Qorti tal-Appell Kriminali

Onor. Imhallef Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

**Appell Numru: 73 / 2016**

Il-Pulizija

vs

**Noel (Emanuel) Mifsud**

Illum, 4 ta' Gunju, 2019

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellant Noel (Emanuel) Mifsud, iben Alfred, imwieled Pieta' , fit-28 ta' Novembru, 1974, detentur tal-karta ta' l-identita' numru 550574 (M), akkuzat quddiem il-Qorti tal-Magistrati (Malta):

Talli ghan-nom u in rapprezentanza ta' Wonka Company Limited (C44106) u/jew bhala persuna registrata mad-Direttur Generali tat-Taxxa fuq il-Valur Mizjud skont l-Att tal-1998 dwar Taxxa fuq il-Valur Mizjud (Att Nru. XXIII tal-1998) u regolamenti maghmula bis-sahha tal-istess Att, inqast li tikkonforma ruhhek mas-sentenza tal-Qorti tal-Magistrati (Malta) datata s-6 ta' Dicembru, 2012, u moghtija fil-konfront tieghek inkwantu li inqast kif ordnata fl-imsemmija sentenza li fi zmien tliet xhur mid-data tas-sentenza, tikkonforma ruhhek mal-ligi u fin-nuqqas tehel multa ohra' ta' €15 ghal kull jum li matulu jkompli n-nuqqas wara li jghaddi l-imsemmi zmien, liema multa, bis-sahha tal-art. 4 u 6 tal-Att XIV tal-2013, ghandha tigi riveduta ghal €5 ghal kull jum li matulu jkompli n-nuqqas.

Il-Prosekuzzjoni talbet li l-imsemmi imputat jigi kkundannat li jhallas il-multa msemmija fis-sentenza fuq riferita ghall-perjodu li jibda mis-7 ta' Marzu, 2013 sat-30

ta' April, 2014, liema multa ghandha tigi kkalkulata mill-gdid kif imsemmi hawn fuq, salv kull multa ghal nuqqas ulterjuri.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tal-4 ta' Frar, 2016 fejn il-Qorti wara li rat l-Artikolu 76 tal-Kapitolu 406 tal-Ligijiet ta' Malta u l-Att XIV tas-sena 2013, sabet lill-imputat hati ta' l-imputazzjoni migjuba kontra tieghu u kkundannatu multa ta' elfejn u mitt Euro (€2,100), multa rapprezentanti l-perjodu ta' bejn is-7 ta' Marzu, 2013 u t-30 ta' April, 2014

Rat ir-rikors tal-appellanti Noel ( Emanuel) Mifsud minnu pprezentat fis-17 ta' Frar, 2016 fejn talab lil din il-Qorti joghgobha **THASSAR U TIRREVOKA** s-sentenza appellata u dan billi **TIDDIKJARAH** mhux hati tal-akkuza migjuba fil-konfront tieghu u konsegwentement **TILLIBERAH** minn kull htija jew piena; jew alternattivament **TIRRIFORMA** s-sentenza appellata fil-parti tal-piena inflitta u dan billi minflok timponi piena aktar ekwa u gusta ghac-cirkostanzi tal-kaz.

Rat l-aggravji tal-appellanti u cioe' :-

Illi fl-ewwel lok jigi rilevat illi l-appellant jissottometti illi l-Ewwel Qorti ghamlet apprezzament zbaljat tal-provi prodotti quddiema u dan kif se jirrizulta ahjar waqt it-trattazzjoni ta' dan l-appell. Illi quddiem l-Ewwel Onorabbli Qorti l-appellant gie akkuzat darbtejn u misjub hati darbtejn (fil-fatt intavola zewg appelli differenti) ghall-istess fatti stante illi l-multa fiz-zewg akkuzi separati tirrelata mal-istess perjodu. Fil-fatt, dakinhar tas-seduta u cioe nhar l-erbgha (4) ta' Frar tas-sena elfejn u sittax (2016) l-appellant kellu zewg akkuzi enumerati tmienja (8) u tmienja u tletin (38) fil-lista ta' dik il-gurnata. Illi minn kopja tas-sentenzi taz-zewg akkuzi enumerati tmienja (8) u tmienja u tletin (38) tal-lista jirrizulta b' mod car u minghajr ebda ombra ta' dubju illi l-appellant gie akkuzat bl-istess akkuza u misjub hati ghall-istess fatti u l-istess perjodu. Fil-fatt, miz-zewg sentenzi jirrizulta illi mhux biss l-akkuzi fiz-zewg istanzi huma l-istess izda illi l-perjodu huwa identiku ukoll u cioe l-perjodu bejn is-sebgha (7) ta' Marzu tas-sena elfejn u tlettax (2013) u t-tletin (30) ta' April tas-sena elfejn u erbatax (2014). Tant hu hekk illi l-appellant fiz-zewg sentenzi gie kkundannat ihallas l-istess piena u cioe' multa ta' elfejn u mitt ewro (€2100) liema

multa tirrigwarda l-istess perjodu hawn fuq surreferit. Illi ghalhekk l-appellant jirrileva illi huwa ma jistax jinstab hati tal-istess reat ghal datbejn u dan abbazi tal-principju ne bis in idem.

Illi l-principju tan-ne bis in idem jinsab imhaddan mhux biss fid-dritt penali taghna u cioé fil-Kodici Kriminali izda ukoll fil-Kostituzzjoni u l-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem. Hemm distinzjoni netta bejn dana il-principju kif inhu imhaddan fil-Kodici Kriminali u dak imhares mill-Kostituzzjoni taghna, kif ukoll distinzjoni ma' dak dikjarat fir-raba' artikolu tas-Seba Protokol tal-Konvenzjoni. Mentri Artikolu 527 tal-Kapitolu 9 tal-Ligijiet ta' Malta jirreferi ghall-"istess fatt", Artikolu 39(9) tal-Kostituzzjoni ta' Malta jirreferi ghall-"[istess] reat".

Illi Artikolu 527 tal-Kapitolu 9 tal-Ligijiet ta' Malta jghid hekk:

> *"Wara sentenza li f' kawża tillibera imputat jew akkużat, dan ma jistax għall-istess fatt ikun suġġett għal kawża oħra".*

Illi, b' hekk jirrizulta illi l-Kodici Kriminali jippostula zewg elementi importanti: fl-ewwel lok, irid ikun hemm sentenza fejn l-imputat jigi liberat jew jinstab hati tal-akkuzi migjuba fil-konfront tieghu u, fit-tieni lok, illi l-istess persuna ma tigix sottoposta ghal proceduri godda dwar l-istess "fatt" (u mhux l-istess "reat").

Illi fin-noti tieghu, il-Profs Mamo jghid hekk:

> *"But it must be strongly emphasised that for the plea to succeed the fresh proceedings must be based on the very same fact. (Cr. App. "Pol. vs. Piscopo" 21/3/1953)"*
>
> …
>
> *"What is particularly essential is to have a notion of what the law means by the same fact. In "Rex vs. Agata Mifsud et" (15/5/1918) Law Reports, Vol. XXIII, p. 1, p. 1077, H.M.' s Criminal Court said: "Per giudicare se si tratti di fatti identici u diversi, bisogna esaminare se il corpo del delitto rimanga lo stesso, pur cambiandosene la qualificazione, o in altri termini, se la materialita' del fatto rimane inalterata malgrado la diversa qualificazione legale che gli venga attribuita". In other words, if*

*the fact on which the subsequent charge is made is the same as that in respect of which the previous judgment was given, the plea lies notwithstanding that the subsequent charge is an offence different from that charge in the previous trial".*

Illi fil-kawza fl-ismijiet Il-Pulizija vs Anthony Vella et, il-Qorti ta' l-Appell Kriminali qalet hekk:

*"Bl-espressjoni l-istess att wiehed ghandu jifhem il-fatt fizikament rigwardat konsistenti ghalhekk kemm fl-element materjali – att ta' kommissjoni jew ommissjoni – kif ukoll dak formali tieghu."*

Illi s-sentenza fl-ismijiet Il-Pulizija vs Nicolai (Nicolai Christian) Magrin, deciza fis-26 ta' Marzu 2009, il-Qorti Civili Prim' Awla (Gurisdizzjoni Kostituzzjonali) ghamlet analizi tajba tal-principju kif jinsab imhaddan fil-ligi taghna kemm penali kif ukoll kostituzzjonali. F' din is-sentenza, il-Qorti qalet is-segwenti:

*"Illi huwa wkoll stabilit li l-principju tan-ne bis in idem imhares fl-artikolu 39(9) tal-Kostituzzjoni jimplika li persuna li tkun ghaddiet minn process dwar reat, m' ghandha qatt terga' tghaddi minn process iehor dwar tali reat jew dwar reati ohra li setghet tinstab hatja dwarhom fl-ewwel process.*

*[...]*

*Illi [...] dana is-subartikolu fil-Kostituzzjoni jaghti harsien usa lill-persuna mixlija minn dak moghti mill-artikolu 527 tal-Kodici Kriminali, sewwa sew ghaliex jgholli l-eccezzjoni tan-ne bis in idem ghall-livell ta' garanzija kostituzzjonali bil-konsegwenza li persuna li jkollha dan il-jedd mhedded jew attwalment miksur quddiem qorti kriminali ghandha ljedd tirrikorri ghall-protezzjoni quddiem qorti ta' xejra kostituzzjonali.*

*[...]*

*Illi meta wiehed jitkellem dwar l-eccezzjoni tan-ne bis in idem fil-qasam tad-dritt penali taht l-ordinament guridiku taghna, wiehed iqies li jehtieg jintwera li l-*

*persuna li tkun tqieghdet taht akkuza ohra trid tkun l-istess wahda li kienet tqieghdet taht l-ewwel procedura u wkoll li tkun hekk tressqet dwar l-istess fatt.*

*[...]*

*Illi fil-qasam tad-dritt penali jidher li huwa principju accettat li, bi thaddim tar-regola ne bis in idem: "The criminal action is extinguished ... when there has been one act on the part of the accused and he has already been convicted (or acquitted) of an offence founded on such act, and afterwards, he is again brought up for judgment on a different charge, but founded on the same act.*

Illi inoltre fil-kawza Sua Maesta' il-Re versus Agata Mifsud e Carmelo Galea [15.6.1918] intqal hekk:

*"un criterio pratico non meno che ragionale per determinare se ad un dato caso si applichi la regola "non bis in idem" é quello appunto affermato dalla giurisprudenza ed accolto dalla dottrina giuridica in Inghilterra. "The true test by which the question whether such a plea (i.e. Autrefoit acquit) is a sufficient bar in any particular case may be tried, is whether the evidence to support the second indictment would have been sufficient to prove a legal conviction upon the first".*

Illi jkun opportun li ssir riferenza wkoll ghad-decizjoni fl-ismijiet Sergey Zolotukhin vs Russja moghtija mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem. Il-Qorti qalet li hija:

*"takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second ' offence' in so far as it arises from identical facts or facts which are substantially the same. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of new prosecution, where a prior acquittal or conviction has already acquired the force of res judicata. At this juncture, the available material will necessarily comprise the decision by which the first ' penal procedure' was concluded and the list of charges levelled against the applicant in the new proceedings. Normally, these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence for which he or she stands accused. In the Court' s*

*view, such statements of fact are an important starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal. The Court' s inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings".*

Illi ghalhekk tenut kont tac-cirkostanzi u l-provi prodotti quddiem l-Ewwel Onorabbli jirrizulta illi l-akkuza migjuba fil-konfront tal-appellanti fiz-zewg kazijiet huma l-istess tant li kemm it-tahrika kif ukoll is-sentenza huma kelma b' kelma identici. Id-dispożizzjonijiet tal-ligi msemmija fiż-żewg taħrikiet huma l-istess u l-fatt li għalih jirreferu ż-żewg Taħrikiet huwa l-istess ukoll u anke l-perjodu li jirreferu ghalih l-akkuzi huwa identiku. Dan ifisser illi l-elementi kostitutivi (l-"elementi essenzjali"), jigifieri kemm dak materjali (l-"actus") u kemm dak formali (il-"mens") tar-reati ipotiżżati fiż-żewg akkużi huma identici ghal kollox u ghalhekk l-appellant semmai ghandu jigi liberat mit-tieni kaz migjub fil-konfront tieghu stante li huwa identiku ghall-ewwel kaz.

Illi inoltre jigi rilevat illi l-appellant apparti illi gie ikkastigat iktar minn darba stante illi z-zewg multi imposti fuqu jirreferu ghall-istess perjodu kif indikat iktar qabel, l-appellant rega gie ikkastigat iktar minn darba stante illi b' mod awtomatiku is-sistema tal-VAT timponi multi amministrattivi, hekk kif persuna f' dan il-kaz l-appellant ghan-nom u in rapprezentanza ta' Wonka Company Limited (C44106) u/jew bhala persuna registrata mad-Direttur Generali tat-Taxxa fuq il-Valur Mizjud skont l-Att tal-1998 dwar Taxxa fuq il-Valur Mizjud (Att Nru. XXIII tal-1998) u regolamenti maghmula bis-sahha tal-istess Att, jonqos li jikkonforma ruhu ma' sentenza moghtija lilu fi zmien tliet (3) xhur fejn jibdew jigu imposti multi ghal kull gurnata li matulu jkompli n-nuqqas. Illi konsegwentement is-sentenza tal-Qorti tal-Magistrati (Malta) tal-erbgha (4) ta' Frar tas-sena elfejn u sittax (2016) apparti li

tikkostitwixxi ksur tal-principju ne bis in idem stante illi z-zewg akkuzi separati fejn l-appellant instab hati jirreferi ghall-istess perjodu tikkonstitwixxi ksur tal-principju ne bis in idem ukoll stante illi l-appellant gie ikkastigat iktar minn darba minhabba l-istes fatt. Illi l-impostazzjoni ta' multi b' mod arbitrarju fil-konfront tal-appellant ikawza lezjoni tad-dritt ta' smiegh u tal-principju ne bis in idem.

Illi fil-fatt issir referenza ghall-kaz ' **<u>Ruotsalainen vs Finland'</u>** (Applikazzjoni nru. 13079/03) fejn gie stabbilit illi:

*".. In the case under consideration two measures were imposed on the applicant in two separate and consecutive sets of proceedings... The Court reiterates that the legal characterization of the procedure under national law cannot be the sole criterion of relevance for the applicability of non bis in idem under article 4/1 of Protocol No. 7. Otherwise the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to result incompatible with the object and purpose of the convention...'*

Illi inoltre fid-decizjoni li nghatat fis-26 ta` Frar 2013 mill-Qorti tal-Gustizzja tal-UE fil-kaz ta` **<u>Aklagaren vs Hans Akerberg Fransson</u>** li ttratta l-kwistjoni ta` ne bis in idem, inghad hekk:

*… Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties … These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final, that that 29 provision precludes criminal proceedings in respect of the same acts from being brought against the person. … The ne bis in idem principle laid down in Article 50 of the Charter of the Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal*

*penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.*

Illi ssir referenza ghall-pronunzjament tal-Prim' Awla tal-Qorti Civili (Sede Kostituzzjonali) fil-21 ta` Frar 2014 fil-procediment fl-ismijiet "**Il-Pulizija vs Godwin Musca**t", li minnu ma kienx hemm appell. Inghad:

*The Strasbourg Court has stated that the aim of Article 4 of Protocol 7 "is to prohibit the repetition of criminal proceedings that have been concluded by a final decision". The scope of Article 4 has been clarified by the Grand Chamber in the Sergey Zolotukhin case. The Grand Chamber was influenced by the text of corresponding provisions in the Covenant on Civil and Political Rights, and the American Convention on Human Rights, in concluding that the Article should be interpreted as prohibiting the prosecution or trial of an individual for a second offence where that second prosecution or trial arose from "identical facts or facts which are substantially the same, and the guarantee comes into play where a new set of proceedings is instituted after a prior acquittal or conviction has acquired the status of res judicata."*

*Fil-kaz Zolotukhin v Russia (applikazzjoni numru : 14939/03) deciz fl- 10 ta` Frar 2009 mill-Grand Chamber tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem, il-Qorti Ewropea tad-Drittijiet tal-Bniedem ikkonfermat li l-Artikolu 4 tal-Protokoll numru 7 :-*

*"98. was not confined to the right not to be punished twice but extended to the right not to be prosecuted or tried twice."*

*Jirrizulta li d-Dipartiment impona taxxa addizzjonali, fit-termini tal-Artikolu 23(4) tal-Att dwar l-Amministrazzjoni tat-Taxxa (Kap. 372) li jipprovdi li d-Direttur Generali tat-Taxxa ghandu d-diskrezzjoni li jimponi taxxa addizzjonali fuq min jonqos li jnaqqas taxxa skond l-Artikolu 23(1), jew ghalkemm ikun naqqasha jkun naqas milli jhallasha lid-Dipartiment, jew xort`ohra jkun naqas milli jhares id-disposizzjonijiet tar-regoli maghmula mid-Dipartiment.*

*Kien hemm diversi kazijiet quddiem il-Qorti Ewropea tad-Drittijiet tal-Bniedem li ttrattaw jekk sanzjonijiet amministrattivi kienux jikkwalifikaw bhala `criminal*

*charge`. Hekk per ezempju huma l-kazijiet Vastberga Taxi Aktiebolag and Vulic v Sweden (36985/97) tal-21 ta` Mejju 2003, Rosenquist v Sweden (60619/00) tal-14 ta` Settembru 2004. Fis-sentenzi jissemmew tlett kriterji biex jigi determinat jekk offiz tikkwalifikax bhala "criminal":*

*"the legal classification of the offence in domestic law, the nature of the offence and the nature and degree of severity of the possible penalty" (paragrafu 76 tal-kaz Vastberga). Kriterji li skond il-gurisprudenza ma jidhirx li jridu jkunu kumulattivi. Il-kaz ta` Vastberga kien jitratta limposizzjoni ta` tax surcharge fuq min ma jatix taghrif korrett. Il-qorti osservat li:-*

- *l-ghan wara l-provvediment fuq surcharges hu "to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive. The latter character is the customary distinguishing feature of a criminal penalty (see the Ozturk v. Germany judgment cited above, p. 20, §53)".*

- *"The criminal character of the offence is further evidenced by the severity of the potential and actual penalty. The surcharges, normally fixed at 20% or 40% of the tax avoided, depending on the type of tax involved, have no upper limit and may come to very large amounts. It is true that surcharges cannot be converted into a prison sentence in the event of non-payment; however this is not decisive for the classification of an offence as `criminal` under Article 6 (see the Lauko v. Slovakia judgment cited above, p. 2505 §58).". Fil-kaz in ezami jirrizulta li hemm massimu ta` Ewro1,000 taxxa addizzjonali li jista` jimponi d-Direttur Generali ghal kull nuqqas (Artikolu 23(5) tal-Kap. 372).*

*Gialadarba jidher li t-taxxa addizzjonali hi ntiza sabiex isservi bhala deterrent u hi wkoll mizura punittiva, allura l-qorti tikkonkludi li tikkwalifika bhala `a criminal penalty`. Ghal dak li jikkoncerna l-ilment taht l-Artikolu 39(9) il- principju ta` ne bis in idem japplika fejn persuna tkun ghaddiet minn proceduri "quddiem qorti kompetenti". Billi t-taxxa addizzjonali tigi mposta mid-Direttur Generali tat-Taxxi, dan il-provvediment ma japplikax fil-kaz in ezami.*

*Il-qorti tinnota wkoll li l-imposizzjoni ta` taxxa addizzjonali ma twassalx ghall-ksur tal-Artikolu 4 tas-Sebgha Protokoll tal-Konvenzjoni meqjus li skond l-Artikolu 23(8) tal-Kap. Kap. 372 : "Il-Kummissarju jista` fid-diskrezzjoni tieghu jaghti lura kollha kemm hi jew f`xi parti minnha xi 31 taxxa addizzjonali imposta taht id-disposizzjoni ta` dan l- artikolu.". Mela l-imposizzjoni ta` taxxa addizzjonali m`hijiex definittiva, kuntrarjament ghal dak li jigri fejn tinghata sentenza li ssir gudikat.*

*F`kull kaz mill-provi ma rrizultax li sal-lum id-Direttur Generali Taxxi hareg xi avviz kontra Dr Muscat Azzopardi li biha mpona taxxa addizzjonali, f`liema eventwalita` jkollu kull dritt li jikkontesta l-istess ai termini tal-Artikolu 23(6) tal-Kap. 372. Fil-fatt l-avvizi li nhargu huma fil-konfront talkumpannija Zimmermann House Projects Limited u Dr Patrick Spiteri. Filkaz Sergey Zolotukhin v Russia, inghad:-*

*"107. The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final `if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the timelimit to expire without availing themselves of them".*

Illi ssir riferenza wkoll ghas-sentenza tal-Qorti Kostituzzjonali tad-29 ta` Mejju 2015 fil-kawza "**Angelo Zahra vs L-Onorevoli Prim Ministru et**". Ghalkemm dik il-kawza kienet tittratta dwar id-disposizzjonijiet tal-ligi fiskali tal-FSS, il-principji li jemergu minn dik is-sentenza jistghu jigu applikati ghall-kaz tal-lum fejn il-Qorti qalet hekk:

*L-Artikolu 4 tas-Seba` Protocoll tal-Konvenzjoni fil-parti relevanti jaqra hekk:*

*"1. Hadd ma jista` jkun ipprocessat jew jerga` jigi kkastigat ghal darb`ohra fi procedimenti kriminali taht il-gurisdizzjoni tal-istess Stat ghal xi reat li dwaru jkun*

*diga` gie finalment liberat jew misjub hati skond il-ligi u lprocedura penali ta` dak l-Istat."*

*25. Fir-rigward din il-Qorti tosserva li hemm certu kazijiet fejn ilmulta amministrattiva tant tkun severa li tikkwalifika bhala piena penali ghax tenut kont tas-severita` taghha titqies derivanti minn akkuza kriminali ghall-finijiet tal-Artikolu 6 tal-Konvenzjoni tal-Artikolu 39 tal-Kostituzzjoni.*

*26. Fil-kaz odjern huwa minnu li, filwaqt li l-piena imposta millQorti hija wahda definittiva, dik amministrattiva m`hijiex definittiva u dan peress li, ai termini tal-Artikolu 23 [8] tal-Att Dwar l-Amministrazzjoni tat-Taxxa Kap. 372, din tista` tigi irtirata parzjalment jew fl-intier taghha millKummissarju. Huwa wkoll minnu li, skont il-proviso tas-subinciz 7 tal-istess att, dik it-taxxa tista` wkoll tigi kontestata quddiem qorti fiz-zmien hmistax-il jum min-notifika tal-avviz. Huwa minnu wkoll li skont ir-regolament nurmu 24 tal-Legislazzjoni Sussidjarja 372.14 intestata "Regoli Dwar Final Settlement System [FSS]", il-pagatur li jhossu aggravat bid-decizjoni jista` ai termini tas-subinciz 3 jipprezenta ittra ta` kontestazzjoni lill-Kummissarju fi zmien ghaxart ijiem min- notifika, u skont is-subinciz [5], dan jista` jahfer ittaxxa addizzjonali, parzjalment jew fl-intier taghha, jekk ikun sodisfatt li nnuqqas tal-pagatur ma jkunx dovut ghal xi htija jew negligenza tieghu.*

*27. Izda mill-provi akkwiziti jirrizulta li l-multi mitluba midDirettur minghand ir-rikorrent potenzjalment ilahhqu eluf kbar ta` euro u ghalhekk huma sostanzjali. Ukoll ma jirrizultax li dawn gew irtirati midDirettur. Ghalhekk meta l-pulizija agixxiet kontra r-rikorrent billi tat bidu ghall-proceduri kriminali kontra tieghu ghar-reati bazati fuq l-istess fatti – li juri li l-fatti huma klassifikati bhala reat kriminali – li fuqhom kienu diga` gew imposti l-multi "amministrattivi", dawn il-multi kienu gja` fis-sehh. Minn dan jirrizulta car li bit-tehid kontra r- rikorrent ta` proceduri kriminali wara li gia` gew imposti l-multi "amministrattivi", ir-rikorrent mhux talli gie processat darbtejn fuq l-istess fatti, izda talli gie wkoll penalizzat darbtejn in vjolazzjoni tal-artikolu konvenzjonali fuq citat.*

*28. Il-konsiderazzjonijiet premessi huma msahhin b`dak li osservat il-Qorti Ewropeja fil-kaz ta` Lucky Dev v. Sweden [Appl.7356/10, deciz 27 Novembru 2014] fejn, wara*

*li osservat li "..the aim of Article 4 of Protocol 33 Np.7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision..." qalet li l-fatt wahdu li kien hemm duplikazzjoni ta` proceduri, kriminali u amministrattivi, ghaddejjin fl-istess hin ma jinvolvix ksur tal-Artikolu 4 tal-Protokoll 7. Dak li f`dak il-kaz kien jinvolvi ksur ta` dak l-artikolu konvenzjonali kien il-fatt li, ghalkemm ilproceduri kriminali kienu gew konkjuzi qabel il-proceduri amministrattivi bil-liberatorja tal-applikant, dawn l-ahhar proceduri damu ghaddejjin ghal 9 xhur ohra, wara li l-applikanti kienet giet liberata. "Therefore the applicant was tried "again" for an offence for which she had already been finally acquitted".*

*29. Fid-dawl tal-premess, fil-kaz odjern jirrizulta li, fiz-zmien meta ttiehdu passi kriminali kontra r-rikorrent konkluzi bis-sejbien ta` htija tarreati li bihom kien gie akkuzat u konsegwentement ikkundannat piena, kienu gia` gew imposti fuqu multi "amministrattivi" ta` entita` tant severa li ghandhom jitqiesu sanzjoni ta` natura penali. Ghaldaqstant fid-dawl tal-fatti kif zvolgew, il-proceduri kriminali kontra tieghu huma vjolattivi tal-Artikoli 4 tal-Protokoll 7. Dan ghandu jwassal ghan-nullita` tas-sentenza moghtija millQorti tal- Magistrati [Malta] fid-9 ta` Marzu 2010 kif riformata mill-Qorti Kriminali fil-31 ta` Ottubru 2013.*

Illi fil-kaz odjern jirrizulta illi l-akkuza li fuqha l-appellant tressaq it-tieni darba (u cioe' l-akkuza mertu tal-appell odjern) kienet ibbazata fuq s-sentenza li nghatat l-ewwel darba li tressaq. It-tieni darba kien fil-fatt akkuzat illi ma ottemporax ruhu mas-sentenza tal-Qorti tal-Magistrati (Malta) datata sitta (6) ta' Dicembru tas-sena elfejn u sittax (2016) li kienet imposta bl-ewwel sentenza. Ghaldaqstant l-appellant jirrileva illi huwa car illi t-tieni procediment kien hemm vjolazzjoni tal-principju ne bis in idem fis-sens illi l-appellant kien immultat ulterjorment ghall-istess akkuza. Mhux biss l-appellant ghadda proceduri kriminali darbtejn ghall-istess akkuza, izda kien ikkundannat ghal darbtejn ghall-istess akkuza. Inoltre ladarba jidher li l-multi imposti fuq l-appellant huma intizi sabiex iservu ta` deterrent u bhala mizuri punittivi, u allura jikkwalifikaw bhala "a criminal penalty".

Ghaldaqstant fid-dawl tas-sentenzi succitati u l-fatti hekk kif elenkati u l-provi prodotti jirrizulta b' mod car u ampju illi l-appellant tressaq darbtejn ghall-istess

akkuza u kkundannat darbtejn ghall-istess akkuza u ghalhekk ghandu jigi liberat fir-rigward.

Illi sussidjarjament u minghajr pregudizzju ghas-suespost jirrizulta, kemm mix-xhieda bil-gurament moghtija mill-appellant quddiem l-Ewwel Onorabbli Qorti kif ukoll mid-dokument esebit mill-appellant stess u cioe' ic-certifikat mediku tal-konsulent psikjatriku Dr. Jean-Pierre Giorgio, illi l-allegat nuqqas da parti tal-appellant illi jhallas l-ammont surreferit ma kienx volut minnu volontarjament imma kien rizultat tac-cirkostanzi illi sehhew tul l-ahhar hames snin fil-hajja tal-appellant. Illi fil-fatt, l-appellant spjega bil-gurament illi huwa dawn l-ahhar hames snin kien taht kura psikjatrika fejn fil-fatt mic-certifikat esebit minnu stess redatt mill-Psikjatra Dr. Jean-Pierre Giorgio hemm miktub illi l-istess Psikjatra ilu jsegwih minn Awwissu tas-sena elfejn u ghaxra (2010). L-appellant bil-gurament ukoll qal illi dahal darbtejn il-*psychatric unit* u dan senjatament bejn is-sena elfejn u tlettax (2013) u s-sena elfejn u erbatax (2014) u cioe' fil-perjodu ghal liema jirrisalu l-akkuzi odjerni. L-appellant bil-gurament spjega wkoll illi minhabba dawn il-problemi ta' sahha anke psikologici kellu jieqaf milli jibqa' jopera l-kumpanija Wonka Company Limited (C 44106). Dan ifisser illi fil-perjodu fejn huwa naqas illi jikkonforma ruhu mas-sentenza moghtija mill-Qorti tal-Magistrati (Malta) datata sitta (6) ta' Dicembru tas-sena elfejn u tnax (2012) u cioe' ghall-perjodu bejn is-sebgha (7) ta' Marzu tas-sena elfejn u tlettax (2013) u t-tletin (30) ta' April tas-sena elfejn u erbatax (2014) kien l-aghar zmien ghall-appellant fejn minhabba l-problemi ta' sahha anke psikologici kien anke sahansitra dahal gewwa l-*psychatric unit* u ghalhekk zgur illi ma kellux hsieb dawn l-affarijiet tal-Kumpanija Wonka Company Limited (C 44106). Tant hu hekk illi huwa waqqaf jopera l-istess Kumpanija. Illi ghalhekk tenut kont tac-cirkostanzi hawn surreferiti ghandu jkun hemm klemenza fil-konfront tal-appellant fejn l-imposizzjoni tal-multa addizzjonali ta' elfejn u mitt ewro (€2100) ghandha titnehha jew alternattivament titnaqqas peress illi l-appellant naqas biss milli jikkonforma ruhu mal-ligi mhux b' mod kapriccjuz izda biss minhabba l-problemi ta' sahha illi kellu.

Rat l-atti kollha tal-kawza.

Semghet it-trattazzjoni tal-partijiet.

Rat il-fedina penali aggornata tal-appellant ezebita mill-prosekuzjoni fuq ordni tal-Qorti.

Ikkunsidrat,

Semghet ix-xhieda prodotta mill-partijiet quddiemha u cioe' lil Paul Scicluna jixhed nhar id-19 ta Frar 2019 u dan spjega li qed jgharaf il-firma tal-kollega tieghu Marisa Stivala ghan-nom tal-Kummissarju tat-Taxxi fuq il-letter to prosecute a fol. 6 ta l-atti markata bhala dok PS1 A fol. 7 tal-proċess hemm reġistration form tas-Sur Noel Mifsud fil-kapacita tieghu ta' Direttur tal-Wonca Company Limited u a fol. 8 tal-proċess hemm estratt tal-MFSA li tindika li s-Sur Mifsud huwa d-direttur tal-kumpnaija in kwistjoni.

Spjega illi l-akkużi kienu bbażati fuq denunzji datati minn April 2010 sa April 2011 li ma ġewx mibigħuta mill-kumpanija in kwistjoni lid-dipartiment tal-VAT.

Spjega ukoll li gja kien hemm sentenza li inghatat fil-konront tal-appellant l-appellant kien gja instab hati mill-ewwel Qorti talli ma kienx ssottometta d-denunzji tal-kumpanija fi żmien tlett xhur, u kien instab hati u kkundnnat ihallas multa u ġiet imposta multa ġurnaljiera ta' 15 Euros kull ġurnata li jibqa ma jaderix ruhu mal-ligi L-appell odjern mhux fuq dik is-sentenza izda ghaliex naqas li jikkonferma ruhu ma dik is-sentenza tas-6 ta' Dicembru 2012 li filfatt hija l-mertu tal-appell ta' llum.

Dwar id-dokument market bhala dok PS 3 kien hemm ezenzjoni mid-difiza li dan id-dokuement jigi konfermat minn rapprezentant tal-MFSA

**L-appellant Noel Mifsud** xehed minn jeddu fl-istess jum tad-19 ta Frar 2019 u spjega li quddiem il-Qorti tal-Magistrati kien ipprezenta certifiat mediku sabiex jispjega ghaliex kien waqa lura u ssottometta d-denunzji tieghu tardivament. Ikkonferma li kien ghaddej minn perjodu difficli kif spjega l-konsulent tiegħu fic-certifikat . Imbagħad wara ftit taż-żmien peress li fl-ewwel tlett xhur kien għadu ma daħħal jew daħħal id-denunzji tard rega' nstab hati darb' ohra u gie kkundannat ihallas multa ta xi erba' t'elef u xi ħaġa.

Qal li ghalhekk il-ġustifikazzjoni tieghu ghad-dewmien tal-presentata tad-denunzji kienet minħabba kwistjoni medika. Dawn kienu dokumenti li kienu għadhom ma daħħlux fil-VAT Department imbagħad wara ammont ta' żmien meta setgha jagħmel il-proċeduri daħħalhom u kien daħħalhom fid-Dipartiment tal-VAT wara. Jiġifieri din hija l-ispjega ċar għalxiex kien waqa' lura milli jdaħħal id-dokumenti tiegħu.

In kontro ezami mistoqsi jekk hux minnu li sakemm ittella' il-Qorti fuq dawn il-multi kien għadu ma ppreżentax id-dokumenti meħtieġa jghid li huwa minnu. Jghid li l-Qorti kienet tatu zmien tlett xhur biex jirregola ruhu fuq ammissjoni tieghu stess ghall-akkuza pero' rigward din il-kawza tellghuh hafna wara. Mistoqsi jekk kienx lahaq dahhal id-dokumenti fiz-zmien it-tlett xhur mghoti lilu jghid li le.

Semghet lill-partijiet jittrattaw il-kawza u dan fl-istess seduta tad-19 ta' Frar, 2019.

Ikkunsidrat,

Illi l-appellant fir-rikors tieghu fl-ewwel lok jistqarr li l-ewwel Qorti ghamlet apprezzament zbaljat tal-provi prodotti.

Illi l-ewwel, tlitt aggravji jirrigwardaw l-apprezzament tal-provi traskritti li ghamlet l-ewwel Qorti. Issa hu principju ormaj stabilit fil-gurisprudenza ta' din il-Qorti (kemm fil-kaz ta' appelli minn sentenzi tal-Qorti tal-Magistrati kif ukoll fil-kaz ta' appelli minn verdetti w sentenzi tal-Qorti Kriminali) li din il-Qorti ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-Ewwel Qorti jekk tasal ghall-konkluzzjoni li dik il-Qorti setghet ragonevolment u legalment tasal ghall-konkluzzjoni li waslet ghaliha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-Ewwel Qorti, izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-Ewwel Qorti kienetx ragjonevoli fil-konkluzzjoni taghha. Jekk izda din il- Qorti tasal ghall-konkluzzjoni li l-Ewwel Qorti fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment tasal ghall-konkluzzjoni li waslet ghaliha, allura din tkun raguni valida, jekk mhux addirittura mpellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni w konkluzzjoni (ara f'dan is-sens "inter alia" l-Appell Kriminali : "**Il-Pulizija vs. Raymond Psaila et**." [12.5.94]; "**Ir-Republika ta' Malta vs. George Azzopardi** " [14.2.1989]; "**Il-Pulizija vs. Carmel sive Chalmer Pace**" [31.5.1991]; "**Il-Pulizija vs. Anthony Zammit" [31.5.1991**] u ohrajn.)

Illi appropozitu , din il-Qorti tirriferi ghal dak li nghad minn LORD CHIEF JUSTICE WIDGERY fil-kawza **"R. v. Cooper**[1]" (in konnessjoni mal-artikolu tal-ligi Ingliza s. 2 (1) (a) tal-Criminal Appeal Act, 1968) :-

"*assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate) , because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone . However, should the overall feel of the case – including the apparent weakness of the prosecution evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then , very exceptionally, a conviction will be quashed.*" (Ara wkoll BLACKSTONE'S CRIMINAL PRACTICE (1991), p. 1392)

Ghalhekk din il-Qorti ma tissostitwix id-decizjoni tal-Ewwel Qorti fuq apprezzament ta' fatti anki jekk ma taqbilx maghha, jekk l-Ewwel Qorti setghet legalment u ragonevolment tasal ghal dik il-konkluzzjoni. Din il-Qorti pero' taghmel ezami approfondit biex tara jekk l-Ewwel Qorti setghetx fuq il-provi li kellha tasal b'mod "*safe and satisfactory*" ghall-konkluzzjoni ta' htija.

Il-fatti li taw lok ghal din il-kawza kienu s-segwenti:-

1. L-appellant kien tressaq quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali u akkuzat talli ghan-nom u in rappresentanza ta Wonka Company Limited jew bhala persuna registrata mad-Direttur Generali tat Taxxa fuq il-Valur mizjud (Att Nru XXIII ta' l-1998) u regolamenti maghmula bis-sahha tal-istess ATT naqas li jikkonferma ruhu mas-sentenza tal-Qorti tal-Magistrati (Malta) datata 6 ta' Dicembru, 2012 u moghtija fil-konfront tieghu inkwantu li naqas kif ordnat fl-imsemmija sentenza fi zmien tlett xhur mid-data tas-sentenza li jikkonforma ruhu mal-ligi u fuq ammissjoni tieghu stess kien instab hati tal-akkuza b'sentenza moghtija nhar is-6 ta'Dicembru 2012 u gie kkundannat ihallas multa ta' €700 u multa addizzjonali ta €15 kuljum ghal kul jum li jibqa' inadempjenti. (vie Dok PS 5 a fol. 8 ta' l-atti).

2. Illi in segwitu jirrizulta li l-appellant ma ottemporax ruhu ma l-ordni mghotija lilu f'dik is-sentenza appena citata moghtija mill-Qorti u ghal darb ohra naqas li jipprezenta id-dokumenti tieghu kif ordnat mill-ewwel Qorti fiz-zmien moghti lilu ta tlett xhur li skadew fis-7 ta' Marzu 2013.

[1] ([1969] 1 QB 276)

3. Illi ghalhekk l-appellant rega tressaq il-Qorti u instab hati li baqa' ma pprezentax id-denunzji imsemmija fis-sentenza tas-6 ta'Dicembru 2012 wara it-tlett xhur moghtija lilu tant li sakemm inghatat is-sentenza ta thija u cioe nhar l-4 ta Frar 2016 l-appellant kien ghadu ma pprezentax id-denunzji u dan sehh skond l-appellant minhabba problemi ta' sahha mentali kif deskritt fic-certifikat mediku presentat minnu fl-atti pero' l-ewwwel Qorti rat li din ma kienitx gustifikazzjoni ghal dan n-nuqqas u ghalhekk iddikjaratu hati u kkkundannatu multa ta' elfejn u mitt euro (€2,100) rappresentanti l-perijodu ta bejn is-7 ta' Marzu 2013 u t-30 ta' April 2014.

Illi l-appellant fir-rikors tieghu qed jilmenta mill-principju tan-*ne bis in idem* u jikkontendi li l-appellant tressaq il-Qorti darbtejn akkzuat bl-istess ret li sehh fl-istess perijodu u ghalhekk gie kkundannat darbtejn ghal-istess reat.

Din il-Qorti esaminat iz-zewg sentenzi u cioe dik tas-6 ta' Dicembru 2012 esebita fl-atti a fol. 13 markata bhala dok PS 5 moghtija dil-konfront tal-appellant odejrn u jirrizulta li kien gie akkuzat bir-reat kif dispost fl-artikolu 76 tal-Kap 406 u cioe' li bhala persuna registrata mal-Kummissarju tat Taxxa fuq il-Valur mizjud skond l-Att tal-1998 naqas sal-hmistax il-jum tat-tieni xahar li jigi wara l-ahhar jum li fih intemmu z-zmienijiet ta' taxxa relattivi li jibghat lill-Kummissarju tat Taxxa fuq il-Valur 6 denunzji flimkien mal-hlas dovut fil-perijdou li ntemmu fil-31 ta Ottubru 2008 sal-31 ta Jannar 2010 u fuq ammissjoni tieghu instab hati u gie kkundannat multa ta' €700 u ordnat ihalls multa ta €15 kul jum li matulu jkompli n–nuqqas wara li jghaddi l-imsemmi zmien ta tlett xhur.

Fit-tieni sentenza u cioe' dik li inghatat nhar l-4 ta' Frar 2016 li minnha sar l-appell odjern l-appellant gie akkzuat li naqas li jottemproa ruhu mas-sentenza tas-6 ta Dicembru 2018 u cioe' li jippresenta d-denunzji fiz-zmien moghti lilu u ghalhekk il-prosekuzzjoni talbet lil dik il-Qorti tikkundannah ihallas il-penali dovuta u dan mill-perijodu tas-7 ta' Marzu 2013 sat-30 ta' April 2014. Fil-fatt huwa gie kkundnnat ihalls il-penali ta €2100 konsistenti fil-penali ta hmsitax il-eruo kuljum ghal mija u erbghin jum.

Kif inhu risaput, ir-regola tan-*ne bis in idem* kif espressa fl-artikolu 527 tal-Kodici Kriminali hija aktar wiesa' minn kif formulata fl-artikolu 39(9) tal-Kostituzzjoni. Filwaqt li l-artikolu 39(9) tal-Kostituzzjoni jitkellem dwar "reat kriminali" u japplika d-dottrina tan-*ne bis in idem* ghal dak ir-"reat kriminali" partikolari li tieghu dak li jkun ikun gie misjub hati jew illiberat u ghal "reati kriminali" ohra komprizi u involuti f'dak ir-reat kriminali partikolari[2], l-artikolu 527 jitkellem dwar "l-istess fatt". L-artikolu 527, infatti, jghid hekk: "Wara sentenza li f'kawza tillibera imputat jew akkuzat, dan ma jistax ghall-istess fatt ikun suggett ghal kawza ohra" (sottolinear ta' din il-Qorti). Hu appena necessarju li jigi osservat li ghalkemm din id-disposizzjoni titkellem dwar il-liberazzjoni ta' dak li jkun, u mhux ukoll dwar il-kundanna tieghu, il-qrati taghna dejjem interpretawha bhala li tinkludi wkoll il-kaz fejn persuna tkun giet misjuba hatja ta' l-istess fatt (ara **Il-Pulizija v. Anthony Vella et**[3].; **Il-Pulizija v. Adrian Cassar Galea** [4]).

Ghadaqstant din il-Qorti hija tal-fehma li l-aggravji sollevati mill-appellant ghandhom jigu michuda u din il-Qorti ghalhekk qed tikkonfermas-sentenza moghtija mill-ewwel Qorti kemm fir-rigward tal-mertu kif ukoll fir-rigward tal-multa inflitta.

Consuelo-Pilar Scerri Herrera

Imhallef

[2] "…jew ghal xi reat kriminali iehor li ghalih setghet tigi misjuba hatja fil-proceduri ghal dak ir-reat…".

[3] App. Krim., 19 ta' Frar 1999

[4] App. Krim., 20 ta' Novembru 2000