Qorti tal-Appell Kriminali

Onor. Imhallef Edwina Grima

Appell Numru: 197/2014

Il-Pulizija

vs

Melchior Bonnici

iben Edgar, imwieled Pieta', fit-28 ta' Dicembru 1980, detentur tal-karta ta' l-identita' numru 30581(M)

Illum, 31 ta' Lulju 2019

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellant Melchior Bonnici quddiem il-Qorti tal-Magistrati (Malta) akkuzat talli gewwa l-Melita Bar, sitwat f' Hal Balzan u fi bnadi ohra f'dawn il-Gzejjer, nhar it-22 ta' Jannar 2003 u fi tlett snin ta' qabel b'diversi atti maghmulin fi zminijiet differenti, li jiksru l-istess disposizzjoni tal-ligi u li gew maghmula b'risoluzzjoni wahda:

1. ikkometta serq ta' proprjeta (xorb akoholiku u oggetti ohra) ghad-dannu ta' Emanuel Cassar u/jew tal-kumpanija San Anton Caterers Limited operatrici tal-lokal "Melita", ta' Sqaq Idmejda, Balzan, liema serq huwa kwalifikat bil-valur ta' izjed minn elf ewro, bil-persuna, bil-lok u bil-hin u dan ai termini ta'l-artikoli 261, 267, 279(b), 268, 269(g) u 270 tal-Ligijiet ta' Malta;
2. talli laqa' ghandu jew xtara hwejjeg misruqa, mehuda b'qerq jew akkwistati b'reat, jew xjentement b'kull mod li jkun, indahal biex ibiegh jew imexxi dawn l-oggetti (xorb alkoholiku u television) u dan ai termini ta'l-artikolu 334(a) tal-Kodici Kriminali.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tat-30 ta' April 2014 fejn il-Qorti sabet lill-appellant hati tal-akkuza tas-serq aggravat u ma sabitux hati ta' ricettazzjoni u illiberatu minn din l-akkuza, wara li rat l-Artikoli 18, 261(c)(d)(e)(f), 267, 268, 269, 270, 279, 280 tal-Kodici Kriminali, wara li rat il-fedina penali tal-appellant u hadet in konsiderazzjoni c-cirkostanzi kollha tal-kaz fejn il-Qorti kienet konvinta li l-imputat kien kostrett taht pressjoni ta' estorsjoni sabiex jikkometti dan ir-reat u wara li hadet in konsiderazzjoni li hallas il-valur minnu misruq minkejja is-serq ikkomettieh taht ic-cirkostanzi hawn spjegati, u tenut kont ukoll li ghadda hafna zmien mid-data tal-kummissjoni tar-reat, illiberat lill-appellant bil-kundizzjoni li ma jikkomettiex reat fi zmien sena.

Rat ir-rikors tal-appellant Melchior Bonnici minnu pprezentat fid-09 ta' Mejju 2014 fejn talab lil din il-Qorti joghgobha tvarja, tirriforma u tbiddel s-sentenza appellata u dan billi:

a. tikkonfermaha f'dik il-parti fejn l-esponent gie illiberat mit-tieni imputazzjoni u cioe' mill-akkuza ta' ricettazzjoni.
b. Thassarha, tirrevokaha u tikkancellaha f'dik il-parti fejn l-esponenti instab hati ta'l-ewwel akkuza, u cioe' l-akkuza ta' serq aggravat, u minflok tghaddi biex tilliberah minn din l-akkuza u minn kull htija u piena.

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

1. Illi fil-konfront tal-appellant kellu japplika l-iskriminanti mahsub fl-artikolu 33(b) tal-Kodici Kriminali u dan ghaliex huwa ikkometta r-reat tas-serq minhabba li gie imgieghel jaghmel dan minn certu Mario Cutajar b'theddid anke ghall-inkolumita' tieghu u tal-familja tieghu u minaccja li jigi irrappurtat lill-pulizija ghal reat ta' ricettazzjoni.
2. Illi minghajr pregudizzju ghall-ewwel aggravju fil-fehma tal-appellant ma kenux jezistu l-elementi necessarji sabiex jissussisti r-reat tas-serq.

Rat l-atti kollha tal-kawza.

Semghet it-trattazzjoni tal-partijiet.

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

Ikkunsidrat,

Illi fl-ewwel aggravju minnu intentat l-appellant jishaq illi gjaldarba l-fattispecje tal-kaz ma kenux gew ikkontestati minnu billi huwa ammetta ghas-serq minnu kommess mill-istabbiliment fejn kien impjegat, u cioe' il-Melita Bar gewwa Hal Balzan u dan meta huwa kien imgieghel jaghmel dan mill-kollega tax-xoghol tieghu Mario Cutajar b'theddid allura kellu japplika fil-konfront tieghu l-iskriminanti ravvizata fl-artikolu 33(b) tal-Kodici Kriminali. Mhux ikkontestat fil-fatt illi l-appellant ma zamm xejn mir-*res furtiva* konsistenti f'kwantita kbira ta' xorb alkoholiku, izda dan kien ighaddieha fl-intier tieghu lil dan Cutajar li kien iheddu li jekk ma jaghmilx dan huwa kien sejjer jirraportah lill-pulizija li kien xtara televizjoni minn fuq l-idejn provenjenti minn serq. Mhux biss izda jidher illi apparti li Cutajar kien igieghel lill-appellant jikkometti dan is-serq u ighaddi r-*res furtiva* lilu kien ukoll jestorci minnu l-flus tant illi l-appellant kien jispicca lanqas ikollu flus biex ighix. Jidher illi meta il-genturi tal-appellant saru jaf b'dak li kien qed isehh, u l-appellant ghamel kuragg ghax kien xeba', sehh skontru fiziku bejnu u bejn Cutajar tant illi gew imsejjha il-pulizija u ghalhekk spicca rrapporta hu stess lill-pulizija li kien vittma ta' theddid u estorsjoni. Fil-fatt ittiehdu proceduri kriminali kontra Cutajar liema proceduri illum ghaddew in gudikat b' Cutajar jinstab hati tal-akkuzi lilu addebitati. L-appellant inoltre hallas lura lil parti leza il-prezz tax-xorb alkoholiku minnu misruq ghalkemm minnu huwa ma gawda xejn billi kien ghaddieh kollu lil Cutajar kif inghad.

Ikkunsidrat,

Illi l-artikolu 33(b) tal-Kodici Kriminali jiddisponi illi:

> **"Kull persuna tkun eżenti minn responsabbiltà kriminali jekk fil-waqt tal-att jew tan-nuqqas kienet imġiegħla b'forza barranija li ma setgħatx tirreżisti għaliha."**

Illi din il-forza barranija tista' tkun wahda kemm fizika kif ukoll morali. Il-kompjant Sir anthony Mamo ighid hekk fuq dina l-iskriminanti:

> **Moral coercion operates as a ground of exemption from criminal responsibility when it completely suppresses the possibility of a normal determination on the part of the person doing or omitting the fact. When it does not attain such a degree of intensity, but leaves to that person the possibility of determining himself one way or another, even if with an effort or at some sacrifices, then the old maxim of Roman Law "coactus tamen voluit" applies, and the fact is imputable, saving the discretion of the Court to mitigate the punishment within the latitude permitted by law, having regard to the particular circumstances under which the offence was committed. (*) In other words, in order that there may be total exemption from punishment, the external force which has constrained the accused to do the act contrary to the law, must be truly 'irresistible' and not merely 'unresisted'. This is why most writers limit the notion of moral coercion to threats of death or serious personal injury: for it is only such threats that may deprive the victim of his freedom of choice and compel him to commit the offence. Threats of injury to property are not considered sufficient. This view seems best to accord with the above quoted provision of our Code. This was modeled on the identical provision of Art. 64 of the French Code and Art. 62 of the Neapolitan Code. With regard to the former, Chauveau et Helie wrote:**
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> ***"It is certain that the fear of a mere pecuniary loss cannot be considered as a force which the actor could not resist: there is nothing but the fear of death, or of grievous bodily harm which may suppress the will and compel the determination. If, on the other hand, the law cannot expect from the accused a heroic firmness of character, it cannot either pardon a blamable weakness".***
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> **And Roberti commenting on the provision of the Neapolitan Code wrote:**
> ***"Ci contentiamo di proporre come regola generale che possa esimere da imputabilita' legale, quella necessita' che i moralisti appellano estrema e per la quale intendiamo lo stato di violenza in cui l'uomo e' obbligato a scegliere tra la perdita della vita, la mutilazione del corpo o altre calamita' annesse a dei tormenti che sembrano piu' acerbi della stessa morte, e la trasgressione della legge. Quei mali sono solamente a nostro credere, capaci di scusare, nel foro umano, la scelta di quest'ultima".***
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> **Other writers, dealing with the question of moral coercion in the abstract that is, not by reference to a specific provision of positive law, pretend to lay down principles of general application. Thus, Pessina, for instance, suggests that moral coercion**

(*) Manzini, op. cit., Vol. II, p.13, S 287

excludes criminal responsibility whenever these three conditions exist: a) an imminent danger b) of a harm which the victim of the threat apprehends as more grievous than the harm to be caused by the offence, and c) which he could not avert except by committing the act contrary to law.

English Law concerning this defence remains – Kenny says (p. 74) – to this day both meager and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse <u>some</u> crimes that have been committed under the influence of such threats. It is impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Harris, on the other hand, thinks that moral coercion can afford no defence for the commission of a criminal act "for the apprehension of personal danger does not furnish any excuse for existing in doing any act which is illegal". The only exception to this rule occurs where rebels or rioters by fear of death or instant bodily harm compel others to take a subordinate part in a disturbance. Here there is constructive physical compulsion, provided that physical force is directly threatened and available" (p.23).

Illi allura minn dan l-insenjament gurisprudenjzali abbinat mal-qari tad-disposizzjoni tal-ligi li holqot dina l-iskriminati ghandhom johorgu tlett elementi importanti:

1. il-forza trid tkun wahda esterna.
2. trid tkun gejja mill-agent attiv, u cioe' dik il-persuna li iggieghel lill-agent passiv biex jikkometti r-reat.
3. l-forza barranija trid tkun tali li ma thalli l-ebda triq ohra miftuha ghall-agent passiv sabiex jikkommetti ir-reat, ghaliex jekk il-kummissjoni tar-reat seta' jigi rezistit umanament b'xi mod iehor allura tonqos l-applikabbilita' ta' dina d-difiza.

Fil-kawza deciza mill-Qorti ta'l-Appell gewwa l-Ingilterra fil-kawza fl-ismijiet R vs Graham (1982) dina l-iskriminanti giet ezaminata *funditus* fejn allura gie deciz illi ghandha tapplika biss f'dawk ic-cirkostanzi fejn jigi determinat illi t-theddida kienet tant kbira li tizboq il-poter tar-resistenza umana. It-test Graham ifassal is-segwenti elementi:

"1. The defendant must have a *reasonable belief* ***in the circumstances;***

2. This belief must have lead the defendant to have a *good cause to fear* ***death or serious injury would result if he did not comply; and***

3. A *sober person of reasonable firmness****, sharing the characteristics of the defendant, might have acted as the defendant did."***

All three elements are objective in nature.”

Fil-ligi ingliza illum hemm limitazzjonijiet ghal applikazzjoni ta’ dina l-iskriminanti bid-difiza allura ma hijiex applikabbli:

“1. For crimes of murder, attempted murder or for an accessory to murder

2. For crimes of treason

3. Where the defendant voluntarily, with knowledge of its nature, joined a violent criminal gang

4. Where the defendant voluntarily joined a terrorist organisation

5. Where the defendant became indebted to drug dealers

6. Where the defendant could reasonably have taken evasive action.”

Fil-ligi taghna madanakollu l-legislatur tant ried ihares lil persuna li tikkommetti reat meta tkun hekk imgieghla minn forza esterna illi l-artikolu 47(a) tal-Kodici Kriminali li jaqa’ taht it-Titolu IV li jitkellem dwar il-komplicita fil-kummissjoni tar-reat jippenalizza lill-agent attiv bhala l-awtur tar-reat u mhux bhala komplici meta hemm dispost illi:

“Kull persuna li iġġiegħel persuna oħra b’forza barranija li dina l-persuna l-oħra ma setgħatx tirreżisti għaliha, biex tagħmel reat, tkun hija stess hatja ta’ dak ir-reat bhala awtur.”

Illi din il-Qorti ezaminat l-atti fejn fosthom hemm kopja tal-atti tal-kawza u d-decizjoni moghtija fil-konfront ta’ Mario Cutajar deciza mill-Qorti tal-Magistrati fit-08 ta’ Gunju 2005 fejn l-imsemmi Cutajar gie misjub hati tar-reat ta’ estorsjoni fil-konfront tal-appellant u dan meta huwa kien ghamel snin twal jehodlu l-flus tal-paga, *bonus* u *leave*, kif ukoll igieghlu jisraq minn ghand il-principal taghhom billi heddu mhux biss b’hajjtu izda ukoll li jirrappurtah lil pulizija fuq xiri ta’ televizjoni fuq l-idejn. Jidher illi l-appellant kien kompletament taht difrejn dan Cutajar li iddominalu hajjtu u li minnu kien jibza’ hafna, tant li sahansitra kien jispicca lanqas ikollu flus biex ighajjex lilu innifsu ghaliex Cutajar kien jedholu kwazi sa l-inqas centezmu. Dan jixhduh mhux biss il-principal ta’ Bonnici li kien osserva lill-appellant jasal ghax-xoghol bil-mixi ghaliex ma kellux flus biex ihallas l-assikurazzjoni u l-licenzja tal-vettura tieghu, kif ukoll il-genituri tal-

appellant li osservaw illi binhom kellu problemi finanzjarji. Huwa ippruvat ukoll illi l-appellant ma kien izomm xejn mix-xorb alkoholiku li kien jigi imgieghel jisraq, ghaliex ir-*res furtiva* kollha kien ighaddieha lil Mario Cutajar. Dan ifisser allura illi huwa Cutajar li ghandu iwiegeb ghar-reat tas-serq u mhux l-appellant li ma kienx ifformula l-intenzjoni biex jisraq, izda kien jaghmel l-att materjali tar-reat ghaliex kien jigi imgieghel minn Cutajar li ghamel snin twal iheddu u anke jestorci l-flus minn ghandu tant illi fuq medda ta' kwazi tlett snin dan kien hadlu 'il fuq minn tmint elef ewro. Mill-agir tal-appellant, li dam ighix f'din il-hajja ghal tlett snin shah, jidher illi huwa kien ihossu f'posizzjoni fejn ma setax jirresisti lil Cutajar tant illi kien jasal biex jaghti kwazi il-flus kollha li kien jaqla' anke jekk kien jaf li ma kienx ser ikollu flus bizzejjed biex ighajjex lilu innifsu. Kien jibza' mit-theddid li kien ighamel Cutajar fil-konfrotn tieghu fejn anke sahansitra kien iheddu li ser jaghtih xebgha u li kien ser iqabbad wiehed ragel mill-Imqabba biex joqtlu. Cutajar stess jammetti meta jixhed illi l-appellant kien jibza' minnu.

> **"Il-forza barranija imsemmija fl-Art. 33(b) – forza li tista' tkun jew fizika jew, kif normalment aktar ikun il-kaz, forza morali (i.e. theddid), pero` dejjem wahda irrezistibbli – trid tinqara ma' dak li jipprovdi l-Artikolu 47(a) tal-Kodici Kriminali. L-Artikolu 47(a) jipprovdi li "Kull persuna li ggieghel persuna ohra b'forza barranija li din il-persuna l-ohra ma setghetx tirrezisti ghaliha biex taghmel reat…tkun hija stess hatja ta' dak ir-reat bhala awtur." Fi kliem iehor, biex ikun hemm il-figura tal-koazzjoni kontemplata fl-Artikolu 33(b) irid ikun hemm sitwazzjoni fejn wiehed jista' jattribwixxi r-reat effettivament kommess mhux lil min wettqu fil-fatt (l-agent passiv, li jkun ezenti mir-responsabbilta` kriminali ghax koatt) izda lill-agent attiv (min hedded) li allura jsir l-awtur ta' dak ir-reat. Dan neccessarjament ifisser, ... li jrid ikun hemm konnessjoni specifika u diretta bejn it-theddida (imwettqa mill-agent attiv) u l-att illegali jew reat imwettaq mill-agent passiv. Theddid generali, serju kemm hu serju, minghajr ma jkun dirett proprju biex l-agent passiv iwettaq reat jew reati partikolari (u b'hekk l-agent passiv ma jkunx kriminalment passibbli, izda jkun passibbli bhala awtur ta' dak ir-reat jew dawk ir-reati l-agent attiv) ma jwassalx ghall-iskriminanti skond l-Artikolu 33(b).[1]"**

Jidher li t-theddid li l-appellant kien jircevi minn ghand Cutajar, li hu deskritt bhala persuna "bully", kien tali li huwa ma setax jirrezisti. Li kieku kien possibbli ghalih li jirrezisti huwa kien certament jasal sabiex matul xi zmien imqar jiftah qalbu ma' xi persuna vicin tieghu, haga li

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[1] App.Inf. Il-Pulizija vs Dr. Mark Anthony Sammut deciza 20/08/2010

jidher illi ma ghamilx billi lanqas il-genituri tieghu ma kienu konsapevoli ta' dak li kien qed jigri. Kien biss meta inqala' incident bejnu u bejn Cutajar li l-appellant kellu isejjah il-pulizija u hawnhekk stqarr maghhom dak li kien qed isehh. Tant hu hekk illi anke l-Ewwel Qorti fil-parti decizorja tas-sentenza impunjata tistqarr illi is-serq li gie kommess mill-appellant sehh ghaliex kien kostrett jaghmel dan taht pressjoni ta' estorsjoni u theddid kontinwu.

Illi maghmula dawn il-konsiderazzjonijiet din il-Qorti hija tal-fehma illi l-ewwel aggravju tal-appellant jisthoqqlu akkoljiment.

Ghal dawn il-motivi, il-Qorti taqta' u tiddeciedi billi tilqa' l-appell tghaddi ghalhekk biex tirriforma id-decizjoni appellata, tikkonfermaha fejn l-appellant gie illiberat mit-tieni imputazzjoni, izda tirrevokaha fejn huwa gie misjub hati tal-ewwel akkuza u wara li rat l-artikolu 33(b) tal-Kodici Kriminali tiddikjara lill-appellant ezenti minn kull responsabbilta' kriminali u ghalhekk tghaddi biex tilliberah minn kull htija u imputazzjoni.

Edwina Grima

Imhallef