FIL-QORTI TAL-MAĠISTRATI (MALTA)
BĦALA QORTI TA' ĠUDIKATURA KRIMINALI

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

Kawża Nru: 545/2013

Il-Pulizija
(Spettur Victor Aquilina)

vs

Mark Cefai
(ID 5880(M))

Illum: 26 ta' Ġunju 2019

Il-Qorti,

Wara li rat l-imputazzjonijiet miġjuba fil-konfront tal-imputat **Mark Cefai** ta' 32 sena, iben Anthony u Anna nee` Mascena, imwieled il-Pieta`, nhar l-10 ta' Diċembru 1979, residenti Nru. 9 Baldacchino Court, Flat 4, Triq Alexandra, Qormi, detentur tal-karta tal-identita` bin-numru 5880(M);

Akkużat talli f'dawn il-Gżejjer, nhar is-27 ta` Mejju 2012, kif ukoll fil-perjodu ta' qabel din id-data:

a) Kellu fil-pussess tiegħu d-droga kokaina speċifikata fl-ewwel Skeda tal-Ordinanza dwar il-Mediċini Perikoluż, Kap. 101 tal-Liġijiet ta' Malta, meta hu ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Prinċipali tal-Gvern skont id-disposizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta ma kienx bil-liċenzja jew xort'oħra awtorizzat li jimmanifattura, jew li jforni d-droga

msemmija u meta ma kienx b'xi mod ieħor bil-liċenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tiegħu u naqas li jipprova li d-droga msemmija ġiet fornuta lilu għall-użu tiegħu skont ir-riċetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-regoli tal-1939 dwar il-Kontroll Intern tad-Drogi Perikoluzi (GN 292/1939), kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta, liema droga nstabet f'tali ċirkustanzi li juru li ma kinitx għall-użu esklussiv tiegħu;

b) Kellu fil-pussess tiegħu d-droga kokaina speċifikata fl-ewwel skeda tal-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta, meta hu ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Prinċipali tal-Gvern skont id-disposizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta ma kienx bil-liċenzja jew xort'oħra awtorizzat li jimmanifattura, jew li jforni d-droga msemmija u meta ma kienx b'xi mod ieħor bil-liċenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tiegħu u naqas li jipprova li d-droga msemmija ġiet fornuta lilu għall-użu tiegħu skont ir-riċetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-regoli tal-1939 dwar il-Kontroll Intern tad-Drogi Perikoluzi (GN 292/1939), kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta.

Semgħet ix-xhieda, rat l-atti kollha tal-każ u d-dokumenti eżebiti, inkluż l-Ordni tal-Avukat Ġenerali bis-saħħa tas-sub-artikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Mediċini Perikolużi (Kap. 101), sabiex din il-kawża tinstema' minn din il-Qorti bħala Qorti ta' Ġudikatura Kriminali;

Rat illi l-imputat irreġistra ammissjoni fir-rigward tat-tieni imputazzjoni kif dedotta kontra tiegħu, fil-waqt illi wieġeb illi mhux ħati tal-ewwel imputazzjoni;

Semgħet lill-Prosekuzzjoni tirrimetti ruħha għall-provi prodotti u semgħet it-trattazzjoni finali tad-difiża.

Ikkunsidrat:

Jirriżulta mix-xhieda ta' **PC 10 Trevor Cassar Mallia** illi dak in-nhar tas-27 ta' Mejju 2012, il-Pulizija rċeviet informazzjoni fis-sens illi l-imputat kien qiegħed jittraffika d-droga u għalhekk ix-xhud, flimkien ma' PS 1044 Gordon Calleja u WPC 297 Rhian Spiteri marru fejn id-dar tal-imputat sabiex iwettqu osservazzjoni. Skont ix-xhud, raw lill-imputat ħiereġ mid-dar tiegħu u jirkeb f'vettura bin-numru ta' reġistrazzjoni EBD 994. Dak il-ħin marru fuqu PS 1044 u WPC 297 u fuq is-*seat* tal-passiġġier, instab bott abjad li kien jikkontjeni miżien

elettroniku, trab abjad suspettat kokaina, sikkina u mgħarfa. Tfittxija fir-residenza tal-imputat ġewwa Ħal Qormi u f'żewġ garaxxijiet, wieħed il-Ħandaq u l-ieħor Ħal Qormi, irriżultaw fin-negattiv.[1]

Skont **PS 1044 Gordon Calleja**, ftit qabel it-tfittxija li saret fil-vettura tal-imputat, huwa ġie osservat jasal bil-vettura tiegħu ħdejn ir-residenza u ġie mwaqqaf minnu u mill-kollegi tiegħu. Ix-xhud imbagħad jikkonferma illi fil-vettura nstab bott abjad li kien fih miżien elettroniku, kuċċarina, *Stanley knife* u borża tal-plastik b'sustanza bajdanija suspettata droga. Tfittxija fir-residenza tiegħu rriżultat fin-negattiv.[2]

WPC 297 Rhian Spiteri ukoll tikkonferma illi fil-jum in kwistjoni, flimkien ma' PC 10 u PS 1044, kienu raw lill-imputat ġej bil-vettura tiegħu u waqqfuh u tikkonferma wkoll illi matul tfittxija fl-istess vettura, instabu borża b'sustanza bajda suspettata kokaina, miżien elettroniku, mgħarfa u *blade*. Kemm it-tfittxijiet fir-residenza tiegħu, kif ukoll f'żewġ garaxxijiet fil-Ħandaq u Ħal Qormi rriżultaw fin-negattiv.[3]

L-Ispettur (illum Supretendent) **Victor Aquilina** xehed dwar dak li kien wassal għall-arrest tal-imputat u jindika li l-ammont ta' sustanza bajda misjuba fil-pussess tiegħu kienet ta' ċirka ħmistax-il gramma. Jgħid ukoll illi l-imputat odjern irrilaxxja stqarrija nhar it-28 ta' Mejju 2012 u dan wara li ngħata s-solita twissija skont il-liġi, kif ukoll id-dritt li jottjeni parir legali qabel l-interrogatorju tiegħu, liema dritt huwa għażel li ma jeżerċitahx. Jgħid in oltre illi fil-presenza tiegħu, ġie elevat *mobile phone* tal-marka Nokia mill-pussess tal-imputat, liema ċellulari ġie esebit fl-atti ta' din il-kawża. In kontro-eżami, ix-xhud jikkonferma illi s-sustanza in kwistjoni nstabet kollha f'borża waħda, li ma nstabux qratas u lanqas xi boroż tal-plastik. Ma ftakarx x'wassal sabiex issir tfittxija f'wieħed mill-garaxxijiet, la kien jaf x'kien in-negozju ta' missier l-imputat, la kien jaf jekk f'wieħed mill-garaxxijiet kienx isir xogħol ta' *spraying* ta' vetturi u lanqas li l-imputat kien jaħdem ukoll bħala *sprayer*, u jgħid illi huwa llimita l-investigazzjoni tiegħu biss għal dak li ġie mniżżel fl-istqarrija tal-imputat, u ma marx oltre biex jivverifika dak li ġie dikjarat mill-imputat f'din l-istqarrija.[4]

Xehed ukoll **Dr. Martin Bajada** inkarigat bħala espert f'dawn il-proċeduri sabiex jestrapola l-kontenut tal-*mobile phone* esebit in atti bħala l-*mobile phone* elevat mill-pussess tal-imputat, li esebixxa r-relazzjoni tiegħu li tindika l-kontenut tal-istess.[5]

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[1] Ara din ix-xhieda a fol. 11 u 12 tal-proċess.
[2] Ara din ix-xhieda a fol. 63 u 64 tal-proċess.
[3] A fol. 68 u 69 tal-proċess.
[4] Ara din ix-xhieda a fol. 17 sa 24 tal-proċess u l-kontro-eżami ulterjuri tax-xhud, a fol. 81 sa 85 tal-proċess.
[5] Din ir-relazzjoni tinsab esebita a fol. 39 sa 62 tal-proċess.

Mir-relazzjoni esebita mill-espert ix-**Xjenzat Godwin Sammut**, maħtur f'dawn il-proċeduri sabiex janalizza s-sustanza esebita in atti, jirriżulta illi huwa ngħata *envelope* kannella mmarkat S/B/154/2015, li fih kien hemm *evidence bag* bin-numru 802605 li kien jikkontjeni s-segwenti:

1) Bott tal-plastik ta' lewn abjad li fuqu kien hemm *tag* bil-kliem "Data: 27/5/12 Ħin: 12:10pm Elevat/i minn ġol-vettura tiegħu EBD 994 Toyota Corsa fil-presenza ta' Mark Cefai ID: 0005880(M) minn PS1041, WPC297, PC10". Fil-bott tal-plastik kien hemm:

   i) kuċċarina
   ii) *Stanley knife*
   iii) miżien
   iv) borża tal-plastik trasparenti li fiha *paste* ta' lewn kannella.

Fuq il-borża kien hemm biċċa *tape*, li fuqha kien hemm miktub "*3.2 Mixed*".

Dwar l-istess dokument, l-espert ikkonkluda illi fuq estratt meħud mill-*paste* ta' lewn kannella nstabet is-sustanza kokaina. Din is-sustanza hija kkontrollata bil-liġi taħt l-Ewwel Skeda Taqsima I tal-Kap. 101 tal-Liġijiet ta' Malta.

Fix-xhieda tiegħu, ix-Xjenzat Godwin Sammut jgħid dwar l-istess *paste*, illi ma setax jgħid jekk is-sustanza kinitx dejjem f'din il-forma jew inkella kinitx trab u saret *paste* mat-trapass taż-żmien minħabba l-mod kif din kienet merfugħa. Jgħid ukoll illi huwa ma setax jieħu l-piż tas-sustanza billi l-*paste* kien imwaħħal mal-plastik u lanqas seta' jasal għall-purita`. Jikkonferma wkoll illi s-sustanza in kwistjoni kienet f'borża waħda.[6]

Fuq talba tad-difiża, ġie redatt *Social Inquiry Report* fil-konfront tal-imputat odjern, mill-**Uffiċjal tal-*Probation* Dorian Cornelius**. Mill-istess rapport jirriżulta illi dan huwa l-ewwel skontru illi l-imputat kellu mal-ġustizzja, illi huwa tifel uniku, irċieva trobbija normali u sa llum, il-ġenituri tiegħu huma preżenti f'ħajtu u jagħtuh l-appoġġ tagħhom. L-imputat huwa miżżewweġ u għandu tifel. Jirriżulta wkoll mill-istess rapport illi l-imputat beda jabbuża mid-droga minn meta kellu sbatax-il sena. Dak iż-żmien kien imur il-*parties* madwar darba fix-xahar u hemm kien jieħu xi pilloli għaliex kien jitħajjar minn sħabu. Waqaf jagħmel dan meta kellu għoxrin sena għaliex ma baqax imur il-*parties*. Aktar tard, meta kellu ħamsa u għoxrin sena beda jieħu l-kokaina kull meta joħroġ, għaliex sħabu kienu jabużżaw mid-droga u kienu jħajjruh. Fil-bidu kien jiġbed linja waqt illi jkun qed jixrob mal-ħbieb. Madankollu, meta kellu tletin sena beda dejjem jabbuża mid-droga b'mod aktar frekwenti u kompla jżid fl-użu tad-droga

[6] Ara x-xhieda tax-Xjenzat Godwin Sammut a fol. 88 u 89 tal-proċess u r-relazzjoni tiegħu esebita a fol. 91 *et seq* tal-proċess.

meta l-mara tiegħu korriet l-ewwel wild tagħhom. Stante li beda jibża' li ma kienx ser ikollhom tfal, l-imputat sab rifuġju fid-droga. F'dan iż-żmien kien jieħu l-kokaina madwar erba' darbiet fil-ġimgħa. L-imputat kien jaħbi l-vizzju tiegħu kemm mill-mara, kif ukoll mill-ġenituri tiegħu. Skont l-istess rapport, meta nqabad mill-Pulizija, l-imputat ħa spunt sabiex jibda jibdel ħajtu bil-mod il-mod, peress li beda jibża' li jerġa' jinqabad u jitlef lit-tifel u lil martu. Dak iż-żmien tilef il-fiduċja ta' kulħadd, missieru waqaf jagħtih għajnuna finanzjarja, u fis-sena 2015 beda jattendi għal sessjonijiet fi ħdan l-Aġenzija Caritas sabiex jieħu l-għajnuna kontra d-droga. Fil-bidu, il-kampjuni tal-urina li ttieħdu lill-imputat baqgħu jirriżultaw fil-pożittiv għal sustanzi lleċiti. B'hekk il-*key worker* tiegħu beda jħajjru jattendi programm, iżda l-imputat ma xtaqx jagħmel dan u għalhekk iddeċieda illi jieqaf juża d-droga. L-imputat illum il-ġurnata huwa *clean* – kampjuni tal-urina illi ttieħdulu f'Novembru 2016 u f'Jannar 2017 irriżultaw fin-negattiv għall-kannabis, kokaina u eroina. Skont l-istess rapport, ħadem għal żmien twil ma' kumpanija bħala *assembly operator*, iżda telaq stante li kien jaħdem ħafna matul il-lejl. Fis-sena 2012, imbagħad, beda jaħdem ma' missieru fil-ħanut li kellu bħala biċċier. Minkejja li kien jaħdem ma' missieru, irreġistra bħala *self-employed*. Eventwalment ħa t-taħriġ u llum huwa impjegat mal-Gvern bħala biċċier.[7]

Fix-xhieda tiegħu, l-Uffiċjal tal-*Probation* jikkonferma illi meta l-imputat sar missier huwa beda jipprova jieqaf mill-użu tad-droga, iżda ma rnexxielux, illi d-determinazzjoni tiegħu kibret meta ġie arrestat mill-pulizija u wara għamel kuntatt mal-Aġenzija Caritas. Jikkonferma wkoll illi f'ħajtu l-imputat dejjem ħadem.[8]

Xehed ukoll **Anthony Cefai**, missier l-imputat, li jgħid illi huwa biċċier u li l-imputat huwa l-unika wild tiegħu. Jgħid illi fil-passat ibnu kien jaħdem f'fabbrika u li sussegwentement waqaf u beda jaħdem miegħu fil-ħanut tal-laħam, apparti li kien jaħdem ukoll *part-time* bħala *sprayer*. Jgħid illi ma rreġistrahx fl-impjieg miegħu mill-bidu nett, iżda eventwalment ġie reġistrat f'dan l-impjieg wara li waqaf jaħdem fil-fabbrika, għalkemm nesa meta eżattament. Jgħid illi huwa kien iħallas lil ibnu bejn €250 u €300 fil-ġimgħa, skont ix-xogħol u li ġieli għenu finanzjarjament ukoll, meta ibnu kien ikollu xi spejjeż. Jgħid illi ma kienx jaf li ibnu kien juża d-droga u li hu u martu segwewh meta kien qed jattendi għas-sessjonijiet fi ħdan l-Aġenzija Caritas u eventwalment gradwa. Jgħid in oltre illi ibnu rċieva taħriġ sabiex ikun jista' jibda jaħdem ġewwa l-biċċerija.[9]

[7] Ara dan ir-rapport, a fol. 79 sa 87 tal-proċess.
[8] Ara a fol. 86 sa 89 tal-proċess.
[9] Ara din ix-xhieda a fol. 113 sa 121 tal-proċess.

Ikkunsidrat:

Qabel tagħmel il-kunsiderazzjonijiet tagħha dwar il-mertu, il-Qorti sejra tikkunsidra fl-ewwel lok, l-ammissibilita` o meno tal-istqarrija rilaxxjata mill-imputat. Jirriżulta mill-atti illi l-imputat irrilaxxja din l-istqarrija fit-28 ta' Mejju 2012, wara li ngħata s-solita twissija skont il-liġi, kif ukoll id-dritt li jottjeni parir legali qabel l-interrogatorju tiegħu, liema dritt huwa għażel li ma jeżerċitahx. L-imputat ma ġiex mogħti d-dritt għall-assistenza legali waqt l-interrogatorju tiegħu, stante illi dan id-dritt ma kienx viġenti fiż-żmien tal-każ odjern. Tali dritt daħal fis-seħħ fit-28 ta' Novembru 2016, permezz tal-Avviż Legali 401 tal-2016.

Dwar l-ammissibilita` o meno tal-istqarrija rilaxxjata mill-imputat f'dawn iċ-ċirkostanzi, il-Qorti tagħmel referenza għas-sentenza mogħtija mill-Qorti Kostituzzjonali fil-5 ta' Ottubru 2018, fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali et**, f'liema każ fl-istqarrijiet tiegħu, ir-rikorrenti minkejja li qabel irrilaxxja l-ewwel stqarrija, kien ingħata parir mingħand l-avukat tiegħu li f'dak l-istadju ma jgħid xejn lill-pulizija, huwa xorta waħda rrisponda għad-domandi waqt l-interrogatorju li sarlu, bir-riżultat li stqarr fatti li kienu inkriminanti għalih, in kwantu ammetta li kien jixtri d-droga kemm għall-użu personali tiegħu, kif ukoll sabiex ibiegħ minnha lil terzi. Fis-sentenza tagħha, il-Qorti Kostituzzjonali qalet hekk dwar l-istqarrijiet rilaxxjati mill-istess rikorrenti mingħajr il-jedd ta' assistenza legali waqt l-interrogatorji tiegħu:

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

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

Allura minkejja illi r-rikorrenti f'dak il-każ, kien ingħata l-jedd li jikkonsulta ma' avukat qabel l-ewwel interrogatorju tiegħu u anke eżerċita dan il-jedd, il-Qorti ordnat illi l-istqarrijiet tiegħu ma jitħallewx fl-inkartament la darba kien ser ikollhom impatt fuq l-eżitu tal-proċess kriminali u dan stante illi ma ngħatax il-jedd għall-assistenza legali waqt l-interrogatorji tiegħu.

Fis-sentenza tagħha tal-20 ta' Novembru 2018, fl-ismijiet **Il-Pulizija vs Claire Farrugia**, il-Qorti tal-Appell Kriminali skartat bħala inammissibbli l-istqarrijiet tal-appellanti, waħda minnhom ġuramentata, u dan għaliex għalkemm hija ngħatat id-dritt li tottjeni parir legali qabel l-istqarrijiet tagħha, liema dritt bħal fil-każ odjern hija għażlet li ma teżercitahx, madankollu hija ma ngħatatx id-dritt li tkun assistita minn avukat waqt l-interrogatorji li sarulha u dan stante li dan id-dritt ma kienx għadu viġenti fiż-żmien in kwistjoni. L-istess iddeċidiet din il-Qorti fis-sentenza tagħha tas-16 ta' Mejju 2019, fl-ismijiet **Il-Pulizija vs Emad Masoud** u iżjed riċentement fis-sentenza tagħha fl-ismijiet **Il-Pulizija vs Sandro Spiteri** tat-18 ta' Ġunju 2019, f'liema każ, l-imputat kien irrilaxxja stqarrija mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u wisq inqas li jkun assistit minn avukat waqt l-istess interrogatorju.

Fis-sentenza tagħha fl-ismijiet **Il-Pulizija (Spettur Malcolm Bondin) vs Aldo Pistella** tal-14 ta' Diċembru 2018, f'liema każ l-appellat kien ingħata l-jedd li jottjeni parir legali qabel l-interrogotarju tiegħu u anke eżerċitah, iżda ma ngħatax il-jedd li jkun assistit minn avukat waqt dan l-interrogatorju, stante illi anke f'dak il-każ, fiż-żmien in kwistjoni, dan il-jedd ma kienx viġenti fil-liġi Maltija, il-Qorti Kostituzzjonali reġgħet irribadiet il-konklużjonijiet tagħha fis-sentenza preċedenti fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali et**:

"*14. Għalkemm, bħall-ewwel qorti, taqbel mal-appellanti illi f'dan l-istadju għadu ma seħħ l-ebda ksur tal-jedd għal smigħ xieraq, madankollu, kif osservat fil-każ ta' Malcolm Said, il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija tal-akkużat Pistella ladarba din, għallinqas f'parti minnha, ittieħdet mingħajr ma Pistella kellu l-għajnuna ta' avukat. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smigħ xieraq, fiċ-ċirkostanzi huwa għaqli illi, kif qalet l-ewwel qorti, ma jsir ebda użu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniġġes b'irregolarità – dik li jkun sar użu minn stqarrija li ttieħdet mingħajr ma l-interrogat kellu l-għajnuna ta' avukat – li tista' twassal għal konsegwenzi bħal tħassir tal-proċess kollu.*"

Fil-każ ta' **Philippe Beuze vs Belgium** deċiż mill-*Grand Chamber* tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fid-9 ta' Novembru 2018, dik il-Qorti reġgħet adottat il-kriterju tal-*overall fairness of the proceedings* sabiex tistħarreġ jekk seħħitx o meno leżjoni tad-dritt għal smiegħ xieraq. Għalkemm sabet li f'dan

il-każ seħħet vjolazzjoni tal-Artikolu 6 tal-Konvenzjoni, il-Qorti mxiet lil hinn minn dawk id-deċiżjonijiet li fihom instabet vjolazzjoni tal-imsemmi artikolu la darba kien hemm restrizzjoni sistematika fil-liġi domestika tad-dritt ta' persuna suspettata jew arrestata ta' aċċess għall-avukat, u ddeċidiet illi l-Qorti għandha dejjem tistħarreġ iċ-ċirkostanzi partikolari tal-każ, tenut kont ta' numru ta' kriterji, mhux eżawrjenti, elenkati fid-deċiżjoni tagħha. Dik il-Qorti qalet hekk dwar id-dritt ta' aċċess għall-avukat u dwar l-istħarriġ li għandu jsir f'kull każ:

"***(a) Preliminary comments***

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

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

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

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

custody and that of the pre-trial investigation (as conducted by an investigating judge in the present case).

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

(b) General principles

(i) Applicability of Article 6 in its criminal aspect

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

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

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

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

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

(iii) Right of access to a lawyer

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

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

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

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

125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see Salduz, cited above, §§ 53 54; Blokhin, cited above, § 198; Ibrahim and Others, cited above, § 255; and Simeonovi, cited above, § 112).

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

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

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

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

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

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

131. Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see Öcalan v. Turkey [GC], no. 46221/99, § 135, ECHR 2005-IV; Salduz, cited above, § 51; Dvorski, cited above, § 80; and Ibrahim and Others, cited above, § 272).

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

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

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

135. The Court has found, for example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may undermine the fairness of the proceedings: (a) a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation (see Moiseyev v. Russia, no. 62936/00, §§ 217-18, 9 October 2008; Sapan v. Turkey, no. 17252/09, § 21, 20 September 2011; and contrast A.T. v. Luxembourg, cited above, §§ 79-84); (b) the non-participation of a lawyer in investigative measures such as identity parades (see Laska and Lika v. Albania, nos. 12315/04 and 17605/04, § 67, 20 April 2010) or reconstructions (see Savaş v. Turkey, no. 9762/03, § 67, 8 December 2009; Karadağ v. Turkey, no. 12976/05, § 47, 29 June 2010; and Galip Doğru v. Turkey, no. 36001/06, § 84, 28 April 2015).

136. In addition to the above-mentioned aspects, which play a crucial role in determining whether access to a lawyer during the pre-trial phase has been practical and effective, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see Hovanesian v. Bulgaria, no. 31814/03, § 34, 21 December 2010; Simons, cited above, § 30; A.T. v. Luxembourg, cited above, § 64; Adamkiewicz, cited above, § 84; and Dvorski, cited above, §§ 78 and 108).

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

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the Salduz judgment (cited above, § 55) as follows: "... in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

138. The Salduz judgment also demonstrated that the application on a "systematic basis", in other words on a statutory basis, of a restriction on the right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 5758).

139. The stages of the analysis as set out in the Salduz judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory

restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.

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

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

(α) Concept of compelling reasons

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

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

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

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

145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see Ibrahim and Others, cited above, § 265).

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

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

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply

with the requirements of a fair trial, having regard to the specific circumstances of each accused.

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

(γ) Relevant factors for the overall fairness assessment

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

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

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

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

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

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

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

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

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

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

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

F'dak il-każ, meta l-Qorti Ewropea ġiet biex teżamina dawn il-kriterji fil-kuntest taċ-ċirkostanzi li kellha quddiemha, fil-waqt illi saħqet illi kienet qed issib vjolazzjoni tal-Artikolu 6 fid-dawl ta' diversi fatturi meħudha lkoll flimkien u mhux kull fattur meqjus separatament, ikkunsidrat *inter alia* illi fl-istess każ, ir-restrizzjonijiet fuq id-dritt tal-aċċess għall-avukat kienu estensivi u dan fis-sens illi l-akkużat ġie interrogat waqt li kien fil-kustodja tal-pulizija mingħajr ma qabel ingħata l-opportunita` li jottjeni parir legali jew li jkollu avukat preżenti u fil-kors tal-investigazzjoni ġudizzjarja li seħħet wara, ma ngħatax il-possibilita` li jkun assistit minn avukat, kif lanqas ma ngħata dan id-dritt f'atti investigattivi oħrajn sussegwenti. F'dawk iċ-ċirkostanzi, mingħajr ma ngħata informazzjoni ċara dwar id-dritt tiegħu għas-silenzju, huwa rrilaxxja stqarrijiet dettaljati u sussegwentement ta wkoll verżjonijiet differenti dwar il-fatti, bir-riżultat illi għamel stqarrijiet, li għalkemm ma kinux inkriminanti fis-sens restrittiv ta' din il-kelma, effettwaw sostanzjalment il-posizzjoni tiegħu, speċjalment fir-rigward ta' akkuża partikolari. Dawn l-stqarrijiet ġew ilkoll ikkunsidrati bħala ammissibbli fil-proċeduri kontra tiegħu. In oltre tali stqarrijiet kellhom rwol importanti fil-proċeduri u fir-rigward ta' akkuża minnhom, kienu jiffurmaw parti integrali mill-provi li a bażi tagħhom huwa nstab ħati.

Fil-każ deċiż mill-Qorti Kostituzzjonali fl-ismijiet **Paul Anthony Caruana vs Avukat Ġenerali et** nhar il-31 ta' Mejju 2019, l-attur ilmenta minn ksur tal-jedd tiegħu għal smiegħ xieraq fid-dawl tal-fatt illi ma ngħatax id-dritt tal-aċċess għall-avukat kemm qabel irrilaxxja l-istqarrija tiegħu lill-pulizija kif ukoll waqt l-interrogatorju tiegħu, u għaldaqstant talab lill-Qorti kemm sabiex tiddikjara illi ġew leżi d-drittjiet fundamentali tiegħu kif sanċiti fl-Artikolu 39 tal-Kostituzzjoni, kif ukoll fl-Artikolu 6 tal-Konvenzjoni Ewropea, kif ukoll sabiex takkorda dawk ir-rimedji effettivi inkluż li tannulla, tħassar u tirrevoka s-sentenza mogħtija fil-konfront tiegħu mill-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali, li permezz tagħha kien instab ħati tal-imputazzjonijiet miġjuba kontra tiegħu u ġie kkundannat għal terminu effettiv ta' priġunerija.

F'dan il-każ, wara li rreferiet għall-każ ta' **Ibrahim and Others v. United Kingdom** deċiż mill-Qorti Ewropea fit-13 ta' Settembru 2016 u kompliet illi allura l-fatt waħdu li persuna ma tkunx tħalliet tingħata l-għajnuna ta' avukat

waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, ma huwiex biżżejjed biex, *ipso facto*, jinsab ksur tal-jedd għal smigħ xieraq, iżda wieħed irid iqis il-proċess fit-totalità tiegħu, il-Qorti Kostituzzjonali għamlet referenza wkoll għad-deċiżjoni f'**Beuze v. Belgium** u għall-kriterji hemmhekk indikati (u fuq ċitati minn din il-Qorti) li a bażi tagħhom wieħed għandu jeżamina l-proċeduri fl-intier tagħhom fid-dawl tal-impatt tan-nuqqasijiet proċedurali fl-istadju ta' qabel il-proċeduri. Il-Qorti kompliet hekk dwar l-ilment tal-attur:

"*20. Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – safejn igħid illi "l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud.*

21. Fil-każ tallum kien hemm raġuni tajba għala l-attur ma tħalliex ikellem avukat qabel jew waqt l-ewwel interrogazzjoni. Ir-raġuni hi li kien hemm il-ħsieb li ssir controlled delivery lil terza persuna li kienet tipprovdi lill-attur bid-droga, u biex din l-operazzjoni tirnexxi kien meħtieġ li l-attur ma jitħalla jikkomunika ma' ħadd biex ma titwassalx il-kelma lil dan it-terz.

...

23. L-attur ingħata t-twissija li trid il-liġi qabel ma ta l-istqarrija, u ma saret ebda allegazzjoni li l-istqarrija saret fiċ-ċirkostanzi msemmija fl-art. 658 tal-Kodiċi Kriminali. ... Ħlief għall-fatt li ma kellux avukat dak il-ħin, l-attur ma ressaq ebda argument serju kontra l-validità u l-veraċità tal-istqarrija.

24. Għandu jingħad ukoll illi l-attur ma nżammx aktar milli kien meħtieġ biex tirnexxi l-operazzjoni tal-controlled delivery; dakinhar stess kien meħlus u seta' liberament ikellem avukat.

25. Barra minn hekk, <u>l-istqarrija magħmula lill-pulizija ma kinitx ir-raġuni li wasslet għall-kundanna tal-attur</u>: l-attur instab ħati mill-qorti ta' ġurisdizzjoni kriminali għax ammetta l-ħtija għal dawk l-akkużi li ma ġewx ritirati. Dan għamlu fil-preżenza tal-avukat wara li ikkonsulta miegħu u quddiem maġistrat li wissih bil-konsegwenzi tal-ammissjoni u tah l-opportunità li jeħodha lura.

26. Tassew illi l-attur igħid illi kien kondizzjonat bil-fatt li kien ġà ta stqarrija lill-pulizija qabel ma ammetta quddiem il-qorti...

27. Dan jista' f'ċerti ċirkostanzi jkun fattur relevanti, iżda fil-każ tal-lum l-attur seta' jiċħad dak li stqarr fl-istqarrija u wkoll, jekk tassew kif qal hu kien fis-sakra meta għamilha u għalhekk l-istqarrija ma għamilhiex "volontarjament", jikkontestaha taħt l-art. 658 tal-Kodiċi Kriminali – seta' saħansitra jirtira l-ammissjoni li għamel quddiem il-qorti – għax il-qorti ta' ġurisdizzjoni kriminali, presjeduta minn ġudikant togat, kienet taf biżżejjed, fid-dawl tas-sentenza ta' Salduz, li kienet ingħatat qabel, li ma kellhiex toqgħod fuq l-istqarrija weħedha, aktar u aktar jekk tkun ġiet irtirata, jekk ma jkunx hemm xiehda oħra li ma tħallix dubju dwar il-ħtija. Bilkemm għalfejn ngħidu wkoll illi l-attur kien inqabad in flagrante, bi kwantità ta' droga fuq il-persuna tiegħu u fid-dar fejn kien joqgħod.

28. Il-qorti aktar temmen illi l-attur ammetta quddiem il-qorti mhux għax kondizzjonat bl-istqarrija li kien ta iżda għax kien jaf bix-xiehda l-oħra kontrieh u biex jieħu l-benefiċċju, li fil-fatt ingħata, taħt l-art. 29 tal-Ordinanza dwar il-Mediċini Perikoluži [Kap. 101]." [sottolinear ta' din il-Qorti]

Fil-każ li għandha l-Qorti quddiemha llum, il-Prosekuzzjoni m'hijiex qed tistrieħ unikament fuq l-istqarrija rilaxxjata mill-imputat, mingħajr il-jedd li jkun assistit waqt tali interrogatorju, stante illi l-imputat instab fil-pussess tad-droga kokaina. Madankollu huwa evidenti fil-fehma tal-Qorti, illi ċerti dikjarazzjonijiet tal-imputat fl-istqarrija rilaxxjata minnu, b'mod partikolari dwar in-nuqqas ta' impjieg tiegħu fiż-żmien in kwistjoni u x-xiri tal-vettura tal-għamla Mercedes, apparti x-xiri tad-droga kokaina fl-istess żmien, kienu tali li saħħew id-deċiżjoni tal-Uffiċjal Investigattiv sabiex jakkuża lill-imputat odjern bir-reat ta' pussess aggravat tad-droga kokaina u mhux sempliċiment bil-pussess 'sempliċi' tal-istess u dan minkejja li in kontro-eżami, huwa jgħid illi ċ-ċirkostanza tax-xiri ta' din il-vettura ma kellha x'taqsam xejn mal-każ. Il-Qorti tqis illi kuntrarjament għal dak li jgħid l-Ispettur Victor Aquilina f'din ix-xhieda, li kieku tali ċirkostanza ma kellhiex x'taqsam mal-każ allura ma kienx ser joqgħod jistaqsi dwar dan fl-interrogatorju li huwa għamel lill-imputat wara s-sejba in kwistjoni u fil-fatt f'punt ieħor tal-kontro-eżami tiegħu, għalkemm fuq domandi relatati mal-impjieg tal-imputat fiż-żmien in kwistjoni, ix-xhud jgħid illi l-każ kien ilu ħafna li seħħ, kien biddel il-materja tax-xogħol tiegħu u ċerti affarijiet ma kienx jiftakarhom. Minn qari tal-istess stqarrija, jidher ċar li l-linja tad-domandi f'parti minnhom kienet tiċċentra proprju dwar kif l-imputat kellu l-mezzi finanzjari sabiex jakkwista tali vettura u droga, meta ftit qabel iddikjara li ma kienx jaħdem.

Huwa evidenti illi għal determinazzjoni ta' din il-vertenza, jeħtieġ li din il-Qorti teżamina ċ-ċirkostanzi li għandha quddiemha mhux mill-ottika ta' ksur tal-jedd għal smiegħ xieraq stante li m'għandhiex kompetenza li tagħmel dan, iżda sempliċiment mil-lat tal-valur probatorju li għandha tingħata l-istqarrija tal-imputat, tenut kont madankollu tal-ġurisprudenza fuq indikata. Mis-suespost, il-Qorti jidhrilha illi fil-każ ta' Beuze, sabiex sabet vjolazzjoni tal-jedd tal-akkużat

għal smiegħ xieraq, il-Qorti Ewropea fil-valutazzjoni tagħha tal-*overall fairness of the proceedings* straħet ħafna fuq il-fatt illi l-akkużat ma ngħatax aċċess għall-avukat qabel u/jew waqt l-interrogatorji diversi li sarulu, illi fl-istqarrijiet tiegħu għamel dikjarazzjonijiet inkriminanti u illi fir-rigward ta' akkuża partikolari, l-istqarrijiet tiegħu kellhom impatt tali illi wasslu għal sejbien ta' ħtija. Fil-każ ta' Paul Anthony Caruana, imbagħad, fil-waqt illi ma sabitx ksur tad-dritt tal-attur għal smiegħ xieraq, il-Qorti Kostituzzjonali qieset bħala fattur determinanti l-fatt illi huwa nstab ħati mill-Qorti tal-Maġistrati mhux fid-dawl tal-istqarrija rilaxxjata minnu lill-pulizija, iżda a bażi tal-ammissjoni tiegħu fil-proċeduri. Effettivament din il-Qorti tinnota illi dejjem tibqa' kunsiderazzjoni determinanti kemm l-istqarrija rilaxxjata mingħajr il-jedd ta' aċċess għall-avukat, ikollha impatt fuq l-eżitu tal-proċeduri, jew fi kliem ieħor fuq is-sejbien ta' ħtija tal-imputat. Il-Qorti tqis illi in kwantu l-istqarrija tal-imputat fil-każ odjern jista' jkollha impatt fuq l-eżitu tal-proċeduri, tqis ukoll illi m'għandhiex tistrieħ fuq l-istess stqarrija bħala prova u għalhekk qegħda tiskartaha, kif qegħda tiskarta wkoll kwalunkwe referenza għal tali stqarrija.

Ikkunsidrat ukoll:

L-imputat jinsab akkużat bir-reati ta' pussess aggravat u 'sempliċi' tad-droga kokaina u dan b'referenza għas-27 ta' Mejju 2012 u l-perjodu ta' qabel din id-data. L-imputat irreġistra ammissjoni in kwantu l-imputazzjoni (b) li tirreferi għall-pussess 'sempliċi' tad-droga kokaina. Dak li qed jikkontesta l-imputat għalhekk huwa l-aggravju tal-pussess ossia dak allegat mill-Prosekuzzjoni permezz tal-imputazzjoni (a) fis-sens illi d-droga nstabet f'tali ċirkostanzi li juru li ma kinitx għall-użu esklussiv tal-istess imputat.

Jirriżulta illi fil-waqt illi PC 10 Trevor Cassar Mallia jgħid illi l-imputat ġie mwaqqaf mill-pulizija fil-vettura tiegħu hekk kif kien għadu kif ħareġ mir-residenza li fiha kien jgħix, mill-banda l-oħra, PS 1044 Gordon Calleja u WPS 297 Rhian Bartolo Spiteri jgħidu illi huma waqqfu lill-imputat hekk kif kien għadu kif wasal ħdejn ir-residenza tiegħu. Mhuwiex kontestat madankollu u jirriżulta sodisfaċentement ippruvat illi fil-vettura misjuqa mill-imputat, instab bott tal-plastik, li kien jikkontjeni borża tal-plastik bil-kokaina, miżien elettroniku, mgħarfa u *Stanley knife*.

Il-Qorti fliet l-atti bir-reqqa u hija tal-fehma konsiderata illi ċ-ċirkostanzi riżultanti mill-atti proċesswali ma jwasslux għall-prova, fil-grad li trid il-liġi, illi d-droga misjuba fil-pussess tal-imputat ma kinitx għall-użu esklussiv tiegħu.

Mix-xhieda tal-Uffiċjali tal-Pulizija li esegwew it-tfittxija fil-vettura tal-imputat, jirriżulta illi l-kokaina in kwistjoni kienet f'borża waħda. Ma nstabu ebda qratas

bil-kokaina, lanqas xi borož li fihom setgħet titqassam id-droga, bħal ma lanqas instabu xi notamenti li jindikaw spaċċ ta' droga jew flejjes fil-pussess tal-imputat.

L-Ispettur Aquilina xehed illi s-sustanza in kwistjoni kellha piż ta' ċirka 15-il gramma. Għalkemm dan ma setax jiġi kkonfermat mix-Xjenzat Godwin Sammut meta dan għamel l-analiżi tiegħu fuq is-sustanza in kwistjoni billi l-forma tagħha laħqet inbidlet u saret dak li huwa jiddeskrivi bħala *paste* sakemm huwa ġie biex janalizzaha, biss il-Qorti tqis illi tista' tieħu konjizzjoni ta' din il-parti tax-xhieda tal-Ispettur Aquilina bħala piż approssimattiv tal-istess sustanza, anke għaliex il-Pulizija normalment tiżen is-sustanza fir-reċipjent li tinsab fiha, f'dan il-każ borża tal-plastik. Issa għalkemm tali piż mhuwiex wieħed li normalment jiġi assoċjat ma' pussess għall-użu personali, fil-każ odjern, dan il-fattur waħdu ma jistax iwassal lill-Qorti għall-konklużjoni illi d-droga ma kinitx intiża għall-użu esklussiv tal-imputat. Veru illi nstab ukoll miżien elettroniku fil-pussess tal-imputat, iżda kif tajjeb tgħid id-difiża fit-trattazzjoni finali tagħha, din il-prova ċirkostanzjali mhijiex waħda univoka u tali li tipponta biss lejn direzzjoni waħda.

Jirriżulta wkoll mill-atti illi l-imputat kien jagħmel użu mid-droga kokaina. Għalkemm ma jirriżultax l-ammont li tipikament kien jagħmel użu minnu l-imputat, biss mis-*Social Inquiry Report* redatt fil-konfront tiegħu, jirriżulta illi huwa beda jagħmel użu mid-droga kokaina meta kellu 25 sena, u li wara ż-żwieġ tiegħu meta martu korriet l-ewwel wild tagħhom, l-użu tal-kokaina da parti tiegħu żdied, tant illi skont hu, kien jagħmel użu minnha anke erba' darbiet f'ġimgħa. Skont l-istess rapport, meta huwa għamel kuntatt mal-Aġenzija Caritas fis-sena 2015, fil-bidu beda jirriżulta fil-posittiv għad-droga, għalkemm eventwalment iggradwa minn programm ta' rijabilitazzjoni li huwa segwa fi ħdan l-istess Aġenzija u rnexxielu jeħles mill-vizzju. Għalkemm mill-informazzjoni li l-Uffiċjal tal-*Probation* ġabar dwar l-istorja tal-impjieg tal-imputat, jirriżulta illi l-imputat ma kellux impjieg reġistrat bejn Awwissu 2011 u Lulju 2012 (u allura fiż-żmien tal-każ), missier l-imputat jgħid illi wara li ibnu waqaf jaħdem fil-fabbrika (allura skont ir-rapport imsemmi f'Awwissu 2011), beda jaħdem miegħu bħala biċċier fil-ħanut tal-laħam. Minn din ix-xhieda mhux ċar meta dan seħħ u x-xhud ma ftakarx jekk huwa rreġistrax lil ibnu mal-ewwel meta beda jaħdem miegħu. In oltre għalkemm fir-rapport ġie indikat illi skont l-imputat huwa beda jaħdem ma' missieru fis-sena 2012, fix-xhieda tiegħu l-Uffiċjal tal-*Probation* jikkonferma illi l-imputat dejjem kien jaħdem. Jirriżulta wkoll mix-xhieda tal-missier, illi l-imputat kien jagħmel ukoll xogħol *part-time* ta' *sprayer* u li huwa kien jgħinu wkoll finanzjarjament.

Il-Qorti qieset ukoll il-kontenut tal-*mobile phone* tal-imputat u tirrileva illi għalkemm xi messaġġi jistgħu jitqiesu bħala suspettużi, biss dan is-suspett ma jwassal imkien u jibqa' biss suspett u xejn iżjed.

Fatti dawn il-konsiderazzjonijiet, il-Qorti għalhekk tqis illi l-Prosekuzzjoni ma rnexxilhiex tipprova li f'dan il-każ, id-droga misjuba fil-pussess tal-imputat ma kintix intiża għall-użu esklussiv tiegħu u għaldaqstant l-imputazzjoni (a) ma tirriżultax sodisfaċentement ippruvata.

Kif ingħad iżjed 'il fuq, madankollu, apparti illi l-imputat irreġistra ammissjoni fir-rigward tal-imputazzjoni (b), mill-provi prodotti jirriżulta ċar illi l-imputat instab fil-pussess tad-droga kokaina.

Kunsiderazzjonijiet dwar Piena

Għal fini ta' piena, il-Qorti qegħda tqis fl-ewwel lok, l-ammissjoni bikrija tal-imputat fir-rigward tal-imputazzjoni (b) li tagħha qed jinstab ħati. Tqis ukoll illi l-fedina penali tal-istess imputat, kif aġġornata sa Mejju 2018, hija waħda netta u li għalhekk, il-każ odjern huwa l-uniku skontru illi l-imputat qatt kellu mal-ġustizzja.

Tqis ukoll iċ-ċirkostanzi tal-każ u in oltre illi kif ingħad iżjed 'il fuq, mis-*Social Inquiry Report* redatt fil-konfront tiegħu, jirriżulta illi l-imputat fittex l-għajnuna u llum għeleb il-vizzju tad-droga. Tqis ukoll illi l-imputat għandu ħajja stabbli u mpjieg regolari.

Konklużjoni

Għal dawn il-motivi, il-Qorti wara li rat it-Taqsimiet IV u VI, l-Artikoli 22(1)(a) u 22(2)(b)(ii) tal-Kap. 101 tal-Liġijiet ta' Malta u r-Regolament 9 tal-Leġislazzjoni Sussidjarja 101.02, qed issib lill-imputat mhux ħati tal-imputazzjoni (a) miġjuba fil-konfront tiegħu u qegħda tilliberah minnha, iżda qed issibu ħati tal-imputazzjoni (b) u tikkundannah għall-piena ta' disa' mitt ewro (€900) li, bl-applikazzjoni tal-Artikolu 14(2) tal-Kapitolu 9 tal-Liġijiet ta' Malta tista' titħallas mill-ħati b'rati mensili u konsekuttivi ta' mitt ewro (€100), bl-ewwel pagament isir fi żmien xahar mil-lum, b'dan illi jekk il-ħati jonqos milli jħallas pagament wieħed, il-bilanċ jiġi dovut minnufih u jiġi konvertit f'piena ta' priġunerija skont il-liġi.

Ai termini tal-Artikolu 533 tal-Kap. 9 tal-Liġijiet ta' Malta, tordna lill-ħati sabiex iħallas l-ispejjeż konnessi mal-ħatra tal-espert ix-Xjenzat Godwin Sammut, ammontanti għas-somma ta' mija, sebgħa u sebgħin ewro (€177), liema spejjeż għandhom jitħallsu mill-ħati fi żmien xahrejn mil-lum.[10]

[10] Il-Qorti m'hijiex tikkundanna lill-ħati għall-ħlas tal-ispejjeż relatati mal-ħatra tal-espert Dr. Martin Bajada u dan stante illi l-kontenut tar-relazzjoni tal-istess espert ma wassal bl-ebda mod għas-sejbien ta' ħtija tal-imputat f'dawn il-proċeduri.

Tordna d-distruzzjoni tad-droga esebiti fl-atti bħala Dokument VA3, hekk kif din is-sentenza tgħaddi in ġudikat u dan taħt il-ħarsien tar-Reġistratur li għandu jirrediġi proċess verbal li jiddokumenta l-proċedura tad-distruzzjoni, liema dokument għandu jiġi nserit fl-atti ta' din il-kawża mhux aktar tard minn ħmistax-il jum minn tali distruzzjoni.

Tordna r-rilaxx tal-*mobile phone* esebit bħala Dokument VA4 favur il-ħati.

Natasha Galea Sciberras
Maġistrat