QORTI TAL-MAGISTRATI (MALTA)

BHALA QORTI TA' GUDIKATURA KRIMINALI

Magistrat Dr Josette Demicoli LL.D

Il-Pulizija

(Spettur Yvonne Farrugia)

Vs

Donald Micallef

Kump Nru: 329/2012

Illum 29 ta' Lulju 2019

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra Donald Micallef detentur tal-karta tal-identita' numru 207082M;

Billi inti personalment u/jew fil-kapacita' tieghek ta' impjegat jew ta' ufficjal principali jew ta' rapprezentant tal-kumpanija Market Handle Limited (C 49546) akkuzat;

1. Talli bejn il-perjodu ta' Lulju 2010 u April 2011, f'dawn il-Gzejjer, approprjajt ruhek, billi dawwart bi profit ghalik jew ghal persuna ohra, minn xoghol digitali li jiswa' aktar minn elfejn tlett mija u disgha u ghoxrin Euro u sebgha u tletin centezmu (€2329.37), liema xoghol gie fdat jew ikkunsinnat lilek taht titolu illi jgib mieghu l-obbligu tar-radd tal-haga jew li jsir uzu minnha specifikat u dan ghad-detriment ta' Martin Bonnici mill-Belt Valletta, u liema xoghol gie fdat lilek minhabba l-professjoni, industrija, kummerc, amministrazzjoni, kariga jew servizz tieghek minhabba depozitu necessarju;

2. Talli fl-istess dati, lokalitajiet u cirkostanzi, b'mezzi kontra l-ligi jew billi ghamilt uzu ta' ismijiet foloz, jew ta' kwalifiku foloz, jew billi inqdejt b'qerq iehor, ingann, jew billi wrejt haga b'ohra sabiex iggieghel jitwemmen l-ezistenza ta' intraprizi foloz, jew ta' hila jew setgha fuq haddiehor jew ta' krediti immaginarji, jew sabiex tqanqal tama jew biza' dwar xi grajja kimerika, ghamilt qliegh b'qerq ta' aktar minn elfejn tlett mija u disgha u ghoxrin Euro u sebgha u tletin centezmu (€2329.37) ghad-detriment ta' Martin Bonnici mill-Belt Valletta;

3. U aktar talli, fl-istess data, lokalitajiet u cirkustanzi, ghal qliegh, jew bi skop ta' kummerc, stampajt, immanifatturajt, idduplikajt jew mod iehor irriproducejt jew ikkuppjajt, jew bieghet, qassamt, jew mod iehor offrejt ghall-bejgh jew biex jitqassam, xi artikolu jew xi haga ohra bi ksur tal-jeddijiet li johorgu mid-drittijiet tal-awtur li jkollha persuna ohra u protetti bil-ligi ta' Malta jew tahtha.

Rat in-nota ta' rinviju ghall-gudizzju mibghuta mill-Avukat Generali li permezz taghha baghat lill-imputat sabiex jigi ggudikat minn din il-Qorti skont l-artikoli indikati fl-istess nota.

Rat li l-imputat ddikjara li ma kellux oggezzjoni li l-kaz tieghu jigi trattat bi procedura sommarja.

Semghet ix-xhieda.

Semghet is-sottomissjonijiet finali.

Rat l-atti u d-dokumenti kollha.

Ikkunsidrat

Illi l-imputat jinsab addebitat bir-reati ta' mizapproprjazzjoni; frodi u ksur tad-drittijiet tal-awtur.

Illi mill-provi prodotti jirrizulta:

- L-Ispettur Yvonne Farrugia xehdet li f'April 2011, il-Pulizija irceviet kwerela minghand Martin Bonnici fejn saret allegazzjoni ta' frodi u mizapproprjazzjoni fl-ammont ta' €6,420.76 li allegatament gie kommess minn Donald Micallef.
  In segwitu ta' hekk hija ghamlet ricerka mal-MFSA fejn irrizulta li l-kumpanija Market Handle Limited kienet kumpanija ta' Celine Lee Bentley. Hija kienet ghajtet lil Donald Micallef u Celine Lee Bentley li rrilaxxjaw stqarrija. Hija talbet ukoll lic-cyber crime unit biex jaghmlu stharrig fuq l-internet biex jinstab video li rrefera ghalih Martin Bonnici, u dan instab f'Marzu 2012. In kontro-ezami qalet li Celine Lee Bentley kienet tafda r-running tal-kumpanija f'idejh u kienet tiffirma c-cekkijiet u thallihom vojta.
- Fit-3 ta' Mejju 2010 giet registrata mar-Registru tal-Kumpaniji, il-kumpanija bl-isem Market Handle Limited (C 49546). Id-direttur u s-segretarju ta' din il-kumpanija kienet Celine Lee Bentley. Ir-rapprezentazzjoni legali, kontrattwali u gudizzjarja kienet tvesti f'direttur[1].

- L-imputat jixhed li huwa kien jokkupa l-kariga ta' Chief Executive Officer f'din il-kumpanija.

- Martin Bonnici, il-parte civile, self-employed, jixhed li huwa jahdem fil-grafika, film u producing ta' animazzjoni. Huwa jixhed li fuq pagna f'Facebook ltaqa' mal-kumpanija Market Handle Ltd u kkomunika mal-imputat ghall-habta ta' Lulju 2010. Huwa qal li mar l-ufficcju f'Birkirkara u ltaqa' ma' Donald Micallef li ntroduca ruhu bhala CEO (u tah business card ukoll[2]) u Managing Director tal-kumpanija u ltaqa' ma' Celine Bentley li kienet direttur ukoll.

  Spjega li Market Handle kellha 4 cartoons kollha jirrapprezentaw sezzjoni tal-istess kumpanija. Ix-xoghol li ntalab kien li dawn il-karattri li kienu 2D jinqalbu f'mudelli, f'karattri digitali li jistghu jiccaqalqu u jigu animati kompletament bl-espressjoni u movimenti differenti.

  L-ewwel depozitu beda dejjem jigi mbuttat lura billi ngabu diversi skuzi u meta nghata cekk l-imputat cempillu biex jaghti cans.

  Gew iffirmati zewg skritturi privati, l-ewwel wahda fit-22 ta' Settembru 2010 bejn Martin Bonnici u Market Handle Limited. Fuq din l-iskrittura ffirma l-imputat 'C/O Market Handle Limited'. Il-partijiet ftehmu, fost diversi klawsoli, fuq prezz u l-modalita' tal-pagament. Gie maqbul li mal-

[1] Dok QT2 a fol 75 tal-process
[2] A fol 24 tal-process

iskrittura kien qieghed jithallas l-ammont ta' €3,540. Jirrizulta[3] li l-ammont li kellu jithallas mal-iffirmar tal-iskrittura baqa' ma thallasx u dan kif tixhed email datata 9 ta' Ottubru 2010 mibghuta mill-istess Donald Micallef lil Martin Bonnici.

Proprju minhabba f'tali nuqqas ta' hlas, giet iffirmata skrittura ohra fl-istess termini fid-19 ta' Ottubru 2010 li permezz taghha gew biss varjati t-termini tal-hlas u mal-iskrittura kien hemm qbil li jithallas l-ammont ta' €1,770.

Lil Martin Bonnici gie kkonsenjat lilu cekk fl-ammont ta' €1,770 mill-kont ta' Market Handle Limited A/C Contact Handle, li gie ffirmat minn Celine Lee Bentley u kkonsenjat lilu minn Donald Micallef. Ic-cekk qatt ma gie onorat u l-istess imputat jikkonferma li x-xoghol sar, kien tajjeb u li Martin Bonnici baqa' ma thallasx ta' xogholu minhabba li l-kumpanija ffacjat problem finanzjarji kbar u giet rinfaccjata b'diversi kawzi civili.

Billi x-xoghol kien lest huwa ta x-xoghol lill-imputat permezz ta' USB anki jekk ma kienx ghadu thallas xejn. U baqa' ma thallasx. Bonnici hareg invoice lil Market Handle Limited datata l-1 ta' Novembru 2010, u Donald Micallef iffirma (minghajr ebda rizerva jew kwalifika) li kien qieghed jirrikonoxxi d-debitu.

Bonnici jixhed li sussegwentement meta Market Handle Limited ma baqghetx topera, kumpanija ohra bdiet tmexxi l-istess prodott taghhom bl-isem ta' E-Business Platforms li kienet tmexxi l-prodott Contact handle u wzaw ix-xoghol tieghu, bi ksur tal-ftehim.

Jixhed li kien hadem ukoll bicca xoghol zghira ohra, li taghha hareg invoice ta' €118 inkluz VAT li taghha wkoll ma thallasx.

Huwa pprova jiehu passi civili billi anke intbgahtet ittra ufficjali l-ewwel lill-kumpanija imma ma setghetx tigi notifikata u billi sar jaf li l-kumpanija kienet qeghda tiffaccja diversi proceduri legali, l-avukat tieghu ghamlet il-verifiki taghha u saru jafu li fil-Qorti Celine Bentley iddikjarat li bhala l-uniku direttrici tal-kumpanija hija ma kinitx qeghda taccetta kuntratti li ffirma l-imputat. B'hekk iccekkja mal-MFSA u gie kkonfermat li l-imputat ma kienx direttur tal-kumpanija izda fl-istess hin huwa ffirma l-kuntratt mieghu f'isem il-kumpanija u ffirma l-invoices biex japprovahom f'isem il-kumpanija u b'hekk ghamel rapport.

[3] A fol 217 tal-process

Is-sur Bonnici pprezenta ritratt ta' stampa[4] li dehret fuq il-facebook page ta' Contact Handle. Il-karattru li haden fuqu huwa ppozawh b'mod differenti minn kif kien ippozah huwa u tpogga fuq it-Tieqa tad-Dwejra.

In kontro-ezami, il-parte civile kkonferma li mar diversi drabi fl-ufficcju tal-kumpanija Market Handle Limited u kien ikun hemm il-haddiema wkoll. Huwa jaqbel li x-xoghol sar ghall-kumpanija. Meta gie ffirmat il-ftehim Celine Lee Bentley kienet prezenti fl-ufficcju izda ma jiftakarx kinitx fuq il-mejda maghhom. Biss pero' maghha ftit tkellem. Huwa qatt ma kellu dubbju li meta l-imputat kien qed jiffirma kien qed jirrapprezenta l-kumpanija.

- Celine Lee Bentley ghazlet li ma tixhidx biex ma tinkriminax ruhha.

- Dr AnnMarie Spiteri[5] tikkonferma li Martin Bonnici kien inkarigaha biex tibghat ittra ufficjali lill-kumpanija Market Handle Limited biex thallsu u kien qalilha li Donald Micallef kien id-direttur taghha. F'jannar 2011 kienet intbaghtet ittra izda ma kinitx giet notifikata u baqghet ma gietx notifikata. Billi kienet taf li kien hemm procedure ohra kontra Market Handle Limited marret twettaq il-verfiki taghha u rat illi l-eccezzjonijiet kienu fis-sens li Donald Micallef ma kienx awtorizzat jiffirma ghan-nom tal-kumpanija u ghalhekk il-ftehim ma kienx validu u l-ammont ma kienx dovut. Dan kien ghall-habta ta' April 2011. B'hekk tkellmet ma' Martin Bonnici u kien qalilha li kellu cekk u li kienu qalulu biex ma jiddepozitahx ghaliex kienu maghfusin bil-flus, izda meta marret hija personalment f'fergha tal-HSBC, il-kaxxier wara li ghamel ir-ricerki, mar ikellem lill-Manager u qalilha biex ikellmu avukat u kif qaltlu li hija kienet avukat wegibha li ahjar imorru jkellmu lill-Pulizija. B'hekk intbaghtet il-kwerela.

- L-imputat ghazel li jixhed[6] f'dawn il-proceduri. Beda billi jispjega li Celine Lee Bentley hija d-direttur tal-kumpanija u bdiet tfittex nies fis-suq li jaghmlu xoghol ta' Mrketing, Advertising and Communications. Huwa kellu l-posizzjoni ta' CEO tal-kumpanija Market Handle Limited. Fil-bidu, xogholu kien li jsib in-nies, l-ufficcju u jmexxi l-kumpanija. Hafna mid-decizjonijiet kien jehodhom huwa. Jispjega li Martin Bonnici kkuntattjah u wrieh ix-xogholijiet u ghogbuh. Tah kwotazzjoni u accettaha u accettaha ghan-nom tal-kumpanija. Ftehmu li l-hlasijiet kienu se jkunu bin-nifs. Jiftakar li Martin Bonnici kien inghata xi cekkijiet u li kien hemm cekk li qallu biex ma jmurx isarrfu ghaliex ma kienx hemm flus. Bonnici kompla

[4] A fol 36 tal-process
[5] Xhieda tas-16 ta' Ottubru 2014
[6] Seduta tal-21 ta' Novembru 2016

ghaddej bix-xoghol, lestih u ta x-xoghol f'idejn l-imputat ghal Market Handle Limited.

Ighid li F'Jannar 2011 kien hemm mandat ta' qbid fuq Market Handle Limited u ingabar kollox mill-ufficcju u l-impjegati u anki huwa stess ma thallsux.

Inkwantu ghall-iskritturi jsostni li huwa ffirma f'isem il-kumpanija u jghid li Bonnici sar jafu bhala CEO tal-kumpanija. Fuq hekk tkellmu.

It-tlett karattri superhereos li hadem fuqhom Martin Bonnici kienu progetti tal-kumpanija. Kien hemm minnhom jiehu hsiebhom b'mod personali pero' kienu proprjeta' ta' Market Handle Limited. Jikkonferma li x-xoghol sar u kien tajjeb. Ighid li kienu bdew jaghmlu t-testijiet bil-karattri bhala campaign teaser ghal Contact Handle li kienet business directory. Market Handle biss kienet kumpanija. L-ohrajn kienu prodotti taghha.

Ighid li wara li Market Handle ma kinitx qed topera mill-istess ufficcju huwa baqa' jhaddem il-website bil-benedizzjoni u ghal skopijiet ta' finanzi ghal Market Handle u mhux ghalih personali. Il-video jista' jkun uplodjah huwa izda l-karattri ma tuzawx band'ohra. Il-problema ma' Martin Bonnici hija wahda finanzjarja.

In kontro-ezami, l-imputat iwiegeb li huwa ffirma ghan-nom ta' Market Handle. Meta sari l-kuntratt ma' Martin Bonnici jixhed li jista' jkun li dak iz-zmien kien hemm xi problema zghira finanzjarja, izda l-problemi kbar bdew fit-13 ta' Jannar 2011. Jikkonferma li x-xoghol inghata lilu permezz ta' USB u ghamluh fil-kompjuter tieghu. Contact Handle huwa domain name *digital business directory just to make it a point, it's just a website.* Hija prodott ta' Market Handle. Spjega li meta nqalghu l-problemi ta' Market Handle billi kienu hadulhom l-affarijiet kollha u huwa kellu ammont kbir ta' flus li ried jigbor. Wasal f'kompromess ma' Celine Bentley fejn talabha jiehu over l-operations u jaghmel flus b'Contact Handle biex jirkupra ftit minn flusu u ghall-impjegati tal-kumpanija. Jixhed li ghal xahrejn inghaqdu ma' kumpanija ohra The Malta Business Directory fejn bdew joperaw huma Contact Handle taht l-isem taghhom pero' bi shab ma' Market handle. Wara li tali arrangamenti fallew, beda jopera Contact Handle huwa.

Jikkonferma li x-xoghol li hadem Martin Bonnici intuza fuq social media u fi print. L-imputat ma jiftakarx jekk tellax il-video huwa fuq il-website izda dan kien biss teaser ta' wahda mis-servizzi li kienet toffri Market Handle.

Ighid li huwa ffirma personalment izda ghan-nom ta' Market Handle Limited u dan anki jekk fuq l-iskrittura m'hemmx indikat li kien qed jiffirma ghan-nom tal-kumpanija.

Isostni li huwa ghad fadallu jiehu l-flus minghand Market Handle Limited. Jixhed li wara dak li gara huwa hassar mill-ewwel il-konnessjoni tieghu ma' Market Handle Limited biex jevita li jkompli jsofri l-konsegwenzi ghax affettwatu anki ghall-opportunitajiet ta' xoghol. Huwa kien konsulent ta' Contact Handle.

Ighid li kien hemm diversi proceduri kriminali fil-konfront tieghu u ta' Celine Bentley mill-haddiema u huwa gie liberat billi d-Direttur kienet Bentley.

Ikkunsidrat

Illi l-imputat tharrek fil-vesti personali tieghu u/jew fil-kapacita' tieghu ta' impjegat jew ta' ufficjal principali jew ta' rapprezentant tal-kumpanija Market Handle Limited.

F'dawn il-proceduri dejjem sostna li huwa dejjem agixxa ghan-nom tal-kumpanija u qatt f'ismu personali. Jekk dan hux minnu jew le hija kwistjoni fil-mertu, biss pero' jekk l-imputat bis-sottomissjoni tieghu jrid ifisser li l-allegati reati twettqu mill-kumpanija xorta wahda ghal dawn il-proceduri jirrizulta li t-tahrika saret b'mod korrett.

Referenza ssir ghall-Artikolu 13 ta' l-Att dwar l-Interpretazzjoni jistipola illi:-

"Meta xi reat taht jew kontra xi disposizzjoni li tinsab f'xi Att, li jkun ghadda sew qabel jew wara dan l-Att, isir minn korp jew ghaqda ta' persuni, sew jekk tkun persuna guridika jew le, kull persuna li, fil-hin tal-eghmil tar-reat, kienet direttur, manager, segretarju jew uffichal iehor simili tal-korp jew ghaqda, jew kienet tidher li qed tagixxi f'dik il-kariga, tkun hatja ta' dak ir-reat kemm il-

darba ma tippruvax li rreat ikun sar minghajr it-taghrif taghha u li tkun ezercitat id-diligenza kollha xierqa biex tevita l-eghmil tar-reat".

Inoltre kif inghad fis-sentenza fl-ismijiet **Il-Pulizija vs Anthony Zahra et**[7]

Kif gja gie ritenut mill-Qorti tal-Appelli Kriminali, diversi drabi f'cirkostanzi bhal dawn ma hemm ebda htiega li fic-citazzjoni jinghad espressament li huwa kien qed jigi imharrek fil-vesti tieghu ta' direttur, jew manager ecc. tal-kumpanija, peress li r-responsabilita' vikarja f'kazijiet bhal dawn iggib ir-responsabilita' personali u individwali ta' dak li jkun ghan-nuqqasijiet tas-socjeta"[8].

F'kazijiet bhal dawn, ic-citazzjoni tkun kompluta w valida jekk issejjah biss lid-direttur jew ufficjal iehor skont il-ligi, anki minghajr riferenza ghas-socjeta' in kwistjoni kif ritenut fis-sentenza fl-ismijiet il-Pulizija vs Martin Pillow[9].

Ikkunsidrat

L-imputat irrilaxxja stqarrija fl-14 ta' Marzu 2012 fejn huwa kien inghata d-dritt sabiex jikkonsulta ma' avukat qabel l-interrogatorju izda ma kellux id-dritt li jkun assistit minn avukat waqt l-interrogatorju u dan billi dak iz-zmien il-ligi ma kienitx tippermettih.

Kif inhu maghruf kien hemm sensiela ta' sentenzi kemm mill-Qrati taghna u minn dik Ewropeja li trattaw il-kwistjoni ta' vjolazzjoni tad-dritt ta' smiegh xieraq l-ewwel minhabba r-restrizzjoni sistemika tad-dritt tal-avukat anki qabel l-interrogatorju, u sussegwentement minhabba n-nuqqas tad-dritt li suspettat ikun assistit minn avukat waqt l-istqarrija.

Se ssir referenza ghas-sentenza fl-ismijiet **Il-Pulizija vs Thomas Pace**[10] fejn fiha saret rassenja ta' sentenzi b'mod dettaljat:

F'dan ir-rigward issir referenza għas-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tat-12 ta' Jannar 2016 fil-każ ***Mario Borg v. Malta****, kif ukoll għas-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet* ***The Republic of Malta vs Chukwudi Onyeabor tal-1 ta' Diċembru 2016****, fejn hemmhekk il-Qorti għamlet*

[7] Deciza mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali deciza fid-19 ta' Lulju 2016
[8] Ara Appelli Inf Pulizija v Joseph Bonnici, 26/5/1995; Pulizija v Carmel Camilleri, 5/11/2004; Pulizija v Joseph Vella, 2/02/2006. 24
[9] Deciza mill-Qorti tal-Appelli Kriminali fit-18 ta' Novembru 2011.
[10] Deciza mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fis-26 ta' Gunju, 2019

referenza għal diversi sentenzi tal-Qorti Kostituzzjonali ossia ***Carmel Saliba vs Avukat Generali*** *tas-16 ta' Mejju 2016,* ***Stephen Nana Owusu vs Avukat Generali*** *tat-30 ta' Mejju 2016,* ***Malcolm Said vs Avukat Generali et*** *tal-24 ta' Ġunju 2016 u* ***Aaron Cassar vs Avukat Generali et*** *tal-11 ta' Lulju 2016 u għaddiet sabiex tiddeċiedi illi "the denial of the right to legal assistance at the pre-trial stage as a result of a systematic restriction applicable to all accused persons must today be held to be in violation of the conditions for the admissibility of an accused's statement."*

Il-Qorti tirreferi wkoll 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. Fissentenza tagħha, il-Qorti Kostituzzjonali qalet hekk dwar l-istqarrijiet rilaxxjati millistess 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 listqarrijiet 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 lezitu tal-process kriminali u, ladarba dan isir, x'aktarx ser isir ksur tad-dritt tar-rikorrent ghal smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mir-rikorrent flassenza 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 għallassistenza legali waqt l-interrogatorji tiegħu. Din kienet ukoll il-konklużjoni tal-Qorti tal-Appell Kriminal fis-sentenza tagħha tal-20 ta' Novembru 2018, fl-ismijiet Il-**Pulizija vs Claire Farrugia**, f'liema każ dik il-Qorti skartat bħala inammissibbli l-istqarrijiet tal-imputata, waħda minnhom ġuramentata, u dan għaliex għalkemm hija ngħatat id-dritt li tottjeni parir legali qabel l-istqarrijiet tagħha, 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. F'dan is-sens ukoll iddeċidiet l-istess Qorti fis-sentenza tagħha fl-ismijiet **Il-Pulizija vs Emad Masoud** tas-16 ta' Mejju 2019 u iżjed riċentement fis-sentenza tagħha flismijiet 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 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 millistqarrija 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 linterrogat 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 caselaw (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 selfincrimination 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 casespecific 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 tać-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 iddritt 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 filkonfront 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 ilproċeduri. 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, l-istqarrija magħmula lill-pulizija ma kinitx ir-raġuni li wasslet għall-kundanna tal-attur: 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 bilkonsegwenzi 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 lillpulizija 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 ilpersuna 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 ilMediċini Perikoluži [Kap. 101]." [sottolinear ta' din il-Qorti]

Omissis

Huwa evidenti illi 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-istess stqarrija, 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.

Fil-kaz odjern, il-Prosekuzzjoni mhiex qeghda tistrieh biss fuq l-istqarrija rilaxxjata izda mill-istess stqarrija jirrizulta li l-imputat ghamel dikjarazzjonijiet inkriminanti li jsahhu t-tezi tal-Prosekuzzjoni.

Fid-dawl ta' dawn is-sentenzi u anke tal-gurisprudenza tal-Qrati taghna u tal-Qorti Ewropea hemmhekk citati, il-Qorti jidhrilha illi m'ghandhiex tistrieh fuq l-istqarrija tal-imputat u ghalhekk qegħda tiskartaha, kif qegħda tiskarta wkoll dik il-parti tax-xhieda tal-Ispettur li tagħmel referenza ghal tali stqarrija u ghal meta l-imputat gie mistoqsi fuq l-istess.

Ikkunsidrat

L-elementi rikjesti biex jissussisti r-reat ta' Frodi huma ben stabbiliti fil-gurisprudenza taghna[11]:

Fil-Ligi taghna biex ikun hemm it-truffa jew il-frodi innominata irid ikun gie perpetrat mill-agent xi forma ta' ingann jew qerq, liema ingann jew qerq ikun wassal lill-vittma sabiex taghmel jew tonqos milli taghmel xi haga li ggibilha telf patrimonjali bil-konsegwenti qligh ghall-agent ... jekk l-ingann jew qerq ikun jikkonsisti f'raggiri jew artifizi - dak li fid-dottrina jissejjah ukoll mis en scene - ikun hemm it-truffa; jekk le ikun hemm hemm ir-reat minuri ta' frodi innominata (jew lukru frawdolenti innominat)[12].

Illi x'jikostitwixxi r-raggiri u l-artifizji ukoll huwa ben stabbilit fil-gurisprudenza taghna. Fi kliem Antolisei[13]

artifizio e' ogni studiata trasfigurazione del vero, ogni camuffamento della realta effetuato sia simulando cio che non esiste, sia dissimulando ... cioe che esiste. Il raggiro d'altra parte e un avvolgimento ingenioso di parole, de`stinate a convincere: piu precisamente una menzogna corredata da ragionamenti idonei a farla scambiare per verita. .... E certo che l'espressione del codice di per se' richiama l' idea di una certa astuzia o di un sottile accorgimento nel porre l'inganno in opera.

Antolisei jkompli jghid pero li

[11] Ara s-sentenza fl-ismijiet Il-Pulizija vs Anthony Fountain et deciza fil-15 ta' Dicembru 2011
[12] Ref Pulizija ve Carmela German AK deciza 30.12.2004 u l-gurisprudenza hemm kwotata.
[13] Manuale Di Diritto Penale (Giuffre) pagna 356

nell'applicazione pratica della legge questa idea e' andata sempre piu affievolendosi, fin quasi a scomparire del tutto. Per tal modo si e' finito con l'ammettere che anche la semplice menzogna puo bastare per dare vita alla truffa[14].

Illi f'dan is-sens anke l-Qorti ta' l-Appell Kriminali qalet hekk dwar il-messa in xena:

Il-Ligi taghna ma tirrikjediex li l-messa in xena, cioe dawk l-artifizji jew raggiri, ikunu xi haga kkumplikata jew arkittetta b'hafna pjanijiet[15].

Imbaghad fis-sentenza fl-ismijiet **Il-Pulizija vs Marjanu Zahra**[16]

Biex jissussti ir-reat tal-frodi jew truffa gie ritenut kostantement fil-gurisprudenza u fis-sentenzi tal-qrati taghna illi iridu jinkonkorru diversi elementi. Ibda biex irid ikun hemm ness bejn is-suggett attiv u is-suggett passiv tar-reat u cioe' bejn minn qieghed jikkometti ir-reat u il-vittma. Hemm imbaghad l-element materjali ta' dana ir-reat u cioe' l'uzu ta' ingann jew raggieri li iwasslu lil vittma sabiex isofri it-telf patrimonjali. Finalment huwa necessarju li ikun hemm l-element formali tar-reat konsistenti fid-dolo jew fl-intenzjoni tat-truffatur jew frodatur li jinganna u dana sabiex jikseb profitt jew vantagg ghalih innifsu. Jekk xi wiehed jew iktar minn dawn l-elementi huma nieqsa, allura ir-reat tat-truffa ma jistax jisussisti. Illi f'sentenza moghtija mill-Qorti ta'l-Appelli Kriminali (per Imhallef Carmel. A. Agius) deciza fit-22 ta' Frar 1993, fl-ismijiet Il-Pulizija vs Charles Zarb, il-Qorti ghamlet esposizzjoni ferm preciza studjata u dettaljata ghar-rigward ta'l-elementi ta' dana ir-reat. Il-Qorti bdiet sabiex esprimiet ruhha b'dan il-mod ghar-rigward ta' dana ir-reat:

"Id-delitt tat-truffa huwa l-iprem fost il-kwalitajiet ta' serq inproprji u hu dak li fl-iskola u fil-legislazzjoni Rumana kien maghruf bhala steljolat u li

[14] Op cit pagna 357

[15] Ref Pulizija vs Emanuel Ellul deciza 20.06.1997.

[16] Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali deciza fit-2 ta' Marzu, 2011

jikkorrispondi ezattament ghat-truffa tal-Codice Sardo, ghal frodi tal-Kodici Toskan, ghal Engano jew Estafa fil-kodici Spanjol, ghal Bulra f'dak Portugiz, u ghal Esroquerie fil-Kodici Francis … Id-disposizzjonijiet tal-Kodici taghna li jikkontemplaw ir-reat ta' truffa kienu gew mehuda minn Sir Adriano Dingli mill-paragrafu 5 ta'l-artikolu 430 tal-Kodici delle Due Sicilie li hu identiku hlief ghal xi kelmiet insinjifikanti ghal Kodici Franciz (artikolu 405) avolja dan, il-Kodici delle Due Sicile, it-truffa kien sejhilha Frodi …..". *Skond gurisprudenza kostanti, l-ingredjenti ta'l-element materjali ta' dan id-delitt ta' truffa, huma dawn li gejjin.*

Fl-ewwel lok bhala suggett attiv ta' dan id-delitt jista' ikun kulhadd.

Fit-tieni lok il-Legislatur, aktar mill-interess socjali tal-fiducja reciproka fir-rapport patrimonjali individwali, hawn qed jittutela l-interess pubbliku li jimpedixxi l-uzu ta'l-ingann u tar-raggieri li jinducu bniedem jiddisponi minn gid li fil-kors normali tan-negozju ma kienx jaghmel.

Fit-tielet lok hemm l-element materjali tat-truffa u jikkometti d-delitt tat-truffa kull min:

a. *b'mezzi kontra l-ligi, jew*
b. *billi jaghmel uzu minn ismijiet foloz jew*
c. *ta' kwalifiki foloz jew*
d. *billi jinqeda b'qerq iehor u*
e. *ingann jew*
f. *billi juri haga b'ohra sabiex igieghel titwemmen l-ezistenza ta' intraprizi foloz,*
g. *jew ta' hila*
h. *setgha fuq haddiehor jew*
i. *ta' krediti immaginarji jew*
j. *sabiex iqanqal tama jew biza dwar xi grajja kimerika, jaghmel qliegh bi hsara ta' haddiehor.*

…. Hu necessarju biex ikun hemm ir-reat ta' truffa, li l-manuvri jridu jkunu ta' natura li jimpressjonaw bniedem ta' prudenza u sagacja ordinarja, li jridu

jkunu frawdolenti u li hu necessarju li jkunu impjegati biex jipperswadu bl-assistenza ta' fatti li qajmu sentimenti kif hemm indikat fil-ligi. ...."

Dwar l-artifizzji intqal mill-Qorti illi ***"hemm bzonn biex ikun reat taht l-artikolu 308 illi l-kliem jkun akkumpanjat minn apparat estern li jsahhah il-kelma stess fil-menti ta' l-iffrodat. Din it-tezi hija dik accettata fil-gurisprudenza ta' din il-Qorti anke kolleggjalment komposta fil-kawza "Reg vs Francesco Cachia e Charles Bech (03.01.1896 – Kollez.XV.350) li fiha intqal illi "quell' articolo non richiede solamente una asserzione mensioniera e falza, ma richiede inoltre che siano state impiegate, inganno, raggiro o simulazione, ed e' necessario quindi che la falza asseriva sia accompagnata da qualche atto diretto a darla fede."***

Ghar-reati ta' truffa komtemplat fl-artikolu 308 tal-Kodici kriminali, il-Qorti iccitata lill-Imhallef Guze Flores fejn qal illi ***"kif jidher mid-dicitura partikolari deskrittiva adoperata, hemm bzonn li tirrizulta materjalita' specifika li sservi ta' supstrat ghall-verosimiljanza tal-falsita prospettata bhala vera u b'hekk bhala mezz ta' qerq. Ma huwiex bizzejjed ghal finijiet ta' dak l-artikolu affermazzjonijiet, luzingi, promessi, minghajr l-uzu ta' apparat estern li jirrivesti bi kredibilita' l-affermazzjonijiet menzjonjieri tal-frodatur. Il-ligi taghti protezzjoni specjali kontra l-ingann li jkun jirrivesti dik il-forma tipika, kwazi tejatrali, li tissupera il-kawtela ordinarja kontra s-semplici u luzingi, u li taghti li dawk l-esterjorita ta' verita kif tirrendi l-idea l-espressjoni felici fid-dritt Franciz mise-en-scene."***

"….Kwantu jirrigwarda l-element formali, cioe' kwantu jirrigwarda d-dolo ta' dan ir-reat ta' truffa, jinghad illi jrid jkun hemm qabel xejn l-intenzjoni tal-frodatur li jipprokura b'ingann l-konsenja tal-flus jew oggett li jkun fi profit ingust tieghu. L-ingustizzja tal-profitt tohrog mill-artikolu 308 tal-Kodici Kriminali fejn il-kliem "bi hsara ta' haddiehor" ma jhallux dubbju dwar dan. Jigifieri biex ikun hemm l-element intenzjonali tar-reat ta' truffa, hemm bzonn li s-suggett attiv tar-reat fil-mument tal-konsumazzjoni tieghu ikun konxju ta'l-ingustizzja tal-profitt u b'dan il-mod il-legittima produttivita tal-profitt hija bizzejjed biex teskludi d-dolo."

Illi minn dina l-esposizzjoni maghmula mill-Qorti ta'l-Appell li iccittat diversi sentenzi ohra tal-qrati taghna jidher illi l-elementi rikjesti sabiex jisussisti ir-reat tal-frodi baqghu invarjati fi-zmien.

Illi f'sentenza moghtija mill-Corte di Cassazione Penale gie deciz illi element ewelieni fir-reat tal-frodi huwa ***"l'elemento del'danno patrimoniale"*** *Biex imbaghad jissusti dana it-tip ta' reat huwa necessarju illi jezistu "****I tre momenti di cui si compone il reato e' cioe' la produzione dell'artificio, nella successive induzione in errore e nella conseguenziale produzione dell'ingiusto profitto per l'agente." (Cassazione penale sez.II 3 ottobre 2006 n.34179)***

Illi ghar-rigward ta' dana l-element soggettiv tar-reat tat-truffa, kif gie ritenut mill-awtur Francesco Antolisei, ikkwotat f'sentenza ohra moghtija mill-Qorti ta'l-Appelli Kriminali (Il-Pulizija vs Patrick Spiteri deciza 22/10/2004) : ***"L'agente … deve volere non solo la sua azione, ma anche l'inganno della vittima, come conseguenza dell'azione stess, la disposizione patrimoniale, come conseguenza dell'inganno e, infine, la realizzazione di quell profitto che costituisce l'ultima fase del processo esecutivo del delitto. Naturalmente occorre che la volonta sia accompagnata dalla consapevolezza del carattere frodatorio del mezzo usato, dell'ingiustizia del profitto avuto in mira e del danno che ne deriva all'ingannato."***

Illi l-artikolu 309 tal-Kapitolu 9, imbaghad jikkontempla ir-reat minuri tal-frodi innominat. Illi ghar-rigward ta' dana ir-reat, ghalkemm l-element tar-"raggiri" jew l-"artifzji", huwa nieqes u allura anke gidba semplici hija bizzejjed ghal kummissjoni ta' dana ir-reat, izda dana irid bil-fors iwassal sabiex il-vittma u cioe' is-suggett passiv ta' dana ir-reat isofri xi telf patrimonjali. Illi kif gie deciz fis-sentenza Il-Puliizja vs Carmela German (Appelli Kriminali Inferjuri 30/12/2004): ***"Kwantu ghal kwistjoni jekk il-gidba semplici – a differenza ta' l-artifizji u raggiri – tistax tammonta ossia twassal ghar-reat ta' frodi innominata, ir-risposta hija certament fl-affermattiv, basta li tali gidba tkun effettivament tammonta ghal qerq, cioe' intiza jew preordinata sabiex il-persuna l-ohra (il-vittma) taghmel jew tonqos milli taghmel xi haga li ggibilha telf patrimonjali bil-konsegwenti arrikkiment ghal min jghid dik il-gidba u basta, s'intendi li tkun effettivament waslet ghal dana it-telf min-naha u arrikkiment min-naha l-ohra."***

Ikkunsidrat Ulterjorment

Skond gurisprudenza kostanti u anke skond awturi, generalment huwa ritenut li l-estremi ta' dan r-reat ta' approprjazzjoni indebita huma dawn li gejjin:

1. Illi l-pussess tal-haga jkun gie trasferit lis-suggett attiv tar-reat voluntarjament mill-proprjetarju jew detentur, ikun min ikun. Jigi specifikat hawnhekk biex ma jkunx hemm ekwivocita, li l-konsenja da parti tal-proprjetarju jew detentur lil agent jew lis-suggett attiv tad-delitt, trid tkun maghmula con l'animo di spostarsi del possesso, ghax altrimenti jiffugura mhux r-reat tal-approprjazzjoni ndebita, imma s-serq.

2. Illi t-trasferiment tal-pussess ma jridx wkoll ikun jimporta t-trasferiment tad-dominju cioe tal-proprjeta' ghaliex f'dan il-kaz ma jiffigurax l-element tal-azzjoni ndebita.

3. Illi l-oggett irid ikun mobbli;

4. Illi l-konsenjatarju in vjolazzjoni tal-kuntratt jaghmel tieghu il-haga cioe japproprja ruhu minnha, jew jbiegha, jew jiddistruggiha a proprio commodo o vantaggio;

5. Irid ikun hemm wkoll l-intenzjoni tas-suggett attiv tar-reat li japproprja ruhu mill-oggett li jkun jaf li huwa ta' haddiehor" (Il-Pulizija vs Marbeck Cremona - Qorti tal-Magistrati (Ghawdex) – 15/02/2007)

Illi f'sentenza moghtija mill-Qorti tal-Appelli Kriminali fl-ismijiet **Il-Pulizija vs Enrico Petroni u Edwin Petroni** deciza fid-9 ta' Gunju 1998, il-Qorti ghaddiet sabiex elenkat l-element essenzjali li isawwru dana ir-reat.

"Dana ir-reat isehh meta wiehed (1) jircevi flus jew xi haga ohra minghand xi hadd; (2) bl-obbligu li jrodd dawk il-flus jew dik ix-xi haga lura <u>jew li jaghmel uzu minnhom b'mod specifiku</u>;(sottolinjar tal-Qorti) (3) u minflok ma jaghmel hekk idawwar dawk il-flus jew dak l-oggett bi profitt ghalih jew ghal haddiehor."

Illi ghalhekk l-awtur ta' dana ir-reat irid ikollu l-intenzjoni specifika illi l-oggett li jigi fdat lilu u li ikun qed jippossjedi ghal ghan specifiku, jigi imdawwar

minnu daqslikieku huwa l-proprjetarju u jaghmel uzu minnu jew jiddisponi minnu bi profitt ghalih jew ghal haddiehor.

Illi kif jispjega l-awtur Francesco Antolisei:

"*La vera essenza del reato [di appropriazione indebita] consiste nell'abuso del possessore, il quale dispone della cosa come se ne fosse proprietario (uti dominus). Egli assume, si arroga poteri che spettano al proprietario e, esercitandoli, ne danneggia il patrimonio*" (**Manuale di Diritto Penale**, Giuffre` (Milano), 1986, Parte Speciale, Vol. 1, p. 276)[17]

Illi f'sentenza ohra deciza mill-Qorti ta'l-Appelli Kriminali fl-ismijiet **Il-Pulizija vs John Gauci** deciza fl-14 ta' Frar 1997, l-Qorti tispjega b'mod semplici l-elementi ta' dana ir-reat:

"Minn ezami ta' l-artikolu 293 tal-Kodici Kriminali jidher car li wiehed mill-elementi essenzjali ta' l-approprjazzjoni indebita huwa kostitwit mill-frazi: "... taht titolu illi jgib mieghu l-obbligu ... li jsir uzu minnha specifikat ...". Specifikat minn min? Ovvjament minn min ikun ikkonsenja l-haga lill-agent u minn hadd izjed. Hija l-persuna li tikkonsenja l-haga u hadd hliefha li jkollha jedd timponi l-obbligu ossia tispecifika lill-agent dwar kif ikollu jaghmel uzu mill-oggett ikkonsenjat lilu minnha. Jekk il-konsenjatur jaghti flus lill-agent biex dan bihom jixtrilu dar, l-agent jikkommetti r-reat ta' approprjazzjoni indebita jekk minflok jaghtihom karita'. Jekk il-konsenjatur jaghti flus lill-agent biex dan jixtrihom armi bi skop ta' serq, l-agent ikun approprja ruhu mill-flus indebitament jekk jaghtihom karita', apparti l-kwistjoni tal-moralita'. Jekk jixtrihom armi, allura l-agent ikun ghamel uzu mill-flus kif specifikat. F'kull kaz, fl-indagini dwar il-htija jew le ta' approprjazzjoni indebita, ghandha ssir prova ta' l-uzu tal-haga specifikata mill-konsenjatur u prova ta' jekk l-agent ma ikunx ghamel mill-haga dak l-uzu jew uzu divers."

Illi finalment dwar id-*dolo* mehtieg ghal kumissjoni ta' dana ir-reat il-Qorti taghmel pjena referenza ghas-sentenza **Il-Pulizija v Dr. Sigfried Borg Cole** deciza mill-Qorti tal-Appell Kriminali fit-23 ta' Dicembru 2003 fejn il-Qorti hemmhekk ghamlet referenza ghal dak li qal il-gurista Luigi Maino fuq il-kuncett tad-*dolo* necessarju ghal ezistenza ta' dan r-reat. (***Commento al Codice Italiano UTET (1922)*** Vol IV para 1951 pagna 105 – 106):

[17] Il-Pulizija vs Francis Camilleri deciza fil-25 ta' Gunju 2001 – Appelli Kriminali Inferjuri

"Finalmente, a costruire il delitto di appropriazione indebita e' necessario il-dolo. Trattandosi di delitto contro la proprieta', a scopo d'indebito profitto per se' o per un terzo, il dolo sara' costituito dalla volontarieta', della conversione con scienza della sua illegittimita'e dal fine di lucro; onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d'un diritto proprio da far valere, non commette reato per difetto di elemento intenzionale. Per la stessa ragione, e per difetto inoltre di elemento obiettivo, non incorrera in reato chi ne disporre della cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo ... il dolo speciale nel reato di appropriazione indebita e' [come nel furto e nella truffa] l'animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell'inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai deviamenti della pratica giudiziale che diedero spesse volte l'esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale. Rettamente pertanto fu giudicato non commettere appropriazione indebita [e neppure il delitto di ragion fattasi, per mancanza di violenza] il creditore che trattiene un oggetto di spettanza del suo debitore a garanzia del credito; l'operaio che avendo ricevuto materia prima da lavorare, si rifiuta, perche' non pagato dal committente, di proseguire nel lavoro e di rendere la materia ricevuta; l'incaricato di esigere l'importo di titoli, che non avendo potuto compiere tale esazione, trattiene i titoli a garanzia del dovutogli per le pratiche inútilmente fatte allo scopo di esigere. In generale la giurisprudenza e' costante nel richiedere come elemento costitutivo imprescindibile il dolo."

Imbaghad fis-sentenza fl-ismijiet **Il-Pulizija vs Ivan Vella** il-Qorti tal-Appell Kriminali[18] irriteniet li "ir-*reat tal-misapproprazzjoni jidher illi dana ir-reat huwa ibbazat fuq l-abbuz tal-fiducja li tkun giet fdata lill-agent. Dana l-abbuz jissarraf fil-fatt illi l-agent idawwar oggett li ikun gie fdat lilu ghal ghan specifikat f'uzu differenti minn dak patwit tal-oggett ikkonsenjat, liema uzu divers madanakollu irid ikun sar b'mod intenzjonali mill-agent bl-ghan li jaghmel profit minnu ghalih innifsu. Dana l-agir minn naha tieghu ma iridx jammonta ghal semplicement uzu tal-oggett, izda l-agent irid iqies illi dak l-oggett sar proprjeta' tieghu u ghalhekk jaghmel uzu minnu bhala sid tieghu u dana bi profitt ghalih."*

[18] Fit-3 ta' Ottubru 2001

Inkwantu ghar-reat ta' mizapproprjazzjoni, l-ufficjal prosekutur issottomettiet li l-imputat ghandu jinstab hati billi huwa inghata usb bil-karattri u dawn inghataw ghal ghan specifiku ossija xoghol ghal Market Handle izda ntuza ghal xi hag'ohra billi gie mghoddi lil terzi.

Mhux kontestat li x-xoghol tlesta u Martin Bonnici ghaddieh lill-imputat permezz ta' usb. Ix-xoghol kif irrizulta mill-provi u kif jispjega l-istess imputat kien intiz ghall-kumpanija Market Handle Limited. It-tlett karattri kellhom jintuzaw biss minn din il-kumpanija u jithaddmu minnha. Altrimenti kien rikjest li jinkiseb il-kunsens tal-istess Martin Bonnici. Infatti saret referenza mill-Ufficjal Prosekutur ghall-iskritturi senjatament fil-klawzoli 3 u 4 tal-iskritturi:

The parties agree that all intellectual property rights including trademarks, patents, designs, franchising, copyright and domain names amongst others, created for the production shall remain the sole property of the Producer. Project files containing such property will be made available to the client (for internal use only), against a fee of €580 (inc VAT) upon delivery of the files;

The parties agree that if the Client had to make any ulterior business arrangements with third parties not stipulated in this agreement is bound to inform the Producer of such arrangements. The Client also binds himself to transfer to the Producer fifteen perecent (15%) of profits that such business arrangements with third parties may yield.

Jirrizulta wkoll li ttella video fuq il-pagna ta' Contact Handle skont dokument ezebit[19] ipprintjat fid-9 ta' Marzu 2012. Meta effettivament ittella ma jirrizultax. Biss pero' l-imputat innifsu fix-xhieda tieghu jghid li ghalkemm ma jiftakarx bi preciz, jista' jkun li kien huwa li tellghu izda dan kien wara li nqalghu d-diffikultajiet finanzjarji fil-kumpanija Market handle Limited u meta din ma kinitx ghadha qegghda topera w allura prezeumibilment wara Jannar 2011. Contact Handle mhix kumpanija registrata mal-MFSA. L-imputat l-ewwel jixhed li din kienet business directory ta' Market Handle Limited u ghalhekk ma kienx hemm il-htiega tal-ebda kunsens billi Market Handle Limited kellha d-dritt taghmel uzu mill-karattri. Ftit hin wara, fl-istess xhieda, jammetti li wara li nqala' l-inkwiet ghamel minn kollox biex jiddisasocja ruhu mill-kumpanija Market Handle Limited u li kien konsulent ta' Contact Handle Limited. Ighid li nghaqdu ma' kumpanija ohra ghal xahrejn izda meta anki meta dan falla, huwa baqa' jopera Contact Handle Limited minn fuq E-Business Platforms li fuq il-pagna ta' facebook tidher li hija s-sid ta' Contact Handle izda dan biex ma juzax l-isem ta' Market Handle Limited. Mill-provi prodotti jirrizulta li hekk kif

[19] A fol 34 tal-process

inqalghu l-problemi Donald Micallef approprja ruhu personalment mix-xoghol li Martin Bonnici wettaq ghal Market Handle Limited biex jew bl-ghajnuna ta' terzi u meta falla huwa personalment beda juzahom huwa biex jipprova jaghmel qliegh minnhom.

L-aggravju huwa wkoll ippruvat invista li x-xoghol thalla f'idejh minhabba l-kariga li kellu fil-kumpanija.

Inkwantu ghar-reat ta' frodi, il-Qorti wkoll tirraviza l-elementi li jikkostitwixxu l-istess reat:

- Meta l-imputat tkellem u nnegozja ma' Martin Bonnici kien hemm drabi fejn ipprezenta ruhu bhala Managing Director u mhux biss bhala CEO.
- Il-Qorti m'ghandhix ghalfejn tiddubita lil Martin Bonnici u l-fatt li l-istess imputat iffirma l-iskritturi meta kien konsapevoli li ma kellux rapprezentanza legali tal-kumpanija huwa sinifikattiv tal-intenzjoni tieghu. Bil-mod kif ipprezenta ruhu l-imputat huwa evidenti li f'Martin Bonnici ma thalla l-ebda dubbju li huwa seta' jiffirma ghan-nom tal-kumpanija u jorbot lill-istess kumpanija bil-ftehim iffirmat.
- Mill-provi prodotti u mix-xhieda tal-imputat innifsu rrizulta li Donald Micallef ma kellux tali setgha.
- Bonnici xehed li huwa qatt ma nnegozja ma' celine Bentley u meta mar fl-ufficcju kienet hemm izda ma haditx wisq interess.
- Martin Bonnici jixhed li l-prodott kien intiz ghall-kumpanija u meta huwa halla x-xoghol tieghu f'idejn Micallef ghamel dan biex il-prodott jintuza' mill-kumpanija. D'altronde kif tnizzel fl-iskritturi ffirmati.
- Fix-xhieda tieghu, Donald Micallef filli jghid li ffirma ghan-nom tal-kumpanija, filli li huwa gie liberat minn diversi procedure kriminali ghaliex huwa ma kienx direttur u li Celine Bentley bdiet issostni li l-kumpanija ma kinitx marbuta b'dak li ffirma huwa.
- Kwindi mhux talli ha x-xoghol, ghan-nom tal-kumpanija, minghajr ma hallas talli Martin Bonnici , apparti l-kwistjoni finanzjarja tal-kumpanija, ghandu diffikulta' biex jirkupra flusu civilment ladarba l-kumpanija ma tqisx ruhha marbuta bil-firma ta' Donald Micallef.
- Oltre dan, harsa lejn l-istatement tal-Bank tal-kumpanija ipprezentat fl-atti, li minnu nhareg ic-cekk lil Martin Bonnici (iffirmat minn Celine Bentley) li qatt ma gie onorat, jirrizulta li l-kumpanija qatt ma kellha bizzejjed fondi biex tonora c-cekk mahrug. L-istess imputat, meta rinfaccjat b'dan in kontro-ezami, jirrispondi li kien hemm diga' problem finanzjarji imma mhux daqstant kbar. Din il-Qorti ma temminx lill-imputat f'dan. Anzi tqis li mhux biss meta hareg ic-cekk izda sa minn mindu giet iffirmata t-tieni skrittura

kien ben konsapevoli li Martin Bonnici ma kienx se jithallas ta' xogholu. Kien Donald Micallef stess li qallu biex ma jmurx isarraf ic-cekk ghax kienu maghfusin bil-flus. In verita altru li kienu maghfusin! L-imputat jixhed li kien huwa li jmexxi l-kumpanija u kien jiehu hafna decizjonijiet huwa, m'hemmx dubbju li kien jaf li fil-kont ma kienx hemm flus, mhux biss wara li nqalghu l-problemi finanzjarji izda wkoll ferm qabel.

- Nonostante li l-imputat kien a konoxxenza tal-fatt li ma kienx hemm fondi biex Martin Bonnici jithallas, huwa ha x-xoghol minghand Bonnici u beda jippruvah ukoll ghaliex ix-xoghol kien tajjeb.

Ghalhekk l-imputat se jinstab hati ta' dawn iz-zewgt imputazzjonijiet.

Inkwantu ghat-tielet imputazzjonijiet, l-imputat gie akkuzat bi ksur tal-artikolu 298B tal-Kapitolu 9 tal-Ligijiet ta' Malta. Biss pero tali artikolu jinnecessita li jkun hemm kwerela tal-parti offiza. Filwaqt li jirrizulta li Martin Bonnici ressaq kwerela lill-pulizija izda din ma kinitx tinkludi fiha ksur tad-drittijiet tal-awtur tieghu w allura l-imputat se jigi liberat minn tali imputazzjoni.

Piena

Illi l-Qorti qeghda tiehu in kunsiderazzjoni n-natura tar-reati, ic-cirkostanzi tal-kaz u l-fedina penali tal-imputat. F'dan il-kaz il-Qorti tqis li ghandha tikkundanna lill-imputat ghal prigunerija effettiva.

Decide

Ghal dawn il-motivi din il-Qorti wara li rat l-artikoli 293, 294, 308, 310(1)(a) tal-Kapitolu 9 tal-Ligijiet ta' Malta ssib lill-imputat hati tal-ewwel u t-tieni imputazzjoni migjuba fil-konfront tieghu u tikkundannah ghal tmintax-il xahar prigunerija. Ma ssibx lill-imputat hati tat-tielet imputazzjoni migjuba fil-konfront tieghu u minnha tilliberah.

Dr Josette Demicoli
Magistrat

Dr Josette Demicoli
Magistrat