput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat u individwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem taghhom sabiex wiehed jara x'inferenzi jew interpretazzjoni ragjonevoli u legali jista' jaghti lil dawk il-provi hekk interpretati. Ma tistax tinstab htija jew nuqqas ta' htija semplicement fuq analizi individwali jew separata tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kif ukoll komplessivament. Dan hu appuntu l-ezercizzju li sejra taghmel din il-Qorti, u cioe' li tezamina bir-reqqa kollha l-provi prodotti f'dan il-kaz.

Illi ghalhekk m'hemmx dubju li kollox jiddependi fuq il-kredibilita` tax-xhieda u dan billi bhala Gudikant, il-Qorti sejra taghti qies l-imgieba, il-kondotta u l-karattru tax-xhieda, tal-fatt jekk ix-xhieda ghandiex mis-sewwa jew hix kostanti, u ta' fatturi ohra tax-xhieda u jekk ix-xhieda hix

imsahha minn xhieda ohra, u tac-cirkostanzi kollha tal-kaz, u dan ai termini tal-Artikolu 637 tal-Kap 9 tal-Ligijiet ta' Malta.

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

Hawnhekk il-Qorti taghmel referenza ghal sentenza moghtija mill-Qorti tal-Appell Kriminali nhar s-sebgha (7) ta' Settembru, 1994 fl-ismijiet '**Il-Pulizija v Philip Zammit et**' u tghid pero' li mhux kull l-icken dubju huwa bizzejjed sabiex l-imputat jigi ddikjarat liberat, hemm bzonn li '*dubbju jkun dak dettat mir-raguni.*'

L-ghodda biex tiddeciedi

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

> *Il-Gudikant għandu jezamina bir-reqqa l-provi rilevanti li jkollu quddiemu u mbagħad jiddeciedi l-kawza abbazi tal-ligi applikabbli, tal-gurisprudenza, u tal-provi li fl-opinjoni tiegħu huma konsistenti, konvincenti u korroboranti.*[7]

[7] 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.

F'decizjoni tal-Qorti tal-Appell Kriminali moghtija fit-23 ta' Jannar, 2007 fil-kaz **Il-Pulizija** ***vs*** **Charles Bianco**[8] 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-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 okkażjoni jagħmlu hekk u għalkemm setgħu jobsru illi d-diskrepanzi x'aktarx kien sejjer jaqbad magħhom l-appellant biex joħloq argument. Differenzi ta' dettal fil-mod kif xhud jara episodju trawmatiku huma ħaga normali u, sakemm fis-sostanza x-xhieda tkun taqbel, ma jfissrux illi dik ix-xhieda għandha tigi skartata.

[8] Appell Kriminali Numru. 115/2006

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

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

<u>Prezunzjoni tal-innocenza</u>

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'.

Huwa principju fundamentali fi proceduri penali li persuna akkuzata hija prezunta innocenti sakemm ippruvata hatja, u dan ai termini tal-Artikolu 40 Subinciz 5 tal-Kostituzzjoni ta' Malta, li jiddisponi is-segwenti:

> "*every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty...*"

Dan il-principju gie wkoll sanat fis-sentenza moghtija minn Sir Augustus Bartolo fl-ismijiet '**Il-Pulizija v Michele Borg et'** (deciza mill-Qorti tal-Appell Kriminali nhar it-13 ta' Mejju, 1936) fejn intqal:

> "*illi skont il-principju u s-sistema tal-ligi u procedura penali taghna mfassla fuq dak tal-Ingilterra u li huma strettament d'ordine pubblico;* '*the accused is presumed innocent until proved guilty.*' "

U issa ghalhekk wiehed jistaqsi xi tfisser verament prezunzjoni tal-innocenza? Din tfisser li l-akkuzat ma jrid jipprova xejn dwar l-innocenza tieghu - hija l-Prosekuzzjoni li trid tipprova l-htija tieghu. Ghalhekk peress li hija l-Prosekuzzjoni li allegat il-htija tal-imputat, l-onus generali tal-prova, u cioe' tal-prova tal-htija, tistrieh fuq il-Prosekuzzjoni, li ghandha ghalhekk tipprova kull element tar-reati partikolari sabiex tasal ghal din l-istess konkluzjoni.

Il-Prosekuzzjoni trid tipprova l-kaz taghha *beyond a reasonable doubt*, li tipprova kaz dettat bla dubju dettat mir-raguni, li tfisser li l-grad ta' buon sens jew ghaqal li jwassal gudikant sabiex jaqbel mat-tezi taghha u cioe' tal-Prosekuzzjoni.

L-obbligu li tipprova l-htija tal-akkuzat irid ikun assolut, oltre kull dubju dettat mir-raguni u f'kaz li jkun hemm xi dubju ragjonevoli, il-Prosekuzzjoni tigi kunsidrata li ma ppruvatx il-kaz taghha ta' htija u ghalhekk il-Qorti hija obbligata li tillibera.

KONSIDERAZZJONIJIET GENERALI DWAR L-IMPUTAZZJONIJIET

Il-hruq volontarju – Artikolu 316(a) tal-Kap 9

Il-Qorti taghmel referenza ghas-sentenza tal-Qorti tal-Appell Kriminali deciza mill-Imhallef Joe Galea Debono l-**Pulizija vs Valentine Sciberras** deciza fil-11 ta' Jannar 2007 li trattat dwar hruq b'mod volontarju:

> *Illil-appellant pero' jobbjetta ukoll li l-artikolu 316 (b) li fuqu tidher bazata l-ewwel imputazzjoni skond in-Nota ta' l-Avukat Generali (fol.210) u skond ma gie citat mill-Ewwel Qorti fis-sentenza appellata, ghandu bhala element essenzjali tieghu li s-soggett passiv tar-reat irid ikun persuna differenti w mhux l-akkuzat stess. In sostenn ta' dan iccita s-sentenza ta' din il-Qorti (Sede Superjuri) fil-kawza* ***"Ir-Repubblika ta' Malta vs. Joseph Desira "*** *[13.5.1999]*
>
> *Fit-trattazzjoni orali tieghu, l-abbli prosekutur Dr. Tonna Lowell, issottometta li f' kaz li ma tirrizultax htija taht l-artikolu 316(b) tista' tinstab htija taht l-artikolu 317 jew 318 li huma reati komprizi w involuti fir-reat kontemplat fl-art. 316 (b).*
>
> *l-abbli difensur Dr. Joseph Giglio pero' rribatta li se mai mhux l-artikolu 317 imma l-artikolu 318 hu applikabbli, imma f'kull kaz dan mhux reat kompriz u nvolut fl-artikolu 316.*
>
> *Ikkonsidrat;*

*Illi is-sentenza ta' **Joseph Desira** citata mill-appellant proprjament tirrigwarda l-interpretazzjoni tal-artikolu 311 tal-Kodici Kriminali u mhux tal-artikolu 316(b) in dizamina. B' dana kollu, fil-fehma ta' din il-Qorti d-difiza ghandha ragun meta tissottometti li l-persuna li tkun gewwa l-lok jew bastiment li jinghata n-nar u cioe' s-suggett passiv tar-reat trid ikun differenti mill-persuna li attwalment tkun appikkat l-incendju w li konsegwentement ma jistax ikun applikabbli l-artikolu 316(b) invokat mill-Avukat Generali, ghaliex fuq il-lancja Lady Tess, meta gie appikkat in-nar, ma rrizulta li kien hemm hadd iehor hlief l-appellant innifsu li hu l-persuna li qabbad in-nar. Lanqas ma hu applikabbli, fil-fehma ta' din il-Qorti l-artikolu 317, ghax ma saret ebda prova li fil-bastimenti jew ingenji tal-bahar li kienu vicin il-Lady Tess u li spiccaw qabdu ukoll jew gew danneggjati bin-nar jew, addirittura fil-bini tal-faccata, qrib fejn anki spiccaw waslu xi oggetti jaqbdu w li ntfew mill-ewwel Pulizija li wasal fuq il-post, kien hemm xi nies fihom, anki jekk, f' kull probbabilta', x' aktarx li fil-bini faccata tat-triq kien hemm xi nies. Imma l-probabbli mhux bizzejjed biex tirrizulta l-htija, trid issir il-prova sal-grad tac-certezza morali.*

*Invece tidher li tirrizulta fil-konfront tal-appellant l-imputazzjoni taht l-artikolu 318, li, fil-fehma ta' din il-Qorti, hija wahda kompriza w involuta fir-reat imputat lill-appellant mill-Avukat Generali, ghaliex tikkontempla proprju l-istess att materjali kontemplat fl-artikolu 316 ossia "**kull min jaghti volontarjament jaghti n-nar li bini, gharix jew lok iehor imsemmi fl-artikolu 316"** (ergo bastiment ukoll), pero' b'konsegwenzi inqas gravi ghax fil-lok ma jkun hemm hadd iehor u ma jkunx hemm il-perikolu li jaqbad lok iehor fejn ikun hemm xi persuna*

hemm gew. Fil-kaz ta' dar-reat, il-piena hija wahda inqas minn dik kontemplata fl-artikolu 316 u 317, u ghalhekk hu certament "reat izghar" li hu kompriz fl-ewwel imputazzjoni kif testwalment dedotta fit-termini tal-art.467 (4).

Ghalhekk fil-fehma tal-Qorti l-aggravju ta' natura legali sollevat mill-appellant huwa gustifikat izda ma jwassalx ghall-assoluzzjoni kompleta, imma biss biex tinstab htija ta' reat minuri kompriz u involut kontemplat fl-artikolu 318 minnflok dak addebitat lill-appellant taht l-artikolu 316 (b), kif ser jigi deciz f' din is-sentenza.

Il-Qorti taghmel referenza ghall-gurisprudenza barranija fejn trattat dan is-suggett:

Lord Bingham of Cornhill qal*: 'in any statutory definition of a crime, 'malice' must, as we have already seen, be taken – not in its vague common law sense as 'wickedness' in general, but – as requiring an actual intention to do the particular kind of harm that in fact was done . . For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so.'*[9]

'Again, if you think that the prisoner set fire to the frame of the picture with a knowledge that in all probability the house itself would thereby be set on fire, and that he was reckless and utterly indifferent whether the

[9] REGINA V G AND R: HL 16 OCT 2003

house caught fire or not, that is abundant evidence from which you may, if you think fit, draw the inference that he intended the probable consequences of his act, and if you draw that inference, then, inasmuch as the house was in fact set on fire through the medium of the picture frame, the prisoner's crime would be that of arson.'[10]

Lord Diplok qal*: 'I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of actus reus, suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failures to act cannot give rise to criminal liability in English Law.'*[11]

Mill-provi li fliet din il-Qorti jirrizulta li meta ha n-nar kien hemm numru ta' persuni gewwa kif xehdet Maria Rita Filippini.

<u>Hsara volontarja – artikolu 325(1)(b) tal-Kap 9</u>

Il-Qorti taghmel referenza ghal sentenza moghtija fl-24 ta' Frar 2003 fl-ismijiet Il-**Pulizija vs Joseph Zahra**, fejn gew elenkati l-metodi kif jista' jigi determinat il-valur ta' hsarat. F'dik is-sentenza ntqal hekk:

[10] REGINA V HARRIS: 18 (1882) 15 COX CC 75
[11] REGINA V MILLER: HL 17 MAR 1982

"Fin-nuqqas ta' qbil bejn il-partijiet u salv dak li jinghad fis-subartikolu (2) ta' l-artikolu 325, biex tigi determinata l-hsara ghall-finijiet ta' l-artikolu 325(1) tal-Kodici Kriminali (moqri ma' l-artikolu 335 ta' l-istess Kodici) din trid (i) jew tigi apprezzata direttament mill-gudikant, fis-sens li jekk il-gudikant ikun jifhem bizzejjed jista' jiddetermina huwa stess l-ammont tal-hsara billi jezamina l-oggett in kwistjoni; jew (ii) il-parti leza tghid kemm effettivament hallset biex issir it-tiswija ta' jew fi l-oggett; jew (iii) billi jitqabbad perit mill-qorti biex jaghti l-fehma tieghu dwar l-ammont tal-hsara."

Dwar din l-imputazzjoni jqumu argumenti ta' natura legali dwar danni volontarji fuq il-proprjeta' ta' terzi. Ladarba l-hsara qed jigi allegat li saret bhala rizultat t'incendju mqabbad minn persuna jew persuni (l-prosekuzzjoni ssostni li dan in-nar tqabbad mill-imputat), allura l-Avukat Generali ma setax jinvoka l-artikolu 325 bhala l-artikolu li tahtu setghet tinstab htija. Fl-appell kriminali **"Il-Pulizija vs. Mark Mizzi"**[12] [11.5.2006] il-Qorti qalet hekk :-

"Illi l-kontenzjoni tad-difiza quddiem l-Ewwel Qorti kienet li l-artikolu 325 ma japplikax ghal dawn il-fatti ghaliex l-actus reus ma jistax ikun dak ta' tqabbid ta' nar go dar, ghaliex dak ir-reat hu kopert b' artikoli ohra tal-ligi , senjatament bl-artikoli 316, 317 u 318 tal-Kodici Kriminali. Invece l-artikolu 325 indikat mill-Avukat Generali fin-nota tieghu, jipprovdi ghall-kazijiet ta' min volontarjament ihassar,jaghmel hsara jew jgharraq hwejjeg haddiehor, mobbli jew imobbli, ***b' mezzi***

[12] Liema decizjoni kienet abbracjata mill-Imhallef Joe Galea Debono fis-sentenza tal-Qorti tal-Appell Kriminali Il-Pulizija vs Valentine Sciberras deciza fil-11 ta' Jannar 2007 – Appell Nru. 244/06

<u>xort' ohra minn dawk imsemmijin fl-artikoli ta' qabel ta' dan is-sub-titolu.</u>

"Issa s-Sub-titolu IV tat-Titolu IX tat-Taqsima II tal-Ewwel Ktieb tal-Kodici Kriminali, li jittratta dwar delitti kontra s-sigurta' pubblika u fuq hsarat fil-proprjeta', johloq diversi reati specifici w cioe' :- dak ta' hsara bi ***spluzzjoni*** *doluza (art. 311,312,) dak ta' min izomm jew jaghmel* ***sustanza esplussiva*** *(art. 313); dak ta' min dolozament jikkonsenja jqieghed, jispara jew jisplodi xi* ***mezz letali*** *u cioe' kull haga imfassla sabiex, jew li ghandha l-kapacita' li tikkawza l-mewt, hsara gravi fuq il-persuna jew proprjeta' billi thalli johorgu jew jinfirxu, jew bl-impatt ta' kimici tossici jew agenti biologici, jew toxins jew sustanzi simili jew radjazzjoni jew materjal radioattiv (art. 314A); dak ta' min dolozament ikollu ghandu jew jaghmel uzu minn, jikkonsenja, ibiddel, jiddisponi minn jew ixerred* ***materjal nukleari*** *li jista' jqieghed f' perikolu il-hajja ta' haddiehor, ecc. (art. 314B); dak ta' min jaghti* ***n-nar*** *jew b' xi mod iehor jiddistruggi tarznar, bastiment tal-gwerra, mahzen tal-porvli, bacil pubbliku jew kamp ta' artillerija; (art. 315) ; dak ta' min* ***jaghti n-nar lil dar , mahzen hanut , dar t' abitazzjoni , bastiment, bacil jew bini iehor, gharix jew xi lok iehor, meta hemm gew ikun hemm persuna fil-waqt tal-hruq*** *(art. 316); dak ta' min volontarjament* ***jaghti n-nar lil bini, gharix jew lok iehor izda meta gewwa ma jkun hemm ebda persuna fil-waqt tal-hruq, ecc****. (art. 317); dak ta' min* ***jaghti n-nar lil bini gharix jew lok iehor izda fil-waqt li ma jkun hemm ebda persuna hemm gewwa u dan il-bini, gharix jew lok iehor ikun qieghed b' mod li ma jistax iqabbad hruq f' bini, iehor, gharix jew lok iehor, fejn waqt il-hruq ikun hemm xi***

persuna hemm gewwa *(art. 318) dak ta' min* ***jaghti n-nar lil dwieli, qatgha imhawwla ta' sigar, munzelli, jew gemgha ohra ta' qmugh , qoton jew prodott iehor simili****, ecc. (art. 319); dak ta'* ***espluzzjoni ta' mina*** *(art. 320); dawk ta'* ***wiri ta' dwal foloz*** *b' perikolu ghan-navigazzjoni u* ***qtugh ta' ktajjen*** *(art. 321, 322 u 323).*

"Wara din il-lista ezawrjenti hafna li tikkontempla numru kbir ta' mezzi differenti kif wiehed jista' jikkaguna hsara lil persuni jew proprjeta', il-ligi fl-artikolu 325 tohloq speci ta' delitt residwali biex ikopri xi tip ta' hsara ohra li ma hix inkluza fl-artikoli dettaljati w specifici li jippreceduh u tghid testwalment :-

"(1) Kull min, ***B' MEZZI XORT' OHRA MINN DAWK*** *IMSEMMIJA FL-ARTIKOLI TA' QABEL TA' DAN IS-SUB-TITOLU , volontarjament ihassar jaghmel hsara jew jgharraq hwejjeg haddiehor , mobbli jew immobbli , jehel meta jinsab hati…." (sottolinear ta' din il-Qorti.)*

"Illi l-appellat qed jissottometti – kif ghamel anki quddiem l-Ewwel Qorti b' success – li d-dicitura ta' dan l-artikolu ma thalli ebda dubju li biex jissussisti dan ir-reat, irid jigi uzat xi mezz differenti ghal kollox mill-mezzi elenkati b' mod ezawrjenti fl-artikoli ta' qabel.

"Din il-Qorti taqbel ma din is-sottomissjoni. Dan ghaliex il-fatti li qed jigu addebitati lill-appellat huma proprju dawk li ***ta nar*** *lill-****bini jew dar t' abitazzjoni*** *w b' hekk ikkaguna danni fil-proprjeta' tal-genituri tieghu. Kjarament dan l-agir li jaqa' taht ir-reat tal-incendju doluz hu*

espressament kopert b' xi wiehed mill-artikoli 316, 317 u 318 fuq imsemmija, skond ic-cirkostanzi li jirrizultaw. Igifieri l-legislatur haseb b' reat "ad hoc" taht id-diversi cirkostanzi kontemplati f' dawn it-tlitt artikoli ghall-agir addebitat lill-appellat u ghalhekk hawn ma jidholx l-artikolu residwali kontemplat fl-artikolu 325.

"…. Konsegwentement l-Ewwel Qorti kienet korretta meta ddecidiet li l-"mezzi xort' ohra" imsemmija fl-artikolu 325 ma jikkomprendux l-ghoti tan-nar lil bini w abitazzjoni, ghax dan hu mezz kopert b' artikoli ohra "ad hoc"."

Il-Qorti ssostni li biex tirrizulta imputazzjoni akkampata fuq l-artikolu 325, il-hsara volontarja trid tkun ir-rizultat ta' xi mezz iehor mhux imsemmi fl-artikoli ta' qabel tal-istess sub-titolu. Invece hawn jirrizulta li l-hsara grat bhala konsegwenza ta' hruq fuq il-propjeta' tal-*parte civile*, reat kopert bid-dispozizzjonijiet tal-artikoli 317 u/jew 318.

KONSIDERAZZJONIJIET OHRA RELEVANTI

Il-prova ta' *fingerprints*

Illi l-aktar prova li kienet prezentata f'dawn l-atti fil-konfront tal-imputat hija l-impronta digitali elevata minn fuq flixkien fuq ix-xena tad-delitt li taqbel ma' dik tal-imputat. Ghalhekk il-Qorti thoss li ghandha tidhol fid-dettal dwar dwar dak deciz mill-Qrati taghna u ohrajn tul l-ahhar snin.

Illi fil-kawza fl-ismijiet Il-**Pulizija vs. Jason Lee Borg et** deciza fil-15 ta' Gunju 1998, il-Qorti tal-Appell Kriminali qalet hekk:

> *"Provi jew indizzji cirkostanzali ghandhom ikunu univoci, cioé mhux ambigwi. Ghandhom ikunu indizzji evidenti li jorbtu lill-akkuzat mar-reat u li jwasslu, mehuda lkoll flimkien, ghall-konkluzjoni li kien l-akkuzat u hadd aktar, anzi l-akkuzat biss, li kien il-hati u li l-provi li tressqu kienu inkompatibbli mal-presunzjoni tal-innocenza tieghu. Il-prova ta' fingerprints qieghda hemmhekk biex f'xi kazijiet issahhah provi ohra tal-Prosekuzzjoni u f'kazijiet fejn dik tkun l-unika prova".*

Illi fid-decizjoni moghtija fis-27 ta' Mejju 1999 mill-Qorti tal-Magistrati fil-kawza fl-ismijiet Il-**Pulizija vs Victor Gatt**, il-Qorti sostniet li l-kaz tal-Prosekuzzjoni jistrieh fuq il-fatt li nstabu l-impronti digitali tal-imputat fuq flixkun tal-*whisky* misjub fil-fond fejn sehhet dik is-serqa. Illi fih innifsu ghalkemm dan hu ndizzju, huwa biss prova li l-imputat mess dak il-flixkun tal-whisky u xejn aktar.

Illi fis-sentenza moghtija 30 ta' Gunju 1998 fil-kawza fl-ismiijiet Il-**Pulizja vs. Emanuel Camilleri** gie deciz li:

> *"f'dak il-kaz il-prova tal-fingerprints kien jinhtiegilha korroborazzjoni minn provi cirkostanzjali ohra. Pero hemm kazijiet fejn il-prova tal-fingerprints wahedha tkun bizzejjed biex il-Qorti tkun moralment konvinta mill-htija tal-akkuza".*

Fil-fatt fl-Ingilterra fil-kaz **R v. Castletan** (3 Cr App R - 74, CCA (vide Archbold 1997 para 14-97) gie deciz li:

> *"Identification of fingerprints by a person expert in such prints may be sufficient even where it is the only evidence of identification".*

Imbaghad, fil-kawza Il-**Pulizija vs. Noel Frendo** deciza fit-30 ta' Dicembru 2004, il-Qorti tal-Appell Kriminali qalet hekk:

> *"L-impronti digitali (u dawk palmari) huma forma ta' prova indizzjarja – "circumstantial evidence"" - li kif qal Lord Salmon fil-kaz DPP v. Kilbourne [1973] AC 729, p. 758 "...works by cumulatively, in geometrical progression, eliminating other possibilities". Il-kwistjoni kollha hi mhux jekk l-impronta nstabitx f'post pubbliku jew f'post privat jew anqas pubbliku - il-kwistjoni kollha hi jekk, fid-dawl tac-cirkostanzi kollha, il-post fejn instabet l-impronta tikkonvincix lill-gudikant lil hinn minn kull dubbju dettat mir-raguni li dik l-impronta saret mill-persuna li lilha tappartjeni fil-kors tal-kommissjoni minn dik l-istess persuna tar-reat li bih tkun akkuzata jew fil-kors ta' xi atti li jammontaw ghall-anqas ghal tentattiv ta' dak ir-reat".*

Fil-kawza kwotata hawn fuq, il-Qorti qalet hekk ukoll:

> *"Wahedhom dawn l-impronti kienu tali li setghu, legalment u ragjonevolment, inisslu fil-gudikant il- konvinciment morali li kienet il-persuna li lilha kienu jappartjenu l-istess impronti li kienet hekk spustathom, u dan evidentement bil-hsieb li jingarru flimkien mal-*

oggetti l-ohra li kienu effettivament ingarru. Fin-nuqqas ta' xi spjegazzjoni, imqar fuq bazi ta' probabbilita`, ta' kif dawk l-impronti tal-appellant Frendo spiccaw fuq l-oggetti misjuba fil-kaxxa, l-ewwel Qorti ftit li xejn kellha triq ohra ghajr li ssib lill-appellant hati skont l-ewwel imputazzjoni".

Riferenza ghandha ssir ghall-kawza fl-ismijiet Il-**Pulizija vs. Alfred Bugeja**, deciza mill-Qorti tal-Appell Kriminali fit-22 ta' Novembru 2012. Il-Qorti qalet hekk:

"F'dan il-kaz l-impronta li qablet mas-saba' z-zghir tal-id ix-xellugija tal-appellat instabet fuq il-kument tat-tieqa tan-naha tal-lemin tal-ufficcju tal-Mid-Med. Din it-tieqa tinsab fuq in-naha ta' wara tal-Bank fejn, minn ezami tar- ritratti mehudin u esebiti minn P.C. 516 Alfio Borg (a fol. 37), jirrizulta li hemm passagg dejjaq – mhux, mela, post fejn hu mistenni li jikkongregaw in-nies. L-impronta nstabet proprju fuq il-kument tat-tieqa tal-lemin, dik it- tieqa (sliding) li tkissritilha l-hgiega biex setghet tinfetah u tigi mbuttata lejn ix-xellug sabiex b'hekk il-halliel jew hallelin setghu jaqtghu l-hadid li kien hemm fuq in-naha ta' gewwa.

[...]

Dak li hu palezi hu li l-appellat ma ta l-ebda spjegazzjoni ragjonevoli ta' kif impronta ta' idu l-leminija thalliet proprju fuq it-tieqa sgassata tal-ufficcju tal-Mid-Med Bank fl-Universita` Tal-Qroqq".

Il-Qorti se taghmel referenza ukoll ghas-sentenza ricenti tal-Qorti tal-Appell Kriminali deciza fit-28 ta' Marzu 2019 fl-ismijiet Il-**Pulizija vs Christopher Schembri**[13]

Il-kwistjoni kollha hi mhux jekk l-impronta instabitx f'post pubbliku jew f'post privat jew anqas pubbliku – il-kwistjoni kollha hi jekk, fid-dawl tac-cirkostanzi kollha, il-post fejn instabet l-impronta tikkonvincix lill-gudikant lil hinn minn kull dubbju dettat mir-raguni li dik l-impronta saret mill-persuna li lilha tappartjeni fil-kors tal-kommissjoni minn dik l-istess persuna tar-reat li bih tkun akkuzata jew fil-kors ta' xi atti li jammontaw ghall-anqas ghal tentattiv ta' dak ir-reat. Hekk, per ezempju, impronta misjuba f'bank fil-parti fejn il-pubbliku ghandu access u meta jirrizulta li l-imputat kien jiffrekwenta dak il-bank ftit li xejn tista' sservi ta' prova kontra dak l-imputat jekk huwa jigi akkuzat b'serq minn dak il-bank. L-istess ma jistax jinghad, pero`, jekk dik l-impronta tinstab fuq il-bieb ta' l-istrongroom tal-bank fejn l-impjegati tal-bank biss jistghu jidhlu u meta l-imputat ma hux tali impjegat u ma jirrizultax li qatt kellu ghalfejn jersaq lejn dak il-bieb .

Illi ghalhekk wiehed jistaqsi, dina l-prova wahedha hija sufficjenti sabiex wiehed jikkonkludi illi l-imputat kien involut f'dina is-serqa? Illi huwa principju rassodat illi l-provi fil-kamp kriminali jistghu ikunu kemm diretti kif ukoll indizjali, izda dawn ta'l-ahhar iridu ikunu univoci, iwasslu ghal konkluzjoni wahda u iridu ikunu sufficjenti tali biex inisslu konvinciment morali f'mohh il-gudikant lil hinn minn kull dubbju ragjonevoli mir-reita' tal-imputat.

[13] Appell Numru: 457 / 2015 deciza mill-Imhallef Consuelo Scerri Herrere

F'dan il-kaz l-unika prova soda kontra l-imputat li huwa ghamel dan ir-reat kienet impronta digitali illi nstabet fuq flixkun tal-plastic tax-xorb li nstab barra fit-triq u illi kien fih xi tip ta' fuel (accelerant) sabiex jahraq il-bieb tad-dar tal-parte civile.

Il-Qorti tinnota illi ma ngabitx prova illi dan il-flixkun kellu xi fuel go fih jew x'tip ta' fuel kien fih dan il-flixkun.

L-espert tal-impronti digitali **Joseph Mallia**[14] xehed:

> *Bhala konkluzjonijiet ghandi nghid li kien hemm impronti tajbin ghal fini ta' komparazzjoni u ohrajn li ma kienux u dawk li kienu tajbin ghal fini ta' komparazzjoni wiehed minnhom kien jaqbel pozittivament u ghalhekk kien identiku mas-subgha tan-nofs ta' l-id ix-xellugija tal-istess Amadeo Grima.*

Jirrizulta illi kien hemm diversi impronti digitali ohra fuq il-flixkun izda malli l-pulizija sabu l-impronta digitali wahda tal-imputat taqbel, huma

[14] A fol 136 fis-seduta tal-31 ta' Lulju 2018

waqfu hemm minghajr ma komplew biex jaraw jekk l-impronti digitali l-ohra kienux kompatibbli ukoll ma' dawk tal-imputat sabiex ikomplu jsahhu l-fatt li kienu l-impronti digitali biss tal-imputat li kellhom x'jaqsmu mar-reat. B'dak il-mod biss huma setghu jkunu certi lil hinn minn kull dubju ragjonevoli dwar il-htija tal-imputat.

Il-filmat esebit

Fil-ktieb *Electronic Evidence*[15], Stephen Mason jispjega li:

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

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

> *"A photograph (or film) the relevance of which can be established by the testimony of someone with personal knowledge of the circumstances in which it was taken (or made), may also be admitted to prove the commission of an offence and the identity of the offender."*[16]

[15] Ippubblikat minn LexisNexis U.K. t-tieni edizzjoni ppubblikata fl-2010 pg. 345 para. 10.91
[16] Pg. 2545 f'*Real Evidence* F8.58

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

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.***
>
> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special***

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

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

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

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

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

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

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

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

> ***'A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses. The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person or animal, the demeanour of witnesses (which may or may not be offered or presented to the court by design), views of the locus in quo or of any object incapable of being brought to court without undue difficulty and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum total of their contents as such ... What is of importance in each case is the visual, aural or other sensory impression which the evidence, by its own characteristics produces on the court, and on which the court may act to find the truth or probability of any fact which seems to follow from it'. ...***
>
> ***'The court may look at and draw any proper conclusions from its visual observation of any relevant material object produced before it ... The tribunal of fact is entitled to act on the results of its own perception, even where it conflicts with other evidence given about the object ...'.***

Ikompli:

> ***'The court must, before admitting recordings as evidence be satisfied that the evidence which may be yielded is relevant and that the recording produced is authentic and original ... The above principles apply to the use of film produced by hidden, automatic security cameras installed in banks and elsewhere for the purpose of recording robberies and other incidents. The jury are entitled to consider the film as identification evidence of the persons recorded on it, subject to the foundational requirements stated above" see eg 'R v Dodson; R v Williams [1984] Crim LR 489; see "Taylor v Chief Constable of Cheshire [1986] 1 WLR 1979'.***

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

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

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

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

Mis-CCTV footage u l-istills li ha l-espert **Dr. Martin Bajada** ghalkemm tidher il-persuna li wettqet dan ir-reat m'hemmx indikazzjoni li l-persuna tixbah lill-imputat.

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

Il-Qorti qabel tghaddi biex tanalizza l-imputazzjonijiet thoss li ghandha taghmel espozizzjoni dwar il-*presumption of facts* u l-provi cirkostanzjali.

Fi kliem Sir Rupert Cross,

> *Presumptions of fact (*praesumptiones hominis*) are merely frequently recurring examples of circumstancial evidence, and instances which have*

already been mentioned are the presumption of continuance, the presumption of guilty knowledge arising from the possession of recently stolen goods and the presumption of unseaworthiness in the case of a vessel which founders shortly after leaving port. These are all inferences which may be drawn by the tribunal of fact.[17]

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.[18]

U fl-edizzjoni tal-2018 ta' **Archbold** jinghad hekk dwar presunzjonijiet ta' fatt:

These are inferences which the court may draw from the facts which are established, but it is not obliged to draw.

For example where a defendant charged with handling stolen goods is found to be in possession of those goods without any explanation, this circumstantial evidence may give rise to a provisional conclusion that the defendant is the handler of those goods.

In some cases a rebuttable presumption of law imposes a legal burden of proof which must be satisfied to the requisite standard

[17] 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

[18] ibid. p. 40.

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.[19]

Huwa minnu li fl-**Artikolu 638(2) tal-Kap. 9** ix-xhieda ta' xhud wiehed biss, jekk emnut minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Ghalhekk jispetta lill-Qorti tara liema hija l-aktar xhieda kredibbli u vero simili fic-cirkostanzi u dan a bazi tal-possibilita'. Huwa veru wkoll li l-Qorti ghandha tqis provi cirkostanzjali jew indizzjarji sabiex tara jekk hemmx irbit bejn l-imputat u l-allegati reati. Dan qed jinghad ghaliex ghalkemm huwa veru li fil-kamp penali l-provi indizzjarji hafna drabi huma aktar importanti mill-provi diretti, pero' hu veru wkoll li provi indizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex il-gudikant jaccerta ruhu li huma univoci.

Fil-fatt il-Qorti hawnhekk taghmel referenza ghal-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-hmistax (15) ta' Gunju, 1998 fil-kawza fl-ismijiet '**Il-Pulizija vs Jason Lee Borg'**, fejn kien gie ritenut li provi jew indizzji cirkostanzjali ghandhom ikunu univoci, cioe' mhux ambigwi. Ghandhom ikunu indizzji evidenti li jorbtu lill-akkuzat mar-reati u hadd iktar, anzi l-akkuzat biss, li huma l-hati u l-provi li jigu mressqa, ikunu kompatibbli mal-presunzjoni tal-innocenza tieghu. Illi ghalhekk huwa importanti fl-isfond ta' dan il-kaz li jigi ppruvat li kien l-imputat biss li ghamel dak li gie akkuzat bih u ghalhekk il-Qorti sejra tikkunsidra kwalunkwe prova possibilment cirkostanzjali li tista' torbot lill-imputat

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

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.[20]

Illi din hija ezattament il-posizzjoni 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 bhal katina li tintrabat minn tarf ghal tarf, b'sensiela ta' ghoqiedi li jaqblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni[21].

KONKLUZZJONI

Il-prova li setghet rabtet lill-imputat mar-reat u li l-prosekuzzjoni strahhet fuqha huwa il-flixkun instab barra fit-triq u barra mix-xena tar-reat in kwistjoni.

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

[21] 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

Jirrizulta li kien fih aktar minn impronta digitali wahda fuq il-flixkun. Dawn setghu kienu ta' kulhadd imma ma gewx ezaminati ulterjorment forensikament.

Mhux rari li wiehed isib numru ta' flixken mormija barra fit-triq. Mhux eskluz li l-imputat seta' xorob minn flixkun u ramih barra.

Ghalhekk il-Qorti ma tistax toqghod biss fuq il-fatt li nstabet impronta digitali wahda fuq flixkun biex jikkonkludi li kienet tali persuna u mhux ohra li wettqet ir-reat.

Wara li din il-Qorti hasbet fit-tul dwar din il-kwistjoni, ma tistax tehles mil-*lurking doubt* dwar jekk l-imputat kienx hu li ta n-nar biex setghet tinstab htija tal-imputazzjonijet dedotti kontra tieghu.

Din il-Qorti qatt ma waslet biex tikkundanna lil xi hadd semplicement fuq suspett.

Illi ghalkemm jista' ikun hemm suspett f'dan il-kaz minhabba l-impronta digitali li nstabet fuq il-flixkun u taqbel ma' dik tal-imputat, madanakollu din il-Qorti ma tistax tasal ghal konkluzjoni lil hinn minn dubbju dettat mir-raguni illi fil-fatt l-imputat huwa hati tal-akkuzi migjuba kontrih, b'din il-prova biss li m'hi kkorraborata mill-ebda xhud.

DECIDE:

Il-Qorti ghal dawn il-mottivi ma ssibx lill-imputat hati tal-imputazzjonijiet kollha migjuba kontrih u tilliberah minnhom.

_____

Dr. Joseph Mifsud
Magistrat