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

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

Il-Pulizija
(Spettur Herman Mula)

vs

Michael Portelli

Drogi numru 274/2015

Illum 11 ta' Ottubru 2019

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat **Michael Portelli** detentur tal-karta tal-identita' bin-numru 252483 (M) billi huwa akkuzat talli fl-4 ta' Settembru 2012:

1. Assocja ruhu ma' xi persuna jew persuni ohra f'dawn il-Gzejjer jew barra minn dawn il-Gzejjer sabiex ibiegh jew jitrraffika f'dan il-Gzejjer medicina (Cannabis Resin), bi ksur tad-dispozizzjonijiet tal-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta' Malta jeww ippromwova , ikkonstitwixxa organizza jew iffinanzja tali assoccjazzjoni;

2. Assocja ruhu ma xi persuna jew persuni ohra f'dawn il-Gzejjer jew barra minn dawn il-Gzejjer sabiex ibiegh jew jitrraffika f'dan il-Gzejjer medicina (Cannabis Grass), bi ksur tad-dispozizzjonijiet tal-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta' Malta jeww ippromwova, ikkonstitwixxa organizza jew iffinanzja tali assoccjazzjoni;
3. Assocja ruhu ma xi persuna jew persuni ohra f'dawn il-Gzejjer jew barra minn dawn il-Gzejjer sabiex ibiegh jew jitrraffika f'dan il-Gzejjer medicina (Herojina), bi ksur tad-dispozizzjonijietta'l-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta' Malta jeww ippromwova, ikkonstitwixxa organizza jew iffinanzja tali assoccjazzjoni;
4. Ittanta jaghmel reat kontra din l-Ordinanza, jew hajjar jew gieghel persuna ohra taghmel dak ir-reat ai termini tal-artikolu 22 sub inciz 5 tal-Kap 101 tal-Ligijiet ta' Malta;
5. U aktar talli kkommetta reat waqt li kont prigunier, kif imfisser fl-artikolu 2 tal-Att dwar il-Habs li jinkludi prigunier meqjus li hu mizmum f'habs skont id-dispozizzjonijiet tal-artikolu 3 (3) tal-istess Att, bi ksur tal-artikolu 33 A tal-kodici kriminali , Kap 9 tal-Ligijiet ta' Malta.

Il-Qorti giet wkoll mitluba li f'kaz ta' htija barra milli tapplika l-piena skond il-ligi tordna lill-imputat ihallas l-ispejjez li ghandhom x'jaqsmu mal-hatra ta' l-esperti skond artiklu 533 (1) tal-Kap. 9 tal-Ligijiet ta' Malta.

Din il-kawza giet assenjata lil din l-Qorti b'digriet tal-Prim'Imhallef Silvio Camillieri fil-15 ta' Marzu 2018.

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

Saru sottomissjonijiet finali fis-seduta ta' nhar it-3 ta' Lulju 2019 *(a.fol. 121 et. Seq.)*

Dewmien ta' procedura

Il-Qorti tinnota li dawn il-proceduri kriminali jitrattaw kaz li sehh fl-4 ta' Settembru 2012. Il-proceduri ilhom ghaddejjin seba' snin fejn f'dan il-perjodu fl-10 ta' Lulju, 2017. Kienet deciza l-kawza ta' dik li kellha tkun ix-xhud principali f'dan il-kaz, liema xhud ma kinetx rinraccata sakemm inghalqu l-provi.

Din il-kawza giet assenjata lil din il-Qorti fil-15 ta' Marzu 2018, tmien xhur wara li ntemmu l-proceduri fil-konfront ta' Lindsey Zammit u kien hemm astensjoni mill-Magistrat li kienet esprimiet ruha bis-sentenza li nghatat lil Zammit.

F'dan ix-xenarju ta' dewmien bla bzonn, din il-Qorti ttenni dak li qalet il-Qorti tal-Appell Kriminali fil-kawza "Il-**Pulizija vs. Anthony Azzopardi**" [4.2.2010] u cioe' li:-

> *"Ghalkemm din il-Qorti tifhem u tapprezza li biz-zieda enormi fil-kompetenza taghhom f'dawn l-ahhar snin il-Qrati tal-Magistrati*

gew inondati bix-xoghol u qed jahdmu taht pressjoni liema bhalha, dan id-dilungar zejjed biex jigu decizi kawzi fil-Qrati tal-Magistrati bhala Qrati ta' Gudikatura Kriminali, wara li l-Avukat Generali jkun baghat l-artikoli, qed johloq znaturazzjoni tal-processi kriminali li min-natura taghhom ghandhom jigu decizi kemm jista' jkun malajr kemm fl-interess tal-persuna akkuzata u kif ukoll fl-interess tas-socjeta' li f'isimha tkun qed issir il-prosekuzzjoni"

Dwar dan esprimiet ruhha l-Qorti Kostituzzjonali fil-kawza **Samuel Onyeabor vs. Avukat Generali** deciza nhar it-Tnejn 14 ta' Dicembru 2015:

Huwa minnu illi l-kaz˙kien x'aktarx kompless u kien je˙htieg˙certa thejjija. Madankollu, dan ma jfissirx illi seba' snin kienu me˙htieg˙a biex il-proce˙ss, mhux jintemm, izda jitwassal sal-istadju li gha˙ll-inqas jinha˙reg˙l-att ta' akkuza˙. Fil-fatt eza˙mi tal-proce˙ss ta' kumpilazzjoni juri illi d-dewmien kien mhux minha˙bba l-komplessità tal-kaz˙jew minha˙bba l-volum ta' xhieda, izda minha˙bba l-mod kif il-proce˙ss tmexxa, li juri illi n-nuqqas aktar milli f'parti jew f'oha˙ra qiegha˙ed fis-sistema nnifsu, li ma jha˙llix li proce˙ss jibda u jintemm izda jitkarkar: il-gbir tax-xieha˙da jsir bin-nifs, seduti jinha˙lew billi jinstema' biss xhud wieha˙ed gha˙al ftit minuti, seduti oha˙ra jkollhom jitha˙ssru gha˙ax lill-Qorti stess jew lill-Prosekuzzjoni jidha˙lilhom xogha˙ol ieha˙or aktar urge˙nti u jitha˙ssru wkoll seduti gha˙al ragunijiet varji. Naturalment, aktar ma l-

proċess jieħu fit-tul, aktar tqum il-possibilità li jinqalgħu ostakoli, li jkomplu jwasslu għal aktar dewmien.

Din il-Qorti, bħall-ewwel Qorti, tapprezza illi l-volum ta' xogħol u n-nuqqas ta' riżorsi jwasslu għal sitwazzjoni fejn ma jibqax possibbli li kull kaz jingħata l-attenzjoni indiviża biex jitmexxa b'ħeffa u bla ħela ta' żmien. Iżda dan ma huwiex ġustifikazzjoni; anzi jfisser illi l-Istat qiegħed jonqos mill-obbligu tiegħu li jara li s-sistema ġudizzjarju jkollu r-riżorsi kollha meħtieġa biex jista' jimxi b'ħeffa u b'efficjenza waqt li fl-istess ħin jitħarsu l-interessi tal- ġustizzja. ***Ma nistgħux ma ngħidux ukoll, iżda, illi hemm nuqqasijiet ukoll min-naħa tal-operaturi tas-sistema, għax hija l-inerzja li twassal biex l-affarijiet inkomplu nagħmluhom b'dan il- mod "għax dejjem hekk sar", u għalhekk, għalkemm nafu li jsiru ħażin, inkomplu nagħmluhom hekk.***[1]

Il-Qorti Ewropea tad-Drittijiet tal-Bniedem hi cara hafna dwar id-dewmien kif esprimiet ruhha fil-kaz **O'NEILL AND LAUCHLAN v. THE UNITED KINGDOM**[2] deciz fit-28 ta' Gunju 2016 fejn intqal hekk dwar dewmien:

… in view of the need for diligence triggered by the significant lapses of time both between the commission of the offence and the laying of charges, and between the laying of charges and the applicants' conviction becoming final, the Court considers

[1] Rikors numru 18/2014 TM, Imhallef Giannino Caruana Demajo (Agent President), Imhallfin Noel Cuschieri u Joseph Zammit McKeon.

[2] *Applications nos. 41516/10 and 75702/13*

that the overall length of the proceedings (almost nine years in respect of the first applicant, and just over nine years and two months for the second applicant – see paragraphs 16, 46 and 90 above) was excessive and failed to meet the reasonable-time requirement.

97. There has accordingly been a breach of Article 6 § 1.

Il-Qorti tirreferi ukoll ghal dak li qal l-Prim Imhallef Emeritu Vincent DeGaetano fl-artikolu **Reasonable time and hasty decisions –the Article 6 dilemma for domestic courts** ricentament:

So, why is the reasonable time requirement so important? Basically because the effectiveness of any legal system is at stake with every case, civil or criminal, that is pending before a court; a lack of effectiveness brings about a lack of credibility in both the legal and the judicial systems; and such lack of credibility undermines the very notion of the rule of law. This may appear obvious to each and every one of us, particularly those of us who sit on the Bench daily, but the European Court of Human Rights (ECtHR) has had to spell out all this in a number of judgments when it was faced with delays that, in a sense, had become accepted or endemic in a number of legal systems. In the case *Stögmüller v. Austria*[3] – a case dealing with Article 5 – the ECtHR noted

[3] 10 November 1969.

that Article 6 aims to protect all the parties to court proceedings "against excessive procedural delays", and that in criminal matters in particular, Article 6 "is designed to avoid that a person charged should remain too long in a state of uncertainly about his fate" irrespective of whether or not that person is held in detention awaiting trial. Twenty years later, in a case brought against France – *H. v. France*[4] – the ECtHR added that the reasonable time guarantee "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility." This was a case brought by a person against the state hospital in Strasbourg for medical malpractice. It took seven years and seven months at two levels of jurisdiction (the Strasbourg Administrative Court and the *Conseil d'Etat*) for a final decision to be rendered, a period that was punctuated by requests by the courts for information which was already in the files, as well as by long periods of inactivity in connection with Mr H's case because the courts had hundreds of other cases to deal with.

[…]

the ECtHR has, in its vast case law, set down guidelines, but it has never gauged by the calendar or set deadlines as to what is or is not a reasonable time. That depends on all the

[4] 24 October 1989.

circumstances of a particular case. What is clear is that periods of inexplicable inactivity on the part of the State authorities, repeated adjournments of a case or the repeated *renvoi* of a case file between one court and another, are not acceptable. Likewise it is also clear that just as the lack of financial or other resources cannot justify prison conditions which reach the threshold of Article 3 – *Orchowski v. Poland*[5] – and a State must organise its penitentiary system so as to ensure compliance with the Convention standards, so also when it comes to length of proceedings such things as backlogs, workloads of individual judges and lack of resources are no excuse (although there is some case law to the effect that a temporary backlog and consequent delays due to the general re-organisation of a system will not *necessarily* amount to a violation of Article 6 – see in this respect the case of *Docevski v. the Former Yugoslav Republic of Macedonia*[6]). In the Grand Chamber case of *Frydlender v France*[7] (27 June 2000) the ECtHR was quite clear: States parties to the convention must organise their legal systems so as to guarantee to everyone within their jurisdiction the right to a final decision within a reasonable time:

[5] 22 October 2009. See in particular §153: "The Court is aware of the fact that solving the systemic problem of overcrowding in Poland may necessitate the mobilisation of significant financial resources. However, it must be observed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention…and that it is incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties... If the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment."

[6] 1 March 2007, particularly §34.

[7] 27 June 2000.

"The Court reiterates that it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations… It further reiterates that an employee who considers that he has been wrongly suspended or dismissed by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his means of subsistence..."[8]

The bottom line really is this: the domestic authorities, and the judicial authorities in particular, must be seen to be pro-actively engaged in bringing civil and judicial proceedings to a final determination.

[…]

how can a judge at national or domestic level gauge when he or she is risking running foul of the reasonable time requirement imposed by Article 5(3) and 6(1) of the ECHR? I would propose the following rule/s of thumb (with apologies to referees in football): (i) the yellow card should

[8] §45

appear if a case has been pending for three years at one level of jurisdiction; (ii) anything from three to four years at one level of jurisdiction would definitely merit the red card; (iii) if a case has been pending for more than four years at two levels of jurisdiction, the red card is again to be borne in mind; (iv) while if a case has been pending for six years or more at three or more levels of jurisdiction, the red card is almost a foregone conclusion!

Il-fatti specie tal-kaz

Il-fatti fil-qosor li taw lok ghal dan il-kaz kienu s-segwenti: Nhar l-10 ta' Settembru 2012, ghall-habta tas-2.00 a.m., saret *strip search* fuq Lindsey Zammit gewwa l-Facilita` Korrettiva ta' Kordin, meta marret sabiex izzur lis-sieheb taghha l-imputat Michael Portelli, li dak iz-zmien kien qed jinzamm il-habs. Ghalkemm din it-tfittxija tat ezitu negattiv, meta Lindsey Zammit ittiehdet gewwa l-Kwartieri Generali tal-Pulizija u hemmhekk minn jeddha ghaddiet sustanza suspettata droga lill-ufficjali tal-pulizija, liema sustanza hija kienet hbietha fil-parti taghha. Lindsey Zammit irrilaxxat stqarrija nhar l-10 ta' Settembru 2012, wara li nghatat is-solita twissija li ma kinitx obbligata li titkellem sakemm ma tkunx tixtieq li taghmel dan, izda dak li tghid jista' jingieb bhala prova, u wara li rrifjutat d-dritt li tottjeni parir legali qabel l-interrogatorju taghha. Hija ghazlet li tikkonferma din l-istqarrija bil-gurament quddiem il-Magistrat Inkwirenti fil-11 ta' Settembru 2012 u xehdet ukoll fi proceduri kontra taghha li ntemmu fl-10 ta' Lulju, 2017.

XHIEDA

F'dan il-process xehdu disa` (9) xhieda kif gej;

Spettur Herman Mula (*a fol* 22 et. seq.); Oriana Deguara (*a fol* 27 et. seq.); WCO 23 Vincianne Mangion (*a fol* 61 et. seq.); WPS 23 Geraldine Caruana (*a fol* 64 et. seq.); PS 1392 Kevin Buhagiar (*a fol* 69 et. seq.); Spettur Paul Camilleri (*a fol* 77 et. seq.); Spizjar Godwin Sammut (*a fol* 84 et. seq.); WPS 136 Charlene Persiano (*a fol* 90 et. seq.); Michael Portelli (*a fol* 115 et. seq.).

KONSIDERAZZJONIJIET GENERALI

Il-Qorti sejra issa tghaddi biex taghmel l-analizi taghha tal-akkuzi li qeghdin jigu addebitati lill-imputat u dan fid-dawl ta' dak li hareg mill-atti processwali.

Il-Livell tal-Prova Rikjest fi Proceduri Kriminali

Kif gia kellha opportunita tirrimarka din il-Qorti fi proceduri ohra, il-Prosekuzzjoni ghandha l-obbligu li tressaq l-ahjar prova sabiex tikkonvinci lill-Qorti li l-imputazzjonijiet addebitati lill-imputat huma veri u dan ghaliex kif jghid il-Manzini fil-ktieb tieghu Diritto Penale *"Il così detto onero della prova, cioé il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit"*.[9]

[9] Manzini, Vol. III, Kap. IV, pagna 234, Edizione 1890

Sabiex jkun hemm dikjarazzjoni ta' htija l-imputazzjoni dedotta ghandha tigi pruvata oltre kull dubju ragjonevoli, cioé oltre kull dubju dettat mir-raguni. Hawnhekk il-Qorti taghmel riferenza ghas-sentenza moghtija mill-Qorti tal-Appell Kriminali fis-sebgha (7) ta' Settembru 1994 fl-ismijiet ***Il-Pulizija vs. Philip Zammit et*** fejn l-istess Qorti ghamlitha cara li mhux kull icken dubju huwa bizzejjed sabiex l-imputat jigi ddikjarat liberat: id-dubju irid ikun wiehed dettat mir-raguni. Kif kompliet tghid il-Qorti tal-Appell Kriminali fis-sentenza taghha tal-hamsa (5) ta' Dicembru 1997 fl-ismijiet **Il-Pulizija vs. Peter Ebejer** dubji ombra ma jistghux jitqiesu li huma dubji dettati mir-raguni u ghalhekk ma jistghu jwasslu qatt ghal-liberatorja. Dak li fl-ahhar mill-ahhar il-Gudikant irid jasal ghalih hu – wara li jqis ic-cirkostanzi u l-provi kollha tal-kaz u b'applikazzjoni tal-bon sens tieghu – konvinciment morali tal-fatti li tkun trid tipprova l-Prosekuzzjoni. Fil-fatt dik il-Qorti ccitat l-ispjegazzjoni moghtija minn Lord Denning fil-kaz **Miller vs. Minister of Pension** tal-espressjoni *"proof beyond a reasonable doubt"*:

> *"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the*

case is proved beyond reasonable doubt, but nothing shall of that will suffice".[10]

Kunflitt fil-provi imressqa m'ghandux bil-fors iwassal ghal-liberatorja tal-imputat. Infatti fil-kawza fl-ismijiet **Il-Pulizija vs. Graham Charles Ducker**, deciza fid-19 ta' Mejju 1997, il-Qorti tal-Appell Kriminali rriteniet issegwenti:

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

Meta rinfaccjat b'zewg verzjonijiet kuntrastanti, gudikant jista' jew ikun tal-fehma li l-kaz tal-Prosekuzzjoni ma jkunx gie sodisfacentement ippruva u allura jghaddi sabiex jillibera l-imputat jew inkella ikun moralment konvint li l-verzjoni korretta hija wahda u mhux l-ohra, jimxi fuq dik il-verzjoni u jekk tali verzjoni tkun twassal ghall-htija tal-imputat jghaddi biex jiddikjara tali htija.[11]

Ta' rilevanza ghall-kaz odjern huwa dak li kienet qalet il-Qorti tal-Appell Kriminali fil-kawza fl-ismijiet **Il-Pulizija vs John Pace** deciza fil-wiehed u tletin (31) ta' Ottubru 2013:

[10] 1974 - 2 ALL ER 372

[11] Ara sentenza fl-ismijiet Il-**Pulizija vs Martin Mark Cutajar** deciza mill-Qorti tal-Appell Kriminali fid-disgha (9) ta' Settembru 2002.

"Ma hemm xejn hazin illi l-Qorti tistrih fuq xhud wiehed biss kif del resto hija ntitolata li taghmel permezz talArtikolu 638(2) tal-Kapitolu 9. Dan l-Artikolu jghid illi xhud wiehed jekk emmnut minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Naturalment din ix-xhud tkun trid tigi evalwata fil-kuntest tal-linji gwida moghtija mill-Artikolu 637 tal-Kapitolu 9".

L-Istqarrijiet Moghtija mill-Imputat

L-ewwel punt li sejjer jigi indirizzat mill-Qorti huwa l-argument imressaq mid-difiza li l-istqarrija moghtija mill-imputat hija inammissibbli bhala prova fid-dawl tal-fatt li l-imputat ma kienx assistit minn Avukat tal-fiducja tieghu **waqt l-ghoti tal-istqarrija** u allura dan illeda d-dritt fundamentali tieghu ghal smigh xieraq.

Mill-atti jirrizulta li l-imputat rrilaxxa stqarrija fis-6 ta' Marzu 2013.[12]

Tali stqarrija ttiehdet wara li l-imputat ngħata is-solita twissija skont il-liġi, kif ukoll id-dritt li jottjeni parir legali qabel l-interrogatorju tieghu.

[12] Ara fol. 8 tal-process.

Madankollu, l-imputat ma ngħatx id-dritt għall-assistenza legali waqt l-interrogatorju tieghu, stante illi dan id-dritt ma kienx vigenti fiż-żmien tal-każ odjern. Fil-fatt dan id-dritt daħal fis-seħħ fit-28 ta' Novembru 2016, permezz tal-Avviż Legali 401 tal-2016.

Il-Qorti hawnhekk taghmel riferenza għas-sentenza mogħtija mill-Qorti Kostituzzjonali fil-5 ta' Ottubru 2018, fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali e**t. 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. Dan in kwantu ammetta li kien jixtri d-droga kemm għall-użu personali tiegħu, kif ukoll sabiex ibiegħ minnha lil terzi. Fis-sentenza tagħha, il-Qorti Kostituzzjonali qalet hekk dwar l-istqarrijiet rilaxxjati mill-istess rikorrenti mingħajr il-jedd ta' assistenza legali waqt l-interrogatorji *tiegħu:*

> *"36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil-proceduri kriminali, mhux in kwantu ghall-ammissjonijiet, izda in kwantu l-kontenut taghhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan ir-rigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jistax f'dan l-istadju jigi*

determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk il-proceduri, jekk l- istqarrijiet jithallew fil-process tal-proceduri kriminali, dawn wisq probabbilment ser isir uzu minnhom mill-Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil-kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.

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

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.

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, liema dritt hija għażlet li ma teżercitahx, madankollu hija ma ngħatatx id-dritt li tkun assistita minn avukat waqt l-interrogatorji li sarulha u dan stante li dan id-dritt ma kienx għadu viġenti fiż-żmien in kwistjoni.

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

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

li jkun sar uzu minn stqarrija li ttieħdet mingħajr ma l-interrogat kellu l-għajnuna ta' avukat – li tista' twassal għal konsegwenzi bħal tħassir tal-process kollu."

L-istess linja ta' hsieb ghandha ghalhekk tapplika fil-kaz li ghandha quddiemha l-Qorti. Fic-cirkustanzi l-istqarrija tal-imputat odjern ghandha titqies bhala lezivi tad-drittijiet tieghu u ghalhekk inammissibbli u dan anke fid-dawl tas-sentenzi u pronuncjament supra citati.

<u>Ghalhekk il-Qorti sejra tiskarta l-istqarrija tal-imputat odjern, kif ukoll kwalunkwe referenza għal tali stqarrija li saru fix-xhieda u fl-atti processwali bħala kompletament inammissibbli.</u>

<u>Ix-xiehda ta' Lindsey Zammit</u>

L-Artikolu 30A tal-Kap. 101 tal-Ligijiet ta' Malta jghid hekk:

"*<u>Minkejja d-disposizzjonijiet tal-artikolu 661 tal-Kodiċi Kriminali</u>, meta persuna tkun involuta f'xi reat kontra din l-Ordinanza, kull dikjarazzjoni magħmula minn dik il-persuna u li tiġi kkonfermata bil-ġurament quddiem maġistrat u kull xiehda li dik il-persuna tagħti quddiem qorti tista' tinġieb bi prova kontra kull persuna oħra akkużata b'reat kontra l-imsemmija Ordinanza, kemm-il darba jinsab li dik id-dikjarazzjoni jew xiehda tkun saret jew ingħatat volontarjament, u ma ġietx imġiegħla jew meħuda b'theddid jew b'biża', jew b'wegħdiet jew*

bi twebbil ta' vantaġġi" [sottolinear ta' din il-Qorti].

Il-valur probattiv tax-xiehda mogħtija preċedentement minn Lindsey Zammit hi kif intqal fis-sentenza fl-ismijiet **Il-Pulizija v. Pierre Gravina**[13] mogħtija fis-26 ta' Mejju 2003 mill-Qorti tal-Appell fis-sede inferjuri:

> **"L-ewwel sentenza tal-Artikolu 30A tal-Kap. 101 taghmilha cara li dak l-Artikolu qed jipprovdi ukoll eccezzjoni, pero` mhux eccezzjoni ghar-regola kontenuta fl-Artikolu 646(1) tal-Kodici Kriminali izda ghar-regola kontenuta fl-Artikolu 661 ta' l-istess Kodici. Minn dan isegwi, li anke meta l-prosekuzzjoni tkun trid taghmel uzu minn dikjarazzjoni guramentata mehuda skond l-imsemmi Artikolu 30A, ir-regola ghandha tkun li min ikun ghamel dik l-istqarrija ghandu jingieb fil-qorti biex l-imputat jew akkuzat ikun jista' jikkontroezaminah dwarha. S'intendi, dan ma jfissirx li jekk ix-xhud, meta jigi ezaminat jew kontro-ezaminat, ibiddel jew jirritratta minn dak li jkun qal fid-dikjarazzjoni guramentata, allura dik id-dikjarazzjoni (jew il-parti mibdula jew ritrattata) ma tkunx aktar tista' tittiehed bhala prova kontra l-akkuzat; il-gudikant jista' xorta wahda, wara li jkun sema' lix-xhud, jasal ghall-konkluzjoni li l-verita` hija dik kontenuta fl-istqarrija guramentata u mhux dak li jkun iddepona fil-qorti x-xhud. Ifisser biss li, bhala regola, min**

[13] Per Imhallef Vicent DeGaetano

ikun ghamel tali stqarrija guramentata ghandu jingieb il-qorti ghall-fini ta' kontroll da parti tal-akkuzat jew imputat. F'dan is-sens ukoll esprimiet ruhha l-Qorti Ewropea fil-kawza Kostovski v. Netherlands (20 ta' Novembru, 1989) meta qalet li d-dritt ta' akkuzat li jikkonfronta xhud migjub kontra tieghu:

> **"'*does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage in the proceedings.'*[14]"**

Fil-kaz Il-**Pulizja vs Malcolm Paul Bugeja** deciz fit-30 ta' Gunju, 2016, l-Imhallef Edwina Grima spjegat li:

> *Illi skond is-sentenza ta' Pierre Gravina, id-dikjarazzjoni guramentata ta' xhud quddiem il-Magistrat Inkwirenti ma jkolha l-ebda validita' jekk ma tinghatax opportunita' tal-kontro ezami*

[14] (1990) 12 E.H.R.R.434, para. 41.

lill-imputat jew akkuzat. Issa x'inhuwa l-iskop tal-kontro-ezami? L-iskop tal-kontro ezami huwa biex dik il-verzjoni li jkun ta' xhud tista' tigi kontradetta, challenged u sahansitra tigi reza inattendibbli minhabba l-karattru jew il-komportament tax-xhud jew inkella d-diversi posizzjonijiet li jiehu. Ikrah kemm hu ikrah ir-reat tat-traffikar tad-droga, pero' hemm principju iktar bil-wisq importanti illi hija dik illi ssir gustizzja u li dejjem issir il-gustizzja minkejja d-diffikultajiet kollha li jkollha. Jekk il-kontro ezami ma jservi ghal xejn specjalment quddiem Imhallef jew quddiem il-Magistrat togat allura hija biss cerimonja u xejn aktar[15].

L-imputat ma kellux l-opportunita' li xhud Lindsey Zammit tinstema' f'dawn il-proceduri ghaliex sakemm il-Prosekuzzjoni ghalqet il-provi ma kinetx instabet u ghalhekk l-imputat ma setax jaghmel kontro-ezami ghal dak li kienet stqarret x'imkien iehor mhux f'dawn il-proceduri. Ghalhekk iregi li "*id-dikjarazzjoni guramentata ta' xhud quddiem il-Magistrat Inkwirenti ma jkolha l-ebda validita' jekk ma tinghatax opportunita' tal-kontro ezami lill-imputat jew akkuzat.*"[16]

<u>Ghalhekk il-Qorti sejra tiskarta dak li stqarret Lindsey Zammit kif ukoll kwalunkwe referenza għal tali dikjarazzjonijiet li saru fix-xhieda u fl-atti processwali bħala kompletament inammissibbli.</u>

[15] Appell Nru: 258/2014

[16] Il-**Pulizja vs Malcolm Paul Bugeja** deciza fit-30 ta' Gunju, 2016 mill-Imhallef Edwina Grima.

Assocjazzjoni

Bl-ewwel tliet (3) imputazzjonijiet l-imputat qieghed ikun mixli li assocja ruhu biex iwettaq reati marbuta mat-traffikar tad-droga u dan meta kien residenti fil-Facilita' Korrettiva ta' Kordin.

Il-ligi tagħna tipprovdi li assoċjazzjoni teżisti "malli jiġu kkumbinati jew miftehma l-mezżi, ikunu li jkunu, li bihom dawk il-persuni għandhom jimxu".[17] F'dan ir-rigward huwa utili li ssir referenza għas-sentenza tal-Qorti tal-Appell Kriminali tat-2 ta' Novembru 2009 fl-ismijiet **The Republic of Malta v. Steven John Lewis Marsden**:

> **"11.** In the Godfrey Ellul case[18] mentioned by appellant, this Court had referred to what is said in **Archbold's Criminal Pleading, Evidence and Practice 2003** in respect of conspiracy**:**
>
> **'The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: *Mulcahy v. R.* (1868) L.R. 3 H.L. 306 at 317; *R. v. Warburton* (1870) L.R. 1 C.C.R. 274; *R. v. Tibbits and Windust* [1902] 1 K.B. 77 at 89; *R. v. Meyrick and Ribuffi*, 21 Cr.App.R. 94, CCA. Nothing need be done in pursuit of the agreement: *O'Connell v. R.* (1844) 5 St.Tr.(N.S.) 1.** [19]
>
> **....**

[17] Art. 22(1A) tal-Kap. 101 tal-Ligijiet ta' Malta.

[18] **Ir-Repubblika ta' Malta v. Godfrey Ellul**, decided by the Court on the 17th March 2005.

[19] See para. 33-4, page 2690.

'The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it: *R. v. Parsons* (1763) 1 W.Bl. 392; *R. v. Murphy* (1837) 8 C. & P. 297. Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': *R. v. Brisac* (1803) 4 East 164 at 171, cited with approval i*n Mulcahy v. R.* (1868) L.R. 3 H.L. 306 at 317.' [20]

"12. In the Godfrey Ellul case this Court had not stated that this is the position under Maltese law. However it is in agreement with what is stated therein as it is quite clear from the said quotation that evidence of a conspiracy is not necessarily or only derived by inferring it from criminal acts of the parties involved. Indeed, a conspiracy may exist even though there is no subsequent criminal activity, that is to say even though the agreement to deal in any manner in a controlled substance is not followed by some commencement of execution of the activity agreed upon[21]. In such

[20] *Op. cit.* Para. 33-11, page 2692.

[21] See also **The Republic of Malta v. Steven John Caddick et** decided by the Court on the 6th March 2003 wherein it was stated: "… although it is true that for the crime of conspiracy to subsist it does not have to be proved that the agreement was put into practice, the converse is not true, that is that evidence of dealing does not necessarily point to a conspiracy. Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed "from the moment in which any mode of action whatsoever is planned or agreed upon between" two or more persons (section 22(1A) Chapter 101). Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of the mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person or persons concerned may be charged both with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming (for the purpose of the attempted or consummated offence) co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason, namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement."

circumstances it is obvious that no inference can be drawn from criminal acts because there are no criminal acts subsequent to the conspiracy itself. Indeed the quotation from Archbold clearly states that a conspiracy may also be proved 'in the usual way' – so by means of direct evidence and/or circumstantial evidence which must be univocal, that is to say, that cannot but be interpreted as pointing towards the existence of a conspiracy…. As one finds stated in the 2008 Edition of **Blackstone's Criminal Practice** [22]

'There are no special evidential rules peculiar to conspiracy. In *Murphy* (1837) C C & P 297, proof of conspiracy was said to be generally 'a matter of inference deduced from certain criminal acts of the parties accused', but there is no actual need for any such acts, and conspiracies may also be proved, *inter alia*, by direct testimony, secret recordings or confessions…'.

"13. This appears to be also the position in Scots law. Professor Gerald Gordon, in his standard text **The Criminal Law of Scotland** [23] makes reference to the dictum of Lord Avonside in ***Milnes and Others*** (Glasgow High Court, January 1971, unreported) to the effect that "you can have a criminal conspiracy even if nothing is done to further it", adding that, indeed, this is the very essence of conspiracy[24]."

Mela sabiex ikun hemm assoċjazzjoni a tenur ta' l-artikolu 22(1)(f) tal-Kap. 101 tal-Liġijiet ta' Malta jrid ikun hemm ftehim bejn tnejn minn nies jew aktar biex ibiegħu jew jittraffikaw mediċina

[22] OUP, p. 99, para. A6.24.

[23] W. Green & Son Ltd. (Edinburgh), 1978, p. 203.

[24] See also the judgement of the Court of the 23 October 2008 in the names **The Republic of Malta v. John Steven Lewis Marsden**.

perikoluża, u liema ftehim jisussissti fil-mument illi jiġu miftehma l-meżżi li bihom dawk il-persuni għandhom jimxu.

Ghalhekk huwa necessarju li sabiex tirrizulta l-imputazzjoni tal-assocjazzjoni kif dedotta kontra l-imputat, irid jirrizulta, lil hinn minn kull dubbju ragjonevoli, il-ftehim bejn zewg persuni jew aktar, l-intenzjoni li tigi negozjata d-droga u l-ftehim dwar il-modalita` tal-pjan ta' azzjoni. Kull ma jirrizulta mill-provi huwa illi Lindsey Zammit giet mitluba mis-sieheb taghha Portelli sabiex tigbor id-droga minn post partikolari u tghaddihielu billi ddahhal din id-droga l-habs fil-vizita sussegwenti tal-10 ta' Settembru 2012 u li Zammit accettat li taghmel dan.

Ghalhekk ma jistax jinghad illi tirrizulta l-assocjazzjoni da parti tal-imputat. Jirrizulta sempliciment ftehim bejn Zammit u Portelli fis-sens hawn fuq spjegat, izda ma tezisti l-ebda prova li kien hemm xi intenzjoni da parti ta' Portelli flimkien ma' Zammit, li jinnegozzja d-droga jew illi kien hemm xi ftehim bejniethom dwar il-modalita` tal-pjan ta' azzjoni sabiex tigi negozjata d-droga.

Ma jistax jinghad li jirrizulta illi kien hemm xi ftehim bejn l-imputat Portelli u Zammit illi jittraffikaw id-droga bhal ma lanqas ma jirrizulta illi gew 'ikkumbinati jew miftiehma mezzi' li bihom huma kellhom jimxu sabiex ibieghu jew jittraffikaw iddroga.

Dak li jirrizulta skont Lindsey Zammit huwa biss l-insistenza ta' Portelli sabiex ggiblu d-droga u li hi accettat li taghmel dan.

Dan bl-ebda mod ma jista' jwassal ghall-inferenza li allura bejn l-Portelli u Zammit kien hemm assocjazzjoni ai termini tal-Artikolu 22(1)(f) tal-Kap. 101 tal-Ligijiet ta' Malta.

Fil-każ in eżami ma rrizultax **mill-provi ammissibli** li l-imputat kellu intenzjoni li jbiegħ jew jittraffika mediċina perikoluża. Barra minn hekk mill-provi ma jirriżultax illi kien ntlaħaq xi forma ta' ftehim dwar il-meżżi sabiex tinbiegħ jew tiġi traffikata d-droga.

Dwar r-raba' (4) imputazzjoni invista ta' dak dikjarat 'l fuq u stante li l-unika prova li seta' kien hemm kienet id-dikjarazzjoni ta' Lindsey Zammit li lanqas hi imsahha jew pruvata b'xi prova ohra l-imputat ma jistax jinstab hati dwarha.

L-istess dwar il-hames (5) u l-ahhar imputazzjoni, la l-imputat qieghed ikun illiberat mill-imputazzjonijiet l-ohra ma tistax tinstab htija lanqas dwar din l-imputazzjoni.

DECIDE:

Ghal dawn il-mottivi l-Qorti ma ssibx lill-imputat hati tal-imputazzjonijiet migjuba kontrih u tilliberah.

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Dr. Joseph Mifsud
Magistrat